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# COMMENT

## POST-MORTEM SEMEN RETRIEVAL: A NORMATIVE PRESCRIPTION FOR LEGISLATION IN THE UNITED STATES

*Jon B. Evans\**

*Post-mortem semen retrieval (PMSR) is an increasingly common medical procedure in which sperm is extracted from a corpse and stored for potential reproductive use in the future. PMSR raises dozens of legal and ethical issues. Should it be legal to extract sperm from a corpse? Under what circumstances?*

*The law in the United States is silent on PMSR. The first report of a successful request for PMSR was made in 1980. Since then, many countries have passed legislation banning or regulating PMSR. To date, however, the United States has no laws on PMSR. Pre-existing laws on tissue donation, inheritance, and parentage incidentally address some of the legal issues raised by PMSR, but both the federal and state governments in the United States have failed to pass any laws either banning or regulating PMSR.*

*The absence of federal and state laws on PMSR has created an unacceptable ethical vacuum. In response, hospitals, academics, and professional organizations have developed protocols to help guide doctors faced with the thorny issues raised by requests for PMSR. The protocols generally fall into two camps. One set of guidelines, the “limited-role” approach, embraces a strict consent standard by requiring the explicit consent of the deceased. The second set of guidelines, often called the “family-centered” approach, places a higher value on the wishes of the surviving partner and allows for PMSR based on a less stringent, implicit consent standard. Despite the existence of such guidelines, many doctors and hospitals are yet unfamiliar with PMSR, and thus, are unprepared to handle requests for PMSR in an ethically coherent manner.*

*As PMSR becomes more common, the need for legislation in the United States grows more urgent. Because PMSR raises significant legal and ethical issues, legislators in the United States must pass laws governing*

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*its use. Any such legislation should formally legalize PMSR when certain requirements are met. Ideal legislation will embrace a limited-role standard and require the explicit consent of the deceased. The law should also dictate that the sperm can only be used by a surviving spouse or by a party explicitly designated by the deceased. If the deceased has given explicit consent, the designee should be free to use the sperm unencumbered by further regulations—rules stipulating waiting periods and counseling prior to sperm use are paternalistic and unnecessary. On the whole, this legislative approach should best serve United States residents by protecting and balancing the interests of the living, the dead, and any children born as a result of PMSR.*

#### INTRODUCTION

Post-mortem semen retrieval (PMSR),<sup>1</sup> is an increasingly common medical procedure that the average person probably has not heard of, much less thought about.<sup>2</sup> Most faces twist with disgust and confusion upon hearing the phrase for the first time. Death? Sperm? People retrieve sperm from the dead? Since when? Fifty years ago, the notion of PMSR was the stuff of science fiction. But today, PMSR is an emerging medical procedure in which the sperm of a recently deceased male is retrieved, frozen, and preserved for future procreative use by a third party. Consider the following hypothetical.

John Doe and Jane Eyre are a young, healthy couple in their early 30s. Although they never married, they are highly committed and have cohabited for a number of years. They have privately discussed their intention to have one or more children, but have rarely shared those thoughts with family and friends. They have made a conscious choice to

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<sup>1</sup> The author acknowledges that PMSR is not a gender-neutral term. Some commentators refer to the legal issue discussed in this Comment as Post-mortem gamete retrieval, or PMGR. While still rare, there are reports of requests for retrieval of oocytes from recently deceased females. Thus, sometimes the acronym PMGR is used to make gender-neutral reference to requests for post-mortem gamete retrieval made by either men or women. The scope of this Comment is confined to a consideration of the ethics and legality of PMSR.

<sup>2</sup> Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 294 (“Is PMGR really an issue worthy of our consideration, or is it such a rarity that it is of academic interest only? The fact is that requests for PMGR are numerous, they appear on a worldwide basis, and their number is expected to grow. Moreover, the number of requests increases every time headlines such as ‘Woman pregnant with sperm from a corpse’ make the news.”).

delay their plans to conceive. One winter afternoon, while on vacation, John, an avid backcountry skier, has a terrible accident resulting in a substantial brain injury. John is rushed to a rural hospital for care, but sadly, he dies on the way.

At the hospital, Jane, traumatized and grieving in the wake of John's death, starts to think about the beautiful children she and John had talked about having someday. She vaguely recalls hearing of a procedure in which sperm could be retrieved and frozen in the hours immediately following a man's death. John, on the other hand, young and healthy as he was at the time of the accident, had never heard of PMSR and, thus, never expressly consented to such a procedure.

Upset, but desperately wanting to hold on to John's memory in some tangible way, Jane asks the doctor if it is possible to retrieve sperm from John's corpse in order to freeze it for future use. Neither the doctor, nor anyone else at the hospital, has ever fielded such a request before, and there are no protocols in place. Naturally, questions abound. Under what circumstances, if any, should Jane be allowed to consent to the post-mortem retrieval of John's sperm? If the sperm is retrieved, does it become Jane's property? How and when can she use it?

Facing these questions, and unsure how to proceed, the doctor searches the Internet for legal, ethical, and practical guidance. The doctor learns that PMSR has been outlawed in some countries, is regulated in others, and that the United States has no existing laws governing its use. Continuing to probe, the doctor finds stories about requests for PMSR in the United States that were approved or denied for various reasons. The doctor reads that the procedure must be completed between twenty-four and thirty-six hours after death—the clock is ticking. In the end, the doctor finds some instructive protocols, but they are contradictory, and he is still uncertain how to proceed. After consulting with the hospital's ethics committee by phone, the doctor decides to retrieve the sperm. Unfamiliar with less-invasive procedures, he surgically removes the testicles from John's corpse and sends the sperm to be cryogenically preserved.

Three weeks later, still grieving and in shock, Jane successfully uses the retrieved sperm to conceive. Nine and a half months later, a healthy baby boy, John Doe Jr., is born. Other doctors and hospitals may never have acceded to Jane's request in the first place—and John Jr. never would have been born. Nonetheless, John Jr. enters the world with one living parent and an unclear set of legal rights.

While this story might sound far-fetched, evidence shows that requests for PMSR are becoming increasingly common.<sup>3</sup> As the hypothetical above suggests, PMSR raises myriad legal and ethical issues. The threshold issue is whether PMSR should be legal at all. If it should be allowed, then many other issues arise. Who can consent to PMSR? The deceased? If so, does that consent have to be expressly written, or can it be implied? May a widow request the sperm? What about a significant other like Jane? Or John's parents? What are the rights and responsibilities of hospitals and doctors? In the event of retrieval, who can receive the sperm? Who can use it? When can they use it? What rights does the child have? PMSR raises all of these legal questions and many more.

This Comment proceeds in four parts. Part I offers a discussion of the historical background of PMSR, and identifies many of the major legal and ethical issues raised by PMSR. In order to give a sense of how these issues have been addressed by governments and institutions, Part II surveys existing statutes, case law, and protocols, both international and domestic. Moving towards prescription, Part III argues that the United States urgently needs legislation regulating PMSR. Because of PMSR's ethical gravity, state legislators in the United States have a responsibility to clarify PMSR's status by passing laws that clearly define the relevant rights of both the living and the dead. To this end, Part III also identifies the major issues that comprehensive legislation must address. Lastly, Part IV advances a solution by arguing for specific prescriptions that ideal legislative proposals ought to include.

## I. BACKGROUND: HISTORY AND LEGAL ISSUES

### A. *PMSR's Emergence as a Viable Assisted Reproductive Technology*

PMSR is the medical practice of retrieving and preserving the sperm of a recently deceased man so that the sperm can be used to reproduce in the future.<sup>4</sup> The primary methods of procuring the sperm are through aspiration of the epididymis, testicular biopsy, or the complete removal of the testes.<sup>5</sup>

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<sup>3</sup> Between 1997 and 2002, there was a 60% increase in documented requests for PMSR. The rate of approval of those requests rose to 68% during that time. Joshua D. Hurwitz & Frances R. Batzer, *Posthumous Sperm Procurement: Demand and Concerns*, 59 OBSTETRICAL GYNECOLOGICAL SURV. 806, 806 (2004).

