

From Death to Life: Ethical Issues in Postmortem Sperm Retrieval as a Source of New Life

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Abstract: This paper examines and critiques the ethical issues in postmortem sperm retrieval and the use of postmortem sperm to create new life. The article was occasioned by the recent request of the parents of a West Point cadet who died in a skiing accident at the Academy to retrieve and use his sperm to honor his memory and perpetuate the family name. The request occasioned national media attention. A trial court judge in New York in a two-page order authorized both the retrieval and use of the postmortem sperm.

Keywords: postmortem sperm retrieval; impregnation using postmortem sperm retrieval; parental rights over progeny's reproduction; court decision postmortem sperm retrieval

On the death of Peter Zhu, a 21-year-old West Point cadet in a skiing accident at the Military Academy, his parents requested court authorization to retrieve their only son's sperm to produce a child to fulfill his expressed desire to have children, as well as respect for the cadet's Chinese culture and the wishes of his family to have the familial name continued. This occasioned front page stories in *The New York Times*¹ and *The Washington Post*,² as well as national coverage on television and in weekly news magazines. Rarely is national coverage given to a local event. Sex sells. Postmortem insemination intrigues. The combination of fascinating issues attracted national media attention.

The parents' request for the post mortem retrieval and use of their son's sperm was made without the prior consent of the deceased. The use of the sperm was authorized in an order by the Westchester County division of the New York State Supreme Court in a bare-boned ruling directing the "Retrieval of Genetic Material," and its use by the deceased's parents for third-party reproduction.³ The two-page order by Judge John P. Colangelo is devoid of citations to policy guidelines issued by various professional societies on the topic of postmortem sperm retrieval. Nor does it provide supporting evidence from the literature on the ethical, legal, or social policy implications of such a procedure.

Ethical concerns about postmortem sperm retrieval and the use of the gametes have been expressed since Dr. Cappy Rothman published an article in 1980 on the first successful postmortem retrieval of sperm.⁴ An example of those ethical concerns is found in the statement by the chair of the British Medical Association's ethics committee.⁵ His comments focused on the unconsented touching of a patient, and the protection of patient 'autonomy.' Those values had been articulated earlier in a landmark opinion by Justice Benjamin Cardozo for the New York Court of Appeals in a 1914 case entitled *Schlorendoff v. Society of New York Hospital*.⁶ In an opinion for New York's highest court, Cardozo noted what has become the foundational principle in the United States for patient self-determination:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an

operation without his patient's consent commits an assault for which he is liable in damages.⁷

Peter Zhu was of adult years. His brain death status precluded him from making medical decisions. The medical decisionmaking role, by default, belonged to his parents.

The question remained: Did the medical decisionmaking authority of the parents extend beyond authorizing the solid organ donation Peter Zhu had agreed to when he renewed his driver's license? An insight into that issue is found in Judge Spottswood Robinson's ruling in *Canterbury v. Spence*⁸ that in the absence of explicit consent by a patient lacking decisionmaking capacity, physicians can 'presume consent' if the patient's wishes are unknown and the patient's medical condition is such that treatment would be a greater benefit than burden. An example would be an individual who suffers a sudden unexpected heart stoppage. The doctors can 'presume' the person, as a rational human being, would want cardiopulmonary resuscitation to attempt to save his or her life unless the individual, when competent, had clearly indicated otherwise.

Does the weighing of an individual's personal values prevail in the situation of a parental request for postmortem sperm retrieval for someone who is dead? The ethical questions continue. What is the proportionate benefit that accrues to the deceased from the postmortem retrieval of his sperm and its use to create a new life in someone he will never know? Selection of the mother to bear his child will be determined not by Peter Zhu, but by his parents or possibly the fertility clinic.

