Article

Posthumous Reproduction

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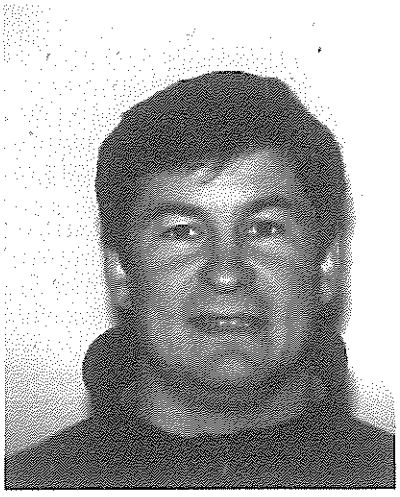
Suppose you and your husband have no children to date, but you do have a long-standing plan to try for them about now. Unfortunately, he has just been diagnosed with a form of cancer that urgently requires radiotherapy. It will make him infertile. After discussion and implications counselling, you jointly decide to collect and store semen from him. The radiotherapy can then start, and all going well, you two will be able to try for a child later with professional assistance. You also face the possibility that he might not recover. After due consideration, you jointly decide that if he dies, and if you still wish a year after that to try for a child from the two of you, then you should go ahead. Being careful middle-class types in an unusual situation, you write down and sign off on all this.

Unfortunately, your husband's illness kills him rather quickly. A year later, you still grieve for him, but also feel able to look forward and to pursue some stable plans. Others say you are doing as well as anyone could hope to in your circumstances. You still think the best thing would be to have had a child with your former husband, in both the bearing and the rearing. But it cannot be so, and you have made your peace with that. You nevertheless gradually come to believe the best feasible option for you now is to try for a child from both of you. You know the relevant IVF procedure is technically feasible, albeit with only a modest success rate, and some discomfort, risk, expense, and hassle. You have substantial support from family and friends, good career options, and material backing. You have no wish to seek another adult partner, and in any case, your reproductive life no longer has a lengthy natural future. Should you proceed with 'posthumous reproduction'?



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From an ethical viewpoint, the case just outlined is about as unproblematical as posthumous reproduction gets. Your stable interests and autonomy favour it, and reasons of your former husband's consent and autonomy support this. Research evidence is favourable regarding child outcome in case of the non-violent death of one parent, and in case of children born into certain unconventional family forms, such as those with two female parents [See Law Commission, 1999: 48-50, for excellent references.] Interests of the child thus also support your plan. So far, then, the arguments firmly favour posthumous reproduction.

This essay's central question is whether the community at large, as represented by the state and its agencies of parliament, family law, or ethics committees on assisted reproduction, have any overriding grounds to oppose posthumous reproduction. More specifically, I focus below on three considerations often thought to be especially weighty: consent of the deceased, possible harm to the child, and certain evaluative judgements the state or its agents might make about reproductive relationships. The last of these considerations is the least familiar, so I start with it.

Posthumous reproduction deliberately creates fatherless children, and some believe that the state should not facilitate this. Why should it not? One rationale is that fatherlessness is at best a sub-optimal state for the children born to it; perhaps even compared to having no child at all. Some might think this sort of claim is an unacceptably 'judgmental' basis for public policy, but nearly all existing states embed such judgements in their family law. For example, nearly all jurisdictions insist that same-sex marriage is unacceptable. There are twenty different ways one can break New Zealand law merely by marrying the wrong sort of person [Marriage Act 1955, second schedule]. And so on. The controversy in political philosophy between 'neutrality' and 'perfectionism' is all about whether such judgements of 'better' and 'worse' in lifestyles and relationships can legitimately ground public policy. But that debate is too big to settle here.

In any event, there are problems specific to the claim that disapproval of fatherlessness should turn public policy against posthumous reproduction. First, it suffers from serious problems of fairness and consistency. All donor-insemination (DI) programmes aim to facilitate the creation of fatherless children. The donor here is explicitly intended not to be a social father to the child he helps create. Indeed, where single women and same-sex female couples have legally enforceable rights of access to DI programmes, public policy already supports the creation of children intended not to have any social father. In posthumous reproduction, fatherlessness does go further still, since the biological father has died by the time the child is conceived. But again, this can happen with DI too. Few DI programmes, if any, check that their donors are still alive when their donations are taken up. This being so, public policy in many jurisdictions already facilitates some forms of posthumous reproduction, and thus also the creation of radically fatherless children. In fairness, it must do so also for those citizens who explicitly seek posthumous reproduction, or it must convincingly explain to them why their life-shaping personal plans in particular should be obstructed.

