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Presuming Consent to Posthumous Reproduction

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PRESUMING CONSENT TO POSTHUMOUS REPRODUCTION

HILARY YOUNG*

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I. INTRODUCTION

Almost twenty years ago John Robertson made the compelling argument that a claim of autonomy marks the beginning, not the end, of the inquiry into the permissibility of posthumous reproduction.¹ Despite this claim, most scholarly articles dealing with posthumous reproduction assume that the deceased's wishes should be determinative.² More specifically, the prevailing view is that people's wish *not* to procreate posthumously must be respected. (No one argues that a person should be able to force someone to bear his child after he has died.) This view is reflected in Batzer *et al.*'s article, which states: "[R]eproductive decisions are so primal that it is imperative to safeguard the deceased's right to determine his own reproductive fate."³ Similarly, Katheryn Katz asserts that "the importance of the decision to reproduce is of such moment and has such a deeply personal nature that procreative autonomy survives death."⁴

Further, the implicit and unjustified assumption is that the absence of information about the deceased's prior wishes should be treated as a refusal of consent: that is, refusal should be presumed. This can be inferred from arguments, law and policy that posthumous reproduction should not be permitted without the deceased's prior explicit (or sometimes implied) consent to posthumous reproduction.⁵ In the absence

¹ John Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1028, 1034 (1994).

² See *infra* note 5; see also Robertson, *supra* note 1, at 1028 n.5.

³ Frances R. Batzer et al., *Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement*, 79 FERTILITY & STERILITY 6, 1263, 1265 (2003).

⁴ Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 300–01 (citing Belinda Bennett, *Posthumous Reproduction and the Meaning of Autonomy*, 23 MELB. U. L. REV. 286, 302 (1999)).

⁵ Regarding posthumous reproduction, see Bennett, *supra* note 4, at 303; Amanda Horner, *I Consented to Do What? Posthumous Children and the Consent to Parent After Death*, 33 S. ILL. U. L.J. 174, 175 (2009); Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 343, 350 (2009); G. Pennings et al., *ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction*, 21 HUM. REPROD. 3050, 3051 (2006); Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 943 (1997). Schiff objects to presuming consent in the context of Postmortem Gamete Retrieval (PMGR), namely removing gametes from a corpse for reproductive purposes, and in the context of stored gametes, but accepts presumed consent in the context of stored preembryos. Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 943 (1997). In the context of PMGR only, see Batzer, *supra* note 3, at 1265; Katz, *supra* note 3, at 299, 300–01; Carson Strong, *Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State*, 14 J. L. & HEALTH 243, 243 (1999–2000) (stating he would allow consent to be inferred rather than explicit); Devon D. Williams, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Removal*, 34 CAMPBELL L. REV. 181, 191–92 (2011). Amy Lai advocates for explicit consent in the context of PMGR and implied consent in the context of cryopreserved gametes. Amy Lai, *Critiquing the 2008 Model Act: Redefining "Consent" and Implications of Intent-Based Parenthood for Posthumous Reproduction*, SELECTED WORKS (Dec. 2010), http://works.bepress.com/amy_lai/1/. Few advocate explicitly or implicitly for presumed consent. See Rebecca Collins, *Posthumous Reproduction and the Presumption*

of such consent, posthumous reproduction should not be allowed. These policies and scholarship implicitly rely on the following view: people have a sufficient interest in not reproducing posthumously to justify not only making their refusal determinative, but also to justify interpreting their silence as refusal.

This article starts from the premise that this is too simplistic a view. The interests at stake in posthumous reproduction vary considerably depending on a number of variables such as whether gametes or embryos are at issue, whether posthumous reproduction would require interference with the deceased's body, and whether there is a certain kind of relationship between the deceased and the person who seeks to procreate with him. Thus, where an embryo has been created, for reproductive purposes, the living genetic contributor to that embryo has a greater claim to deciding the fate of that embryo, even against the deceased's prior explicit wishes, than she would have to accessing the deceased's sperm for reproduction against his wishes.⁶ Her interest might even be sufficient to justify her right to override the deceased contributor's express refusal to reproduce posthumously.

My goal, however, is not to argue that individuals should have no power to veto posthumous reproduction where preembryos are concerned—I leave that issue for another day. Rather, I examine the interests at stake and conclude that presuming consent to *some kinds of posthumous reproduction* sufficiently protects individuals' interest in reproducing (or not reproducing) posthumously while better protecting the interests of the surviving parent than a model of presumed refusal does. Those who do not wish to reproduce posthumously may avoid that outcome while not unduly limiting surviving partners' ability to reproduce with their partner of choice.

I begin by explaining what presuming consent to posthumous reproduction would mean, then justify a presumed consent policy in some circumstances by considering the relevant interests at stake. Specifically, I distinguish between a person's interest, while alive, in not being made a genetic parent after his death, and a dead person's interest in not being made a genetic parent. I then examine the nature of the surviving partner's interest in reproducing with her deceased partner. Each of these interests varies depending on the type of posthumous reproduction at stake. For example, all things being equal, reproduction involving interferences with a corpse are harder to justify on the basis of presumed consent than those that do not. Similarly, presuming consent to posthumous reproduction where the genetic parents were long-term romantic partners is easier to justify than if the genetic parents were strangers. Finally, since presumed consent is often discussed in the context of organ donation and is controversial in that context, I compare the situation of presumed consent to posthumous reproduction to presumed consent to organ donation. I

Against Consent in Cases of Death Caused by Sudden Trauma, 30 J. MED. & PHIL. 431, 432 (2005); Malcolm Parker, *Response to Orr and Siegler: Collective Intentionality and Procreative Desires: The Permissible View on Consent to Posthumous Conception*, 30 J. MED. ETHICS 389, 389 (2004). *But cf.* Robertson, *supra* note 1, at 147 (views appear consistent with presumed consent). In addition, American Society for Reproductive Medicine's new opinion advocates for presumed consent where pre-embryos are at issue; and presumed refusal, but with implied consent counting as consent, where PMGR is at stake. *See* Ethics Comm. of the Am. Soc'y for Reprod. Med., *Posthumous Collection and Use of Reproductive Tissue: A Committee Opinion*, 99 FERTILITY & STERILITY 1842, 1842 (2013).

⁶ I am not the first to note the relevance of these kinds of factors for policy and the role of consent. *See, e.g.*, Robertson, *supra* note 1, at 1045; Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 5.

demonstrate that there are important differences, such that even if presumed consent to organ donation should be rejected, that does not mean that presumed consent should be rejected in the context of posthumous reproduction.

II. TERMINOLOGY AND SCOPE

A. *Posthumous Reproduction*

Posthumous reproduction is the birth of a baby after the death of at least one genetic parent. However, we may exclude the age-old situation in which a child is conceived through sexual intercourse, but where the father dies before his child is born. That scenario raises no new moral or legal issues. I consider posthumous reproduction to include maintaining pregnant women on life support to allow a fetus to continue gestating, implanting cryopreserved preembryos after one genetic parent's death, and using a deceased person's gametes (sperm or ova) to conceive after death. This last example could involve previously stored gametes or removing gametes from the recently deceased.

B. *Presumed Consent to Posthumous Reproduction*

As in the organ donation context, a policy of presumed consent to posthumous reproduction would permit an individual to opt out of posthumous reproduction. However, in the absence of a refusal in some recognized form, individuals would be presumed to have consented to posthumous reproduction, and that reproduction would be permitted on the basis of that presumed consent.

A refusal could take a range of forms. Individuals could opt out explicitly, by signing a contract or other sufficiently reliable document declaring a desire not to be made a posthumous parent. Such contractual terms already exist in most agreements for storing preembryos.⁷ Alternately, an expressed desire not to be made a posthumous parent might be respected, despite its not being reduced to writing. This would be analogous to anatomical gift legislation that precludes donation, regardless of whether a refusal was registered, if there is evidence that the deceased would not have wanted to be a donor.⁸ A further possibility is that implicit refusals of consent might be recognized. For example, a person who had had a vasectomy or who said he thought people should not have children (for environmental reasons, perhaps) might be inferred to refuse consent to being a posthumous parent. For the purposes of this article I am agnostic about what kind of evidence would be sufficient to defeat the presumption of consent. Clearly signing a legal document would suffice,

⁷ Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 5, at 1843.

⁸ See N.Y. PUB. HEALTH §4301(2) (McKinney 2009) (“[A]ny of the following persons, in the order of priority stated, may . . . in the absence of actual notice of contrary indications by the decedent . . . or reason to believe that an anatomical gift is contrary to the decedent's religious or moral beliefs, give all or any part of the decedent's body for any purpose specified . . .”) (emphasis added); see also Illinois Anatomical Gift Act 755 ILL. COMP. STAT. 50/5-5(b) (“If no gift has been executed under subsection (a), any of the following persons . . . and in the absence of (i) actual notice of contrary intentions by the decedent . . . may consent” Section 5-25(c) of The Illinois Act further states, “If (1) the hospital . . . has actual notice of opposition to the gift by the decedent . . . or (2) there is reason to believe that an anatomical gift is contrary to the decedent's religious beliefs . . . then the gift of all or any part of the decedent's body shall not be requested.”) (emphasis added).

but whether oral or implied refusals should be recognized will not be discussed further.

It is important to note that presumed consent is a presumption in the legal sense: that is, in the absence of sufficient evidence to rebut the presumption of consent, the law considers there to have been consent. There need not be any affirmative evidence of consent in order to trigger the presumption. Nor need there be any reason to believe that the deceased would have consented had he turned his mind to the question. A presumed consent policy is therefore synonymous with an opt-out policy.

C. Methodology: An Interests-Based Approach

In arguing for presumed consent to some kinds of posthumous reproduction, I employ an interests-based approach. That is, I consider the interests at stake and balance them to determine the benefits and detriments of presuming consent versus presuming refusal to posthumous reproduction. There are different interests-based theories of rights, but their differences will largely be ignored for the purposes of this article.⁹ I focus on what it means for a person to have an interest in events that happen after his own death, since this gets at the crux of the matter: the extent of a person's autonomy interest in posthumous procreation. However, I also discuss the important competing interests of living people, such as the surviving parent, family members and the public at large in whether posthumous reproduction takes place.

