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Evaluating the Constitutionality of Marital Status Classifications in the Regulation of Posthumous Reproduction and Postmortem Sperm Retrieval

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Note

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ALISON JANE WALKER

In Eisenstadt v. Baird, the Supreme Court held that a state law prohibiting the provision of contraceptives to unmarried persons violated the Fourteenth Amendment's rational basis test because of the disparate treatment it afforded to married and unmarried individuals. Eisenstadt stands for an individual's right to make their own procreative decisions, free from governmental intrusions which impose arbitrary classifications on privacy and freedom. This Note focuses on posthumous reproduction and, more specifically, postmortem sperm retrieval: the process of using a deceased male's frozen sperm after his death to produce his biological children at the request of his spouse or intimate partner. It provides a survey of judicial decisions relating to assisted reproductive technology, posthumous reproduction, and the constitutional right to privacy as it relates to procreative decision-making, as well as model statutes, state laws, and institutional guidelines that seek to regulate posthumous reproduction.

Ultimately, this Note argues that judicial decisions, legislation, and medical facility regulations or policies that prohibit unmarried partners from posthumously reproducing with their deceased partner's gametes on the basis of their marital status are unconstitutionally discriminatory.

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ALISON JANE WALKER *

INTRODUCTION

The concept of “family” is continually evolving as society, legislators, and the judiciary reckon with near-constant developments in Assisted Reproductive Technology (ART) that raise increasingly complex legal and ethical questions. One such development is posthumous reproduction: conceiving a child using gametes from a deceased individual.¹ Posthumous reproduction can occur using gametes from a deceased male or female.² However, this Note will primarily focus on posthumous reproduction using a deceased male’s gametes. This is accomplished by insemination with frozen sperm stored prior to one’s death or with frozen sperm gathered through postmortem sperm retrieval (PMSR), a medical procedure by which a male’s sperm is removed shortly after death.³ Use of one’s sperm for posthumous reproduction is either requested by the deceased prior to his death and typically supported by a deposit of his sperm into a sperm bank,⁴

* JD Candidate at the University of Connecticut School of Law. I would like to extend a very sincere thank you to Professor Susan Schmeiser for her guidance and advice during the drafting of this Note. I would also like to thank my fellow members of the *Connecticut Law Review* for their hard work and thoughtful feedback. Most importantly, I would like to thank the people without whom I could not have written a Note, made it through law school, or become the person I am today. Mom and Dad: Thank you for encouraging me to challenge myself, for believing in me, and for reading this Note, and everything else I’ve written, all the way through. Jake: Thank you for making me smile every day and for listening to me stress about writing this when you didn’t even know what a Law Review was. Liv: Thank you for enduring these three years with me, and for being my greatest ally in law school—proving that Westover really is forevermore. Emma: Thank you for always texting back in girls club, no matter how ridiculous my questions are, and for motivating me to push myself so I can keep up with you.

¹ Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 579 (2005).

² *Id.* at 580.

³ Andrew R. Zinkel et al., *Postmortem Sperm Retrieval in the Emergency Department: A Case Report and Review of Available Guidelines*, 3 CLINICAL PRAC. & CASES EMERGENCY MED. 405, 405 (2019).

⁴ See *Gillett-Netting v. Barnhart*, 371 F.3d 593, 594 (9th Cir. 2004) (holding that posthumously conceived children were entitled to insurance benefits based on the deceased father’s earnings where he had requested his wife use sperm he had frozen prior to his death from terminal cancer to conceive after his death), *abrogated by Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 545 (2012); *Hall v. Fertility Inst. of New Orleans*, 647 So. 2d 1348, 1349, 1351 (La. Ct. App. 1994) (holding that the deceased’s premortem donation of his frozen sperm to his romantic partner for use in her own insemination following his death did not violate public policy, if found to be a valid donation).

or, in many cases, requested by his spouse, partner, or family members after he is declared legally dead.⁵

The question of whether posthumous reproduction using a deceased male's sperm should take place is only the beginning. The aftermath of posthumous reproduction and PMSR opens a Pandora's box of ethical and legal considerations. Now that the sperm has been made available, what happens next? The use of the deceased's sperm, the legal status of children resulting from that sperm, and the effect that the wishes of the deceased and his survivors have on those determinations are all up for debate. But, because there is no federal regulation⁶ to govern when, under what circumstances, and at whose request posthumous reproduction or PMSR is appropriate, some states have enacted statutes addressing the issue,⁷ and some courts have decided posthumous reproduction disputes as cases of first impression.⁸ This Note focuses on one commonality among the initial efforts to regulate in states across the country: marriage as a prerequisite for individuals to posthumously reproduce with the assurance that any resulting child will have the same legal status as a child conceived prior to death.

Part I of this Note begins with a discussion of the ethical questions that arise when an individual seeks to posthumously reproduce. The numerosity and complexity of these questions may explain why the present regulatory framework addressing posthumous reproduction and PMSR is sparse and inconsistent across the United States. Next, Part II presents a survey of the regulatory frameworks governing posthumous reproduction and PMSR in the states that have addressed it through statutes or judicial decisions thus far. The existing framework demonstrates that the legal rights of the deceased, of the individuals who wish to use their deceased partner's sperm, and of the children resulting from posthumous reproduction often largely depend on whether the deceased was married. Courts, statutes, and

⁵ Requests for PMSR by the deceased's partner or family are becoming so commonplace that hospitals have begun instituting policies to govern decisions related to the procedure. *See, e.g., Postmortem Sperm Retrieval (PMSR)*, WEILL CORNELL MED., <https://urology.weillcornell.org/Postmortem-Sperm-Retrieval> (last visited Dec. 29, 2021) (outlining the considerations made and requirements that must be met by the requesting party for the facility to perform PMSR).

⁶ *See, e.g., id.* ("Currently, as there are no national regulations or restrictions related to postmortem sperm retrieval, it is recommended that regulations are implemented at the local or institutional level prior to the need arising for discussions with patients or families around this medical procedure."); Emma Grillo, *The Complex Ethics of Saving a Dead Person's Sperm*, VICE (May 31, 2019, 4:00 PM), <https://www.vice.com/en/article/7xggyb/the-complex-ethics-of-saving-a-dead-persons-sperm> (stating that, unlike in other countries, the United States has "no national regulations" pertaining to PMSR).

⁷ The following state statutes are just some of those which address the parentage and status of posthumously conceived children: ALA. CODE § 26-17-707 (2008); COLO. REV. STAT. § 19-4-106 (2021); LA. STAT. ANN. § 9:391.1 (2003); UTAH CODE ANN. § 78B-15-707 (West 2008); WYO. STAT. ANN. § 14-2-907 (2003).

⁸ *See, e.g., Hecht v. Superior Ct.*, 20 Cal. Rptr. 2d 275, 276 (Cal. Ct. App. 1993) (holding that the use of a deceased man's frozen sperm to reproduce is not contrary to public policy).

institutional guidelines alike tend to infer the deceased's consent primarily from the fact of a marriage between the deceased and the requesting party.

Part III of this Note examines the merits of this framework under the lens of American constitutional jurisprudence on the right to privacy in procreation and procreative decision-making. This Note focuses specifically on *Eisenstadt v. Baird*, in which the Supreme Court held that a law prohibiting the distribution of contraceptives to unmarried persons failed the Fourteenth Amendment's rational basis test because of the distinction it made between married and unmarried individuals.⁹ Famously, *Eisenstadt* stands for the principle that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁰

Finally, Part IV of this Note makes recommendations as to how legislators and the courts can better balance the interests at stake in disputes arising out of posthumous reproduction and PMSR. Public policy interests, including respecting the wishes of the dead and establishing the rights of posthumously conceived children, should be weighed against individual interests, including preserving autonomy in reproductive decision-making and protecting privacy in intimate relationships. These recommendations are geared toward creating a regulatory framework of posthumous reproduction and PMSR that coexists with modern conceptions of "partners" and "family" and resists making determinations based solely, or largely, on marital status.

I. ETHICAL IMPLICATIONS OF POSTHUMOUS REPRODUCTION AND PMSR

In the United States, the structure and formation of family is a contentious subject because it is inextricable from various moral, sexual, religious, political, and cultural associations. Family and procreation are so often defined in the negative—by what they are not. Again and again, Americans have drawn lines in the sand indicating what the proper moral and legal limits are when it comes to sexuality, reproduction, and family formation, just to move the lines further later on.¹¹ ART is one factor that plays into this pattern. As ART advances, new and varied forms of reproduction come into conflict with traditional notions of parenting and family. One such advancement, and the focus of this Note, is posthumous reproduction. Although the ethical implications of posthumous reproduction are not the primary concern of this Note, they cannot be separated from the legal, constitutional, and regulatory considerations involved.