In Chinese society, the family name is passed on through male lineage. If the fetus were female rather than male, how would the parents' goals for the continuation of the deceased son's lineage be implemented? And how, if the situation arose, could the parents prevent the woman impregnated with a dead man's sperm from deciding to terminate that pregnancy? An example of a potential problem with the parents' petition and the trial judge's ruling is found in the statement of the chairman of the Ethics Committee of the British Medical Association (BMA) that "the special nature of genetic material, which is used to create new life, makes it particularly important that genuine and explicit consent is obtained for its use."⁹

The Ethics Committee of the American Society for Reproductive Medicine (ASRM) took a similar position: "Posthumous sperm or oocyte retrieval or use for reproduction purposes is ethically justifiable if written documentation from the deceased authorizing the procedure is available."¹⁰ The ASRM ethics committee went even further than did its counterpart for the British Medical Association. It held that "in the absence of written documentation from the decedent, programs open to requests for posthumous assisted reproduction, should be restricted to requests initiated by the surviving spouse or partner."¹¹ The ASRM ethics committee also warned that programs should be aware that "state laws vary on whether posthumously conceived children are legally recognized as offspring of the deceased."¹²

The ASRM committee took a position similar to that of Sandra Webb who maintains that "the collection and cryopreservation of sperm from [deceased] men should not be carried out unless they had given their prior consent for this, or appointed a proxy."¹³ Another potential difficulty for Peter Zhu's parents is the ASRM ethics committee's observation that, "A more troubling situation is when the request for gametes for posthumous reproduction does not come from a spouse or

life partner, but from the parents of the deceased.”¹⁴ In the committee’s view, “Ethically, these situations are not comparable. In the case of a surviving parent, no joint reproductive effort can be said to have existed. Nor do the desires of the parents, in the perspective of the ethics committee, give the parents any ethical claim to their child’s gametes.”¹⁵ In language reminiscent of the folksy humor of late night TV commentators such as Stephen Colbert, the ASRM ethics committee’s standard can be summarized bluntly: ‘your parents don’t get to decide when you reproduce.’

The ethics committee also declined to adopt the argument made by those who argue ‘presumed consent’ of the deceased can be inferred from the individual’s known values.¹⁶ The supporters of that position seem to rely on and over-read Judge Spottswood Robinson’s opinion in *Canterbury v. Spence* that in the absence of an explicit directive from a now incompetent patient, we can presume that the patient would have wanted efforts to save his or her life because that is what most reasonable people would want when there is not sufficient time to ascertain their personal values.

Does support for ‘presumed consent’ extend beyond the presumption that reasonable people would want a doctor to try to save their life to the proposition that if one were to die unexpectedly an individual would want his sperm harvested posthumously in order to create a new life? The evidence provided by those who support that view is taken from survey data in which the majority of patients at a reproduction clinic agreed that if they died before achieving a conception they would want postmortem assisted reproduction utilized.¹⁷

A significant problem with the interpretation of the data is that a poll taken of clients at a reproductive clinic is not a representative sample of the general population. All the data establishes is that a majority of clients surveyed at a reproductive clinic, when asked, would go so far as to use postmortem sperm retrieval to achieve their goal of conception. The survey results do not provide answers about the views of the general population on the propriety of postmortem sperm extraction or the use of that sperm for reproduction. Nor do they resolve the ethical, legal, and social issues occasioned by the possibility of postmortem sperm retrieval and use.

An additional area of ethical concern is the self-interest of the individuals who are petitioning for postmortem retrieval of the sperm. Is there a potential financial benefit—as there apparently was with the dozens of women who sought to be impregnated with the frozen embryos stored by a wealthy American couple who died simultaneously in an airplane crash in Chile?¹⁸ The interest of those ‘willing wombs’ in becoming a gestational mother for the embryos dissipated once the clinic revealed the sperm used to create the embryos came not from the multimillionaire husband but from an anonymous donor. No inheritance awaited the successful completion of a pregnancy from those embryos. A potential financial benefit in the United States would be monthly Social Security disability payments until age 18 for a child whose deceased father, while employed, paid Social Security taxes.¹⁹

Another open question is the basis of the claim by the parents to determine the reproductive activity of their children. There are whole areas of law devoted to grandparents who wish to have a court order authorizing their right to visit or be involved with the raising of their grandchildren.²⁰ The litigation illustrates a potential conflict between the desires of parents and grandparents regarding the raising of the children. The values of the parties do not necessarily coincide.