D. Scope

I assume throughout that posthumous reproduction should be permitted if there is consent. The only issue I discuss is whether and when it is appropriate to presume consent to posthumous reproduction. As a result, I do not deeply engage with issues such as the best interests of the child and what benefits posthumously conceived children should receive. Although these are both extremely important issues at the core of posthumous reproduction policy, they have relatively little bearing on whether consent versus refusal should be presumed. If we consider it not in a child's best interests to be conceived posthumously, then posthumous reproduction should perhaps not be permitted, regardless of whether we presume consent or refusal. Similarly, whether consent is presumed would seem irrelevant to whether posthumously conceived children are entitled to Social Security and other benefits (although in the absence of actual consent there may be a better argument for fewer entitlements to benefits and inheritances). I therefore do not discuss this issue further.

Although not everyone agrees that posthumous reproduction should be permitted so long as the deceased consented, most scholars seem to accept that premise,¹⁰ and many laws and policies permit posthumous reproduction with consent.¹¹ For this

⁹ For a more detailed account of various interests-based theories of rights and their application to interests in posthumous events see Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is*, 14 MARQ. ELDER'S ADVISOR 197, 209 (2013).

¹⁰ See *supra* note 4 and accompanying text.

¹¹ In the United States, see ABA Comm. On Reprod. & Genetic Tech., Model Act Governing Assisted Reprod. Tech. § 501(4) (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf> (stating that "No provider shall transfer or create any embryos

reason, I believe it is reasonable and helpful to begin from the premise that consensual posthumous reproduction is permissible and to examine whether and under what circumstances consent could be presumed.

III. THE INTERESTS AT STAKE

A. *Interest of the Posthumous Parent*

It is widely accepted that the living have an interest in certain events that occur after their deaths because they may be part of a person's overall life plan. Our society and our laws reflect the existence of present interests in posthumous states of affairs. We may decide, for example, how our estates will be distributed. Many American states allow people to decide whether to be buried or cremated.¹² All states allow people to decide whether to consent to posthumous organ donors.

Ronald Dworkin refers to interests that relate to our values and overall life plan as "critical interests."¹³ Whereas we have an interest in those things we can experience, such as enjoying ourselves and avoiding pain (experiential interests), we also have interests that reflect critical judgments about what makes life good.¹⁴ The ability to shape our lives according to our critical and experiential interests, according to Dworkin, is central to the value of autonomy.¹⁵

Decisions about reproduction may reflect experiential interests (for example, the desire (not) to give birth or (not) to experience pregnancy, the desire to raise a child) or critical interests (for example, the desire to leave your mark on future generations or the desire not to contribute to overpopulation). People can have no experiential interests in posthumous events, since death negates the possibility of experiencing anything. People do, however, have critical interests in posthumous states of affairs. "What happens after death can (depending on the particular person's own idea of self-development) complete the development of the self."¹⁶

As a result, people not only care what happens after they die, but they also have a moral claim to making decisions with posthumous effect. That said, the strength of this moral claim is to be determined: certainly one's posthumous wishes need not and should not always be respected or legally protected. People are not allowed to vote after they are dead despite many people having a critical interest in ensuring that a particular political party shapes future policy. The interest is insufficient to ground a right. Similarly, no one suggests creating a right for individuals to force a pregnant partner get an abortion if they were to die before the child was born: in that

following the death of an intended parent unless the necessary consent referred to in 3(f) of this Section is obtained and permanently recorded.") (Section 3(f) requires a record of actual consent to posthumous reproduction); *see also* Hecht v. Super. Ct. of Los Angeles, 59 Cal. Rptr. 2d 222 (Cal. Ct. App. 1996) (order not published); Hall v. Fertility Inst. of New Orleans, 647 So. 2d 1348 (La. Ct. App. 1994).

¹² *See* Young, *supra* note 9, at 198.

¹³ RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 224 (1993).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ T. M. Wilkinson, *Individual and Family Decisions About Organ Donation*, 24 J. APPLIED PHIL. 26, 31 (2007); *see also* ROBERT VEATCH, *TRANSPLANTATION ETHICS* 146 (2000).

situation any interest in not being a posthumous parent must give way to the surviving parent's own autonomy interests.

The foregoing establishes that living people have critical interests in posthumous reproduction that could ground legal rights. However, these interests must still be weighed against the interests of others. It is therefore not obvious that because some people have an interest in avoiding posthumous parenthood, that that interest should result in a legal right to avoid genetic parenthood that would override the wishes of survivors.¹⁷ *A fortiori*, it is not obvious that an interest in avoiding posthumous genetic parenthood is sufficient to justify a policy of presuming refusal to consent.

Although I focus on living people's interest in whether they are made posthumous parents after their deaths, some scholars believe the dead themselves have interests.¹⁸ That is, a dead person can be said to have an interest in whether she reproduces posthumously. I briefly set out how the dead can be conceived of as having interests, then explain why, in my view, they do not. If my argument is persuasive, then any interest in posthumous reproduction must rely on the critical interests of living people rather than on interests of the dead themselves. If my arguments are not convincing, then the dead may have their own claim to reproductive autonomy, but it is still uncertain what weight that claim should receive.

The possibility of the dead having interests raises two problems: the experience problem and the problem of the subject. The experience problem is essentially that because the dead cannot experience anything, they cannot be harmed and do not have a stake in anything. However, this assumes a subjective approach to harm and some scholars consider harm to be at least partially objective.¹⁹ Although one's interests are subjectively determined by virtue of what specific individuals value, whether or not those interests have been thwarted can be determined objectively. On such an approach, I can be harmed by being (or not being) made a genetic parent posthumously even if I am not aware of having been made a parent.

A second challenge for the idea that the dead have interests is the problem of the subject. When the interests of a living person are only harmed after her death, we may reasonably ask *whose* interests have been harmed. Philosophers have taken various approaches to the problem of the subject,²⁰ such as Feinberg's ante-mortem person approach. This holds that people retain their critical interests after death and can be harmed if those desires are thwarted after death.²¹ George Pitcher takes a

¹⁷ Although one can frame an interest in posthumous reproduction in terms of wanting to reproduce or wanting to NOT reproduce, in practice the only issue at stake is the right to NOT reproduce posthumously. Where it is the survivor who does not want children and the deceased who does, there is no question of forcing the survivor to have unwanted children. See Young, *supra* note 9, at 198.

¹⁸ See Young, *supra* note 9, at 203, 207.

¹⁹ See, e.g., JOEL FEINBERG, RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 61 (1980) [hereinafter FEINBERG, RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY]; Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243, 247 (1981).

²⁰ See, e.g., George Pitcher, *The Misfortunes of the Dead*, 21 AM. PHIL. Q. 183, 184 (1984); see Young, *supra* note 9.

²¹ JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 91 (1984) [hereinafter FEINBERG, MORAL LIMITS].

similar approach that differentiates between the post-mortem dead, which are mere physical remains and cannot be harmed, and the dead as reflecting the ante-mortem persons that they were.²²

The problem with the ante-mortem person approach is retroactivity. The person is not harmed until she is no longer a person. For her to have an interest in post-mortem events we must conceive of the posthumous harm as having been a harm all along. The individual is harmed because she was playing a “losing game”.²³ According to Joan Callaghan, this approach amounts to saying that only the *living* can be harmed by unfulfilled critical interests, and therefore the ante-mortem person approach actually detracts from, rather than supports, the premise that the dead themselves have interests.²⁴ I agree, and as I have argued elsewhere, I do not find the ante-mortem person approach or other accounts of the dead having interests to be persuasive.²⁵ I therefore assume throughout that the only interests at stake for the potential posthumous parent are the interests of the living in their posthumous procreation. Those who disagree and view the dead as interests-holders may disagree with my conclusions about presuming consent since the interests at stake will be different.

Before moving on, let me address a problem that could be said to arise from the view that the dead lose all their interests at the moment of death. If this is so, how can we justify allowing people to make any decisions regarding posthumous events? Or more accurately, why would we enforce any such decisions? How, for example, could we justify allowing people to refuse to be organ donors if, as I will be assuming, the dead have no interests and cannot be harmed?

The answer lies in the fact that living people have critical interests in posthumous states of affairs. Even if the dead cannot be harmed by their interests not being met, since they will no longer exist when the interest is thwarted, the living benefit from enforcement. If we do not actually respect people’s wishes regarding posthumous events, the interests of the living in what happens after they die cannot be fulfilled because they will have no confidence that their wishes will in fact be respected. We respect people’s wishes not because it harms the dead not to respect their wishes, but because it harms other living people who derive comfort from believing that their own wishes will be respected. Part of the answer may also relate to the moral importance of keeping promises,²⁶ and to the fact that we like to see ourselves as a society that treats the dead with respect. It may therefore harm the living not to respect the wishes of the dead, since we may consider that to be disrespectful or undignified treatment of the dead.

²² Pitcher, *supra* note 20.

²³ Feinberg, FEINBERG, MORAL LIMITS, *supra* note 21, at 91.

²⁴ Joan Callaghan, *On Harming the Dead*, 97 ETHICS 341, 345–46 (1987). For more arguments against the dead having interests see Malin Masterton et al., *Queen Christina’s Moral Claim on the Living: Justification of a Tenacious Moral Intuition*, 10 MED. HEALTH CARE & PHIL. 321, 321 (2007).

²⁵ See Young, *supra* note 9, at 220.

²⁶ See Joel Feinberg, *The Rights of Animals and Unborn Generations*, PHIL. & ENVTL. CRISIS 43, 58 (1974).

Having explained the nature of people's interest in posthumous events generally, I now turn to the posthumous parent's interest in posthumous reproduction. In particular, I turn to the nature of parenthood for the posthumous parent.