⁹ *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

¹⁰ *Id.* at 453.

¹¹ See discussion *infra* Part III (tracing the development of the right to privacy in procreation and procreative decision-making in American constitutional jurisprudence).

A discussion of the ethical implications of any ART procedure or process must necessarily start with the United States' legal and societal mandate to protect individuals' privacy and liberty when it comes to reproduction and reproductive decision-making.¹² While reproductive issues are often highly politicized and extremely contested, the majority of Americans believe that reproduction is a personal choice that should be respected.¹³ However, "reproductive freedom" and "procreative liberty" do not have concise, agreed-upon definitions. Most may interpret these terms to mean that it is an individual's right to choose to pursue or to avoid procreation, but is that all? The scope of the right to reproduce becomes less clear as reproduction departs from its simplest, most traditional context: a married couple engaging in family planning and conceiving through intercourse. When procreation occurs via ART, the same privacy and liberty interests that support the right to reproduce are implicated, but new ethical and legal questions necessarily arise that can affect how we view the importance of protecting those interests.

In many cases, posthumous reproduction does not require technology or expertise that substantially differs from that of a typical *in vitro* fertilization or artificial insemination procedure.¹⁴ But, ethical and legal conflicts are more likely to arise in this context than in a similar, "typical" procedure because a state, medical facility, family member, or other party may question whether it is right to conceive a child where one parent is already deceased.¹⁵ Because Americans hold procreative liberty and autonomy in such high esteem, the first question we must ask is whether an individual maintains an interest in that liberty and autonomy after death. Some may answer that question in the affirmative because they feel there is a societal and moral imperative to respect both the wishes of the deceased individual and the finality of death as a concept.¹⁶ Others may answer in the negative, expressing the belief, with which this Note agrees, that reproduction is an experience for the living. We value reproduction because of the experiences that result from it including conception, gestation, birth, and parenting. A

¹² *Id.*

¹³ *New Poll from the Center for Reproductive Rights: 6 in 10 Americans Support Federal Law to Protect Abortion Access*, CTR. FOR REPROD. RTS. (Aug. 4, 2017), <https://reproductiverights.org/new-poll-from-the-center-for-reproductive-rights-6-in-10-americans-support-federal-law-to-protect-abortion-access/>.

¹⁴ See Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 333–34 (2009) (describing the differences between posthumous reproduction and established conception).

¹⁵ See generally Shelly Simana, *Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?*, 5 J.L. & BIOSCIS. 329, 330 (2018) (exploring the legal and ethical issues that posthumous reproduction presents in the United States, the United Kingdom, Australia, and Israel).

¹⁶ See Kathryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 UNIV. CHI. LEGAL F. 289, 301 (stating that "the importance of the decision to reproduce is of such moment and has such a deeply personal nature that procreative autonomy survives death").

deceased individual will not experience the conception of a *posthumously conceived* child. A deceased individual does not gestate, does not give birth, and does not parent. One could even go so far as to argue that no unwanted reproduction can occur posthumously because a deceased individual cannot experience the anxiety or fear that comes with the desire to avoid parenthood. This does not mean that we should dismiss the wishes of the deceased in situations where they have indicated whether they wish to have posthumous children or whether they wish to procreate in general. A living individual's desire to procreate and to choose with whom to procreate does not outweigh a deceased individual's desire not to procreate.

This Note agrees that reproduction is primarily an experience for the living and that, in some contexts, namely where the deceased has not expressly objected, it is appropriate for a living individual to decide to posthumously reproduce using a deceased individual's gametes. However, it does not support posthumous reproduction becoming an equal opportunity option for all grieving individuals. One class of individuals that may seek posthumous reproduction consists of those who use their deceased child's gametes and donor gametes to posthumously conceive their own grandchild.¹⁷ Justifications for allowing these individuals to become posthumous grandparents include allowing them to "realiz[e] their child's interest in genetic continuity," realize their "own interest[] in the continuation of the family genetic heritage," and participate in "the grand-parenting experience."¹⁸ Arguments against postmortem grandparenthood include that "allowing . . . parents to use their child's gametes and raise the resulting child may blur the boundaries between parents and grandparents" and that "the deceased's parents will raise th[e] child as if he or she were their own," essentially treating the child as a "living monument" to the deceased,¹⁹ which could harm the child's self-worth, independence, and mental health. The Ethics Committee of the American Society for Reproductive Medicine (ASRM) strongly advises against allowing individuals to become posthumous grandparents.²⁰ This Note agrees that posthumous grandparenthood is inappropriate and that the use of posthumous reproduction and PMSR should be reserved for surviving partners and spouses of the deceased.

¹⁷ Simana, *supra* note 15, at 350.

¹⁸ *Id.*

¹⁹ *Id.* at 339, 352; see Shira Rubin, *In Israel, Becoming a Dad After Death*, UNDARK (Feb. 25, 2019), <https://undark.org/2019/02/25/posthumous-reproduction-israel-dad/> (discussing Israeli court decisions denying grieving parents the right to posthumously reproduce using their deceased son's gametes and a gestational carrier due to "potential harm to the child") ("[S]ociety does not know how such a child 'will feel to know that he is not an individual, but a copy of someone else'—what Israeli judges in the past have called a 'living monument to the dead.'").

²⁰ Ethics Comm. of the Am. Soc'y for Reprod. Med., *Posthumous Retrieval and Use of Gametes and Embryos: An Ethics Committee Opinion*, 110 FERTILITY & STERILITY 45, 48–49 (2018) (noting that "the desires of the [deceased's] parents [do not] give them any ethical claim to their child's gametes").

This Note cannot and will not reach every ethical question that is raised by the use of posthumous reproduction and PMSR. However, the judiciary and the legislature must begin to grapple with these preliminary questions, as well as others that this Note has not reached, before they can effectively and thoughtfully regulate posthumous reproduction and PMSR, which they have failed to do thus far.

II. SURVEY OF THE EXISTING REGULATORY FRAMEWORK

A. *Judicial Decisions*

1. *The Parpalaix Case and the Donor Intent Standard*

In 1981, the Tribunal de Grande Instance, a French court, became the first judicial body to decide whether a deceased man's sperm could be used for posthumous reproduction and to establish a test for determining who should be given control of his sperm following his death.²¹ Alain Parpalaix, who had been diagnosed with testicular cancer and warned that his chemotherapy treatment could leave him sterile if he recovered, deposited his sperm with the Centre d'étude de Conservation du Sperme (CECOS).²² Alain later married his girlfriend, Corinne, two days before losing his fight with cancer.²³ Following Alain's death, Corinne attempted to retrieve his sperm from CECOS to use for her own insemination, but CECOS refused.²⁴ Consequently, Corinne, along with Alain's parents, sued CECOS to recover the sperm.²⁵ Together, they put forth an emotional plea in addition to their legal arguments: "Let her give life to this child, the fruit of a love that she goes on expressing with quiet determination. It is her most sacred right."²⁶

At the start, the *Parpalaix* court rejected arguments on both sides of the dispute. Alain's family contended that his sperm was subject to the law of inheritance that made it the property of his heirs.²⁷ CECOS contended that, without an express manifestation of Alain's intent to provide his sperm to Corinne for posthumous reproduction, she could not recover his sperm.²⁸ The court dismissed the family's notion that sperm is inheritable property, as well as CECOS's position that express, written consent by Alain was required.²⁹

²¹ *Parpalaix c. CECOS* is unreported, and, seemingly, the original text of the decision is unavailable. As such, this Note's discussion of *Parpalaix* is based on Gail A. Katz's retelling. See Gail A. Katz, Note, *Parpalaix c. CECOS: Protecting Intent in Reproductive Technology*, 11 HARV. J.L. & TECH. 683, 683-84 (1998) (citing T.G.I. Creteil, Aug. 1, 1984, Gaz. du Pal. 1984, 2, pan. jurisp., 560).

²² *Id.* at 684.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 684-85.

²⁶ *Id.* at 685.

²⁷ *Id.*

²⁸ *Id.* at 686-87.

²⁹ *Id.* at 686.

Still, the court decided that the deceased's intent to procreate was dispositive of the proper use of his sperm and embarked on an inquiry to determine Alain's intent for the posthumous use of his sperm.³⁰ Notably, the court did not find Alain's failure to contract for posthumous reproduction by Corinne to be dispositive.³¹ After an investigation into the circumstances surrounding Alain's death and its aftermath—namely, that Alain's parents supported Corinne's decision to seek posthumous reproduction using his sperm, that Alain and Corinne's marriage was motivated in part by a desire to eliminate red tape surrounding posthumous reproduction, and that Alain was unaware of CECOS's objection to posthumous reproduction using donor sperm—the court inferred that Alain intended to posthumously conceive a child with Corinne and ordered that his sperm be placed in her possession.³² In doing so, the *Parpalaix* court established a standard of prioritizing donor intent in the resolution of reproductive technology disputes.