<sup>4</sup> Sarah Bahm, Katrina Karkazis, & David Magnus, *A Content Analysis of Posthumous Sperm Procurement Protocols with Considerations for Developing an Institutional Policy*, 100 J. FERTILITY & STERILITY 839, 839 (2013).

<sup>5</sup> *Id.*

To increase the chances of viability, the sperm should be retrieved in the first twenty-four to thirty-six hours after death.<sup>6</sup> After retrieval, the sperm is frozen and preserved for future use.<sup>7</sup> The first report of successful retrieval of sperm from a corpse occurred in 1980.<sup>8</sup> In the case, reported by Professor Rothman, a family requested the sperm of a brain-dead thirty-year-old man who had been injured in a motor vehicle accident.<sup>9</sup> The sperm was never successfully used.<sup>10</sup> The first successful pregnancy resulting from post-mortem semen retrieval was reported in 1998.<sup>11</sup> Since the 1990s the volume of requests for PMSR has been steadily increasing.<sup>12</sup>

At least part of the increase in the volume of requests may be attributable to media reports of high-profile international cases. One of the most famously reported cases came in 1995 when Diane Blood, a British woman, publicly fought for the right to retrieve the sperm of her recently deceased husband.<sup>13</sup> A physician extracted the sperm at her request, but use of the sperm was barred by the 1990 Human Fertilisation and Embryology Act, which made it illegal to store the sperm of a donor without his written consent.<sup>14</sup> The public viewed Mrs. Blood's cause sympathetically, drawing significant attention to the practice of PMSR.<sup>15</sup> Ultimately, on appeal,<sup>16</sup> the

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> C.M. Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 J. FERTILITY & STERILITY 512, 512 (1980).

<sup>9</sup> *Id.*

<sup>10</sup> Bahm, Karkazis, & Magnus, *supra* note 4, at 839.

<sup>11</sup> Jane E. Allen, *Woman Pregnant by Sperm from Corpse*, APNEWSARCHIVE (July 15, 1998, 3:11 AM), <http://www.apnewsarchive.com/1998/Woman-Pregnant-By-Sperm-From-Corpse/id-af6f1754d1ea19d202e17a046220e373>.

<sup>12</sup> Hurwitz & Batzer, *supra* note 3, at 806.

<sup>13</sup> See *R v. Human Fertilisation & Embryology Auth. ex parte Blood* (1997), 2 W.L.R. 806 (Eng. C.A.).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; see also *The Diane Blood Case*, LINACRE CTR., <http://www.linacre.org/dblood.html> (last visited Feb. 1, 2016).

<sup>16</sup> The lower court held:

(a) Parliament has enacted a careful code allowing for the posthumous use of sperm only if specific requirements are met. In particular there is a clear requirement for the written and effective consent of a man, after he has had the opportunity to receive counseling and after he has had a proper opportunity to consider the implications of a posthumous birth. These important requirements were not satisfied in this case. (b) The Authority does not think that it would be right to allow Mrs. Blood to export the sperm to avoid the specific requirements which prevent her from using the sperm in this country. The Authority noted that Mrs. Blood has no prior connection with any country to which she wishes to

court allowed Mrs. Blood to export the semen to Belgium, a country that did not prohibit her use of the sperm.<sup>17</sup> As a result, she gave birth to a posthumously conceived child. This case raised public awareness of the availability of PMSR. In retrospect, this early case highlights the thornier legal and ethical issues that can arise when a party requests PMSR.

B. *The Blood Case and the Emergence of Legal and Ethical Issues*

First, the *Blood* case shows that the United Kingdom has passed legislation regulating PMSR that allows for its use when certain legal requirements have been satisfied. Other countries have also passed laws on PMSR. For instance, Germany and France have gone a step further than the United Kingdom by banning PMSR completely.<sup>18</sup> Yet other countries, including the United States and Belgium, have not passed any legislation setting limits on the use of PMSR. Given the increased use of PMSR technology, it is imperative that state legislatures in the United States pass laws clarifying the rights of individuals who may be party to a PMSR decision. Existing international laws on PMSR provide state legislators in the United States with a laundry list of policy options to choose from.

Second, the *Blood* case is useful to consider because it highlights the importance of the issue of consent to PMSR.<sup>19</sup> In *Blood*, the British statute prohibited the storing of sperm without the explicit written consent of the donor. The government thus argued that Mr. Blood had not given sufficient consent and that, therefore, Mrs. Blood's request for the sperm should be denied. Mrs. Blood argued that her husband had provided implicit consent to her use of the sperm by virtue of his words and actions during life. The arguments made in this case are good examples of the competing

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export the sperm. (c) In the context of the use of genetic material, the Authority considers that any consent should be given in clear and formal terms by the person himself or herself and that the Authority is reluctant to seek to identify a person's wishes from the evidence of another person. (d) The Authority also bore in mind that Mr. Blood had not given any consideration, let alone consent, to the export of his sperm to another country.

R v. Human Fertilisation & Embryology Auth. *Ex parte Blood* (1999) Fam. 151 173 (Eng.).

<sup>17</sup> *Id.* Notably, in its decision, the Court of Appeal upheld the written consent requirement of the 1990 Human Fertilisation and Embryology Act. In a nod to the unique circumstances of Mrs. Blood's case, the court carved out an exception which allowed her to proceed with the export of her husband's sperm to Belgium.

<sup>18</sup> See *infra* Part II.A.2.

<sup>19</sup> See *The Diane Blood Case*, *supra* note 15.

viewpoints on what the appropriate standard of consent should be when deciding whether to use the donor's sperm after his death.<sup>20</sup> As *Blood* demonstrates, there is a wide range of opinions about who should be able to provide consent, whether that consent must be explicit, and what the evidentiary standard for consent should be.<sup>21</sup>

In addition to consent, other legal issues have arisen with the development of viable methods for PMSR. The list of legal questions is long: Who can use the sperm? A party specifically designated by the deceased only? The wife? A significant other like Jane Eyre? A third party such as John's parents? In the event of a valid request for PMSR, should there be a mandatory waiting period before the party designated to receive the sperm can try to conceive? Should there be a mandatory counseling requirement during any such waiting period? What rights do posthumously conceived children have? These questions, and many others, evidence the ethical and legal hornet's nest faced by doctors, hospitals, and grieving loved ones considering PMSR requests.<sup>22</sup> Next, Part II will explore the ways in which governments and institutions have attempted to answer these difficult questions.

## II. BACKGROUND: SURVEY OF STATUTES, CASE LAW, AND PROTOCOLS

### A. *PMSR and International Law*

International law on PMSR varies depending upon whether foreign legislatures have embraced the limited-role or the family-centered approach. The limited-role approach embraces a strict consent standard which requires the explicit consent of the deceased. In contrast, the family-centered approach places a higher value on the wishes of the surviving partner and allows for PMSR based on a less-stringent, implicit consent standard. Often, the approach adopted by each country is a reflection of that country's political history, values, and norms.

Countries such as the United Kingdom (UK), Israel, Germany, and France have statutes and common law that embrace one of the two approaches. In other countries, like Belgium and the United States,

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<sup>20</sup> See *infra* Part II.B.1.

<sup>21</sup> See *infra* Part II.

<sup>22</sup> Katz, *supra* note 2, at 290 ("When physicians face a request to remove sperm from a dead or dying male or ovarian tissue from a woman who has suffered sudden death or is declared brain-dead, the physician is presented with ethical and legal issues of profound dimensions, but scant direction as to the proper course of action.").

legislatures and courts have remained largely silent on the subject.<sup>23</sup> The threshold issue of PMSR is its legality, and most countries fall into one of three camps: countries that have legalized PMSR, but have imposed conditions and regulations on its practice;<sup>24</sup> countries that have completely banned PMSR;<sup>25</sup> and countries that have not implemented specific PMSR legislation, thus, making it de facto legal.<sup>26</sup>

1. **Countries with PMSR Laws.** Countries in the first camp, such as the UK, have passed laws that specifically address PMSR. For example, in the UK, the Fertilisation and Embryology Act of 1990 authorizes PMSR only with the valid, written consent of the deceased.<sup>27</sup> In this sense, the UK has adopted the limited-role approach. More than likely, this strict written consent requirement deters the use of PMSR in the UK and reduces the overall usage of the technology, as evidenced by the effect of strict consent requirements in other medical contexts.<sup>28</sup> However, some parties seeking PMSR in the UK have circumvented the written consent requirement by convincing doctors to harvest sperm in contravention of the

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<sup>23</sup> Carson Strong, Jeffrey R. Gingrich & William H. Kutteh, *Ethics of Postmortem Sperm Retrieval*, 15 HUM. REPROD. 739, 740 (2000).