When people speak of the fundamental importance of reproductive choice justifying a need for consent to posthumous reproduction, they often fail to examine the nature of the reproductive interests at stake.²⁷ They make the mistake, identified by Harvard Law professor Glenn Cohen, of treating procreation as monolithic, rather than identifying varying sticks in a bundle that may or may not be implicated in specific instances of procreation.²⁸

Cohen identifies three kinds of parenthood: gestational, genetic and legal.²⁹ Gestational parenthood means gestating and giving birth to a child.³⁰ It is presently possible only for women, but with the advent of gestational surrogates, the woman need not be genetically related to the child.³¹

Legal parenthood refers to state-conferred obligations and benefits on people whom it regards as parents.³² One example is the obligation to provide necessities of life to one's legal children.³³ It need not coincide with genetic or gestational parenthood, as when a child is adopted.³⁴

Finally, genetic parenthood means contributing gametes (ova or sperm) from which a child is conceived and ultimately born.³⁵ Again, it need not coincide with other types of parenthood. For example, anonymous sperm donors are genetic parents but are not gestational parents and rarely legal parents.³⁶

To these three categories I would add social parenthood, meaning participating in child-rearing in the role of a parent. Social parents need not be genetic or gestational parents (as in the case of adoption) but also need not be legal parents: legal parents may not be involved in their child's life and those raising children may not be legal parents.

²⁷ Robertson, *supra* note 1, at 1028–35, 1044.

²⁸ See I. Glenn Cohen, *The Right Not to Be a Genetic Parent*, 81 S. CAL. L. REV. 1115, 1121 (2008) [hereinafter Cohen, *Parent*]; Robertson, *supra* note 1, at 1031–32.

²⁹ Cohen, *Parent*, *supra* note 28, at 1121.

³⁰ Cohen, *Parent*, *supra* note 28, at 1118.

³¹ Cohen, *Parent*, *supra* note 28, at 1118, 1121.

³² See I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1140 n.7 (2008) [hereinafter Cohen, *Procreate*].

³³ *Id.*

³⁴ *Id.* at 1154 n.66.

³⁵ *Id.* at 1146.

³⁶ See Cohen, *Parent*, *supra* note 28, at 1144 n.23. Cohen sets out the legal regimes that generally absolve sperm donors of legal parenthood. However, the laws generally only apply to donors who used a clinic. This has led to rare cases of sperm donors being held to be legal parents. For example, a Kansas couple, who obtained sperm from a donor they found on Craigslist, obtained a right to child support from the biological father. Rosie Beauchamp, *Sperm Donor to Lesbian Couple Sued for Child Support*, BIONEWS (Jan. 7, 2013), http://www.bionews.org.uk/page_232949.asp?dinfo=p4cHOW25geFkYHSAehytOTxR&PPID=232817.

Posthumous reproduction implicates several kinds of parenthood: in each instance of posthumous reproduction there will be two genetic parents,³⁷ one gestational parent, one or more legal parents and one or more social parents. However, for the posthumous parent, only genetic parenthood is implicated.

A deceased parent could be a gestational parent, as in the situation of pregnant women being maintained on life support. However, that kind of gestational parenthood differs significantly from traditional gestation in that pregnancy is not experienced and the interference with bodily integrity relates to a corpse rather than a living person. The situation of a deceased woman being maintained on life support to allow a fetus to come to term is discussed in section IV(4).

Similarly, one might think that the deceased could be a legal parent since in some jurisdictions (and depending on the circumstances of conception and birth) the deceased's estate will have obligations to the child. Regardless of how the law treats posthumously conceived children, it is more accurate to think of the deceased's estate, rather than the deceased himself, having legal obligations to genetic children. These obligations are different than those associated with legal parenthood, which include financial and non-financial obligations, as well as entitlements such as rights to custody or visitation, right to make decisions for the child etc. Posthumous genetic parents are therefore not legal parents in the same way that living (legal) parents are, even though the law may confer obligations on the estate and benefits on the child (such as social security benefits) based on genetic ties.

Thus, in discussing policy for posthumous reproduction, it is important to recognize that for the deceased parent, only part of the spectrum of procreative interests is implicated in posthumous reproduction, namely those interests related to genetic parenthood.

Consider what it means to be a genetic parent. Cohen equates genetic parenthood with attributional parenthood, in that society attributes the role of "parent" to genetic parents regardless of whether gestational or legal parenthood is also involved.³⁸ Thus, the potential harm posed by allowing people to be made genetic parents against their will is related to "the social assignment of the status of parent to the provider of genetic material that persists notwithstanding the fact that the legal system has declared him or her a nonparent."³⁹

Specifically, the individual himself, the resulting child, and society at large may view the genetic parent as "parent." Although this is a limited form of parenthood, it is a powerful one: the fact that children conceived through donor sperm sometimes spend years seeking out their genetic fathers (and not only to obtain family medical histories but to fill a void in their sense of identity)⁴⁰ speaks to the important role of attributional parenthood. Cohen argues that the harm of unwanted attributional

³⁷ Of course, in the brave new world of reproductive technology even this is not necessarily true. In the United Kingdom it is now possible to create children with three genetic parents. See Steve Connor, *UK Becomes First Country in World to Approve IVF Using Genes of Three Parents*, THE INDEPENDENT ONLINE, June 28, 2013, <http://www.independent.co.uk/news/science/uk-becomes-first-country-in-world-to-approve-ivf-using-genes-of-three-parents-8677595.html>.

³⁸ Cohen, *Parent*, *supra* note 28, at 1125.

³⁹ Cohen, *Parent*, *supra* note 28, at 1119.

⁴⁰ See *Pratten v. Att'y Gen. of B. C.*, 2012 BCCA 480, para. 3, 17 (Can.).

parenthood is significant and can justify a policy of not allowing (living) people to be made genetic parents without their consent.⁴¹

Recalling the difference between critical and experiential interests, however, attributional parenthood differs in the posthumous reproduction context from attributional parenthood in the context of living genetic parents: one can only have a *critical* interest in avoiding posthumous reproduction, not an *experiential* one. That is, since the posthumous parent will never experience feeling like a parent or being treated like one, his interests in not being an attributional parent are a subset of those of living people who seek to avoid attributional parenthood and for whom both critical and experiential interests are at stake.

Given the foregoing, autonomy interests are at stake for posthumous parents but these are vastly different than the interests people have in reproducing while alive. They amount to a subset of procreative interests (genetic parenthood rather than legal, social, or gestational parenthood) and those interests are critical and not experiential interests. Thus, while living people maintain an interest in whether they procreate posthumously, and may justify giving them the ability to make decisions about posthumous reproduction while alive, we cannot equate this interest with the full range of procreative interests of the living. This distinction will have implications for a policy of presumed consent.

B. The Surviving Parent's Reproductive Interests

I refer to the living person who wishes to reproduce with a now deceased person as the surviving parent. Those who argue that the deceased parent must have a veto over posthumous reproduction and that silence should equal non-consent are inclined to dismiss the countervailing interests of the surviving parent in procreating with the deceased. Although her procreative interests are clearly implicated, people have no right to force others to reproduce with them. The surviving parent has reproductive rights but these do not extend to the right to use a particular person's genetic material.⁴²

At first glance this line of reasoning appears persuasive, but there are several reasons why one may, in fact, have a legitimate interest in reproducing with a particular person. These include where a preembryo or embryo has already been conceived, where a person cannot reproduce with anyone else, and where the surviving parent relied on an expectation that a relationship would lead to genetic parenthood.

It is uncontroversial that individuals have little, if any, legitimate interest in reproducing with whomever they want. Professor Cohen cites the example of fans who might want to bear Brad Pitt's child.⁴³ No one seriously suggests that whatever interest individuals have in selecting the other genetic contributor to their offspring could justify forcing someone to contribute their genetic material.

⁴¹ Cohen, *Parent*, *supra* note 28, at 1193.

⁴² See Katz, *supra* note 4; see e.g., Cohen, *Parent*, *supra* note 28, at 1193 (albeit in the context of pre-embryo disputes between the living rather than the context of posthumous reproduction). More often, this view is implicit in the rejection of posthumous reproduction without explicit prior consent.

⁴³ Cohen, *Parent*, *supra* note 28, at 1156.

In reality, however, most disputes over posthumous reproduction do not involve Brad Pitt-like scenarios or Cohen's related "bathtub scenario" in which sloughed cells retrieved from a bathtub could someday be used for procreative purposes without the bather's knowledge or consent.⁴⁴ Rather, disputes primarily arise where one member of a couple dies and the other wishes to use preembryos or gametes to reproduce with the deceased.

The differences between this and the Brad Pitt scenario are highly relevant to the strength of an individual's interest in reproducing with a particular individual.

i. Conceived Preembryos

In this era of artificial reproductive technology, preembryos are conceived and stored for reproductive and other purposes, such as research. When there have been disputes between living genetic contributors over using these preembryos for reproductive purposes (for example, when a couple has divorced after undergoing IVF), the courts have generally required the contemporaneous consent of both genetic contributors.⁴⁵ Professor Cohen generally agrees with this approach, calling for a right not to be made a genetic parent against one's will.⁴⁶ (That said, he acknowledges possible exceptions to this, some of which will be discussed below.) He does not rely on a monolithic conception of a right not to be made a parent but rather focuses on a specific interest at stake in preembryo disposition disputes: namely genetic or attributional parenthood.⁴⁷

Where an embryo has already been conceived, both genetic contributors have a significant reproductive interest in whether that embryo becomes a person. While it is clear that fans have no significant interest in Brad Pitt's sperm, each genetic contributor to a preembryo has an interest in its fate. This is because an entity exists with the potential for life, and this entity bears the genes of both potential genetic parents. Since the embryo exists, the question is not whether to reproduce but whether to continue reproducing. The fact that both genetic parents have willingly produced an embryo is relevant to any claims they would make based on reproductive autonomy. Each genetic parent has a moral claim to determining what happens to the preembryo that is quite distinct from any claim to wanting to reproduce with a particular person. It is grounded in the genetic connection to an existing preembryo and the potential for attributional parenthood (and perhaps other kinds of parenthood).

Compare this to the case of a woman who is seeking a legal right to refuse consent to her husband being a sperm donor.⁴⁸ The woman clearly has an interest in

⁴⁴ Cohen, *Parent*, *supra* note 28, at 1125.