Evidence of the widespread disagreement on the resolution of reproductive issues is found in the diversity of legislation in different nations. France, Germany, Sweden, Canada, and major regions of Australia, among others, ban the harvesting of postmortem sperm or its use to create new life.²¹ The Attorney General of Israel issued a formal legal opinion that allows harvesting of sperm without explicit consent of the deceased provided the family agrees to the process.²² That opinion, however, requires court authorization for the use of such sperm to impregnate a woman. The global situation is a quagmire of conflicting regulations and statutes. The situation in the United States is even more convoluted. Fifty separate state legislatures and fifty distinct state supreme courts, each with its own insights and interests, have independent authority to produce binding legal rulings on reproduction within their jurisdiction.²³

Arthur Caplan, a distinguished bioethics professor at New York University's Langone Medical Center and a frequent commentator in the national media on biomedical issues, maintains that the bedrock principle to be upheld in the Peter Zhu case is the protection of patient 'autonomy.'²⁴ That would mean no physician is justified in touching a body, alive or deceased, without consent of the patient, the patient's proxy, or statutory authorization. When queried on these issues, Caplan stated that while 'presumed consent' might be necessary to meet the tight time-frame available in which to retrieve viable sperm (24-36 hours), he believes there should be a minimum of 6 months to 1 year for the grieving process before impregnating a woman with the dead man's sperm. When asked the basis for that standard, Caplan replied, "He devised the policy on the fly."²⁵ Such an 'ad hoc' resolution to an unresolved ethical dilemma is illustrative of the way guidelines or norms are formulated in the uncharted territory of reproductive ethics.

Many of the early practitioners in the field of bioethics concede that they, as did Caplan, 'made it up' as they went along.²⁶ The law and ethical analysis with regard to bioethical topics had not yet matured. Justice Paul Liacos of the Massachusetts Supreme Judicial Court, in an opinion for the court in *Superintendent of Belchertown State School v. Saikewitz*,²⁷ noted that the law frequently lags behind developments in technology. As he put it in his opinion, "Our task of establishing a framework in the law...is furthered by seeking the collective guidance of those in health care, moral ethics, philosophy and other disciplines."²⁸ These disciplines, he noted, provide insight and guidance, not necessarily the answer, on how the issues should be framed by courts and legislatures.

Both bioethics and the law lag behind developments in reproductive technology. Debora L. Spar, the president of Barnard College and a frequent writer on reproductive issues, in an article in a medical journal, described the present situation of reproductive regulation as "a Wild West."²⁹ In a subsequent op-ed piece in *The New York Times*, she warned, "We are treading too far into dangerous territory, into areas where we are raising basic issues of safety and health."³⁰ As an example, she cautions that no woman should knowingly undertake a pregnancy of eight children. Nor, she could have added, should any man's 'donated' sperm be used to father multiple children. The possibility of unintended marriage between half-siblings in a relatively small community is all too real. Formulating regulations and laws in the area of reproductive technology is and remains a difficult and demanding task, one, unfortunately, relegated all too often in the United States to the commercial marketplace.

An exploration of topics in reproductive ethics makes us realize ever more clearly how unsettled and unsettling the issues can be. In a classic essay published nearly four decades ago, Richard McCormick, one of the founding fathers of bioethics, writing about a seriously compromised newborn, asked, “Granted the life can be saved. What kind of a life are we saving?”³¹ McCormick was discussing medical developments in neonatology that created the possibility of the survival, but not necessarily the well-being of critically ill newborns. Today analysis of ethical issues in bioethics has moved from post-delivery treatment of neonates to postmortem forms of conception. The question remains the same: “Granted it can be done. What sort of a world or life are we creating?”