2. *Davis v. Davis and the Balancing Interests Standard*

In 1992, the Supreme Court of Tennessee issued the first American judicial decision on the proper disposition of frozen embryos following a divorce in *Davis v. Davis*.³³ Mrs. Davis, in the immediate aftermath of her and her husband's divorce, sought possession of frozen embryos that the couple had commissioned a fertility clinic to produce and store during their marriage.³⁴ Mrs. Davis originally intended to use the embryos to become pregnant, but Mr. Davis strongly objected, stating that his preference was to leave the embryos in storage.³⁵ The trial court issued the embryos to Mrs. Davis, bestowing "custody" on her, based on its assertion that the embryos were "human beings."³⁶ The Court of Appeals reversed the trial court's decision, holding that Mr. Davis had a constitutional right not to father a child where no conception had occurred and holding that there was no justification for ordering implantation or insemination of Mrs. Davis against Mr. Davis' objection.³⁷ By the time the case reached the Supreme Court of Tennessee, the parties' circumstances and objectives had changed. Both Mr. and Mrs. Davis had remarried, and Mrs. Davis no longer wanted to use the embryos herself; instead, she hoped to receive the court's permission to

³⁰ *Id.* at 686–87.

³¹ *Id.* at 686.

³² *Id.* at 686–87.

³³ 842 S.W.2d 588, 589 (Tenn. 1992), *reh'g granted in part*, *Davis v. Davis*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Davis v. Davis*, No. E-14496, 1989 WL 140495, at *1 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588, *reh'g granted in part*, 1992 WL 341632.

³⁷ *Davis*, 842 S.W.2d at 589.

donate them.³⁸ Mr. Davis remained opposed to Mrs. Davis' proposed disposition of the embryos, and he sought the court's permission to have them destroyed.³⁹

First, the *Davis* court held that the Davises' un-implanted embryos were neither human beings nor movable property; rather, they "occup[ie]d] an interim category that entitle[d] them to special respect because of their potential for human life."⁴⁰ Therefore, neither of the Davises had a traditional property interest in the embryos, but each had an ownership interest in the embryos that entitled them to some "decision-making authority" over their disposition.⁴¹ Reminiscent of the *Parpalaix* court's emphasis on donor intent, the *Davis* court noted that "decisional authority" over the use of the parties' genetic material belonged to "the gamete-providers alone" and that "no other person or entity has an interest sufficient to permit interference" with the gamete-providers' choices and intentions.⁴² Second, the court concluded that both Mr. and Mrs. Davis held a constitutional right to procreational autonomy in "the right to procreate and the right to avoid procreation," respectively.⁴³

Finally, absent any relevant case law, statutory guidance, or written agreement between the parties to govern,⁴⁴ the *Davis* court developed a three-step framework to balance the parties' interests for use in the case at bar and in future similar disputes.⁴⁵ First, courts should carry out "the preferences of the progenitors."⁴⁶ Second, when the progenitors' preferences are unclear or disputed, a prior, enforceable agreement regarding the disposition of the embryos should be carried out.⁴⁷ Third, where there is no prior, enforceable agreement, the interests of the parties should be balanced to determine the proper disposition of the embryos.⁴⁸ As a default rule, where one party wishes to "avoid procreation" and the other "has a reasonable possibility of achieving parenthood by means other than" the use of the embryos in dispute, the party seeking to avoid procreation should prevail.⁴⁹ If the party seeking procreation has "no other reasonable alternatives," their

³⁸ *Id.* at 590.

³⁹ *Id.*

⁴⁰ *Id.* at 597.

⁴¹ *Id.*

⁴² *Id.* at 602.

⁴³ *Id.* at 603.

⁴⁴ *See id.* at 589–90 (noting that the case presents a "question of first impression," and there existed no "written agreement" or "statute governing such disposition").

⁴⁵ *See id.* at 603–04 ("Resolving disputes over conflicting interests of constitutional import is a task familiar to the courts. One way of resolving these disputes is to consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.")

⁴⁶ *Id.* at 604.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

use of the embryos in dispute should be given due consideration.⁵⁰ As an exception to this default rule, the party seeking to avoid procreation should prevail if the party seeking to use the embryos only wishes to donate them, rather than use them to bring about a child of their own.⁵¹

3. Hecht v. Superior Court: *Broadening Davis*

In 1993, a California court became the first in America to decide a dispute concerning posthumous reproduction.⁵² Before William Kane died by suicide, he deposited his sperm in a Los Angeles sperm bank.⁵³ The written agreement he entered into with the sperm bank permitted it to release his sperm to his girlfriend, Deborah Hecht, or her physician.⁵⁴ The agreement provided that, in the event of Kane's death, the bank should "[c]ontinue to store [the specimens] upon request of the executor of the estate [or] [r]elease the specimens to the executor of the estate."⁵⁵ Subsequently, Kane executed a will, naming Hecht as the executor of his estate and stating that "should she so desire," it would be his "wish" that she use his deposited sperm to "become impregnated . . . before or after [his] death."⁵⁶

Kane's adult children brought an action seeking to destroy Kane's frozen sperm to "help guard the family unit" by preventing both the creation of a non-traditional family and the "disruption of [an] existing famil[y] by after-born children."⁵⁷ In response, Hecht argued that Kane's children had no property interest in or right to his sperm, as it had been gifted to her at the time of the deposit.⁵⁸ Furthermore, Hecht contended that destroying the sperm over her objections "would violate her rights to privacy and procreation under the federal and California constitutions."⁵⁹ Following a hearing, the lower court ordered that Kane's sperm should be destroyed.⁶⁰ Hecht successfully filed for an order staying execution of the trial court's decision, bringing the case to the California Court of Appeal.⁶¹

The *Hecht* court began by adopting the *Davis* court's decision regarding the status of gametic material—that it "occup[ies] an interim category"⁶²

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *Hecht v. Superior Ct.*, 20 Cal. Rptr. 2d 275, 276 (Cal. Ct. App. 1993) ("This proceeding presents several matters of first impression involving the disposition of cryogenically-preserved sperm of a deceased.").

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 276–77.

⁵⁷ *Id.* at 279.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 279–80.

⁶¹ *Id.* at 280.

⁶² *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), *reh'g granted in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

between living thing and movable property because its value “lies in its potential to create a child.”⁶³ The court concluded that Kane, at the time of his death, had an ownership interest in his frozen sperm “to the extent that he had decision making authority as to the use of his sperm for reproduction.”⁶⁴ The court went on to hold that his interest constituted a property interest under California’s Probate Code.⁶⁵ Kane’s children responded by arguing that, regardless of whether the disposition of his sperm fell within the jurisdiction of the probate court, Kane and Hecht’s intended use for the sperm violated public policy two-fold, and it should be prohibited.⁶⁶ Namely, Kane’s children asserted that both the artificial insemination of an unmarried woman and the use of a deceased man’s sperm in an artificial insemination were contrary to public policy.⁶⁷ The *Hecht* court declined to hold that either act was violative of California’s public policy.⁶⁸

As for artificial insemination of an unmarried woman, the court noted that neither California’s courts nor its legislature had looked negatively on the practice in recent history.⁶⁹ When deciding *Jhordan C. v. Mary K.*, an earlier case regarding the determination of paternity in an artificial insemination dispute, the California Court of Appeal had interpreted a section of California’s Civil Code—an adoption of the Uniform Parentage Act (UPA)—to provide “unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination.”⁷⁰ The court in *Jhordan C.* noted that it did not wish “to express any judicial preference toward traditional notions of family structure or toward providing a father where a single woman has chosen to bear a child” and that it would defer to the legislature to determine public policy on issues of marriage and family.⁷¹ California’s legislature had already made clear that it was an unmarried woman’s right to be artificially inseminated by adopting the UPA’s artificial insemination provision⁷² word-for-word with one exception: the exclusion of the UPA’s use of the word “married.”⁷³ The courts in *Jhordan C.* and *Hecht* agreed that, if the California legislature wished to steer public policy away from the artificial insemination

⁶³ *Hecht*, 20 Cal. Rptr. 2d at 283.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 284.

⁶⁷ *Id.*

⁶⁸ *Id.* at 284, 290–91.

⁶⁹ *Id.* 284–86 (discussing precedent which avoids establishing judicial preference on issues of marriage and family).

⁷⁰ *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 534 (Cal. Ct. App. 1986). For information on the UPA, see *infra* Part I.B.2.

⁷¹ *Id.* at 537.

⁷² The UPA provision in place at the time narrowed a sperm donor’s nonpaternity to situations in which a “married woman other than the donor’s wife” is artificially inseminated. UNIF. PARENTAGE ACT § 5(b) (UNIF. L. COMM’N 1973).