⁴⁵ Cohen, *Parent*, *supra* note 28, at 1118 n.3 (discussing case law).

⁴⁶ Cohen, *Parent*, *supra* note 28, at 1118, 1148.

⁴⁷ Cohen, *Parent*, *supra* note 28, at 1121, 1123.

⁴⁸ See, e.g., Peter Lloyd, "A Wife's Consent to Donate Sperm? That's Sexist and Absurd," Says a Male Writer Who Believes It's a Man's Body, a Man's Choice, Daily Mail Online, Aug. 28, 2012, <http://www.dailymail.co.uk/femail/article-2194765/Sperm-donation-A-wifes-consent-donate-sperm-Thats-sexist-absurd-says-male-writer.html?ito=feeds-newsxml>; Loriley Sessions, Woman Campaigns to Stop Husband Donating His Sperm, Marie Claire, Aug. 30 2012, <http://www.marieclaire.co.uk/news/537998/woman-campaigns-to-stop-husband-donating-his-sperm.html>.

the use of her husband's reproductive material, but an interest that most think insufficient to prevent her husband from donating sperm. Her interest is simply too remote: it is something like an interest in avoiding attributional step-parenthood.

Thus, where a preembryo exists, a surviving parent has a legitimate claim to ensuring that preembryo is brought to term (or not). The deceased, before death, also had an interest in the fate of that preembryo, and the point is not that the surviving parent's wishes should trump. Rather, the point is that the surviving parent has a greater interest in the fate of the preembryo than in having access to her chosen partner's gametes for the purposes of procreation.

ii. Inability to Reproduce with Anyone Else

Still assuming the existence of a preembryo, a factor that may influence the interest the surviving parent has in the fate of that preembryo is infertility. Professor Cohen asks whether a person might have a greater interest in reproducing with a particular person if she were unable to have other genetically related children.⁴⁹ He cites the example of *Evans v United Kingdom*⁵⁰ in which a couple had created preembryos before the woman's ovaries were removed as part of her cancer treatment. The couple subsequently separated and could not agree what to do with the preembryos.⁵¹ Although a majority of the court upheld the man's right not to be made a genetic parent against his will, it was considered significant that it was not only the woman's ability to procreate with the person of her choice that was at stake, but her ability to procreate at all. A dissenting judge would have held for the woman.⁵²

The effect of infertility was also discussed by an Illinois appellate court in *Jacob Szafranski v. Karla Dunston*.⁵³ In a dispute between living genetic parents over embryos, the court noted that infertility could shift the balance of interests in favour of the infertile person. Citing *Davis v. Davis*,⁵⁴ the court stated:

Ordinarily the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than the use of the pre-embryos in question. If no other reasonable alternatives exist, then the argument in favor of using the pre-embryos to achieve a pregnancy should be considered. However, if the party seeking control of the pre-embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.

⁴⁹ Cohen, *Parent*, *supra* note 28, at 1193.

⁵⁰ *Evans v. United Kingdom*, 2007 Eur. Ct. H.R. 264.

⁵¹ *Id.*

⁵² Cohen, *Parent*, *supra* note 28, at 1193.

⁵³ *Szafranski v. Dunston*, No. 1-12-2975, 2013 WL 3048631, at *13 (Ill. App. Ct. 1st Dist. 2013).

⁵⁴ *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

Thus, where the surviving parent is now infertile she has a stronger claim than she otherwise would have to reproducing with the existing preembryos, regardless of the deceased parent's consent—in fact, even faced with his explicit opposition.

iii. Expectations and Reliance

Another factor that differentiates many cases of posthumous reproduction from the Brad Pitt and bathtub scenarios is the existence of the kind of relationship that generated expectations of procreation.⁵⁵ In addition, there may have been reliance on such expectations. In entering into such a relationship, assuming monogamy, an individual forgoes other opportunities for reproduction. This is relevant to the issue of consent for two reasons. First, there may have been explicit or implicit commitments to procreating (albeit not necessarily to procreating posthumously and not legally enforceable) on which a person may have relied.

The American Society for Reproductive Medicine frames the same interest somewhat differently in terms of an interest promoted by the couple's "joint reproductive project."⁵⁶ It argues that where a couple planned to have a family together, a lack of explicit consent should not necessarily preclude posthumous reproduction so long as there was no evidence of opposition.⁵⁷ The ASRM does not state that the joint reproductive project had to relate to posthumous reproduction or that the deceased had to have contemplated posthumous reproduction specifically.⁵⁸

This kind of relationship therefore grounds an interest in procreating with one's partner. Whether that interest is sufficient to justify access to preembryos or genetic materials for reproductive purposes without consent is addressed below.

D. *Interests of Family Members*

Although I focus on the interests of the deceased parent and of the surviving parent, there are others who are affected by posthumous reproduction and who have an interest in whether such reproduction happens.

First, family members have an interest in posthumous reproduction. The parents of the deceased, for example, have a critical interest in whether they have grandchildren. They may also have an experiential interest in grandparenting. The fact that their child has died may add to the importance of grandchildren for these parents. They may feel more strongly that posthumous reproduction should go ahead so that they have a living link to their dead child. Alternately, the fact their child is dead may make them oppose posthumous reproduction when they would not have opposed their living child reproducing, perhaps because it seems selfish or unnatural.

Despite people's critical interest in whether they have grandchildren, and specifically in whether their children partake in posthumous reproduction, our culture does not consider parents to have a significant interest in deciding whether their children or children-in-law reproduce. Our individualistic society treats this as a

⁵⁵ I leave for others to discuss whether any rule permitting posthumous reproduction should apply to married heterosexual couples, to common law partners, or to same-sex partners. Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 5, at 1844.

⁵⁶ Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 5, at 1844.

⁵⁷ Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 5, at 1844.

⁵⁸ Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 5, at 1844.

decision for the potential genetic or legal parents themselves. Katheryn Katz notes that:

[n]o right of parents to control the reproductive decisions of their adult progeny is recognized in the law. The parents' desire to have a grandchild with the genes of the deceased—that is, to “prolong” the deceased’s life through postmortem conception, or to simply continue their lineage—is not among the recognized legal interests.⁵⁹

This suggests that potential grandparents’ and other family members’ interests in posthumous reproduction are relatively weak compared to the interests of the genetic parents. Nevertheless, as we shall see, there are situations in which the interests of family members may help tip the balance against presuming consent to posthumous reproduction.

E. The Public Interest

There is also a public interest in posthumous reproduction. The issue raises moral questions about which reasonable people may disagree. Posthumous reproduction may also have implications for the public purse: reliance on reproductive technologies and single parenting are both potentially costly for the state. (That said, there is no reason to assume they *will* be costly for the state. Reproductive procedures tend to be privately funded and there is no reason to think that the people who pursue posthumous reproduction are more likely than others to be dependent on government benefits.)

These are legitimate interests, but speak more to the permissibility of posthumous reproduction generally. In dealing with the policy issue of whether consent is required and what the default should be we have already accepted that posthumous reproduction is not inherently contrary to the public interest.⁶⁰ Similarly, we have accepted that the financial costs to society are not too great.

One way in which the public interest may be relevant to presuming consent is that by presuming consent we may cause living people to fear that they will be made posthumous parents. This is a legitimate concern. That said, even were consent presumed, it is likely that most people would not give posthumous reproduction much thought and would therefore not suffer from fearing unwanted posthumous reproduction. Second, people who do have that concern would be able to opt out by expressing their refusal to be made posthumous parents. Thus, what is really at stake is the public’s interest in not having to fear posthumous reproduction if they decide not to opt out. This is a legitimate concern, but given the fact that most people will not have this fear and that opting out would eliminate that fear the public interest at stake seems rather limited. However, it should be considered in the balancing of interests.

A further way in which the public interest is implicated is that we may be treating the dead as means to an end rather than as ends in themselves. Carson Strong makes

⁵⁹ Katz, *supra* note 4, at 307.

⁶⁰ This was also the conclusion in *Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222, 228 (Cal. 1996).

this argument: he says it is disrespectful to retrieve sperm after death and use it for reproductive purposes without “explicit or reasonably inferred consent.”⁶¹

There are several responses to this argument. First, it assumes a Kantian approach to the balancing of interests, but let us assume such an approach is appropriate. Second, without delving too far into Kantian philosophy, it does not prohibit treating living human beings as means to an end: we do this all the time and it is not always morally objectionable.⁶²

Third, Strong assumes that the dead are like people in that they should not be treated as means to an end. The maxim that one should not treat people as means to an end is grounded in respect for human beings.⁶³ It is not clear to what extent, if at all, this rule should be extended to former human beings. Corpses should be treated with respect because they are symbols of humanity and of the person that once was, but it is not clear that it is wrong to treat corpses as means to an end in the same way that it would be to treat living people as means to an end. Arguably, since it is the “humanity” in human beings that should not be treated as means, rather than human beings *per se*, and since humanity implicates the capacity for rational thought etc., the dead are not subject to the prohibition on treating people as means to an end. This conclusion would have to be further justified, but it is at least arguable.

Fourth, it is not clear that making the dead posthumous parents is disrespectful to humanity in a way that would be contrary to Kant’s moral philosophy. We do not know what the deceased would have wanted (in other words, there is no evidence of actual opposition to posthumous reproduction). At least within the context of a committed romantic relationship, posthumous reproduction may reflect great respect toward the deceased because it promotes the loving relationship that the deceased enjoyed.

It is therefore not sufficient to assert that posthumous reproduction without actual consent is immoral because it treats the dead as means to an end. Any such argument would have to be articulated in detail and the issues above addressed.

F. *Interests of the Child*

Finally, the child who results from posthumous reproduction clearly has an interest in the conditions under which such reproduction is permitted. The primary issues of the child’s best interests, however, would seem to be a) whether it is a good idea to bring children into the world when they will only have one living genetic parent; b) whether such children are truly wanted or whether they are merely a symbolic link to the deceased created out of grief; and c) whether such children will have access to their deceased parent’s citizenship, social security benefits, inheritances, etc.