<sup>24</sup> Israel, Great Britain, and New Zealand are examples of countries in this group.

<sup>25</sup> France, Germany, and Sweden, among other countries, have banned PMSR completely.

<sup>26</sup> See Katz, *supra* note 2, at 290.

<sup>27</sup> Strong, Gingrich & Kutteh, *supra* note 23, at 740 (“In regard to spermatozoa, in the UK, the 1990 Human Fertilisation and Embryology Act does not prohibit posthumous storage and use of spermatozoa, but it requires the man’s prior written consent for sperm storage. Thus, postmortem retrieval, storage, and insemination would be permitted with valid written consent.”); Cf. NEW ZEALAND NAT’L ETHICS COMM. ON ASSISTED HUMAN REPROD., GUIDELINES FOR THE STORAGE, USE, AND DISPOSAL OF SPERM FROM A DECEASED MAN (2000) (Imposing a similar rule to that of the UK, the New Zealand National Ethics Committee on Assisted Human Reproduction (NECAHR) concluded that “collection of sperm from a comatose or recently deceased person without that person’s prior written consent is ethically unacceptable.”); cf. Assisted Human Reproduction Act, S.C. 2004, c 2. (Can.) (“This Act dictates that: Before a person removes human reproductive material from a donor’s body after the donor’s death for the purpose of creating an embryo, the person shall have a document signed by the donor stating that, before consenting to the removal, the donor was informed in writing that the human reproductive material will be removed in accordance with the donor’s consent to create an embryo for 1 or more of the following purposes, namely, (1) the reproductive use of the person who is, at the time of the donor’s death, the donor’s spouse or common-law partner, (2) improving assisted reproduction procedures, or (3) providing instruction in assisted reproduction procedures.”).

<sup>28</sup> RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS 176–77 (2008) (discussing, in the context of organ donation, the dramatic impact that the use of explicit and implicit consent requirements can have on the frequency of use of medical technologies).

Act.<sup>29</sup> Such parties hope to get permission to export the sperm to another European Union nation that allows use of the retrieved sperm without written consent.<sup>30</sup> Notably, the government in the UK has not prosecuted parties that have engaged in such circumventions of the Act, thus, calling into question the extent to which the written consent requirement is actually being enforced there at this time.<sup>31</sup>

Like the UK, Israel has addressed the legal question of PMSR by establishing guidelines for the use of PMSR, but the laws in Israel are comparatively more liberal than those in the UK. In 2003, the Israeli Attorney General, Elyakim Rubenstein, published a set of comprehensive regulations that reflect a liberal view of the consent requirement.<sup>32</sup> Israel's guidelines automatically give effect to any explicit wish expressed by the deceased.<sup>33</sup> Where the deceased had expressly consented to retrieval, a post-mortem request can be honored.<sup>34</sup> Conversely, where the deceased made it clear that he did not consent to retrieval, that request will similarly be honored.<sup>35</sup> The standards used in Israel are clear in cases where the deceased has made an express wish about PMSR. In most cases, however, the deceased has not expressed any clear intention about PMSR prior to death.

In Israel, when the deceased has expressed no clear intention, the wishes of the surviving spouse can govern if evidence indicates that the deceased would have consented to the request for retrieval.<sup>36</sup> In this part of its guidelines, Israel has adopted a relatively liberal, implied consent standard which tracks closely with the family-centered approach. The surviving spouse or significant other can, at a minimum, request the

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<sup>29</sup> See *R v. Human Fertilisation & Embryology Auth. Ex parte Blood* (1999) Fam. 151 173 (Eng.); see also *Fight to Use Dead Husband's Sperm*, BBC NEWS (Oct. 8, 2008, 3:37 PM), <http://news.bbc.co.uk/1/hi/england/7659430.stm>.

<sup>30</sup> See *Ex parte Blood*, Fam. at 173; see also *Fight to Use Dead Husband's Sperm*, *supra* note 29.

<sup>31</sup> Anna Smajdor, *Perimortem Gamete Retrieval: Should We Worry About Consent?*, J. MED. ETHICS ONLINE (July 3, 2014), [http://www.annasmajdor.me.uk/perimortem\\_gamete\\_retrieval.pdf](http://www.annasmajdor.me.uk/perimortem_gamete_retrieval.pdf).

<sup>32</sup> *Ministry of Justice Guidelines of the Attorney General of the Government*, Guideline 1.2202, Oct. 27, 2003.

<sup>33</sup> Ruth Landau, *Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique*, 19 HUM. REPROD. 1952, 1952 (2004).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1954.

<sup>36</sup> *Id.* (This approach resembles the family-centered approach discussed in the Stanford Protocols. See *infra* Part II.B.1.).

retrieval of the sperm under almost any circumstances.<sup>37</sup> But the act of retrieval does not automatically confer the right to use the sperm for in-vitro fertilization.<sup>38</sup> In order to use the sperm for in-vitro fertilization, the surviving spouse must request permission in a court proceeding.<sup>39</sup>

According to the Israeli guidelines, the decision of the court in such a proceeding should give significant weight to the deceased's implied wishes based on an objective assessment of his conduct while he was alive.<sup>40</sup> The guidelines suggest that the court appoint a social worker whose task is to assemble an objective report on the potential nature of the deceased's wishes.<sup>41</sup> The procedure adopted in Israel is a hybrid of express and implied consent standards: express wishes are honored if they exist, but otherwise, the court uses an implied consent standard based on its best guess of the deceased's wishes. Because the Israeli system allows for the application of an implied consent standard for PMSR requests under certain circumstances, it is comparatively more liberal than the law in the UK.

2. ***Countries that Have Banned PMSR.*** In contrast to the approaches of countries like the UK and Israel that have legalized PMSR to some extent, other countries, like Germany and France, have banned the practice of PMSR altogether.<sup>42</sup> For example, the German Embryo Protection Act of 1990 provides for “up to three years imprisonment or a fine, [for any person] who . . . knowingly fertilizes artificially an egg cell with the sperm of a man after his death.”<sup>43</sup> This strict policy against PMSR is emblematic of reticence in post-World War II Germany to use assisted reproductive technologies (ARTs).<sup>44</sup> Some contend that modern German society is slow to embrace ARTs because the use of medical and genetic science to commit moral atrocities under the Nazi regime is still relatively fresh in its collective mind.<sup>45</sup> For this reason, Germany's laws restricting

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<sup>37</sup> *Id.* at 1952.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1954.

<sup>41</sup> *Id.* at 1954–55.

<sup>42</sup> See Gesetz zum Schutz von Embryonen [ESchG] [The Embryo Protection Act], Dec. 13, 1990, BUNDESGESETZBLATT [BGBl I] at 2746, “as amended” (Ger.).

<sup>43</sup> Gesetz zum Schutz von Embryonen [ESchG] [The Embryo Protection Act], Dec. 13, 1990, BGBl I at 2746, at §4(1) (Ger.).

<sup>44</sup> John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. TRANSNAT'L L. 189, 194–95 (2004).

<sup>45</sup> *Id.*

ARTs, and banning practices like PMSR, are reflective of the German people's reluctance to embrace technologies that may lead to ethically dubious outcomes.<sup>46</sup>

Similarly, France has adopted a restrictive approach to PMSR. A guiding principle of French reproductive law is that technology should only be used to remedy the infertility of the living or to prevent disease.<sup>47</sup> Accordingly, in 1994, France outlawed PMSR by passing a law limiting access to ARTs.<sup>48</sup> The new law mandated that ARTs should only be made available to a couple consisting of a man and a woman who are married, or can prove they have cohabited for two years, and *who are both alive*.<sup>49</sup> The stated purpose of the law was to limit the use of ARTs only to situations justified by medical necessity, and to prevent the use of ARTs for personal reasons unrelated to the traditional family model.<sup>50</sup> Thus, France's law is reflective of the high value that French society places on the protection of the traditional family unit.<sup>51</sup> Both France and Germany have passed laws banning PMSR that reflect the political and ethical values of their respective citizenries.