⁷³ *Hecht*, 20 Cal. Rptr. 2d at 285–86.

of unmarried women, it would have adopted the UPA provision as originally written, rather than adopting it with a change that broadened its scope.⁷⁴ Given the lack of authority supporting Kane's children's argument, the court concluded that it was not contrary to public policy to allow an unmarried woman to pursue artificial insemination.⁷⁵

As for the public policy implicated by permitting artificial insemination using a deceased man's sperm, the *Hecht* court noted the absence of any authority allowing it to substitute its judgment for that of the gamete-providers and override their choice to procreate.⁷⁶ As in *Davis*, there existed no "statement of public policy which reveal[ed] [a governmental] interest that could justify infringing on gamete-providers' decisional authority."⁷⁷ Kane's children argued that the court should continue to apply the *Davis* framework, specifically contending that *Hecht*'s claim should fail because, in their opinion, she could pursue other means of procreation.⁷⁸ However, the court distinguished *Hecht* from *Davis* on this point, noting that the *Davis* framework applied to disputes where the progenitors disagreed as to the disposition of their genetic material.⁷⁹ Because *Hecht* and Kane agreed on how to use Kane's sperm, further application of the *Davis* framework was unnecessary.⁸⁰ The *Hecht* court was limited to decide only whether public policy necessitated prohibiting *Hecht*'s intended use of the sperm and concluded that it did not, thus overruling the trial court's order that Kane's sperm be destroyed.⁸¹

To be clear, the *Hecht* court did not hold that endorsing posthumous reproduction is favorable public policy. It only hedged that "no other person or entity has an interest sufficient to permit interference with the gamete-providers' decision . . . because no one else bears the consequences of these decisions in the way that the gamete-providers do."⁸² Thus, the *Hecht* court broadened the application of *Davis*' emphasis on donor intent and balancing interests from disputes concerning disposition of embryos to those concerning posthumous reproduction.

⁷⁴ *See id.* ("We agree with the reasoning in *Jhordan C.*; had the Legislature intended to express a public policy against procreative rights of unmarried women or against artificial insemination of unmarried women, it would not have excluded the word 'married'").

⁷⁵ *Id.* at 287.

⁷⁶ *Id.* at 288–89.

⁷⁷ *Id.* at 289 (quoting *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992)).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See id.* ("[T]he only issue which we address is whether artificial insemination with the sperm of a decedent violates public policy. There is nothing in *Davis* which indicates that such artificial insemination violates public policy.").

⁸² *Id.* (quoting *Davis*, 842 S.W.2d at 602).

4. *Cases Deciding the Rights and Status of Posthumously Conceived Children*

A discussion of the jurisprudence surrounding posthumous reproduction would be incomplete without a discussion of actions involving paternity and inheritance. Most often, these disputes arise in the context of Social Security and death benefits, and they are decided according to the particular state's inheritance law.⁸³ Massachusetts employs a three-prong test to secure benefits for a posthumously conceived child in which the surviving parent must show that there is a genetic relationship between the deceased parent and the child; that the deceased parent had "affirmatively consented" to posthumous reproduction; and that the deceased parent had "affirmatively consented . . . to the support of any resulting child."⁸⁴ In New Hampshire and Arkansas, posthumously conceived children are ineligible to inherit from the deceased parent as a matter of law;⁸⁵ courts in both states appealed to their respective legislatures to address the issue via policy.⁸⁶ Federal courts have reached the same conclusion—that posthumously conceived children are not the issue of their deceased parent and are thus prohibited from inheritance—by applying the intestacy law of the state in which the deceased parent died.⁸⁷ The United States Supreme Court, in *Astrue v. Capato ex rel. B.N.C.*, solidified this developing default rule by relegating the determination of a posthumously conceived child's legal status to the intestacy laws of the state in which the deceased parent's will was executed.⁸⁸

These cases reveal a pattern: states' intestacy laws are, by and large, either lacking any mention of, or do not grant any affirmative rights to, posthumously conceived children.⁸⁹ Under the current jurisprudence, this

⁸³ Joanna L. Grossman, *A Growing Debate over the Rights of Posthumously Conceived Children: Part Two in a Two-Part Series of Columns*, JUSTIA: VERDICT (Sept. 20, 2011), <https://verdict.justia.com/2011/09/20/a-growing-debate-over-the-rights-of-posthumously-conceived-children-2>.

⁸⁴ *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002).

⁸⁵ *Khabbaz v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180, 1182 (N.H. 2007); *Finley v. Astrue*, 270 S.W.3d 849, 850 (Ark. 2008).

⁸⁶ *See Khabbaz*, 930 A.2d at 1186 ("We reserve such matters of public policy for the legislature."); *Finley*, 270 S.W.3d at 855 ("[W]e strongly encourage the General Assembly to revisit the intestacy succession statutes to address the issues involved in the instant case and those that have not but will likely evolve.").

⁸⁷ *See Vernoff v. Astrue*, 568 F.3d 1102, 1112 (9th Cir. 2009) ("[T]he SSA is not excluding all posthumously-conceived children, only those that do not meet the statutory requirements under State law."); *Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011) ("The Commissioner . . . interprets the Act to provide that a natural child of the decedent is not entitled to benefits unless she has inheritance rights under state law We conclude that the Commissioner's interpretation is, at a minimum, reasonable and entitled to deference.").

⁸⁸ *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 559 (2012).

⁸⁹ *See, e.g., Gillett-Netting v. Barnhart*, 371 F.3d 593, 599 (9th Cir. 2004) ("Arizona law does not deal specifically with posthumously-conceived children . . ."); *see also Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1265 (M.D. Fla. 2005) (distinguishing the intestacy statutes governing the result in *Gillett-Netting*, which did not account for posthumously conceived children, from the Florida intestacy statutes, which "do[] deal specifically with posthumously-conceived children").

gap in the law singlehandedly deprives posthumously conceived children of the ability to establish their parentage and to inherit.

5. *Judicial Impact on Posthumous Reproduction*

The judicial decisions pertaining to posthumous reproduction and the rights of posthumously conceived children point to two conclusions. First, the progenitors' intent is the key to resolving disputes arising out of posthumous reproduction and, more broadly, ART in general. Second, there is a widespread failure by state legislatures and Congress to act effectively in response to the growing use of ART, posthumous reproduction, and the increasingly complex legal disputes that arise in these areas. As this Note discusses in the subpart, there are still numerous legal questions about the circumstances in which posthumous reproduction is appropriate that the judiciary has not spoken on because of its deference to legislatures.

B. *Statutes*

1. *Uniform Probate Code*

The Uniform Probate Code (UPC) sets forth important standards for determining the rights and parentage of posthumously conceived children. Currently, eighteen states have adopted the 2010 version of the UPC.⁹⁰ However, the 2010 UPC is not the most recent version; the Uniform Law Commission published a newly amended UPC in 2019, which has yet to be adopted by any state.⁹¹

Section 2-120(f) of the 2010 UPC provides, in relevant part:

[A] parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual . . . signed a record that, considering all the facts and circumstances, evidences the individual's consent[] or . . . intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.⁹²

⁹⁰ The states that have adopted the 2010 UPC are Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, and Utah. *Probate Code 2010*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=a539920d-c477-44b8-84fe-b0d7b1a4cca8> (last visited Feb. 4, 2022).

⁹¹ *Probate Code 2019*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3> (last visited Feb. 4, 2022).

⁹² UNIF. PROB. CODE § 2-120(f) (2010) (UNIF. L. COMM'N, amended 2019) [hereinafter UPC 2010].

It also provides, “[i]f the birth mother is a surviving spouse and at her deceased spouse’s death no divorce proceeding was pending, in the absence of clear and convincing evidence to the contrary,” the deceased spouse is presumed to have the requisite intent to establish parentage of a posthumously conceived child.⁹³

Read together, these two provisions indicate that the favorable outcome is to establish parentage wherever possible, provided there is clear evidence that the deceased parent consented. Rather than dismissing a deceased parent’s parentage and the inheritance rights of their posthumously conceived child where there was no marriage between the parents, the 2010 UPC includes no language requiring a spousal relationship. Instead, the second provision functions to recognize the likelihood that those in a spousal relationship may be more likely to consent to posthumous reproduction. The provisions can be read as an attempt to serve judicial economy by codifying a presumption in favor of married persons without creating a substantial barrier to unmarried persons looking to posthumously reproduce.

The 2019 UPC, yet to be adopted by any state,⁹⁴ eliminates these provisions as a response to the recently amended Uniform Parentage Act of 2017,⁹⁵ which incorporates most of the relevant language contained in the 2010 UPC.⁹⁶ The 2017 Uniform Parentage Act and the 2019 UPC now effectively function as one, as far as each pertains to posthumous reproduction.