It is certainly possible that having only one living genetic parent could be harmful to children, but the evidence suggests otherwise. According to the American

⁶¹ Strong, *supra* note 5, at 260.

⁶² “[T]he Humanity formula does not rule out using people as means to our ends. Clearly this would be an absurd demand, since we do this all the time. Indeed, it is hard to imagine any life that is recognizably human without the use of others in pursuit of our goals.” Robert Johnson, *Kant’s Moral Philosophy*, *THE STANFORD ENCYCLOPEDIA OF PHIL.* (Apr. 6, 2008), <http://plato.stanford.edu/entries/kant-moral/>.

⁶³ *Id.*

Society for Reproductive Medicine, “[t]he evidence to date . . . cannot reasonably be interpreted to support such fears.”⁶⁴

It is also possible that having children simply to create a symbolic genetic link to a dead loved one could be damaging to such children—either because they are not truly wanted or because certain expectations are placed on them.⁶⁵ Finally, issues around inheritance and social security benefits are extremely important to posthumously conceived children.

However, there are two reasons why the interests of posthumously conceived children should be given relatively little weight in deciding whether consent should be presumed. The first two arguments above amount to arguments that the child is better off not being born at all, which is always difficult to maintain.⁶⁶

Second, the above arguments about a child’s best interests go to whether posthumous reproduction should be allowed at all, or what benefits posthumously conceived children should be entitled to, rather than to whether consent should be presumed. Since I am assuming posthumous reproduction is permissible with consent, these issues of the child’s best interests are not relevant to the question at hand. Of course, one may reject the premise that posthumous reproduction is permissible where both genetic parents consent, but in that case, this article should be rejected in its entirety as relying on a false premise.

IV. BALANCING THE INTERESTS: CAN PRESUMED CONSENT BE JUSTIFIED?

Based on the foregoing, I draw the following conclusions. First, the relevant interests of the deceased genetic parent relate to critical interests of living people in being or not being made genetic parents after their death, rather than to interests of the dead themselves. Second, the posthumous parent’s interests relate always, and primarily, to genetic parenthood rather than gestational⁶⁷ or legal parenthood and are critical rather than experiential interests. Third, the strength of a surviving parent’s interest in having a child with the deceased varies depending on factors that include whether they have already created a preembryo, the nature of their relationship, and whether she is capable of having biological children with others. Fourth, the interests of others (parents of the deceased, society, and the future children themselves) are secondary with regard to the issue of presuming refusal or presuming consent but may nevertheless be considered in balancing the relevant interests.

⁶⁴ Ethics Comm. of the Am. Soc’y for Reprod. Med., *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons*, 86 FERTILITY & STERILITY 1333, 1334 (2006) cited in Cohen, *Parent*, *supra* note 28, at 1134.

⁶⁵ Batzer, *supra* note 3, at 1266 states “To pursue posthumous sperm procurement may be a ‘parent-centered’ viewpoint that cannot account for the full nurturing needs of the resultant child.”; “[U]se of the sperm for procreation should be delayed to allow a bereavement period. Most centers with existing protocols suggest 6 months to 1 year for the appropriate medical and psychological screenings to be completed.” Batzer, *supra* note 3, at 1266.

⁶⁶ See, e.g., *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978) (“Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.”).

⁶⁷ *But see infra* Part IV.

Because the interests at stake will be balanced differently depending on variables such as the existence of a preembryo or the nature of the relationship between the genetic parents, it is helpful to consider specific scenarios separately.

1. The Deceased and the Surviving Parent Created a Preembryo for Reproductive Purposes before the Deceased's Death

As discussed above, the issue regarding posthumous reproduction involving a preembryo is not whether to procreate *per se* but whether to continue to procreate. It is a question of what to do with an entity that has the potential for life.

Both genetic parents have a reproductive interest in the fate of the preembryo. The surviving parent's interest relates to genetic and perhaps social, legal, and gestational parenthood. Her reproductive interests are experiential as well as critical. As discussed above, her interest in the fate of the preembryo is even stronger if she is now infertile and unable to have genetic offspring with anyone else. This is because it is not only her interest in the particular preembryo or in reproducing with the mate of her choice that is at stake but her ability to have genetic offspring at all.

The deceased had an interest in the fate of the preembryo before his death. While alive, people have moral claims to making decisions with posthumous effect, including reproductive decisions. The question is whether such a claim is sufficiently strong to justify denying the other genetic parent the ability to make reproductive use of that preembryo, and if so, whether uncertainty should be interpreted as refusal.

Compare this situation to the situation of preembryo disputes between living genetic parents. In this context, Professor Cohen argues for a right not to be made a genetic parent against one's will.⁶⁸ The situation arises where a couple willingly contributes genetic material to create a preembryo for the purposes of assisted reproduction. Subsequently, one contributor changes his mind and no longer wishes to be a parent to this potential child.

This context is similar to posthumous reproduction in that genetic parenthood is primarily at stake for the unwilling party. (Whether legal parenthood would be imposed is unclear, and whether it *should* be imposed is a question I bracket off from the present discussion.) The preembryo context discussed by Professor Cohen differs, however, in several ways. First, the deceased will never experience genetic parenthood because he will be dead before the child is born: he will not experience feeling like a parent or being treated like a parent by others. This diminishes his claim against being made a genetic parent against his will. Second, and relatedly, the interest at stake relates to a posthumous state of affairs. While people have a moral claim to making decisions with posthumous effect, such interest is diminished compared to making personal decisions that affect us while we are alive. Third, and perhaps most importantly, we are assuming for the purposes of this article that the deceased's wishes are unknown: we are assuming that explicit refusal would be honored, and that explicit consent would be sufficient to permit posthumous reproduction. Unlike in the preembryo dispute cases where refusal is explicit, we have no reason to think that one genetic parent would have refused consent to bringing the embryo to term.⁶⁹

⁶⁸ Cohen, *Parent*, *supra* note 28, at 1145–61.

⁶⁹ Some argue that most people would grant consent to posthumous reproduction. *See, e.g.*, Collins, *supra* note 5, at 435–36. Others question this or debate its relevance. This is

For all of these reasons, what Cohen considers a close call (whether living people should have a right not to be made genetic parents when they have consensually created a preembryo) is not close in the context of posthumous reproduction. The surviving parent should have the right to determine the fate of the preembryo—perhaps even if it is clear that the deceased would have objected. We need not resolve that issue, however, since I am simply dealing with whether to presume consent. It is hard to argue that in the absence of consent or refusal a genetic parent should be denied the ability to bring to term a preembryo for no reason other than that the deceased's prior wishes regarding the preembryo are uncertain. To do otherwise is to place too great a weight on whatever autonomy interests people have regarding posthumous events.

This argument is even stronger where the surviving genetic parent is unable to have genetic children in any other way due to present infertility. What is at stake is no longer just the ability to reproduce with the person of one's choice, or one's interest in particular tissue with the potential for life. What is at stake is the ability to have genetic offspring at all.

Although Cohen argues for a right not to be made a genetic parent against one's will, he notes that in the context of infertility of one genetic parent there is no agreement as to whose interests should prevail. He considers it at least plausible that: "the impossibility of having genetic children reduces someone's welfare more than having unwanted genetic children raised by an ex-spouse."⁷⁰ Although framed in utilitarian terms, one could rephrase Cohen's conclusion to state that the infertile surviving parent's interests might outweigh the interests of the living person who voluntarily contributed gametes and now prefers that the preembryo be destroyed. If this is true in the context of living genetic parents, it is all the more plausible to argue that consent should be presumed in cases of posthumous reproduction involving the infertility of the surviving spouse. This is both because the surviving spouse's interests in reproduction with the preembryo are greater than if she were not infertile and because the deceased's interest in avoiding genetic parenthood is diminished by death. Further, it must be recalled that we are dealing only with uncertainty as to the deceased parent's wishes not express refusal, as in the preembryo dispute cases.

As for the interests of others, although we cannot completely dismiss the interests of society and of family members in the fate of the preembryo, given the strong personal reproductive interests at stake for the surviving spouse it is difficult to conceive of these interests tipping the balance toward presumed refusal. Certainly in the preembryo dispute cases between living genetic parents there is no suggestion that family members' interests or the public interest should receive significant weight.

Given the foregoing, where posthumous reproduction involves the use of a preembryo presuming consent better promotes the relevant interests at stake. The surviving parent risks having an extremely important reproductive interest thwarted under a policy of presumed refusal. The deceased's prior interest in the fate of the preembryo is by no means insignificant. But, given that the interest relates only to genetic parenthood, is a critical rather than experiential interest, and relates to a

evident in the fact that most reject Collins' "permissive approach." See Katz, *supra* note 4, at 304. As far as I am aware, there are no studies that test the question empirically.

⁷⁰ Cohen, *Parent*, *supra* note 28, at 1193–94.

posthumous state of affairs, along with the fact that a presumed consent policy would allow the deceased to refuse consent while alive, the deceased's interests are outweighed by the interests of the surviving parent.

It should be noted that a policy of presumed consent is in some ways the least important when it comes to preembryos. This is because by necessity preembryos must be stored in circumstances that require people to enter into contracts regarding the use of that material. It is a simple matter to include a clause regarding what happens to the preembryo should one genetic parent die, and such clauses are often included in preembryo storage contracts.⁷¹ There is no need to presume or refuse consent because the deceased's prior consent or refusal is express. Nevertheless, this analysis demonstrates why presuming consent is the approach that best promotes the interests at stake. It demonstrates that context matters, and that the deceased's autonomy interest does not justify presuming refusal in all circumstances.

2. *The Deceased and the Surviving Parent were in a Committed Relationship and the Issue is one of Access to the Deceased's Stored Gametes*

In this scenario, the deceased's interests remain essentially the same, namely a critical interest, while alive, in posthumous genetic parenthood. The primary difference is that the surviving parent's interests in reproducing with the deceased are diminished. There is no longer an existing entity with potential for life that shares her genes. Any claim to reproducing using the deceased's gametes must rest on a relationship of expectation and reliance on that expectation. As discussed above, the expectation interest is not a very strong one: certainly it could not result in legally enforceable entitlements to another living person's gametes. Nevertheless, the ties between the surviving and deceased genetic parents differentiate this situation from the Brad Pitt scenario.