3. **Countries with No PMSR Laws.** Many countries, such as Belgium and the United States, have no laws on PMSR. These countries have effectively legalized the practice of PMSR by failing to pass any specific legislation addressing it. Interestingly, in Belgium, the absence of regulations has allowed citizens of neighboring countries to circumvent—and thus undermine—the laws of their own countries by allowing for cross-border reproductive services (CBRS) or reproductive tourism, as seen in the *Blood* case above.<sup>52</sup>

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<sup>46</sup> One consequence of Germany's highly restrictive policies regarding the use of ARTs is an increase in cross-border reproductive services (CBRS). Unable to access to ARTs at home, many Germans travel to the United States, Ukraine, India, Denmark, Eastern Europe, and other locations where laws are more relaxed. This, in turn, raises its own set of ethical issues. In some situations, children born abroad to German citizens using ARTs have been bestowed with more limited rights than children born in Germany itself. See Petra Thorn, *Fertility Treatment in Germany*, BIONEWs (Aug. 19, 2011), [http://www.bionews.org.uk/page\\_104661.asp](http://www.bionews.org.uk/page_104661.asp).

<sup>47</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. L-152-2 (Fr.).

<sup>48</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. L-152 (Fr.).

<sup>49</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. L-2141-1 (Fr.).

<sup>50</sup> Veronique Fournier, *Access to Assisted Reproductive Technology in France: The Emergence of the Patient's Voice*, 16 MED. HEALTH CARE PHIL. J. 55, 55–56 (2013).

<sup>51</sup> *Id.* at 56.

<sup>52</sup> Thorn, *supra* note 46.

In the United States, legislative silence has likely had the effect of inconsistent access to PMSR technologies. It is easy to imagine scenarios in which doctors and hospitals—unfamiliar with the ethics of PMSR—may arbitrarily deny access to sperm retrieval where it might otherwise have been granted at a different hospital on a different day, or in the same hospital on a different day simply because a different doctor happened to be on call. The lack of regulation cries out for laws that clarify the rights of parties seeking PMSR. Since there are currently no laws in the United States available to guide practitioners, out of necessity, doctors, hospitals, and professional associations in the United States have developed their own sets of protocols and guidelines governing the use of PMSR.<sup>53</sup>

#### B. *Institutional Protocols and Guidelines*

In an effort to provide ethical and legal guidance on PMSR issues, institutions in the United States have developed their own protocols for the use of PMSR.<sup>54</sup> Two of the best known guidelines are the Stanford Protocols<sup>55</sup> and the New York Hospital Guidelines (hereinafter Cornell Guidelines).<sup>56</sup> In addition to these relatively comprehensive guidelines, other organizations, such as the American Medical Association (AMA),<sup>57</sup> the American Bar Association (ABA),<sup>58</sup> and the European Society of Human Reproduction and Endocrinology (ESHRE),<sup>59</sup> have provided limited formal guidance on PMSR. All of these guidelines provide insight into the

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<sup>53</sup> The impetus for development of regulations at some hospitals has been a concern about potential legal liability. Therefore, institutional PMSR policies do not always reflect moral or ethical concerns so much as a desire to insulate themselves from lawsuit. *See, e.g.*, Strong, Gingrich & Kutteh, *supra* note 23, at 739. On the contrary, as we shall see, other institutions and organizations have issued more comprehensive guidelines that address a broader range of ethical and legal issues raised by the use of PMSR. *See infra* Part II.B.

<sup>54</sup> While it is wonderful that some institutions have done so, unfortunately, many have not. A study by Bahm, Karkazis, and Magnus found that roughly 60% of the institutions surveyed did not have an existing PMSR protocol. Bahm, Karkazis, & Magnus, *supra* note 4, at 840.

<sup>55</sup> *Id.*

<sup>56</sup> *New York Hospital Guidelines for Consideration of Requests for Post-mortem Sperm Retrieval*, WEIL CORNELL MED. COLL. JAMES BUCHANAN BRADY FOUND. DEPT UROLOGY, <https://www.cornellurology.com/resources/guidelines/> (last visited Feb. 1, 2016) [hereinafter *Cornell Guidelines*].

<sup>57</sup> AMA, COUNCIL ON ETHICAL & JUD. AFF., *Code of Medical Ethics: Current Opinions*, §2.04, 6 (2003).

<sup>58</sup> A.B.A. MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008), <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

<sup>59</sup> ESHRE TASK FORCE ON ETHICS AND LAW, *ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction*, 21 HUM. REPROD. 3050 (2006).

different policy options available to legislatures seeking to pass laws on PMSR.

1. ***The Stanford Protocols.*** The starting point for the Stanford Protocols was an empirical analysis conducted by researchers who surveyed and analyzed existing procedures in place (or, in many cases, not in place) at various hospitals throughout the United States.<sup>60</sup> The Stanford Protocols compare and contrast the limited-role model of PMSR (which is comparable to explicit consent requirements found in the UK) with the family-centered role (or permissive approach, comparable to the law in Israel).<sup>61</sup> The protocols are broken down into six areas of consideration: (1) standards of evidence; (2) terms of eligibility; (3) sperm designation; (4) restrictions on use in reproduction; (5) logistics; and (6) contraindications.<sup>62</sup>

The limited-role protocol is so named because the hospital has a clear and limited set of responsibilities in the sperm retrieval process.<sup>63</sup> This protocol requires a high standard of explicit evidence of consent from the deceased.<sup>64</sup> Under this approach, for a request to be valid, the donor must have issued a notarized written directive that authorizes the retrieval of the sperm and a clear designation of who will receive the sperm after retrieval.<sup>65</sup> Next, the recipient must assume financial and logistical responsibility for the transfer and storage of the sperm by signing a consent form.<sup>66</sup> If the donor has made a designation in writing, and the recipient/designee accepts responsibility for the sperm, then the responsibilities of the hospital in the PMSR process end at the time of sperm transfer.<sup>67</sup>

This limited-role protocol can be contrasted with the family-centered protocol that allows for more rights, and decision-making opportunities for the surviving widow and family.<sup>68</sup> Like Israeli law, the family-centered protocol is more liberal than the limited-role protocol and does not require explicit written consent.<sup>69</sup> Instead, the judgment of the wife

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<sup>60</sup> Bahm, Karkazis & Magnus, *supra* note 4, at 840.

<sup>61</sup> *Id.* at 841.

<sup>62</sup> *Id.* at 841–42.

<sup>63</sup> *Id.* at 841.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 841–42.

<sup>66</sup> *Id.* at 841.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 840–42.

<sup>69</sup> *Id.* at 841.

or partner can be substituted for that of the deceased.<sup>70</sup> This substituted judgment is limited to the ability to make a decision about whether or not to retrieve the sperm.<sup>71</sup> If the sperm is retrieved, it can only be used by the wife or partner.<sup>72</sup> The family-centered approach dictates that sperm should not be used earlier than one year after the date of retrieval.<sup>73</sup> During that time, the wife or partner must undergo psychological counseling.<sup>74</sup>

In sum, the protocols set forth above provide guidance for other hospitals and policy makers as they foster their own PMSR policies. The researchers that created the protocols drew some fundamental conclusions based on their survey of existing policies:

[W]hether requiring a high bar for evidence of the deceased's desire for posthumous reproduction or placing significant restrictions on the use of sperm after its procurement to ensure that substituted judgment reflects considered judgment of the patient's wishes rather than grief is critical to an ethical [PMSR] policy. Combining a low standard of evidence regarding the deceased's wishes with little in the way of restriction to access for reproductive purposes should be avoided.<sup>75</sup>

Thus, the researchers concluded that both protocols have ethical merit and can feasibly be adopted by institutions seeking to establish their own guidelines.<sup>76</sup> The Stanford Protocols can serve as a useful guide to state legislators because they are comprehensive, and because they describe two possible PMSR policy options, one at each end of the ethical spectrum.

