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Life After Death: How the Widespread Implementation of Postmortem Sperm Retrieval Can Redefine Procreative Liberty

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Life After Death: How the Widespread Implementation of Postmortem Sperm Retrieval Can Redefine Procreative Liberty

*Samuel Hoy Brown VII**

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ABSTRACT

“The fear of death follows from the fear of life. A man who lives fully is prepared to die at any time.” - Samuel Langhorne Clemens (Mark Twain).

Death and life. Yin and Yang. The beginning and the end. But what if the end was only the beginning for those we leave behind?

Advancements in the fertility industry have allowed wives, fiancées, girlfriends, parents, and even non-related individuals to seek a rare procedure known as postmortem sperm retrieval when a man dies unexpectedly. Unfortunately for many families, a tangle of confusing and often conflicting federal and state laws and regulations leave Americans unsure whether they can request the procedure on behalf of their loved ones. In recent years there has been significant debate over both the ethics and legality of the procedure and the legal rights of the child and surviving parent if the gametes are used for impregnation, making this issue ripe for further examination.

This Article seeks to explore the historical and procedural background, legal framework, and critical issues surrounding postmortem sperm retrieval before offering a tangible and effective policy recommendation that has the potential to fundamentally change the way United States policymakers view organ donation and reproductive autonomy. In sum, this Article seeks above all else to boldly envision a world where every male can have the opportunity to make his own reproductive decisions in his current life and even in the next.

INTRODUCTION

In April 2009, Nikolas Evans, a 21-year-old college student, was assaulted and beaten to death outside of a bar in Austin, Texas.¹ The fatal blow came when Evans was violently knocked sideways by an assailant and struck his temple on the ground.² Investigators first to the crime scene found that Evans had slipped into a medically induced coma from which he would never awaken.³ His mother, Missy Evans, was left distraught after Nikolas's unexpected end and began to reflect on the dreams and desires her son had recounted over his lifetime.⁴ This reflection prompted Missy Evans to request from the hospital board the performance of a rare operation that would seek to harvest residual sperm from Nikolas's body after he was declared legally brain dead.⁵ The hospital was stunned by Missy's request, with doctors indicating to Missy their reluctance, explaining that none of the doctors had ever received such a request.⁶ Believing that Missy's grief had clouded her judgment capabilities, medical personnel declined to perform the procedure and instead sent Nikolas's body to the morgue.⁷ The next day, Missy proceeded to probate court, where a central Texas judge ruled Nikolas's sperm was the "exclusive domain" of the next-of-kin.⁸ This controversial ruling entitled Missy to the unthinkable: the ability to both harvest her son's sperm after his death and retain the exclusive right to create a grandchild.⁹

Stories similar to the Evans family are prevalent throughout the United States.¹⁰ Advancements in the fertility industry have allowed wives,

1. See Susan Donaldson James, *Sperm Retrieval: Mother Creates Life After Death*, ABC NEWS (Feb. 22, 2010, 4:56 PM), <https://abcnews.go.com/Health/Wellness/mother-murdered-son-hopes-create-grandchild-post-mortem/story?id=9913939> [<https://perma.cc/9RZZ-8HMA>].

2. *Id.*

3. See Marc Savlov, *Crime and the City Solution: Do you know who's killing Austin's golden goose?*, AUSTIN CHRON. (June 26, 2009), <https://www.austinchronicle.com/music/2009-06-26/799104/> [<https://perma.cc/QGU6-A274>].

4. See James, *supra* note 1.

5. See *id.* (describing the mental evolution and timeline of Missy Evans requesting a medical procedure from the hospital).

6. *Id.*

7. *Id.*

8. *Judge orders collecting of dead son's sperm*, ABC7 AMARILLO (Apr. 8, 2009, 11:12 AM CDT), <https://abc7amarillo.com/news/local/judge-orders-collecting-of-dead-sons-sperm> [<https://perma.cc/93NR-5HQA>].

9. See *id.*

10. See Andrew Joseph, *'They don't want his story to end': Efforts to save the sperm of the deceased come with heartache and tough questions*, STATNEWS

girlfriends, parents, and even non-related individuals to seek a procedure known as postmortem sperm retrieval (PSR) when a man dies unexpectedly. Unfortunately for many families, a tangle of confusing and often conflicting federal and state laws and regulations leave many Americans unsure of whether they can request the procedure on behalf of their loved ones.¹¹ While Missy Evans was able to appear before a probate court and request the procedure, in many states these scenarios are handled on a case-by-case basis, with virtually no legal precedent indicating which way a probate judge should rule.¹² In recent years, there has been significant debate over both the ethics and legality of the procedure and the legal rights of the child and surviving parent if the gametes are used for impregnation, making this issue ripe for further examination.¹³