Recall also that the critical interests of the deceased in genetic parenthood do not necessarily support a policy of presumed refusal. The deceased only had those critical interests while alive and did not avail himself of the opportunity to make a decision about the stored gametes. Now that he is dead, his interests cannot be thwarted.

One might go further and argue that the fact that the deceased had gametes stored implies consent to reproducing. (And one might make the same argument about storing preembryos.) However, even if this were a reasonable inference, it is not reasonable to draw the further inference that he consented to reproducing *posthumously*. I therefore do not rely on any arguments about the likelihood that the deceased would have consented in considering whether consent should be presumed. Instead, the primary point is that a policy of presumed consent protects the deceased parent's critical interests in reproduction while alive. After he is dead, he is beyond harm.

The interests of surviving family members in this context are similar, if not identical, to their interests in the preembryo context. They have a legitimate interest in having or not having genetic relatives through posthumous reproduction. Again, however, this is relatively weak as compared to the interests of the genetic parents.

⁷¹ Robertson, *supra* note 1, at 1045–46 (citing Ethics Comm. of the Am. Fertility Soc', *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY & STERILITY 32S (Supp. 1986)).

Finally, the public interest in not having to make a decision about posthumous reproduction but nevertheless having the comfort of knowing one will not be made a posthumous parent is a weak one. In my opinion, living individuals' own reproductive interests should generally not be denied in order to protect people's right not to have to make a decision about posthumous reproduction. In addition, posthumous reproduction is likely to remain quite rare, and it is unrealistic to think that many people will worry about being made posthumous parents.⁷²

Balancing these interests in the context of a committed relationship and stored gametes, I believe reasonable people can disagree about whether consent should be presumed. In my opinion, however, it should. The strong reproductive interests of the surviving spouse (albeit less strong than in the preembryo context) outweigh the weak interests of family members and the public. As for the deceased parent, recall that he no longer has any interests. His interest in posthumous reproduction lies in making decisions while he is alive that further his view of the good life. To protect that interest, we should enforce those decisions. But, where no decision was made there is no critical interest to promote.

I therefore conclude that in this context consent to posthumous reproduction should be presumed. However, I acknowledge that the case for this is weaker than it was in Scenario One.

3. *The Deceased and the Surviving Parent Were in a Committed Relationship and the Issue is Removing Gametes from the Deceased's Body for Reproductive Purposes*

The only difference between this scenario and Scenario Two is that in addition to the posthumous reproduction issue there is a necessary interference with the deceased parent's corpse. There is a short window of time following death when sperm may be removed for reproductive purposes. This can be done through "stimulated ejaculation, micro surgical epididymal sperm aspirations, or testicular sperm extraction."⁷³ (It is not presently possible to remove ova from deceased women for reproductive purposes, but surely it is only a matter of time.)⁷⁴ Post mortem gamete retrieval (PMGR) for reproductive purposes is quite controversial and few people argue for its permissibility without prior explicit or at least implicit consent to reproducing posthumously.⁷⁵

The surviving spouse's interests are the same as in Scenario Two. The family members' interests are similar except they may have an additional interest in not having their loved one's body interfered with in a manner that they may find upsetting or undignified. The public interest is also similar except in addition to

⁷² Schiff would presumably disagree on this point. She argues that there are legitimate expectations that posthumous reproduction will not occur after death and that these expectations ground a public interest against posthumous reproduction without explicit consent. However, if there were an explicit change in the law from presumed refusal to presumed consent, that would eliminate any legitimate expectation people have in not being made posthumous parents. *See Schiff, supra* note 5, at 945.

⁷³ Katz, *supra* note 4, at 293 (citing Ethics Comm. of the Am. Fertility Soc'y, *Posthumous Reproduction*, 82 FERTILITY & STERILITY 32S (Supp. 2004)).

⁷⁴ Katz, *supra* note 4, at 289.

⁷⁵ *See supra* note 5.

having an interest in respecting the deceased's wishes regarding procreation, there is also an interest in the respectful treatment of dead bodies.

Returning to the deceased parent's interest in not having sperm removed from his body, this is an example of an interest in posthumous bodily integrity. I have written about this interest elsewhere.⁷⁶ Specifically, I have argued that even if the dead do not have interests, living people have critical interests in the fate of their remains that can justify allowing them to make enforceable decisions about their corpses (e.g., whether to be an organ donor, whether to be cremated or buried). That said, this article assumes that the deceased parent has died without expressing any wishes about posthumous reproduction (including, in this case, PMGR). How then should the interests be balanced in presuming consent or refusal?

For the same reasons that I conclude presumed consent to posthumous reproduction can be justified in Scenario Two, I believe it can be justified even where PMGR is required. Again, this relies on my conclusion that the only interests at stake for the deceased parent are interests while alive in making decisions about posthumous reproduction and the treatment of one's corpse. There is nothing at stake for a dead person who never made any such decisions. I conclude that when people speak of the dead retaining an interest in procreation they mean one of two things. They mean either that the dead themselves continue to have interests, which for reasons set out above I reject; or alternately, they mean that the living have a moral claim to deciding whether they reproduce after they are dead.⁷⁷ I agree, and this can ground a right to consent or to refuse consent to procreating posthumously. However, this in no way implies that silence should be interpreted as refusal. If the dead have no interests I have argued that there is often little reason to presume refusal. Thus, just as allowing posthumous reproduction cannot harm the deceased parent who never contemplated it, PMGR cannot harm him either.

At this point a clarification is necessary. The fact that the dead cannot be harmed does not mean that anything is morally permissible when it comes to posthumous reproduction or posthumous bodily interferences. I have stated all along that a range of interests are implicated: not only those of the genetic parents. There is a public interest in the dignified treatment of human remains, for example. We must treat the dead with dignity not because to do otherwise harms them, but because to do otherwise harms us. We must therefore ask whether PMGR is undignified, either always or only in the absence of prior consent. Again, reasonable people may disagree, but my view is that it is not undignified to remove sperm from a dead man for the purposes of allowing his partner to bear his child. Context matters. The same procedure might be undignified if conducted for other purposes, such as for commercial gain.

Thus, as in the first two scenarios, I believe presumed consent to PMGR can be justified for the reproductive purposes of the deceased's partner.

4. Pregnant Woman's Body is Maintained on Life Support to Gestate a Fetus

This scenario assumes that a woman dies while pregnant and that she is far enough along in her pregnancy that the fetus might be brought to term if the

⁷⁶ Young, *supra* note 9.

⁷⁷ The claim that the dead retain a sufficient degree of autonomy to make their decisions about posthumous reproduction determinative is often stated without much justification. It is therefore sometimes difficult to know on what basis the claim is made.

woman's body were maintained on life support. This is often not the case, since a fetus must be at a fairly late stage of development in order for there to be a reasonable possibility of success. However, as technology improves the procedure will be feasible more often, and we will have to face the question of whether to permit such uses of a dead body.

This scenario raises some of the same issues as PMGR in terms of posthumous bodily integrity, but the nature of the interference with the corpse is quite different. Although PMGR is invasive, it does not take long. In addition, it involves removing gametes which are then used for reproductive purposes. When a woman's body is maintained on life support the interference is much longer—in theory it can take months. In addition, it is not a question of removing genetic material that is then used for reproductive purposes. Rather, the whole body is dedicated to a reproductive purpose.

Let us consider the relevant interests at stake. As always, the deceased has none after she is dead. Her interests in posthumous reproduction and in posthumous bodily integrity were critical interests she had while alive. If she knew she was dying, for example, she may have had strong views about whether her body should be used in this way. Allowing her to decide would promote those interests. We are assuming, however, that she made no such decision while alive. She is now beyond harming.

The surviving genetic parent has an interest in the fate of the fetus similar to that in the preembryo context (Scenario One)—that is, a relatively strong one. The interest may be even stronger now that the entity at stake is not merely a few frozen cells but rather a fetus at a more advanced stage of development. As in Scenario One, the surviving parent's infertility would increase his interest in the fate of the fetus.

The deceased's family members have an interest in being (or not being) genetic relatives to the child. In addition, they have an interest in the treatment of their loved one's body. This interest is likely greater in this scenario than in the PMGR scenario for two reasons. First, as noted above, the interference is of longer duration, which affects the family's ability to have closure, to conduct a funeral, and to dispose of the body. Second, the particular nature of this interference is such as to give the impression that the deceased is still alive. Vital functions are maintained and a fetus continues to develop in the womb. This may cause particular distress to family members trying to come to terms with the death of a relatively young family member (since she is of child bearing years). One of the issues that arises in obtaining consent for organ donation is the perception that the deceased is still alive—that there is still hope—because she is breathing and her heart is beating, albeit with mechanical assistance. Maintaining a woman's body on life support for weeks or months would likely prolong the agony that comes from a clinical diagnosis of brain death combined with common sense indications of life.

The public interest also takes on a particular interest in this scenario. The public has very little interest in whether a particular person reproduces or not, but it does have an interest in the dignified treatment of dead bodies. Maintaining a pregnant woman's body on life support for the purpose of gestation is using the body as a means to an end to a much greater degree than in the case of stored gametes or PMGR. I made the argument above that we should be skeptical of the "means to an end" argument. The reasons for this include the fact that it is not always immoral to treat people as a means to an end and that dead bodies do not necessarily have the same status as people vis-à-vis the prohibition on treating people as a means to an

end. Nevertheless, because the entire body is conscripted, and for a relatively long period of time, this use is more objectifying than using or retrieving gametes for reproductive purposes.

In fact, one might think this use of a body undignified even with the woman's prior consent. Consent is not always determinative of dignified treatment: there are some uses of bodies that are considered undignified regardless of consent. One cannot give prior consent to being the subject of necrophilia, for example.⁷⁸ The public interest in the dignified treatment of bodies is thought to outweigh one's autonomy interest in deciding what may be done with one's corpse.