2. ***The Cornell Guidelines.*** In 1995, the Cornell University Department of Urology issued the Cornell Guidelines in an effort to provide guidance to its practitioners.<sup>77</sup> The Cornell Guidelines are emblematic of what is known as the family-centered, or permissive, approach to PMSR.<sup>78</sup> They focus on four major considerations: (1) issues of consent; (2) medical

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 842.

<sup>72</sup> *Id.* at 841.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 842.

<sup>76</sup> *Id.*

<sup>77</sup> *Cornell Guidelines, supra* note 56.

<sup>78</sup> *See supra* Part II.B.1.

contraindications; (3) resource availability; and (4) bereavement waiting periods that limit the ability of the designee to use the sperm.<sup>79</sup> While the Cornell Guidelines do not cover all of the issues that PMSR legislation should address, they provide a useful example of how institutions might choose to address many of the key legal issues raised by PMSR requests.<sup>80</sup>

First, the Cornell Guidelines embrace a less stringent standard of consent to PMSR,<sup>81</sup> which is similar to the family-centered approach. Unlike the model embraced in some European countries,<sup>82</sup> the Cornell Guidelines do not require explicit consent.<sup>83</sup> Instead, acknowledging that it will be a rare case in which the man has given explicit consent prior to his death, the Cornell Guidelines embrace an implicit consent requirement.<sup>84</sup> Accordingly, the Cornell Guidelines allow decision makers to attempt to determine the deceased's desire to procreate by considering his "actions and discussions prior to his death."<sup>85</sup> In this sense, the Cornell Guidelines are similar to the more permissive laws of Israel.<sup>86</sup> Theoretically, the implicit consent standard, as outlined in the Cornell Guidelines, would likely result in a higher rate of approved requests for sperm retrieval.<sup>87</sup>

Next, the Cornell Guidelines address the issue of who may provide implicit consent, explaining that the wife or next-of-kin is "the individual who is best capable of determining the deceased man's intentions for conception and is best able to give procedural consent."<sup>88</sup> In the event that the wife or next-of-kin provides consent to retrieval, the Cornell Guidelines state that the wife<sup>89</sup> must be the only person to use the sperm.<sup>90</sup> In sum, the Cornell Guidelines recognize the validity of implicit consent by giving

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<sup>79</sup> *Cornell Guidelines*, *supra* note 56.

<sup>80</sup> *See generally id.* (regarding key legal issue raised by PMSR).

<sup>81</sup> *Id.*

<sup>82</sup> *See* ESHRE TASK FORCE ON ETHICS AND LAW, *supra* note 59.

<sup>83</sup> *Cornell Guidelines*, *supra* note 56.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See Ministry of Justice Guidelines of the Attorney General of the Government*, *supra* note 32.

<sup>87</sup> THALER & SUNSTEIN, *supra* note 28.

<sup>88</sup> *Id.*

<sup>89</sup> The Cornell Guidelines specifically use the word "wife," and the phrase "next of kin." The Guidelines make no mention of the rights of girlfriends or significant others. Thus, this aspect of the consent guidelines has a limiting effect on the number of approved requests because it excludes non-marital significant others. *Id.*

<sup>90</sup> *Id.*

significant weight to the wishes and opinions of the surviving wife and limiting the use of the sperm to the wife only.<sup>91</sup>

The second and third sections of the Cornell Guidelines pertain to medical contraindications and resource availability.<sup>92</sup> The medical contraindications specify that sperm should only be retrieved in cases of sudden death, where the procedure can be conducted within twenty-four hours.<sup>93</sup> Further, the sperm of the deceased should not be retrieved if the deceased suffered from any disease known to affect sperm or to otherwise be transmittable.<sup>94</sup> The Cornell Guidelines also briefly address practical concerns of resource availability: there must be a sperm storage facility available to receive the sperm, and the designee must contract with the sperm storage facility in the immediate aftermath of the death.<sup>95</sup> These two sections pertain to medical issues, and are best dealt with using common sense. They do not raise legal issues per se. While instructive for practitioners, the Cornell Guidelines on medical contraindications and resource availability are practical matters best left to the judgment of hospital staff. Therefore, policies on medical contraindications and resource availability need not be included in legislative proposals.

Lastly, the Cornell Guidelines instruct hospitals to recommend a one-year waiting period for bereavement and recipient evaluation before the sperm can be used.<sup>96</sup> This prescription is based on psychological theories of loss and grief processing.<sup>97</sup> During that year,

the wife must undergo medical and psychological consultations with discussion of the procedures necessary to achieve conception, including costs and medical interventions. Consultation should include a basic assessment of the psychological status of the wife, family stability, social and financial support systems, as well as a

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<sup>91</sup> Because PMSR is a relatively new medical procedure, it is yet unclear how existing institutional policies and laws apply to same-sex couples. Therefore, the discussion in this Comment is limited to an exploration of how the issue applies to opposite-sex couples. However, the policy proposals contained in Part IV *infra* are largely gender-neutral, and could potentially be applied to same-sex couples in the future.

<sup>92</sup> *Cornell Guidelines, supra* note 56.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

discussion of the implications of raising a child as a single parent without its genetic father.<sup>98</sup>

Since the implicit consent component of the Cornell Guidelines is a relatively liberal one, the recommended waiting period is best understood as an attempt to limit the otherwise expansive effects of the Cornell Guidelines taken as a whole.

3. ***Guidance from Other Organizations.*** Whereas the Stanford Protocols and the Cornell Guidelines provide comprehensive guidance on PMSR policies, many professional organizations and other institutions have provided less comprehensive guidance. For instance, the American Society for Reproductive Medicine (ASRM) takes the limited stance that doctors and hospitals “are not obligated to participate in [posthumous gamete procurement], but in any case should develop written policies regarding the circumstances in which they will or will not participate in such activities.”<sup>99</sup>

Other professional organizations have issued guidance and policies on PMSR as well. Endorsing a more limited-role stance, the ABA has circulated the *Model Reproductive Technologies Act*, which would make it unlawful to collect gametes<sup>100</sup> from a dead person without a “testamentary document authorizing the procedure.”<sup>101</sup> In its Code of Medical Ethics, the AMA Council on Ethical and Judicial Affairs provides that frozen semen should not be used for purposes other than those originally intended by the

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<sup>98</sup> *Id.*

<sup>99</sup> ETHICS COMM. OF THE AM. SOC’Y FOR REPROD. MED., *Posthumous Collection and Use of Reproductive Tissue: A Committee Opinion*, 99 J. FERTILITY & STERILITY 1842, 1842 (2013).

<sup>100</sup> A mature haploid male or female germ cell that is able to unite with another of the opposite sex in sexual reproduction to form a zygote.

<sup>101</sup> A.B.A., *supra* note 58 (“SECTION 205. COLLECTION OF GAMETES OR EMBRYOS FROM PRESERVED TISSUE OR FROM DECEASED OR INCOMPETENT INDIVIDUALS 1. Gametes or embryos shall not be collected from deceased or incompetent individuals or from preserved tissues unless consent in a record was executed prior to death or incompetency by the individual from whom the gametes or embryos are to be collected or the individual’s authorized fiduciary who has express authorization from the principal to so consent. 2. In the event of an emergency where the required consent is alleged but unavailable and where, in the opinion of the treating physician, loss of viability would occur as a result of delay, and where there is a genuine question as to the existence of consent in a record, an exception is permissible. 3. If gametes or embryos are collected pursuant to paragraph 2 of this Section, transfer of gametes or of an embryo is expressly prohibited unless approved by a Court. Absence of a record as described in Paragraph 1 shall constitute a presumption of non-consent. 4. Any individual or entity not acting in accordance with this Section may be subject to civil and/or criminal liability as provided in law.”).

donor.<sup>102</sup> While the guidelines were initially drawn up for perimortem semen retrieval,<sup>103</sup> PMSR is a similar process, and the guidelines are worth considering in the context of PMSR as well. The AMA Council indicated that, where the donor has left no instructions, “it is reasonable to allow the remaining partner to use the semen for artificial insemination,” but doctors should advise prospective semen donors of the post-mortem use policy so donors can understand the consequences, and specify the terms, of the post-mortem use of the semen.<sup>104</sup>

Lastly, in 2006, the European Society of Human Reproduction and Embryology (ESHRE) adopted guidelines requiring the explicit written consent of the deceased.<sup>105</sup> Even with such consent, however, the surviving partner must wait one year after the death and undergo counseling before the sperm can be used.<sup>106</sup> Thus, these guidelines are a hybrid of the family-centered and limited-role protocols. On the one hand, they sound like the limited-role approach because they stipulate that retrieval may only be conducted with the explicit consent of the donor. On the other hand, the guidelines require the one-year waiting period more commonly associated with the family-centered approach. In this sense, the ESHRE is attempting to strike a balance between the rights of the deceased to define their earthly legacy and the need to protect the living from making hasty life decisions in the immediate aftermath of a spouse’s death. While numerous organizations have offered opinions on different aspects of PMSR, the United States still has no laws governing its use.