2. *Uniform Parentage Act*

The Uniform Parentage Act (UPA) serves to guide determinations of parentage as ART sees rapid developments and family structures become more diverse in the United States. The UPA was most recently amended in 2017, and six states—California, Connecticut, Maine, Rhode Island, Vermont, and Washington—have since enacted it as governing law on the subject.⁹⁷ The next most-recently amended UPA, amended in 2002, is the governing law in

⁹³ *Id.* § 2-120(h)(2).

⁹⁴ *Probate Code 2019*, *supra* note 91.

⁹⁵ *See* UNIF. PROBATE CODE § 2-120 (UNIF. L. COMM’N 2019) (noting that “parentage of an individual conceived by assisted reproduction is determined under . . . [the] Uniform Parentage Act (2017)”) [hereinafter UPC 2019].

⁹⁶ *See generally* UNIF. PARENTAGE ACT § 708 (UNIF. L. COMM’N 2017) (establishing parentage of a posthumously conceived child only with written consent of the deceased parent or “clear-and-convincing evidence”) [hereinafter UPA 2017].

⁹⁷ *Parentage Act 2017*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> (last visited Apr. 6, 2022). Connecticut adopted a substantially similar law. *Id.*

nine states.⁹⁸ Maine and Washington originally enacted the 2002 UPA, but have since enacted the amended 2017 UPA as governing law.⁹⁹

The 2002 UPA includes a “Parental Status of Deceased Individual” provision, which provides, in relevant part:

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if the assisted reproduction were to occur after death, the deceased individual would be a parent of the child.¹⁰⁰

This rule requires express, written consent prior to death from the deceased parent of a posthumously conceived child. Absent this consent, the rule does not recognize the deceased parent as the posthumously conceived child’s parent. It is also important to note that inclusion of the word “spouse” in this rule presumes that those who would, or should, posthumously conceive are spouses, which excludes unmarried partners to some degree.¹⁰¹ Under this rule, the prevailing party in *Hecht*, the deceased’s girlfriend, could have been prevented from pursuing posthumous reproduction.

Unlike the 2002 UPA’s provision, the 2017 UPA’s “Parental Status of Deceased Individual” provision provides, in relevant part:

If an individual who consented in a record to assisted reproduction by a woman who agreed to give birth to a child dies before a transfer of gametes or embryos, the deceased individual is a parent of a child conceived by the assisted reproduction only if:

⁹⁸ The states in which the 2002 UPA is the governing law are Alabama, Delaware, Illinois, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming. *Parentage Act 2002*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=5d5c48d6-623f-4d01-9994-6933ca8af315> (last visited Apr. 6, 2020).

⁹⁹ *Parentage Act 2002*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=5d5c48d6-623f-4d01-9994-6933ca8af315> (last visited Apr. 6, 2020); *Parentage Act 2017*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> (last visited Apr. 6, 2022).

¹⁰⁰ UNIF. PARENTAGE ACT § 707 (2002) (UNIF. L. COMM’N, amended 2017) [hereinafter UPA 2002].

¹⁰¹ The 2002 UPA does not define “spouse,” but the 2008 American Bar Association Model Act Governing Assisted Reproductive Technology defined a “legal spouse” as “an individual married to another, or who has a legal relationship to another that this state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage.” AM. BAR ASS’N MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(21) (2008) (AM. BAR ASS’N, amended 2019). Although the ABA has replaced this definition, *see supra* text accompanying note 104, adapting it to the UPA would allow for those in a civil union or domestic partnership, as defined by the individuals’ state statutes, to posthumously conceive. Notably, the 2017 UPA does not include a definition of “spouse” or “legal spouse.” *See generally* UNIF. PARENTAGE ACT § 102 (UNIF. L. COMM’N 2017) (defining terms relevant to the Act). As discussed in Part II.B.1, *supra*, the 2017 UPA also includes no presumption or requirement of marriage in its provision pertaining to posthumous reproduction.

(1) either:

(A) the individual consented in a record that if assisted reproduction were to occur after the death of the individual, the individual would be a parent of the child; or

(B) the individual's intent to be a parent of a child conceived by assisted reproduction after the individual's death is established by clear-and-convincing evidence; and

(2) either:

(A) the embryo is in utero not later than [36] months after the individual's death; or

(B) the child is born not later than [45] months after the individual's death.¹⁰²

This rule indicates a preference for the deceased's express, written consent to posthumous reproduction to establish parentage, but it provides a secondary route, as well. A surviving parent seeking to establish a posthumously conceived child's parentage can also succeed by providing "clear-and-convincing evidence"¹⁰³ of the deceased parent's intent if, and only if, the child was gestating or born within the appropriate time period following the deceased parent's death. This rule also eliminates any mention or requirement of a marriage prior to the deceased parent's death and the posthumously conceived child's birth. As a result, the revised rule keeps with the seminal holding in *Hecht*, without sacrificing its focus on the deceased parent's intent and consent to posthumous reproduction. The "clear-and-convincing" evidence standard in this context is vague, but its inclusion, in conjunction with the temporal restraints, appears to be an attempt to balance the governmental and personal interests implicated by posthumous reproduction.

3. *The ABA Model Act Governing Assisted Reproduction*

In January 2019, the American Bar Association (ABA) adopted the ABA Model Act Governing Assisted Reproduction to replace its 2008 Model Act Governing Assisted Reproductive Technology.¹⁰⁴ The Act is meant to provide a readily adaptable regulatory framework for states to enact.¹⁰⁵ The Model Act includes a provision titled "Parental Status of Deceased Individual," which provides, in relevant part:

¹⁰² UNIF. PARENTAGE ACT § 708(b) (UNIF. L. COMM'N 2017).

¹⁰³ *Id.* § 708(b)(1)(B). The 2017 UPA does not include a definition of "clear-and-convincing evidence." See generally *id.* § 102 (defining terms relevant to the Act).

¹⁰⁴ AM. BAR ASS'N MODEL ACT GOVERNING ASSISTED REPROD. (AM. BAR ASS'N 2019), https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/art/resolution-111.pdf [hereinafter MODEL ACT].

¹⁰⁵ *Id.*

Except as otherwise provided in the enacting jurisdiction's probate code, if an individual who consented in a Record to be a Parent by Assisted Reproduction dies before an insemination or Embryo Transfer, the deceased individual is not a Parent of the resulting Child unless the deceased spouse consented in a Record that if Assisted Reproduction were to occur after death, the deceased individual would be a Parent of the Child.¹⁰⁶

This rule essentially codifies the Supreme Court's holding in *Astrue v. Capato ex rel. B.N.C.*, leaving it to the states to decide the parentage¹⁰⁷ and inheritance¹⁰⁸ rights of posthumously conceived children,¹⁰⁹ with the default being that parentage and inheritance are denied. Like the 2002 and 2017 UPA, the Model Act requires a clear expression of the deceased's intent and consent to posthumous reproduction. However, although it was drafted after the 2017 UPA eliminated language requiring marriage in order for a surviving parent to establish the deceased parent's parentage of a posthumously conceived child, the 2019 Model Act retains language indicating that a marriage between the parents is a prerequisite to establishing the deceased parent's parentage.

4. *Institutional Guidelines for Posthumous Reproduction*

In the absence of national regulation, and, in many cases, state regulation¹¹⁰ of posthumous reproduction and PMSR, the medical facilities that manage these technologies have led the charge on their regulation.¹¹¹ It is now commonplace for a private facility to enact its own guidelines for posthumous reproduction and PMSR.¹¹² Medical experts in the field recommend that, in developing guidelines for the practice, facilities are mindful of and strive to balance the interests of the deceased, the requesting party, the resultant child, the physician, and society.¹¹³ Depending on how each individual institution chooses to balance those interests, the resulting guidelines typically fall into one of two categories: the limited-role approach or the family-centered approach.¹¹⁴

¹⁰⁶ *Id.* § 607.

¹⁰⁷ *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 549–50, 553 (2012).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 559.

¹¹⁰ See Charles P. Kindregan, Jr., *Dead Dads: Thawing an Heir from the Freezer*, 35 WM. MITCHELL L. REV. 433, 441 (2009) (“Most states have no statutes dealing expressly with posthumous reproduction.”).

¹¹¹ See generally *Postmortem Sperm Retrieval (PMSR)*, *supra* note 5 (outlining the considerations made and requirements that must be met by the requesting party for the facility to perform PMSR).

¹¹² Zinkel et al., *supra* note 3, at 406.

¹¹³ Frances R. Batzer, Joshua M. Hurwitz & Arthur Caplan, *Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement*, 79 FERTILITY & STERILITY 1263, 1265 (2003).