Maintaining a pregnant woman's body on life support for the sole purpose of allowing a fetus to come to term is not inherently undignified in the way that necrophilia is. Consent or a refusal of consent would likely be determinative.⁷⁹ However, we are assuming no such decision exists, and this raises some difficult issues. In particular, the long history of treating women as reproductive objects and of not giving them control over their reproduction may cause people to object to using women's bodies in this way—at least in the absence of prior consent.⁸⁰ Where a woman has died, it may be thought to diminish her humanity to treat her in death as an incubator.

Alternately, some believe that maintaining a brain-dead pregnant woman on life support is morally appropriate for the benefit of the fetus—at least in the absence of an expressed wish to the contrary.⁸¹ The fetus has no legal rights but could be said to have an interest in being born. This raises difficult issues about whether the fetus is an entity capable of having interests, and if so, about what weight those interests should be given. My own view is that these interests cannot weigh very heavily in deciding what to do. Our society has generally concluded that people's reproductive and bodily autonomy interests outweigh any interests of a fetus,⁸² and I agree with that view.

In weighing these various interests, it is difficult to know what the default rule should be. Reasonable people will disagree. On the one hand, there is no harm to the deceased in allowing this treatment of her corpse, and the surviving parent may have a strong interest in having the fetus come to term. On the other hand, such instrumental reproductive use of a woman's body without actual consent is arguably

⁷⁸ See, e.g., N.Y. PENAL LAW § 130.20(3) (McKinney 2013); CAL. HEALTH & SAFETY CODE § 7052 (West 2013).

⁷⁹ See UNIF. HEALTH-CARE DECISIONS ACT (1993), which grants people the right to discontinue medical treatment. *But see Univ. Health Serv. v. Piazzi*, in which a woman was allowed to be kept on life support without prior consent because she was held to have no constitutional right to privacy after death that would make her consent necessary. *Order in the Piazzi Case*, 2 ISSUES L. & MED. 415, 418 (1987).

⁸⁰ See, e.g., Sarah Elliston, *Life After Death? Legal and Ethical Considerations of Maintaining Pregnancy in Brain Dead Women*, in INTERSECTIONS: WOMEN ON LAW, MED. AND TECH. 145, 145–46 (1997).

⁸¹ See, e.g., Erich Loewy, *The Pregnant Brain Dead and the Fetus: Must We Always Try to Wrest Life from Death?*, 157 AM. J. OBSTETRICS & GYNECOLOGY 1097, 1099 (1987). Note, however, that Loewy does not discount the role of informed consent.

⁸² This is a gross generalization, of course. This article is not the place to explore in detail the relative interests of the fetus and genetic parents.

undignified and perpetuates stereotypes about women's status as reproductive objects.

My own view is that consent should not be presumed here, but that the surviving parent could provide substitute consent. The surviving parent's conflict of interest can be dealt with through existing laws on substitute consent. What is clear, however, is that presumed consent is more difficult to justify in this scenario than in the preembryo scenario and in the gamete retrieval scenario.

5. There Was No Preembryo – the Issue is one of Access to the Deceased's Gametes (Stored or Otherwise). The Deceased and the Surviving Parent Had No Relationship (i.e., Brad Pitt Scenario)

At this point, one might wonder whether I have so discounted the interests of individuals in their own posthumous reproduction and those of the family and of society at large that anything goes. This is not the case. In Scenario Five, the Brad Pitt scenario, presumed consent cannot be justified. However, my reasoning does not rely on Brad Pitt's objection. After all, we are assuming that he is dead and his prior wishes are unknown. We could avoid the problem entirely by concluding that because most people would refuse consent to reproducing posthumously with a stranger we have sufficient implicit evidence of refusal. This is one way around the problem, but to further elucidate my framework I reject that conclusion for the sake of argument. That is, I treat the absence of explicit instructions about posthumous reproduction as actual uncertainty about the deceased's wishes. If we cannot simply assume that the deceased would have refused and if the dead cannot be harmed why not let anyone have access to Brad Pitt's sperm after his death?

The reason the Brad Pitt scenario is impermissible is not because it is harmful to Brad Pitt (assuming all steps toward posthumous reproduction take place after Pitt's death) but because it is harmful to his family and to society and especially because the surviving parent's interests are much weaker in the absence of existing preembryos or a relationship of expectation and reliance.

The dead Brad Pitt has no interest in avoiding posthumous reproduction. His living wishes are unknown, he took no steps to avoid this fate, and he is now incapable of being harmed. His ability while alive to make decisions about posthumous reproduction largely fulfilled his critical interests while alive.

The surviving parent under this scenario is a stranger—a mere fan of Pitt's—and has a much weaker claim to reproducing with Pitt than the surviving parents in the previous scenarios. Her claim is not grounded in the existence of a preembryo or in any relationship of reliance or expectation. She cannot claim to only be able to reproduce with Pitt, and as a result, her claim to Pitt's reproductive material is no better than to anyone else's. In addition, whereas we can understand the desire to procreate with one's deceased spouse (although we may not share that desire), the desire to procreate with a dead stranger, a celebrity, is suspect—even creepy. On the one hand, it may not be much different than selecting a sperm donor based on listed attributes such as appearance, profession, etc. On the other hand, however, we must wonder whether the motivation is some sort of desire to have ties to the celebrity rather than to ensure one's child has socially desirable attributes. If the former is true, we may have greater concerns for the welfare of the child.

In addition to the surviving parent's much weaker interest in procreating with the dead Brad Pitt, family members' interest in avoiding Scenario Five is arguably stronger than it is in avoiding the first three scenarios. In each case, the question is whether a new family member should be created posthumously. In this case,

however, there are no family ties between the surviving parent and the deceased's family as there would likely be where there was a relationship between the deceased and the surviving parent. The family members may be less likely to have a relationship with the child under Scenario Five. They may also be upset by what they perceive of as inappropriate treatment of their deceased loved one (although this may also be true under the other scenarios). Finally, Brad Pitt may have a spouse (Angelina Jolie) who arguably has a stronger interest in her husband's reproduction than other family members do. Given the nature of a committed romantic relationship, and its sexual and reproductive aspects, Jolie could be said to have a stronger interest in whether Pitt reproduces posthumously than Pitt's mother or brother would.⁸³

Finally, societal interests must be considered. Although I discounted these interests above as being relatively unimportant, they nevertheless play a greater role in Scenario Five because all of the other interests are also fairly weak. Recall that the societal interest relates to dignified treatment of the dead and people's interest in not having to make a decision and still not worry that they will be made posthumous parents.

The societal interest plays a greater role here because it is safe to say that most people would be opposed to being made posthumous parents with a stranger. Assuming they were asked for consent, we may assume most would refuse consent. This opposition matters not because these people who would have refused will then be harmed by posthumous reproduction. I have already argued that they can only be harmed if they know while alive what awaits them. Instead, the harm lies in the worry and disapproval that the living will experience given the possibility of being made posthumous parents with a stranger. Although I am not convinced that such reproduction will ever be sufficiently common to actually cause a significant number of individuals to worry about it, it is nevertheless at least arguable that the public would suffer should this kind of posthumous reproduction be permitted. And so, although this is still not a strong interest in my opinion, neither is the surviving parent's interest, and the public interest helps tip the scales in favor of presumed refusal. In other words, living people should not have access to dead people's gametes for reproductive purposes outside the context of a committed romantic relationship without the prior consent of the deceased to donating gametes to a stranger for that purpose.

V. WHY IS PRESUMED CONSENT (SOMETIMES) JUSTIFIABLE FOR POSTHUMOUS REPRODUCTION WHEN WE HAVE REJECTED IT FOR ORGAN DONATION?

I have argued for a policy of presumed consent to posthumous reproduction in certain contexts, and many of my arguments could be adapted in support of presumed consent to organ donation. Yet, in common law jurisdictions at least, presumed consent to organ donation has consistently been rejected.⁸⁴ Arguments

⁸³ Compare with the case involving attributional step-parenthood. *See supra* note 48.

⁸⁴ No state in the United States has presumed consent legislation, although several have proposed bills that would have implemented some form of presumed consent. *See, e.g.*, 2010 *N.Y. Laws 09865 Summary*, N.Y. STATE ASSEMB. (Feb. 4, 2010), http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A09865&term=2009&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y; S.B. 3613, 98th Gen. Assemb., Reg. Sess. (Ill. 2010); S.B. 11-042, 68th Gen. Assemb., 1st Reg. Sess. (Col. 2011). For a history of presumed consent to organ donation in the United States, *see* David Orentlicher, *Presumed Consent to Organ Donation*:

marshaled against presumed consent to organ donation tend to relate to a perception that opt-in systems respect autonomy better than opt-out systems.⁸⁵ And although critics of presumed consent acknowledge that the dead have limited autonomy interests, or that the living have limited autonomy interests in relation to their future corpses, they nevertheless conclude that presumed consent to organ donation is not justifiable. In addition, many are of the view that the family should have a say—perhaps a determinative one—at least where the deceased’s wishes are not known.⁸⁶ Why, then, is there any reason to think that presumed consent should not also be rejected in the posthumous reproduction context?

I have two responses. First, I think presumed consent *is* justifiable in the organ donation context. Second, posthumous reproduction is significantly different from cadaveric organ donation, such that even if it were appropriate to reject presumed consent to the latter, it would not always be appropriate to reject presumed consent to the former. I address these points in turn.

A. *We Should Presume Consent to Cadaveric Organ Donation*

The law of consent to cadaveric organ donation reflects a medical model of consent in which the patient’s consent is required to avoid liability in negligence or battery. If the patient lacks capacity (because he is dead) and did not make a decision while capable a substitute decision may be made by a substitute decision-maker in accordance with anatomical gift legislation. As with all medical treatment, refusal is presumed: an affirmative act of consenting by the donor or his substitute decision-maker is required in order for donation to be lawful.