### C. *Incidental Coverage of PMSR by Pre-Existing U.S. Federal Law*

Because the United States lacks PMSR laws, wherever hospitals are willing to perform the procedure, it is de facto legal.<sup>107</sup> Because PMSR is implicitly legal in the United States, children have already been born as a result of PMSR.<sup>108</sup> Therefore, courts and legislatures have been called upon

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<sup>102</sup> AMA, *supra* note 57.

<sup>103</sup> Perimortem means at or near the time of death, as opposed to postmortem, which means after death.

<sup>104</sup> AMA, *supra* note 57.

<sup>105</sup> ESHRE TASK FORCE ON ETHICS AND LAW, *supra* note 59.

<sup>106</sup> *Id.*

<sup>107</sup> Devon D. Williams, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval*, 34 CAMPBELL L. REV. 181, 182 (2011).

<sup>108</sup> See generally Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154 (2008).

to make determinations on the rights of such children even though they have never decided whether such children should have been born in the first place. As a result, there is limited American common law that applies to children born of PMSR, even though there are no laws regulating PMSR itself.<sup>109</sup>

One example of a law that some courts have tried to apply to PMSR by analogy is the Uniform Anatomical Gift Act (UAGA).<sup>110</sup> The UAGA regulates organ donations for the purpose of transplantation; it also governs the making of anatomical gifts of one's cadaver to be dissected in the study of medicine.<sup>111</sup> The UAGA allows the next-of-kin to consent to the retrieval of organs and tissues after death unless there is evidence that the deceased would not have consented.<sup>112</sup> An interesting American case involved parents that requested the sperm of their deceased son, without his prior consent, under the terms of the UAGA.<sup>113</sup> The judge allowed the parents to retrieve the sperm.<sup>114</sup> None of the existing international laws or institutional protocols discussed above allow for retrieval, without consent of the deceased, by the parents. This decision is unique, but is a prime example of how, in the absence of concrete legislation, courts must analogize legal principles found in other laws to fill the gap in American PMSR laws.

Another law relevant to children born of PMSR is the Uniform Parentage Act (UPA).<sup>115</sup> The UPA provides that "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."<sup>116</sup> This law directly affects parentage determinations and inheritance rights.<sup>117</sup> If a man has not

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<sup>109</sup> UNIF. ANATOMICAL GIFT ACT (amended 2006); UNIF. PARENTAGE ACT § 707 (amended 2002); *cf.* UNIF. PROBATE CODE § 2-120(f) (amended 2010).

<sup>110</sup> UNIF. ANATOMICAL GIFT ACT (amended 2006).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *In re Daniel Thomas Christy*, Johnson County Case No. EQVO68545 (Sept. 14, 2007).

<sup>114</sup> Bethany Spielman, *Pushing the Dead into the Next Frontier: Post Mortem Gamete Retrieval Under the Uniform Anatomical Gift Act*, 37 J.L. MED. & ETHICS 331, 332 (2009).

<sup>115</sup> UNIF. PARENTAGE ACT § 707 (amended 2002).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* There is a substantial body of case law on inheritance and property rights, most of which lies outside the scope of this Comment. Katz, *supra* note 2, at 293 ("Moreover, issues of a resulting child's inheritance, survivor's benefits, and parentage are gradually being answered by legislatures and the courts."). The literature in this area is prolific. *E.g.*, Ruth Zafran, *Dying to be a Father: Legal Paternity in Cases of Posthumous Conception*, 8

expressly consented to be the legal father prior to death, the child may be born with only one legal parent.<sup>118</sup> In terms of the best interests of the child, this is an issue of great concern.<sup>119</sup> Many existing American laws incidentally address PMSR, and have ramifications for its use in the United States, but there are still no laws that address PMSR's legality and the requirements for its proper use.

D. *PMSR and State Laws*

Just as is there are no laws that directly address PMSR at the federal level, there are no laws that address PMSR at the state level either. Interestingly, in 1998, Senator Roy Goodman proposed a bill in the New York state legislature that would have required the written consent of the donor as a prerequisite to sperm retrieval.<sup>120</sup> Opponents of the bill objected

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HOUS. J. HEALTH L. & POL'Y 47 (2008); Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347 (2011); Lorio, *supra* note 108; Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMPORARY HEALTH L. & POL'Y 332 (2009). Legislators may want to include policy elements that address these issues to their laws as they see fit, but these topics are already covered by existing bodies of common law and pre-existing statutes that apply by analogy. The development of the law in this area is significant because it defines the rights of any child born as a result of a request for PMSR. Nonetheless, because these issues are already being worked out by statutes and other common law, they are not a necessary part of the legislation advocated for in this Comment.

<sup>118</sup> UNIF. PARENTAGE ACT § 707 (amended 2002).

<sup>119</sup> Professor Hilary Young discussed the best interests of the child in her 2009 Article:

[T]he child who results from posthumous reproduction clearly has an interest in the conditions under which such reproduction is permitted. The primary issues of the child's best interests, however, would seem to be a) whether it is a good idea to bring children into the world when they will only have one living genetic parent; b) whether such children are truly wanted or whether they are merely a symbolic link to the deceased created out of grief; and c) whether such children will have access to their deceased parent's citizenship, social security benefits, inheritances, etc.

Hilary Young, *Presuming Consent to Posthumous Reproduction*, 27 J.L. & HEALTH 68, 83 (2014).

<sup>120</sup> A New York Times article explained that Senator Goodman objected to the implicit consent standard because of ethical concerns: "The bill would only allow sperm to be taken from a man who had given permission, in writing, before he died. And the sperm could only be used to conceive a child by a wife or a 'partner.' Unless a man has specifically consented in writing, said the bill's author, Senator Roy M. Goodman, 'it would be entirely inappropriate and, in many ways, seriously improper for anyone to assume his intentions on this.'" Ian Fisher, *Bill Would Govern Use of Dead Men's Sperm*, N.Y. TIMES (Mar. 7,

on moral grounds, arguing that there was no reason a grieving widow should not be able to comfort herself by birthing the child of her deceased husband.<sup>121</sup> The bill was never passed.<sup>122</sup> To date, no state has passed a law that explicitly addresses the legality of PMSR or the consent standard that should apply to its use.

### III. LEGISLATION ON PMSR IS NEEDED: PMSR SHOULD BE LEGAL

#### A. *Legislation Is a Practical and Ethical Necessity*

In the absence of federal and state law in the United States, surviving family members, doctors, and hospitals are left to fend for themselves in an ethical vacuum. Collectively, they will face difficult questions. Thinking back to the Doe/Eyre hypothetical above: did the hospital do right by John Doe and Jane Eyre? Was the hospital's decision fair to society? Thus far, this Comment has shown that there are many laws from other countries and academic and institutional guidelines available to the legislator seeking to advance PMSR legislation.<sup>123</sup> Despite the availability of guidelines from alternative sources, a definitive, legislative answer on the legality of PMSR is needed.