Some ethics committee members and politicians, and many other citizens, do have low opinions of fatherlessness. The real issue here, however, is whether such personal views may legitimately form the enforceable basis of public policy. I think there should be a powerful presumption against grounding public policy in any such evaluative judgement of people's relationships or situations, where doing so might prevent competent adults from choosing to have children. It is certainly illegitimate for any ethics committee, even one established by statute, to give any weight to any such judgement that it might itself be tempted to make. Ethics committees draw on too little experience or diversity for this, they offer too few effective rights to anything like reply or appeal, and their public accountability is much too weak. They should, instead, bring these matters to the attention of the relevant Minister or officer of Parliament. Evaluation of some citizens' relationships and childbearing circumstances as unacceptable, or as worse than others, can at best legitimately ground public policy only if due parliamentary political process delivers that result. Even then, as I argued above, there should be a powerful presumption against it.

A further problem here is that, with good reason, political action on assisted reproduction is usually slow and reluctant. Yet citizens have naturally narrow reproductive windows open to them. What are they to do as the political process grinds on? This question is answered for us by the presumption against any state action that would prevent competent citizens from making momentous decisions about the shape of their own reproductive lives. Citizens should be allowed to proceed unless and until due political process sends unequivocal signals in the opposite direction. It can do so quickly enough, if the need is genuinely felt. Witness the recent worldwide rush to legislation against human cloning. Citizens should not be forced to lose their reproductive lives through mere failure of the state or its agents to decide the issue in a timely manner.

The belief that creation of fatherless children is undesirable or sub-optimal has little legitimate business in the regulation of posthumous reproduction. In fact, though, this belief often crumbles under pressure, into the claim that posthumous reproduction is objectionable because it harms the children born of it. The children of posthumous reproduction would not otherwise exist at all, so the obvious interpretation of this claim is that fatherlessness is worse for them than is no existence. Since very few people's existence is this bad, I conclude that the 'zero standard' of harm relied on here offers no persuasive 'harm to the child' case against posthumous reproduction. An alternative interpretation is that fatherlessness is a harmed state for the children born of it, in that they would be better off if born with a father. On this 'no negative features' interpretation, posthumous reproduction can harm a child even if this particular child could not but have been fatherless, and even if the child's fatherless existence is better overall than no life.

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The 'zero standard' fits with the idea that we only have reason not to harm people overall or globally. The rival 'no negative features standard' suits the more demanding idea that even if we avoid harming people overall, by giving them large enough offsetting benefits, we still shouldn't do people even the *local* harms we thereby offset. If any injunction against harming people is rightly understood in terms of local harm, then there is a 'harm to the child' case against posthumous reproduction. The trouble is, though, that this argument generalises alarmingly. A great many medical procedures cause people local harm, by pricking them with needles, knocking them unconscious, slicing their flesh, prescribing them medication that has unpleasant side-effects, and so forth. This is intended to achieve a larger overall or global benefit to the patient, but the injunction against doing local harm refuses to melt this down without trace into the pool of overall benefit. Nor is medicine the only activity under ethical threat here. Learning, conversation, hard work, and virtually all relationships and instances of natural reproduction, cause some local discomfort or harm. In short, the injunction against doing local harm objects to posthumous reproduction only by objecting to virtually every activity whatever. That makes it an implausible interpretation of the injunction. The overall or global version of the injunction against doing harm, on the other hand, has no objection to posthumous reproduction.

My interim conclusion is that neither evaluative judgement of the circumstances of posthumous reproduction, nor harm to the child born of it, mounts a good case against this practice. So far at least, the ethical reasons favour posthumous reproduction.

How should ethics committees treat cases of posthumous reproduction? An excellent strategy is to specify conditions under which citizens, and providers of assisted reproduction on their behalf, may proceed without any need for individual ethics committee application. *Post facto* reporting can then be required for audit purposes, and to pick up any matters that might merit future consideration. Here is a first attempt to outline such conditions:

1. Clear intention: the dead or dying man clearly intended (for example, though not necessarily, in a written consent) to facilitate posthumous reproductive use of his semen by the woman seeking this service.
2. Counselling: the woman seeking this service will receive relevant implications counselling, the results of which will be reported to the ethics committee.
3. Delay: the posthumous reproductive service will proceed only after an interval of at least one year from the death of the man referred to in condition 1., above.

The case that opened this paper meets all three conditions, and should consequently involve ethics committees only through a *post facto* report from the attending provider of assisted reproductive services. Any proposed posthumous reproduction that does not meet all three conditions, should be pursued through individual ethics committee application. A second brief case description can get us started on this more problematical sort of case, as follows.