¹¹⁴ Zinkel et al., *supra* note 3, at 406.

In the limited-role approach, the prospective father's pre-mortem written consent to the procedure, and to posthumous reproduction, is required, including an affirmative statement outlining to whom the sperm should be given.¹¹⁵ In the family-centered approach, the requesting party may substitute their judgment in the absence of the deceased's written consent.¹¹⁶ However, the requesting party must undergo psychological counseling for a period of time to evaluate whether posthumous reproduction is the best choice for them before they are permitted to use the sperm.¹¹⁷ Exact guidelines vary among each institution but will typically fall into one of these approaches.

One institution that adheres to a limited-role approach characterizes the hallmarks of its guidelines as "evidence of intended paternity for the deceased man, . . . next of kin . . . consent (ie [sic] only the wife can give consent for PMSR), . . . the death was sudden[,] . . . and consent to a 1-year waiting period for bereavement and assessment of recipient."¹¹⁸ Weill Cornell Medicine, within New York-Presbyterian Hospital, is another institution that has adopted limited-role guidelines to dictate its use of PMSR.¹¹⁹ The facility "only considers requests for sperm retrieval from the decedent's wife," excluding all others.¹²⁰ Weill Cornell's guidelines provide that "[t]he wife should be the primary provider of the deceased's intentions to procreate and . . . the only person for whom the sperm could be used for procreation."¹²¹ The facility also limits PMSR to cases in which it is requested "within 24 hours of death" and encourages the requesting party to take at least one year to consider whether they truly want to procreate using the posthumously retrieved sperm.¹²² At the time of this writing, there appear to be no publicly available PMSR institutional guidelines that take a family-centered approach. This could be explained by the family-centered approach's patient-focused philosophy, a hesitancy to use an approach that contradicts the principles behind existing regulation, or a confirmation that the family-centered approach has been adopted by a minority of institutions.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Jennifer A. Tash et al., *Postmortem Sperm Retrieval: The Effect of Instituting Guidelines*, 170 J. UROLOGY 1922, 1922 (2003).

¹¹⁹ See generally *Postmortem Sperm Retrieval (PMSR)*, *supra* note 5 (setting out requirements for the use of PMSR, including affirmative, written consent).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

III. CONSTITUTIONAL ANALYSIS OF THE EXISTING FRAMEWORK

A. *Constitutional Questions Arising from Current Posthumous Reproduction Regulation*

The existing regulatory framework governing posthumous reproduction and PMSR has resolved certain issues, including whether sperm constitutes property and what interests the provider and the intended recipient of sperm have in its disposition.¹²³ However, the existing regulatory framework leaves unanswered several vital questions concerning the constitutional rights of those who seek to use posthumous reproduction and PMSR. For instance, is there a constitutional right to conceive via ART and, more specifically, through posthumously gathered sperm? Considering that the judicial decisions relating to these technologies rely heavily on the constitutional right to privacy in reproduction and reproductive decision-making, this Note argues that the constitutional right extends to reproduction via ART and posthumous reproduction. Assuming that there is a constitutional right to procreate through ART and its available forms, including posthumous reproduction and PMSR, does that right depend on one's marital status? In some states, yes.¹²⁴ Furthermore, does a posthumously conceived child have the same right to inherit and receive benefits from its deceased father as a child born before their father's death? In many states, no.¹²⁵ Justifying the dissimilar rights afforded to unmarried versus married persons and posthumously conceived versus non-posthumously conceived children in ART-centered disputes is an arduous task. It appears that neither the judicial branch nor the legislative branch of government is interested in attempting to settle the rule of law or in establishing a comprehensive regulatory framework in this area. It is likely that, because of this governmental inertia, individuals seeking posthumous reproduction or PMSR—and the children who are the result of those technologies—will find that their rights are determined according to their, or their parents', marital status.

¹²³ See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (finding un-implanted embryos are neither human beings nor movable property “but occupy an interim category that entitles them to special respect because of their potential for human life”); *Hecht v. Superior Ct.*, 20 Cal. Rptr. 2d 275, 283 (Cal. Ct. App. 1993) (adopting the *Davis* court's finding because “the value of sperm lies in its potential to create a child”).

¹²⁴ See *supra* note 98 (listing the states that have adopted the 2002 UPA, which effectively prohibits unmarried persons who do not meet the requirements of their state's definition of civil union or domestic partnership from pursuing posthumous reproduction).

¹²⁵ See generally discussion *supra* Part I (asserting that “states' intestacy laws are, by and large, either lacking any mention of, or do not grant any affirmative rights to, posthumously conceived children”).

B. *Constitutional Framework for Evaluating Regulation of Posthumous Reproduction*

1. *Skinner v. Oklahoma*

The constitutional right to procreate was established in 1942 in *Skinner v. Oklahoma*,¹²⁶ in which the Supreme Court departed from the precedent set in its 1927 decision in *Buck v. Bell*, which permitted the sterilization of a cognitively impaired eighteen-year-old woman to “promote” “her welfare and that of society.”¹²⁷ Oklahoma’s Attorney General intended to sterilize Skinner pursuant to his status as a “habitual criminal” under Oklahoma’s Habitual Criminal Sterilization Act.¹²⁸ The Court was in agreement that the statute at issue implicated one’s personal and protected liberties.¹²⁹ Justice Douglas, writing for the majority, began the opinion, “Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.”¹³⁰ The Court held that Oklahoma’s statute was violative of the Fourteenth Amendment’s Equal Protection Clause because of its inherent “inequalities.”¹³¹ Certain felonies were exempt from the “moral turpitude” classification underlying the definition of “habitual criminals.”¹³² For instance, larceny was considered to involve moral turpitude while embezzlement was not, thus subjecting perpetrators of larceny to sterilization under the statute but sparing embezzlers.¹³³ Essentially, the classifications made by the Oklahoma statute had no rhyme or reason behind them. The Court emphasized that classifications made by laws implicating one’s right to procreate should be subject to strict scrutiny review.¹³⁴

2. *Griswold v. Connecticut*

The constitutional right to privacy in making procreative decisions *within one’s marriage* was established in 1965 by the Supreme Court in

¹²⁶ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 538 (1942) (holding that Oklahoma’s sterilization statute was unconstitutional because of “its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment”).

¹²⁷ 274 U.S. 200, 207 (1927).

¹²⁸ *Skinner*, 316 U.S. at 536. The statute defined “habitual criminal” as someone with at least two past convictions for crimes “amounting to felonies involving moral turpitude” who is then convicted of another such felony in Oklahoma and sentenced to imprisonment in the state. *Id.* (citing OKLA. STAT. tit. 57, § 173 (1935)).

¹²⁹ *Id.* at 541 (“We are dealing here with legislation which involves one of the basic civil rights of man.”).

¹³⁰ *Id.* at 536.

¹³¹ *Id.* at 538.

¹³² *Id.* at 541.

¹³³ *Id.* at 538–39 (“A clerk who appropriates over \$20 from his employer’s till and a stranger who steals the same amount are thus both guilty of felonies. If the latter . . . is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act . . .”) (citation omitted).

¹³⁴ *See id.* at 541 (noting that strict scrutiny review of sterilization laws’ classifications is “essential”).

Griswold v. Connecticut.¹³⁵ Connecticut statutes at the time provided that “[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined . . . or imprisoned . . . or be both fined and imprisoned” and that “[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.”¹³⁶ The appellants, a gynecologist and a Planned Parenthood administrator, were arrested and convicted of violating the statutes because they had given medical advice on contraception and provided contraceptive devices to married women.¹³⁷ The Court concluded that the appellants had standing to “raise the constitutional rights of the married people with whom they had a professional relationship.”¹³⁸ The Court went on to discuss what it called “peripheral rights,” as opposed to “specific rights.”¹³⁹ “[S]pecific rights” are those that are explicitly outlined in the Constitution, such as the freedom of speech.¹⁴⁰ “[P]eripheral rights” are those that can be inferred from, or implied by, specific rights.¹⁴¹ The Court posited that this amalgam of specific and peripheral rights forming the Constitution implies that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,” and that some of these guarantees, taken together, “create zones of privacy.”¹⁴² The Court concluded that those zones of privacy create a “right to privacy, no less important than any other right carefully and particularly reserved to the people,” which encompasses the procreative decision-making of a married couple.¹⁴³ According to the Court, upholding the Connecticut statute and denying contraceptives to married persons would be “repulsive,” akin to permitting police searches of “marital bedrooms for telltale signs of the use of contraceptives.”¹⁴⁴

3. Eisenstadt v. Baird

In 1972, the Supreme Court in *Eisenstadt v. Baird* extended its holding in *Griswold*, establishing the right of unmarried persons to use contraceptives and, more broadly, establishing that the right to privacy

¹³⁵ 381 U.S. 479, 484–86 (1965) (referring to privacy within one’s marriage as a right “older than the Bill of Rights—older than our political parties, older than our school system”).