The decision to allow PMSR is of great ethical gravity. PMSR implicates what many consider a sacred right—the right to create life. Some widows find comfort in the knowledge that they will be able to give birth to their deceased partner's child, continuing the legacy of the couple in a concrete way.<sup>124</sup> These widows may argue that they should be free to exercise the right to procreate through PMSR.

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1998), <http://www.nytimes.com/1998/03/07/nyregion/bill-would-govern-use-of-dead-men-s-sperm.html>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See *supra* Parts II.A, II.B.

<sup>124</sup> As Strong, Gingrich, and Kutteh explained:

One reason some might value procreation in the ordinary context is that it involves participation in the creation of a person. Such participation can be important to individuals for various reasons. Some might attach meaning to the idea of creating an individual who develops self-consciousness. For others, participation in the creation of a person might have religious significance; some might see it as acting as an instrument of God's will, while others might regard it as fulfillment of a religious duty. Moreover, it is reasonable to say that one can participate in the creation of a person even though the conception and/or gestation occurs after one's death. After all, individuals can take actions when alive that will cause the conception or gestation to occur after death, and it is their

Critics disagree, instead arguing that PMSR is ethically abhorrent and should not be permitted.<sup>125</sup> Some believe that any tampering with the testicles of the deceased is a wildly inappropriate, non-consensual, mutilation of a corpse.<sup>126</sup> Others say PMSR is wrong because it substantially affects the earthly legacy of the dead in a way the deceased may not have intended.<sup>127</sup> The disagreement about the ethical propriety of PMSR is widespread. Irrespective of one's beliefs about the morality of PMSR, its ethical significance suggests that laws should be passed to clarify the rights of individuals in the United States who seek PMSR. The procreative rights of parties seeking PMSR should not be determined by a system that leaves so much to chance.

The number of requests for PMSR is increasing and, due to the nature of the medical procedure, the decision to grant or deny a request must be made quickly.<sup>128</sup> The democratization of reproductive technologies inevitably leads to increased public awareness of such technologies. As awareness of PMSR increases, the upward trend in the number of requests

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own gametes that would be used. Admittedly, the individual would not know whether the attempt to create a person posthumously would be successful. Nevertheless, the plan to accomplish it and the hope that the plan succeeds could be meaningful to some. Another reason some people value procreation in the ordinary scenario is that it can be an affirmation of mutual love and acceptance. It can be an expression of strong acceptance to say to another, in effect, 'I want your genes to contribute to the genetic makeup of my children.' A relationship can be deepened and enriched by this sort of affirmation. Moreover, such affirmation can exist when the procreation is planned to occur after the death of one member of the couple. For example, in the Parpalaix case it was reported that the plan to attempt postmortem reproduction had this sort of special meaning for the couple. Furthermore, when one member of the couple survives, that person can have reasons for valuing the procreation in question. In addition to the two reasons discussed above, other reasons individuals might have for valuing procreation in the ordinary context could be relevant. One is that procreation leads to experiences associated with child rearing, and a surviving spouse might attach importance to this. For women, procreation sometimes is valued in part because it involves experiences of pregnancy and childbirth, and a surviving wife might consider such experiences to be significant. Thus, there are various reasons that sometimes are relevant in explaining why a plan to reproduce posthumously can be meaningful to a person before death and to the surviving partner.

Strong, Gingrich & Kutteh, *supra* note 23, at 740–44 (citation omitted).

<sup>125</sup> Williams, *supra* note 107, at 197–98.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See Hurwitz & Batzer, *supra* note 3, at 806.

for PMSR is likely to continue.<sup>129</sup> Due to the increase in the number of cases similar to those of John Doe and Jane Eyre, and the fact that decisions on such cases must be made so quickly, lawmakers must adopt legislation clarifying the rights of all involved parties.

Since PMSR is of great ethical significance, and is likely to become more common in the future, legislatures must pass PMSR laws in order to protect the interests of future parties to PMSR decisions. Such interests include those of the deceased,<sup>130</sup> surviving family members, doctors and hospitals, and society at large. It is unfair to those involved to leave this area of the law unaddressed. Legislative clarification will ensure reliability and consistency for surviving members of the deceased's family.<sup>131</sup> Laws will also help relieve hospitals and doctors of unnecessary legal liability by outlining the appropriate policies and procedures that hospital ethics committees should follow. Lastly, the very process of drafting, debating, and passing PMSR legislation should raise awareness of the issue, allowing legislatures to craft a policy that, at least in theory, approximates its constituents' sense of moral propriety regarding PMSR.

#### B. *PMSR Should be Legal*

Proceeding under the assumption that the existence of PMSR laws is preferable to the current state of affairs, what policy elements should ideal legislation include? The first issue that the best legislation must address is PMSR's legality. A legislature could choose to ban PMSR, as governments in Germany and France have done.<sup>132</sup> Alternatively, following the example of countries like the UK and Israel, a legislature could choose to legalize PMSR, but regulate the conditions of its use. While either option is preferable to the ethical chaos of the current situation in the United States, the latter alternative best reflects American values on procreative rights.

Legislatures in the United States must pass laws recognizing the legality of PMSR. The legalization of PMSR makes sense in light of

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<sup>129</sup> See Katz, *supra* note 2, at 290.

<sup>130</sup> Many argue the deceased have no rights. However, since PMSR creates life using the deceased's DNA, the deceased's rights and wishes should be afforded consideration.

<sup>131</sup> Ryan Smith & Larry Lipshultz, *A Call for Institutional Policies on Postmortem Sperm Retrieval*, 100 J. FERTILITY STERILITY 656, 656 (2013) ("Decisions regarding PMSR should be made based on established ethical and legal grounds as opposed to reactionary decisions made in haste.").

<sup>132</sup> See *supra* Part II.A.2.

historical American values of freedom of choice and procreative liberty.<sup>133</sup> In keeping with these American values of freedom of choice and procreative liberty, PMSR should be legalized because it provides an opportunity for individuals to exercise their freedom to make procreative choices.

Laws in every society are reflective of values, history, religion, political beliefs, technological advancements, and power structures.<sup>134</sup> For example, because of the horrors associated with eugenics experimentation during the Holocaust, modern Germany has outlawed PMSR.<sup>135</sup> Similarly, France does not allow PMSR because the French place a high value on the integrity of the traditional family unit. The United States has its own cultural history, and its own fundamental political values, grounded in notions of privacy and individual liberty guaranteed by the Constitution. While PMSR is not an enumerated constitutional right, allowing citizens the right to choose how and when to procreate is in line with historical norms and political values in the United States.<sup>136</sup>

PMSR should be legalized only in cases where the deceased has consented—in writing—to have his sperm used for procreation by a specific person after death. Allowing a man to consent to PMSR prior to death protects his freedom to control his own legacy. It affords him the opportunity to continue his family lineage by providing offspring to his significant other. As some courts have recognized, in the absence of substantial societal costs, the government should stay out of the way, and allow the man to make this decision freely.<sup>137</sup>

Some may say that an express consent proposal does not go far enough, and that legislation should go a step further by allowing PMSR in the absence of the explicit consent of the deceased, so long as the surviving

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<sup>133</sup> Robertson, *supra* note 44, at 193–94 (“The reception of ARTs in the United States cannot be understood without an appreciation of the country’s long tradition of individual liberty, free market and free enterprise orientation, and grants of wide autonomy to physicians and other professionals.”).

<sup>134</sup> *Id.* at 193 (“[L]aw ‘is not about the worldly realization of wisdom or sophistication as such. Law is about what works, what seems appealing and appropriate in a given society.’”).

<sup>135</sup> See *supra* Part II.A.2.

<sup>136</sup> See Robertson, *supra* note 44, at 194.

<sup>137</sup> See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 288–89 (Cal. Ct. App. 1993) (“[R]eal parties do not cite any authority establishing the propriety of this court, or any court, to make the value judgment as to whether it is better for such a potential child not to be born, assuming that both gamete providers wish to conceive the child. . . . [R]eal parties fail to establish a state interest sufficient to justify interference with that decision.”).

significant other believes retrieval is commensurate with the deceased's implied wishes. Even so, those that would go further take the position that PMSR should be legal. Regardless of whether one prefers the express consent standard or the implicit consent standard, advocates of both positions agree that, at a minimum, legislation legalizing PMSR is necessary.