Suppose a man is suddenly taken very ill through accident or illness. As he slips into a coma, it is clear to all that he is dying. His distressed wife explains that, amongst other things, they have been trying for children for many months, but so far without success. She would still very much like to keep this option open. To that end, she proposes to collect some semen from him shortly before or immediately after his death. She is not deterred by news that this might commit her to an emergency ethics committee application, and that any later reproductive use would require a further application, implications counselling for her, a delay of at least a year, and perhaps other processes, uncertainties, or intrusions. She is also willing to meet any financial costs her plans make her liable for. Discussion with those who know this couple unfortunately sheds no further light on her statement that they were trying for a child. She herself also further comments that the two of them never even discussed death, let alone whether she should try for posthumous reproduction, were he suddenly to die.

This case fails the clear intention condition, and thereby raises issues of consent. Claims about consent are at the heart of many criticisms of posthumous reproduction more generally, so they are the focus of the rest of this paper. I explore them via the popular dictum that: 'There's only one rule in the game of life, and that's consent.' This thought has two halves, which can be more formally put as follows:

- Non-consent principle: a practice, P, is ethically *unacceptable* if at least one party to P does not validly consent to it.
- Consent principle: a practice, P, is ethically *acceptable* if all parties to P validly consent to it, and P does not significantly harm anyone else. [Both adapted from Archard, 1998: 1-2.]

The consent principle implies that if our man validly consented to posthumous reproduction, and that practice would not significantly harm anyone else, then it is ethically acceptable. The non-consent principle implies that if he did not validly consent to it, then this practice is unethical.

Consider first the consent argument for posthumous reproduction. The story told above is that as far as anyone now knows, our man did not explicitly consent to posthumous reproduction. Some might nevertheless argue that his explicit consent to their trying for a child committed him tacitly, indirectly, or by implication, to posthumous reproduction. In my view, however, this inference is indefensible. From a person's will regarding conventional reproduction, one cannot reliably infer anything about her or his will regarding posthumous reproduction. Perhaps this man thought: 'If there were suddenly only one chance left for me to have a child, I'd want even a posthumous chance to be taken.' Or maybe instead: 'We're trying for a child together, but I wouldn't want her to try for our child on her own.' More plausible than either conjecture, however, is the hypothesis that he never thought about the matter at all, whether explicitly, tacitly, indirectly, or by implication. Nor, as far as I know, do we yet have any population-based evidence about how most men would respond to this matter, were they to be asked. I conclude that there is no convincing consent argument for posthumous reproduction in this sort of case.

The non-consent argument against posthumous reproduction might seem easy to vindicate in the case at hand. I have just argued that our man's consent cannot legitimately be inferred, so if non-consent is sufficient for a practice to be ethically unacceptable, isn't that curtains for posthumous reproduction? No, it isn't.

Some friends of posthumous reproduction go on the offensive at this point. They say, correctly, that many of our well-established practices after a person dies are inconsistent with belief in the decisive importance of consent and non-consent. Our courts frequently override wishes of the deceased on matters of succession, wills, and estates. Relatives frequently go against the deceased's express wishes regarding organ donation, funeral arrangements, and method of body disposal. So why not also do so with posthumous reproduction? Those with enough scruple to care about consistency, however, will see that these arguments are two-edged. One response is to treat the deceased's consent and non-consent to posthumous reproduction and to the other things in a rather cavalier fashion. A rival response is to take the deceased's consent and non-consent very seriously in all these cases. Since both responses are internally consistent, these initial arguments are not necessarily friends of posthumous reproduction where the deceased did not consent.

A much better response points out the high price we pay if we adhere to the consent and non-consent principles in posthumous settings. Most of us in most Western societies rarely, if ever, discuss what is to be done with our body and its parts when we die. Indeed, few of us have more than the vaguest idea what the common practice even is here: how our dead body is initially stored, for example, or where, by whom, or for how long; what is taken out or put in to preserve it; when it is examined, chopped open or chopped up; how and by whom this is done; the limitations on its acceptable disposal or further use; how much say we have ourselves, what we may have a say over, and how to give effect to it; what dispute resolution processes there are for these matters; and so forth.

So what? My point is that when someone dies, many decisions have to be made, and many actions taken, regarding her or his body and its parts. For nearly all of us, the fact that we never address these matters means they will unavoidably be actioned without our consent. To insist on consent here is thus to insist that whatever we do when a typical Westerner dies, we behave unethically. This conclusion strikes me as absurd, but it is directly implied by application of the non-consent principle to these posthumous activities. I conclude that these cases fall beyond its scope of plausible application.