¹³⁶ *Id.* at 480 (quoting CONN. GEN. STAT. §§ 53-32, 54-196 (1958)).

¹³⁷ *Id.*

¹³⁸ *Id.* at 481.

¹³⁹ *Id.* at 482–83 (“Without those peripheral rights the specific rights would be less secure.”).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (noting that established rights such as “[t]he right to educate a child in a school of the parents’ choice” and “the right to study any particular subject or any foreign language” are not expressly written into the Constitution, but it has nevertheless been “construed to include certain of those rights”).

¹⁴² *Id.* at 484.

¹⁴³ *Id.* at 485 (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)).

¹⁴⁴ *Id.* at 485–86.

belongs to all individuals regardless of marital status.¹⁴⁵ Baird, a reproductive rights activist of sorts, provided a contraceptive device to a young woman while lecturing at a college.¹⁴⁶ He was subsequently convicted under a Massachusetts statute making it a felony to provide contraception to unmarried persons.¹⁴⁷

The Court held that the Massachusetts statute violated the Fourteenth Amendment's Equal Protection Clause because it denied contraception to single persons without a compelling explanation for "the different treatment accorded married and unmarried persons."¹⁴⁸ The Court reasoned that, if the procreative decisions of married persons cannot be infringed upon, neither can those of single persons, since a married couple is not a like-minded unit but "an association of two individuals each with a separate intellectual and emotional makeup."¹⁴⁹ Justice Brennan, writing for the majority, explained that, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁵⁰ In essence, *Eisenstadt* stands for the principle that one's right to make his or her own reproductive decisions is not subject to arbitrary classifications and is essential to individual freedom.

4. *Carey v. Population Services International*

While *Eisenstadt* established the right to make one's own procreative decisions without government intrusion, the Supreme Court clarified the types of decisions that are protected in *Carey v. Population Services International*.¹⁵¹ *Carey* came before the Court after a corporation that sold mail-order contraceptives was advised that its failure to comply with a New York statute—criminalizing the advertising of contraceptives, the sale of contraceptives to anyone under the age of sixteen, and the distribution of contraceptives to anyone over the age of sixteen by anyone other than a licensed pharmacist—would subject it to legal action.¹⁵² The company, Population Services International, challenged the New York statute as an unconstitutional intrusion into its customers' right to privacy.¹⁵³ The Court agreed with Population Services International, holding that, "where a decision . . . to bear or beget a child is involved, regulations imposing a

¹⁴⁵ 405 U.S. 438, 443, 453 (1972).

¹⁴⁶ *Id.* at 440, 445 ("The very point of Baird's giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives.")

¹⁴⁷ *Id.* at 440–41.

¹⁴⁸ *Id.* at 447.

¹⁴⁹ *Id.* at 453.

¹⁵⁰ *Id.*

¹⁵¹ 431 U.S. 678, 684–85 (1977).

¹⁵² *Id.* at 681–83.

¹⁵³ *Id.* at 683–84.

burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.”¹⁵⁴ The New York statute did not meet those requirements.¹⁵⁵ Justice Brennan, writing for the majority, reflected on the Court’s prior jurisprudence concerning the right to privacy:

Th[e] right of personal privacy includes “the interest in independence in making certain kinds of important decisions.” While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions “relating to marriage, procreation, contraception, family relationships, and child rearing and education.” The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy¹⁵⁶

In *Skinner*, the Court placed the right to procreate among “the basic civil rights of man” and concluded that classifications which infringe on an individual’s right to procreate are subject to strict scrutiny review.¹⁵⁷ In *Griswold*, *Eisenstadt*, and *Carey*, the Court protected the individual’s right to make decisions that would *prevent* their own procreation via available technology.¹⁵⁸ This Note argues that this right also applies in the alternative—protecting the individual’s right to make decisions that would *promote* their own procreation via available technology—though the Court has not yet affirmatively stated such a proposition. In particular, the *Carey* Court’s inclusion of “procreation,” “family relationships,” and “child rearing” as “decisions that an individual may make without unjustified government interference”¹⁵⁹ indicates that one’s choice to conceive and bear a child with the help of advancements in the field of ART is protected from governmental intrusion, absent a narrowly tailored mandate that furthers a compelling state interest.

¹⁵⁴ *Id.* at 686.

¹⁵⁵ *Id.* at 678–79, 681–82, 684–86, 690.

¹⁵⁶ *Id.* at 684–85 (citations omitted) (first quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); then quoting *Roe v. Wade*, 410 U.S. 113, 152–53 (1973)).

¹⁵⁷ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

¹⁵⁸ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Carey*, 431 U.S. at 684–85.

¹⁵⁹ *Carey*, 431 U.S. at 684–85.

C. *An Affirmative Right to Non-Discriminatory Regulation of Posthumous Reproduction and PMSR*

The holdings of the constitutional right to privacy cases—*Skinner*, *Griswold*, *Eisenstadt*, and *Carey*—together with the holdings of the seminal American ART and posthumous reproduction cases—*Davis* and *Hecht*—establish an individual’s right to use ART, including methods of posthumous reproduction, to conceive and bear a child. To put it in the terms of the *Griswold* Court, the right to procreate is a “specific right[,]” while the rights to use ART in general, to pursue posthumous reproduction, and to pursue PMSR are “peripheral rights.”¹⁶⁰ Justice Douglas’s sentiment in *Griswold* is just as relevant here: “Without those peripheral rights[,] the specific rights would be less secure.”¹⁶¹ The reticence of American courts and legislatures to affirmatively establish the peripheral rights pertaining to ART is already actively harming certain individuals’ right to procreate, particularly unmarried individuals.

Publicly available institutional guidelines governing medical facilities that provide posthumous reproduction services and perform PMSR expressly, or impliedly, exclude unmarried individuals from taking advantage of those technologies.¹⁶² Without national or state regulation governing when it is appropriate to grant requests for PMSR, unmarried persons will become increasingly prohibited from pursuing it if current trends continue. Statutes in nine states governing parentage determinations effectively disinherit posthumously conceived children whose parents were not married.¹⁶³ Worse still is that most states have not enacted any statutory framework that contemplates posthumous reproduction, PMSR, or the rights of posthumously conceived children.¹⁶⁴

These restrictions on the right of unmarried individuals to posthumously reproduce and the ill effects they have on posthumously conceived children constitute an unacceptable infringement on the constitutional right of unmarried partners to carry out their procreative plans. Taken together, *Skinner*, *Griswold*, *Eisenstadt*, and *Carey* recognize that the rights to procreate and to make decisions regarding one’s procreation are fundamental rights upon which governmental intrusion should be subject to strict scrutiny review. To limit these rights, the government must show that its legislation is narrowly tailored to further a compelling state interest. While there may be some

¹⁶⁰ *Griswold*, 381 U.S. at 482–83.

¹⁶¹ *Id.*

¹⁶² See, e.g., *Postmortem Sperm Retrieval (PMSR)*, *supra* note 5 (outlining the considerations made and requirements that must be met by the requesting party for the facility to perform PMSR); Tash et al., *supra* note 118, at 1922–23 (describing the facility’s primary considerations in developing its guidelines).

¹⁶³ See *supra* notes 98–101 and accompanying text (discussing the exclusionary effect of the 2002 UPA’s “spouse” requirement).

¹⁶⁴ Kindregan, Jr., *supra* note 110.

compelling state interests in limiting the occurrence of posthumous reproduction and PMSR through legislation—such as serving judicial economy, closing estates in a timely manner, and respecting the sanctity, and permanency, of death¹⁶⁵—distinguishing on the basis of marital status is neither the most narrowly tailored nor the best suited approach to furthering those interests.

The most important consideration in ART cases is the intention and affirmative consent of the progenitor to participate in any ART-related procedure or process.¹⁶⁶ Institutional guidelines, state statutes, and model codes alike emphasize the necessity of determining whether the deceased would have, or did, affirmatively consent to posthumous reproduction.¹⁶⁷ However, marriage does not, in itself, establish consent, despite the presumption to the contrary inherent in many states' existing regulations.¹⁶⁸ The deceased may have affirmatively consented to or may have had the requisite intent to pursue posthumous reproduction despite being unmarried, as was the case in *Hecht*.¹⁶⁹ In the alternative, there are also scenarios in which the deceased did not consent and did not intend to conceive a posthumously conceived child despite being married to the requesting party.¹⁷⁰ These scenarios demonstrate that marriage is neither necessary nor sufficient to establish consent to posthumous reproduction. While making distinctions based on marital status may appear an attractive, and sometimes effective, shortcut to furthering state interests, it is simply unconstitutional.