Additionally, there are other reasons why state legislatures should pass laws that legalize PMSR. The United States already allows for posthumous conception in cases where the man has banked his sperm *prior* to death.<sup>138</sup> In such cases, the spouse or partner is still legally allowed to birth a child, even though that child will not have two living parents. Further, counter-arguments concerned with the unintended expansion of the deceased's earthly legacy can be answered with a policy that only allows for PMSR with explicit consent of the deceased.<sup>139</sup> Lastly, religious and personal rights in the United States are sacrosanct. The opinions of some about the religious and moral propriety of an act are rarely binding on others who wish to engage in that act, especially when that act has a limited impact on others in society.<sup>140</sup> For these reasons, PMSR should be legally recognized by state legislatures in the United States. Taking this to be true, the best legislation should go further by addressing the critical ethical issues associated with PMSR.

#### IV. TOWARD A SOLUTION: A NORMATIVE PRESCRIPTION FOR PMSR LEGISLATION

##### A. *Issues the Ideal PMSR Legislation Will Address*

Ideal legislation must address other ethical and legal issues raised by PMSR. Legislators, in crafting a bill, should answer the following questions: (1) Who can provide consent to sperm retrieval? (2) What constitutes sufficient consent? (3) If retrieval is allowed, who can use the sperm? (4) Should waiting periods be required? (5) Should counseling be required? State legislatures have an ethical obligation to pass bills that legalize PMSR and address these major issues. This will help provide a

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<sup>138</sup> Bonnie Rochman, *Should Men Be Allowed to Father Children After They're Dead?*, TIME (June 3, 2011), <http://healthland.time.com/2011/06/03/should-men-be-allowed-to-father-children-after-theyre-dead/>.

<sup>139</sup> See *infra* Part IV.B.1.

<sup>140</sup> See, e.g., *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925); *United States v. Reynolds*, 345 U.S. 1 (1953); *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

clear framework that individuals and institutions can use to navigate the difficult decisions that arise during the PMSR process.

B. *A Framework for PMSR Legislation in the United States*

The ideal PMSR legislation will embrace many of the principles of the limited-role protocol.<sup>141</sup> Proposed bills should protect the rights of the donor, during life and after death, by giving effect to any explicit wishes that were clearly expressed during the donor's life. If the donor consented to PMSR in writing, effect should be given to that consent and PMSR should be allowed.<sup>142</sup> Ideally, the consent will also clearly designate who can receive the sperm and that the designee must be the only person allowed to use the sperm.<sup>143</sup> Conversely, if the donor made it clear that he would not consent to PMSR, or there is evidence of any hesitation, reticence, or aversion to PMSR, retrieval should not be allowed.

If adequate consent has been provided, then the sperm designee should be allowed to use the sperm freely under any terms or timelines the designee deems appropriate. Counseling and waiting period requirements are unnecessary and paternalistic. PMSR legislation that tracks with these limited-role principles will best protect the interests of the deceased individual, while still providing the surviving spouse the opportunity to procreate with the help of PMSR technology.

1. **Consent Issues.** Only the deceased should be allowed to provide consent to retrieval. The ideal bill should only validate consent when the wishes of the deceased have been expressed in writing.<sup>144</sup> Because

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<sup>141</sup> See *supra* Part II.B.1.

<sup>142</sup> An exception to the effectiveness of consent should be made for divorce. If a man provides written consent to PMSR to his wife, but the couple later divorces, the divorce action should nullify the effectiveness of the consent. Written consent between divorced parties should only be effective in the unlikely event that such consent is made effective after a divorce.

<sup>143</sup> In the event that the identity of the designee is not clear, the default designee would be the wife. Next, a significant other would have a right to use the sperm if it is reasonably inferable that the deceased intended the sperm for that significant other's use. No other party should be able to use the sperm.

<sup>144</sup> Some might say that this standard sets the evidentiary bar for PMSR too high because few men will have the foresight to memorialize their wishes in a testamentary document. However, a 2012 study shows that 29% of millennials (individuals aged 18 to 34) have wills in place. *Got Wills? Rocket Lawyer Make a Will Month Survey Results*, VISUALLY, <http://visual.ly/got-wills-rocket-lawyer-make-will-month-survey-results> (last visited Feb. 24, 2016). Consideration of consent to PMSR could logically be incorporated into the estate planning process at the time a will is drafted. See Benjamin C. Carpenter,

sperm must be retrieved within the first thirty-six hours after death, there is not adequate time for any other standard. With a thirty-six hour timeline, already grieving widows should not be asked to provide any other evidence. Further, doctors and hospitals should not be asked to make such a complex and momentous decision in such a short period of time.

This policy is just. It will give effect to the wishes the deceased, expressed during life, and protect his ability to determine the circumstances under which he is willing to procreate after death. This policy is also practical because it creates a bright-line standard for doctors and hospitals to refer to when faced with the complex ethical issues of a PMSR request. To this end, the bill should expressly forbid others to substitute their judgment for that of the deceased. That is, the judgment and wishes of family members, and others, should not bear weight on the decision to grant or deny a request for retrieval. Consent should only be validated when the written consent of the deceased has been provided.

2. **Use Issues.** Next, ideal legislation should stipulate that the only person eligible to use the sperm is the individual designated in writing by the designor, and the designee must be a wife or significant other who will ultimately be the party exercising the right to use the sperm. Any other system of allocating the right to use the sperm risks inappropriate misuse. It is unethical for any party not previously designated by the deceased to request the sperm. Requests made by any party not specifically designated by the deceased, including parents, girlfriends, spouses with ulterior motives,<sup>145</sup> ex-spouses, social workers, anonymous recipients, and other third parties, must be denied. Just as it is appropriate to give effect to the wishes of the donor when deciding whether retrieval should be allowed in the first place, it is also appropriate to limit the control over, and use of, the sperm to an appropriate party designated by the deceased in writing during his lifetime.

3. **Timeline Issues.** Since the requirement of written consent by the deceased sets a high ethical bar, if adequate written consent has been provided, the designee should be given broad discretion to decide how and

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*Sex Post Facto: Advising Clients Regarding Posthumous Conception*, 38 ACTEC L.J. 187 (2012).

<sup>145</sup> The television show *Law and Order* produced an episode that shows what this “spouses with ulterior motives” scenario might look like. In the episode, a young wife, who had married a wealthy older man, aggressively requested PMSR in an effort to bear a child that could then be used to claim a portion of the wealthy man’s inheritance. *Law & Order: Mammon* (NBC television broadcast Jan. 5, 2005).

when the sperm can be used. No waiting periods, counseling sessions, or medical evaluations should be required. These requirements are unnecessary and paternalistic—they presume the inability of surviving spouses and partners to make decisions in their own best interests and the best interests of their future child. Consistent with the underlying policy principle of individual freedom inherent in the other elements of an ideal PMSR bill, a woman's right to procreative freedom should not be limited when the express wishes of the deceased spouse are clear.

#### CONCLUSION

Legislation regulating PMSR is necessary in order to consistently protect the rights of the deceased and their survivors. Any legislation would be preferable to the current system, under which PMSR requests are granted or denied by doctors according to their individual moral judgment, which may vary greatly, leading to potential hazard. A PMSR bill is desperately needed to offer clarity to families, doctors, and hospitals.

The best PMSR legislation must address critical issues of consent to retrieval, sperm designation, and terms and conditions of sperm use. Answers to questions about PMSR are of critical importance to parties that find themselves in the unfortunate situation of contemplating such a momentous decision. Therefore, state legislators must pass bills that protect the interests of their constituencies. Any legislation that gives effect to constituent wishes on PMSR, and addresses the minimum issues discussed above, is better than the ethical vacuum created by the absence of regulation.

Ultimately, legislators should embrace standards similar to those embodied in the limited-role approach to PMSR. Ideal legislation will require the express written consent of the deceased, that only the designee use the sperm, and that waiting periods and counseling are not required. A PMSR bill that addresses these critical ethical issues, and resolves them by embracing the limited-role model, will best serve the interests of the living, the dead, children born of PMSR, institutions, and society as a whole.