I believe this model has been applied to cadaveric organ donation in part because organ removal is performed by doctors in hospitals. It is a procedure for which the

Its Rise and Fall in the United States, 61 RUTGERS L. REV. 295 (2009). In Canada, see An Act to Amend the Trillium Gift of Life Network Act, B. 61, 38th Leg., 2nd Sess. (Ont. 2006) (first reading 16 Feb. 2006). In Australia see Legis. Council, Legal and Social Issues References Comm., *Inquiry into Organ Donation in Victoria, Report No. 1*, (No. 119 Session 2010-12, Mar. 2012), http://www.parliament.vic.gov.au/images/stories/documents/council/SCLSI/Organ_Donation/Final_Report.pdf. Wales recently became the first common country in the United Kingdom to adopt a policy of presumed consent. See Steffan Messinger, *Organ Donation: Wales Opts for Presumed Consent Change*, BBC NEWS (Jul. 3, 2013), <http://www.bbc.co.uk/news/uk-wales-23157427>.

⁸⁵ *But see* Orentlicher, *supra* note 84, who notes that an opt-in system does not necessarily reflect the deceased’s wishes. The assumption seems to be that in protecting autonomy it is worse to take organs against the wishes of the deceased than not to take them against the wishes of the deceased, but this is not obvious. That doing something is worse than not doing something reflects the principle that acts are worse than omissions, but this is not always the case. Further, the inability of a dead person to know whether the organs have been removed must make one question whether the acts/omissions distinction makes any difference in the context of the dead. Even acknowledging *living* people’s interests in what happens after they are dead, it is not clear that the acts/omissions distinction is compelling. Because failing to remove my organs against my will could result in the needless death of another person, this is potentially at least as great an outrage to an individual who would have consented than removing the organs of someone who would have refused consent would be to them.

⁸⁶ This is known as the “family veto.” See Wilkinson, *supra* note 16, at 587; *see also* Jennifer Mesich-Brant & Lawrence Grossback, *Assisting Altruism: Evaluating Legally Binding Consent in Organ Donation Policy*, 30 J. HEALTH POL. POL’Y & L. 687, 709 (2005).

medical model for consent (that is, presumed refusal) would be appropriate were the donor alive. In addition, the procedure is performed at a time very shortly after death when the donor still seems, in many respects, to be alive. Because of technological intervention, the deceased still has circulatory and respiratory functions. This may make it easier to apply the traditional medical model of consent to organ donation.⁸⁷

Because of these facts, my view is that people are inclined to treat cadaveric organ donation like a medical procedure without giving sufficient weight to the fact that the “patient” is not a living person. When they die, donors cease to have any interest in what happens to them. People should perhaps still be allowed to decide whether to be organ donors, but the interest of the living in what becomes of their future cadavers is, in my opinion, insufficient to justify presuming refusal. Even if one thinks that one’s critical interest in the fate of one’s cadaver is enough to justify denying people life-saving and health-improving organs, this does not mean that refusal should be presumed. After all, presuming refusal not only places this critical interest above other people’s lives, it also gives great weight to the interest in not having to make a decision at all.

When we further consider the fact that someone who expressed no wishes about organ donation one way or the other, and is now dead, cannot be harmed, presumed refusal seems too costly. If the reason why we allow people to decide whether to be organ donors is to protect living people’s critical interests in the fate of their cadavers, that interest is extinguished with death. Given the impossibility of harming the interests of the donor at this point, we should presume consent. The deceased, while alive, did not avail himself of his right to decide and now he is no longer an entity with any interest in what happens to him.

Further evidence that presumed refusal is not necessarily appropriate for organ donation is the fact that in many countries, especially civil law countries, presumed consent to organ donation is the law.⁸⁸ Although family members can generally override the presumption of consent in these countries,⁸⁹ the default is nevertheless consent rather than refusal such that organs may legally be retrieved if the wishes of the deceased are not known.

B. In Any Event, Posthumous Reproduction is Different

Although I am convinced that presumed refusal to cadaveric organ donation is inappropriate, I nevertheless recognize that presuming consent to organ donation is not currently politically feasible in most common law countries.⁹⁰ However, there are

⁸⁷ However, this would also be true of certain types of posthumous reproduction, namely PMGR and maintaining a woman’s body on life support to gestate a fetus.

⁸⁸ See Alberto Abadie & Sebastien Gay, *The Impact of Presumed Consent Legislation on Cadaveric Organ Donation: A Cross-Country Study*, 25 J. HEALTH ECON. 599, app. C at 617–19 (2006).

⁸⁹ *Id.*

⁹⁰ In fact, whether it is true that most would oppose presumed consent to cadaveric organ donation depends on where you are and on what you mean by presumed consent. In the United Kingdom, a majority is in favor of a soft version of presumed consent. See *Forty-Four Million Britons in Favour of ‘Opt-Out’ Organ Donation*, PATIENT.CO.UK, <http://www.patient.co.uk/press-releases/forty-four-million-britons-are-in-favour-of-opt-out-organ-donation> (last visited Jul. 23, 2013); see also Rebecca Smith, *Presumed Consent for Organ Donation Could Increase Transplants by a Quarter*, THE TELEGRAPH, Jan. 14, 2009,

important differences between organ donation and posthumous reproduction that can help justify presuming consent to (some instances of) the latter, even if we reject it for the former.

The biggest difference relates to the nature of procreation itself. It is a natural part of the human experience that requires two genetic participants and typically occurs within a particular kind of relationship. Given the existence of such a relationship, the expectations of a surviving parent are quite different than those of an organ recipient who has no ties to the deceased and no expectation of receiving a particular person's organs. This is not to suggest that surviving parents have an absolute right to reproduce with their deceased spouse—only that their interest in doing so is significant because it is grounded in a particular relationship that does not exist in the organ donation context. Where there is a preembryo, the interest in procreating using that preembryo is even stronger.

Another major difference between organ donation and posthumous reproduction relates to the nature of the procedure involved. Organ donation necessarily involves an interference with the deceased's corpse, whereas posthumous reproduction need not. (It does in the context of PMGR and maintaining a pregnant woman on life support, but does not where sperm or preembryos have been stored before death.) As I have suggested above, the metaphor of medical treatment, which grants an almost absolute right against unwanted interference with the body and which applies to organ donation, may not make sense in the context of at least some cases of posthumous reproduction.

That said, some point out differences between organ donation and posthumous reproduction not to argue in favor of presumed consent for the latter, but rather to argue that presumed consent is even *less* appropriate for posthumous reproduction than for organ donation. Such arguments include: a) the fact that organ donation is a socially desirable practice, while posthumous reproduction is not; b) the limited supply of organs; c) the fact that not having an organ can lead to a person's death; and d) the fact that procreation is "central to an individual's identity in a way that organ donation is not."⁹¹

I have implied above that, in certain contexts, posthumous reproduction *is* a socially desirable practice because it allows the surviving parent to fulfill her reproductive goals. The second argument regarding organ scarcity implies that for the surviving parent reproducing with someone other than her former partner is an acceptable alternative. It may or may not be. I agree with the third argument—namely that the life or death nature of organ donation weighs in favor of presumed consent, and that the same argument cannot be made regarding posthumous reproduction. Finally, the fourth argument about the importance of procreation to an individual's identity is true. However, it can support the surviving parent's claim to reproducing with her former partner as easily as it can support the need for the deceased's actual prior consent.

The differences of opinion between me and scholars such as Anne Schiff⁹² can largely be traced to our different views on two points: first, the relative importance

<http://www.telegraph.co.uk/health/healthnews/4239652/Presumed-consent-for-organ-donation-could-increase-transplants-by-a-quarter.html>.

⁹¹ See, e.g., Schiff, *supra* note 5, at 932–34.

⁹² See Schiff, *supra* note 5, at 932–34.

of the surviving parent's interest in procreating with her partner, and second, the strength of the autonomy interest in not having to make a decision about posthumous reproduction and still not be made a posthumous parent.

VI. CONCLUSION

Assertions that reproductive interests survive death are often made but are rarely well justified.⁹³ If this is true, we need a way of conceiving of how dead people can have an interest in whether they reproduce posthumously. After engaging with the philosophical literature, I concluded that the dead can have no interests: in part because they are not entities that can be affected by anything (the experience problem) and in part because they are not entities with moral standing at all (the problem of the subject). Instead, living people have an interest in the fate of their remains, but once they die that interest dies with them.

Reasonable people disagree: some like Feinberg and Pitcher hold that the dead can have interests. However, in this article I have explored the consequences for a policy of presumed consent to posthumous reproduction of assuming that although the living have an interest in posthumous states of affairs the dead have no interests.

The primary implication of this assumption is that if we do not know what the deceased wanted while alive presuming refusal in no way harms (or benefits) the deceased. Others have interests that are affected by presuming refusal. In particular, the surviving spouse who wants to reproduce with the deceased has an ongoing reproductive interest in whether that happens. The strength of this interest varies depending on factors such as whether a preembryo was created while the deceased parent was still alive and the nature of the relationship between the deceased and the surviving parent.

Other interests-holders include the deceased parent's other family members, society at large, and the child born through posthumous reproduction. However, I have argued that these interests are often insufficient to outweigh the surviving parent's interests in procreating with the deceased—at least where there is a preembryo or there was a committed romantic relationship between the deceased and the surviving parent. On the other hand, where the deceased and the surviving parent are strangers, as in the Brad Pitt scenario, the interests of the surviving parent are sufficiently weak that they are outweighed by the interests of others. Posthumous reproduction should not be presumed in such circumstances.

Those who argue that the default for consent to posthumous reproduction should be refusal should indicate how the interests of the dead justify that conclusion. It is not enough to assert that a certain amount of autonomy survives death; one must engage with the problem of the subject and the problem of experience. One must also engage not only with the autonomy interest in posthumous procreation, but also with the interest in not having to make a decision about such procreation. Finally, one must consider how much weight should be given to the interests of the surviving parent. These are not insurmountable obstacles for those that oppose presumed consent to posthumous reproduction. However, before we deny people the ability to reproduce with their deceased partner we must understand and justify that decision based on something more than recourse to the broad and flexible concept of autonomy. My analysis of the relevant interests at stake suggests that, at least in certain types of posthumous reproduction, presuming consent is the better approach.

⁹³ Excluding Schiff, *supra* note 5, at 932–34; Robertson, *supra* note 1.