The consent and non-consent principles have some plausibility where strangers interact. Their demands are reasonable even for some interactions between intimates. Suppose, for example, that our man had no wife, and his *parents* wished to collect semen from him as he died, to seek a woman worthy of giving them a grandchild. His

parents are not his reproductive intimates, so we should insist that they get his consent. The consent and non-consent principles overreach their scope, however, if applied to intimate relations between intimates. For this reason, the non-consent argument against posthumous reproduction fails. Given my earlier argument that the consent argument fails here too, consent has so far got us nowhere.

We need not get consent for everything we do with our intimates in intimate settings. But we do still need to understand the consent-related considerations that matter for intimates in intimate settings. These considerations must neither allow one intimate to ride rough-shod over the wishes of another, nor treat them as though they are mere strangers to one another. The following proposals perhaps steer the right middle path:

- Non-dissent principle: a practice, P, is ethically *acceptable* if no party to P validly dissents from it, and P does not significantly harm anyone else.
- Dissent principle: a practice, P, is ethically *unacceptable* if any party to P validly dissents from it.
  [Both adapted from Archard, 1998: 80-1.]

Again, these principles are naturally regarded as two sides of a single thought, and thus as standing or falling together. Again, they support arguments to opposite conclusions on the issue at hand. The dissent principle implies that if our man validly dissented from posthumous reproduction, then that practice is unethical. The non-dissent principle implies that if he did not validly dissent, and posthumous reproduction in his case would not significantly harm anyone else, then it is ethically acceptable.

Is there a convincing dissent argument here against posthumous reproduction? It seems not, given the case description that as far as anyone knows now, our man did not dissent. Opponents of posthumous reproduction might nevertheless contest this. They might argue that we should presume dissent. But why should we? Because we are already uneasy about posthumous reproduction? If we are, we should try to articulate its authentic source, not mislocate it in a spurious presumption of dissent. Because we have only his wife's word on his consent and dissent, and she has a clear conflict of interest? Well, we could do a lot worse than accept the word of a person's loved one, even acknowledging her potential conflict of interest. If our man was a typical Westerner, there is in any case a high background probability that he never even thought about the possibility of posthumous reproduction in his case, let alone dissented from this prospect. I conclude that the dissent argument offers nothing to critics of posthumous reproduction in this sort of case.

Is there a convincing non-dissent argument here for posthumous reproduction? On the face of it, there is, but I see two serious opposing arguments. First, some might say the non-dissent principle requires all parties to be competent at the time of action. Our man was not. But this requirement would itself be unreasonably demanding. Very often, we competently consent to things in advance, and the main point of our doing so is to ensure that our contribution is given its due when the time comes, whether or not we are then competent. These precommitments should not be swept aside if we are incompetent when the time comes. Second, it might be argued that non-dissent establishes ethical acceptability only if all parties had a fair opportunity to dissent. Many men do not know that posthumous reproduction is even possible, let alone take seriously the thought that it might happen to them. If our man is such a one, then he arguably did not have a fair opportunity to dissent. This point generalises to the large majority of men, and I find it persuasive. I therefore conclude that the non-dissent argument for posthumous reproduction is also a failure.

I have now canvassed four consent-related arguments about posthumous reproduction: those from consent, non-consent, dissent, and non-dissent. I argued that all of them fail. Where does that leave us? I think it shows that, contrary to widely held belief, consent-related considerations usually shed little light on the ethics of posthumous reproduction. Most cultures that are technologically capable of posthumous reproduction are also deeply averse to open discussion of death and its aftermath. If this matter is not even discussed, it cannot honestly be treated as a source of consent or dissent. Until posthumous reproduction is a common topic of conversation, thus giving us all a fair opportunity to consent to or dissent from it, we must look elsewhere for our ethical lead.

Isn't my concluding scepticism about consent inconsistent with my earlier espousal of the 'clear intention condition'? I don't think so. That was one of the conditions which, if jointly met, would justify posthumous reproduction without any ethics committee application. I then argued, in effect, that posthumous reproduction is often acceptable even if this condition is not met. In light of that, perhaps we should replace the clear intention condition with a less demanding 'non-dissent condition'. On my account, the key consent-related question is whether the person who seeks posthumous reproduction is a reproductive intimate of the dead or dying man. If not, then the very demanding consent and non-consent principles apply. If so, then the less demanding dissent and non-dissent principles apply. In the latter case, however, consent-related considerations will typically be unilluminating. 'Harm to the child' arguments rarely count against assisted human reproduction [Mulgan and Moore, 1997]. What is left? Primarily the autonomy and best interests of the woman involved. In general, these matters are best addressed by her working together with her health professionals, rather than by making her case to any ethics committee or other public body.

References.

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Acknowledgement

I wish to thank Claire Gallop, participants in the Bioethics Symposium, Dunedin, December 1999, and the members of New Zealand's National Ethics Committee on Assisted Human Reproduction, of which I was a member in 1997–98.