Viewing the existing regulatory framework surrounding posthumous reproduction in conjunction with the jurisprudence establishing the right to privacy in reproductive decision-making, one can conclude that statutes barring unmarried persons from pursuing posthumous reproduction contradict constitutional precedent. These statutes and practices cannot be considered narrowly tailored enough to further the intended state interests. Moving forward, legislatures and courts must catch up with the times and expressly affirm the rights of individuals, regardless of marital status, to

¹⁶⁵ See Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 444 (2009) (discussing possible state interests in prohibiting certain individuals from pursuing posthumous reproduction).

¹⁶⁶ See generally discussion, *supra* Part I (outlining the foundational jurisprudence on ART and posthumous reproduction, including the *Parpalaix*, *Davis*, and *Hecht* cases, which place special importance on the donor's intent and consent).

¹⁶⁷ *Postmortem Sperm Retrieval (PMSR)*, *supra* note 5; MODEL ACT § 607, *supra* note 104; UPA 2017, *supra* note 96; UPA 2002, *supra* note 100; UPC 2010, *supra* note 92; UPC 2019, *supra* note 95.

¹⁶⁸ See *supra* notes 98–101 and accompanying text (discussing the exclusionary effect of the 2002 UPA's "spouse" requirement).

¹⁶⁹ *Hecht v. Superior Ct.*, 20 Cal. Rptr. 2d 275, 276–77 (Cal. Ct. App. 1993).

¹⁷⁰ *Kindregan, Jr.*, *supra* note 110, at 439 n.29 (citing *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312–13 (Cal. Ct. App. 2008), "in which a widow sought a court order giving her access to her late husband's cryopreserved sperm," but "the man expressed a desire not to have children" and "executed a form that included an option to dispose of his deposited sperm in the event of his death" where he had written a checkmark)).

procreate through ART and to make procreative decisions, including the decision to pursue posthumous reproduction.

IV. RECOMMENDATIONS

It is imperative that legislatures and courts continue to balance the state's interests in honoring the wishes of the dead, respecting individuals' procreative intent, and closing estates in a timely manner with individuals' interests in maintaining autonomy in reproductive decision-making, protecting privacy in intimate relationships, and having access to medical technology. It is possible to enact a regulatory framework pertaining to posthumous reproduction and PMSR that coexists with modern conceptions of "partners" and "family" and resists creating discriminatory classifications based on marital status. There is already an effective, non-discriminatory model statute establishing the parentage of posthumously conceived children available for adoption by state or federal government—the 2017 UPA's "Parental Status of Deceased Individual" provision.¹⁷¹

The 2017 UPA's rule emphasizes the need for the deceased's express, written consent to posthumous reproduction to establish parentage of the deceased and makes no classifications based on marital status.¹⁷² The model also attempts to balance governmental and individual interests by imposing a "clear-and-convincing[-]evidence" standard in lieu of the deceased's written consent where certain temporal conditions are met.¹⁷³ Therefore, states that have adopted the 2002 UPA, which excludes unmarried persons from establishing posthumously conceived children's parentage, can eliminate their discriminatory practices by simply adopting the 2017 UPA. Furthermore, states that have no statutes governing posthumous reproduction and its effects on parentage determinations should also look to adopt the 2017 UPA and the 2019 UPC, which function together.¹⁷⁴ States that have enacted statutes specifically pertaining to posthumous reproduction should eliminate suspect classifications based on marital status by ensuring their provisions refer to "individuals," "persons," or "parents," rather than "spouses," "husbands," or "wives."

Likewise, medical facilities that have instituted guidelines for permitting PMSR and assisting in posthumous reproduction should make equivalent edits to their language. Furthermore, institutions should consider adopting a requirement of written, affirmative consent to PMSR and posthumous reproduction from the deceased, *as well as* a requirement that the deceased identify who should receive their sperm. This specificity would eliminate the need to deny unmarried individuals access to posthumous reproduction.

¹⁷¹ UPA 2017, *supra* note 96.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See UPC 2019, *supra* note 95 ("[P]arentage of an individual conceived by assisted reproduction is determined under . . . [the] Uniform Parentage Act (2017).").

If an institution that prefers the family-centered approach did not wish to adopt a requirement of written, affirmative consent, the best practice would be a clear-and-convincing-evidence standard. Under this standard, a marriage between the deceased and the requesting party would constitute one factor of many in the ultimate determination of whether PMSR and posthumous reproduction is appropriate. Other factors to consider could include the length and depth of the relationship between the deceased and the requesting party, testimonials of family members and friends as to the deceased's opinions and intent regarding procreation, and the psychological state of the requesting party.

The Ethics Committee of the ASRM's guidance outlining best practices for posthumous reproduction and PMSR can be especially helpful to medical facilities, courts, and legislative bodies seeking to regulate these technologies. The ASRM emphasizes that no medical facility is "ethically obligated" to assist persons seeking to posthumously reproduce, but that any facility that chooses to do so should institute its own guidelines specifying "circumstances in which they will or will not participate" in the process.¹⁷⁵ The ASRM notes that the main criterion for choosing to perform PMSR in a given case should be whether documented consent to the process by the deceased is available.¹⁷⁶ However, the ASRM does not expressly advise against facilitating posthumous reproduction where there is no documentation of the deceased's consent; it only advises against granting such requests that have been initiated by someone other than the deceased's surviving spouse or partner, such as the deceased's parent.¹⁷⁷ The ASRM also stresses the need to allow sufficient time for parties who pursue PMSR and posthumous reproduction to grieve and seek counseling before attempting to conceive with the deceased's gametes.¹⁷⁸ Finally, the ASRM highlights the responsibility of medical facilities and professionals who practice in ART and posthumous reproduction to familiarize themselves with the relevant state laws on the legal status of posthumously conceived children.¹⁷⁹ Medical facilities can then advise individuals seeking to posthumously conceive that they may need an attorney to work with them throughout the process and that there may be harmful repercussions on any child born from their efforts.¹⁸⁰

Determining who has access to ART, posthumous reproduction, and PMSR based on marital status is not only outdated, but unnecessary in light of the other options available. The recommended approaches could prove more effective in balancing the delicate interests involved in these

¹⁷⁵ Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 20, at 45.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

considerations. Additionally, implementing these recommendations would require minimal effort, given the lack of existing regulation of posthumous reproduction and PMSR in most of the United States.

CONCLUSION

The Supreme Court has affirmatively established that the right to procreate and the right to make procreative decisions belong to each individual.¹⁸¹ Additionally, lower courts have produced a line of decisions effectively extending constitutional protection of those rights to include the right to use ART.¹⁸² If individuals have an affirmative right to make their own procreative decisions, and couples have an affirmative right to privacy in making those decisions as a unit, then a surviving partner should have the right to continue a couple's mutual procreative plan following the other partner's death, regardless of marital status. Individuals who seek to procreate using the sperm of a deceased partner are exercising their constitutional right to make procreative decisions. There is no reason this right should be limited when it comes to the ability to choose with whom to conceive, provided that the chosen gamete-provider's consent is evident. The rights to use ART and to make reproductive decisions were established to protect the personal freedom to make and carry out an individual or couple's procreative plans.¹⁸³ Posthumous reproduction and PMSR, as features within the broader field of ART, are becoming an important part of family planning for many partners and spouses.¹⁸⁴ It follows that there is a constitutional right to posthumously reproduce for partners whose procreative plans have been disrupted, whether they are married or unmarried.

The existing regulatory framework governing posthumous reproduction and PMSR is wholly insufficient to grapple with the complex ethical and legal questions involved. With a total absence of national regulation and sparse state regulation, the courts may soon be forced to step up and address these issues as the use of these technologies becomes increasingly commonplace. For whoever develops the next phase of regulation, it is essential that they eliminate classifications controlling who has access to posthumous reproduction and PMSR that discriminate based on marital status in language or in effect. In *Eisenstadt*, Justice Brennan made a point to include the following quote from Justice Jackson's concurrence in *Railway Express Agency v. New York*:

¹⁸¹ See *supra* Part III.B (describing the constitutional framework for evaluating regulation of posthumous reproduction).

¹⁸² See *supra* Part I.A.2–3 (describing seminal American ART and posthumous reproduction cases).

¹⁸³ See *supra* Part III.C (describing an affirmative right to non-discriminatory regulation of posthumous reproduction and PMSR).

¹⁸⁴ See *supra* Part I (describing how new forms of reproduction come into conflict with traditional notions of parenting and family).

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.¹⁸⁵

While we may not see it now, and while unmarried individuals may be in the minority of those pursuing posthumous reproduction, governmental inaction in affirmatively establishing the right of unmarried persons to use ART detracts from the right of all persons to use ART.

¹⁸⁵ Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (quoting *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949)).