Notes

1. Stark L. Parents of dead West Point cadet can use his sperm, judge rules. *The New York Times*, 2019 May 22:A1.
2. Bever L, Chiu A. A cadet died in a tragedy. Now his parents can use his sperm to create his child, a judge rules. *The Washington Post* 2019 May 21:A1.
3. *In the Matter of the Application of Monica Zhu & Youngmin Zhu for an Order Directing the Retrieval of Genetic Material*. State of New York Supreme Court, County of Westchester, 21 Mar 2019, Index Number: 53327/2019.
4. Rothman C. A method for obtaining viable sperm in the postmortem state. *Fertility & Sterility* 1980;34:512–6.
5. Horner JS. Reply from chairman of British Medical Association ethics committee. *British Medical Journal* 1996;313:1477–83.
6. *Schlorendoff v. Society of New York Hospital* 105 N.E.92 (N.Y. 1914).
7. See note 6, *Schlorendoff* 1914:93.
8. *Canterbury v. Spence* 464 F.2d 772 (D.C. Cir. 1972).
9. See note 5, Horner 1996:1483.
10. Ethics committee of the American Society for Reproductive Medicine. Posthumous retrieval/and or use of gametes or embryos: An ethics committee opinion. *Fertility & Sterility* 2018;4:1–5.
11. See note 10, Ethics Committee of the American Society for Reproductive Medicine. 2018:1.
12. See note 10, Ethics Committee of the American Society for Reproductive Medicine. 2018:3.
13. Webb SM., Raising sperm from the Dead, *Journal of Andrology* 1996;17:325-326.
14. See note 10, Ethics committee of the American Society for Reproductive Medicine. 2018:4.
15. See note 10, Ethics committee of the American Society for Reproductive Medicine. 2018:4–5.
16. Strong C. Ethical and legal aspects of sperm retrieval after death or persistent vegetative state. *Journal of Law, Medicine & Ethics* 1999;27:347–58.
17. Gholipour B. Making babies after death: It’s possible, but is it ethical? *Live Science* 2013 June 11:2–7.
18. Dalton K. Dead couple’s embryos to be thawed. *The Washington Post* 1987 December 4:A1.
19. Radford M. Post-mortem sperm retrieval and Social security Administration: How modern reproduction technology makes strange bedfellows. Georgia State College of Law. Legal Studies Research Paper No 2009-09.
20. Johnston J. Grandparents should understand their rights to visitation of their grandchildren. May 7 2018 <https://www.hhmlaw.com>> grandparents-should-understand-their-rights -to-visitation-of -their- grandchildren (Accessed March 18, 2020).
21. Simana S. Creating life after death: Should posthumous reproduction be legally permissible without the decease’s prior consent? *Journal of Law and Biosciences* 2018:329–54. Advance Access Publication 7 Aug 2018. doi 10.1093/jlb/lys017.
22. Landau R. Posthumous sperm retrieval for the purpose of later insemination or IVF in Israel: An ethical and psychosocial critique. *Human Reproduction* 2004;19(9):1952–66.
23. Paris JJ, Ahluwalia J, Cummings BM, Wilkinson D. The Charlie Gard case: British and American approaches to court resolution on disputes over medical decisions. *Journal of Perinatology* 2017;17:1268–71.
24. Kramer PD. West Point cadet Peter Zhu: Sperm retrieval case raises thorny ethical, legal questions. *Rockland/Westchester Journal News* 2019 March 8:4ff (includes an interview with Arthur Caplan).
25. See note 24, Kramer 2019:5.

26. Paris JJ. A road oft travelled: Stumbling into clinical ethics. *The American Journal of Bioethics* 2018;18 (6):49–50.
27. *Superintendent of Belchertown State School v. Saikewitz* 373 Mass 778,370 N.E.2d 417 (1977).
28. See note 27, *Superintendent of Belchertown State School v. Saikewitz* 1977:736.
29. Spar DL. Reproductive tourism and the regulatory map. *The New England Journal of Medicine* 2005;352 (6):531–3.
30. Spar DL. Fertility industry is a Wild West. *The New York Times* 2011 September 13:A16.
31. McCormick RA. To save or let die: The dilemma of modern medicine. *JAMA* 1974;229(2):172–6.