Thus, this Article seeks to explore the dynamics of how PSR is perceived in the United States while fostering a conversation of how legal clarity for this procedure could improve the status quo. Part I will provide historical and procedural background, explaining how the procedure was first developed and the various ways the procedure is performed.¹⁴ Part II will explore the legal context surrounding the procedure by discussing the rules and requirements throughout various jurisdictions, as well as the medical guidelines that currently exist.¹⁵ Part III analyzes the current issues that PSR presents in the United States, including consent requirements, funding realities, hospital liability issues, and ethical debates related to members of religious bodies who request the procedure.¹⁶ Finally, Part IV proposes a tangible solution that can provide immediate solvency to virtually all impacted parties by increasing procreative liberty for American families and solving the international sperm shortage.¹⁷ While the

(Mar. 13, 2019), <https://www.statnews.com/2019/03/13/postmortem-sperm-retrieval/> [<https://perma.cc/Y4AQ-BDNU>] (showcasing several stories of PSR in the United States).

11. See generally Shelly Simana, *Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?*, 5 J.L. & BIOSCIENCE 329, 329–54 (2018) (describing a confusing legal framework regarding PSR).

12. See generally *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (Cal. 1990); see also *Hecht v. Superior Ct.*, 20 Cal. Rptr. 2d 275, 276 (Cal. Ct. App. 1993) (showcasing examples of state court decisions demonstrating requests for PSR being denied).

13. See Joseph, *supra* note 10 (showcasing the debate between advocates and detractors of PSR).

14. See discussion *infra* Part I.

15. See discussion *infra* Part II.

16. See discussion *infra* Part III.

17. See discussion *infra* Part IV.

forthcoming analysis cannot solve every issue, this Article will seek to solve as many as possible, so that families just like the Evans family will never have to question their rights in regard to their loved ones again.

I. BACKGROUND AND PROCEDURAL CONTEXT

In the late 1970s, Los Angeles urologist Dr. Cappy Rothman performed the first documented procedure of PSR, paving the way for pioneers in the sexual reproduction space.¹⁸

A. Historical Foundations

Before his medical breakthrough, Dr. Rothman had been extracting spermatozoa from living men dealing with erectile dysfunction and infertility, which gave him a detailed knowledge of male reproductive anatomy and experience extracting spermatozoa efficiently and effectively.¹⁹ When first prompted to perform the procedure, Rothman proposed what seemed at the time to be a medically impossible option: removing the man's reproductive organs postmortem and attempting to make a full extraction.²⁰ After several instances of trial and error, Rothman deemed the procedure a success and proceeded to describe the procedure in the 1980 edition of the American Journal of Fertility and Sterility as "[a] method for obtaining viable spermatozoa in the postmortem state."²¹ Rothman is also responsible for the first birth in the United States stemming from PSR, in which the mother received spermatozoa from her late husband extracted by Dr. Rothman over 29 hours after death.²²

Rothman made several critical findings during his experimentations, including that: (1) extraction must occur within 48 hours after a man's death; (2) the extracted sample must then be preserved cryogenically; and (3) the extracted spermatozoa could theoretically be preserved indefinitely with the full possibility of impregnation.²³ Turning to the present, Dr.

18. See Jenny Morber, *The moral maze of using a dead man's sperm*, BBC: FUTURE (May 19, 2016), <https://www.bbc.com/future/article/20160518-the-moral-maze-of-using-a-dead-mans-sperm> [<https://perma.cc/7GML-5B2B>] [hereinafter Morber, *The Moral Maze of Using a Dead Man's Sperm*] (detailing the history of Dr. Rothman's discovery of PSR).

19. See *id.*

20. See *id.*

21. See Cappy Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 J. FERTILITY & STERILITY 512, 512 (1980).

22. See Morber, *The Moral Maze of Using a Dead Man's Sperm*, *supra* note 18.

23. See Rothman, *supra* note 21.

Rothman is the founder of California Cryobank, one of the largest sperm banks in the United States. The sperm bank describes an array of services on their website, while at the same time detailing all of the mechanics necessary for a procedure, such as the costs for the procedure itself and storage.²⁴ Unfortunately for families that do not live near California Cryobank, gaining access to this procedure is inherently more difficult, which leads this Article to a critical discussion on the legality of PSR in the United States. In understanding these critical findings, it is necessary to explore exactly how members of the medical community perform this procedure so as to more holistically evaluate the issue.

B. The Procedure

The most common and effective form of PSR is conducted using a technical medical procedure known as Minimally Invasive Epididymal Sperm Aspiration (MIESA).²⁵ MIESA has a litany of uses, including assisting: (1) men with reproductive stimulant issues; (2) men who wish to reverse the effects of a vasectomy; and even (3) men who wish to have their spermatozoa preserved in the event of their untimely demise.²⁶ While there are many spermatozoa retrieval methods, this extraction technique is used most commonly, as it targets the epididymis, which stores reserves of healthy spermatozoa that remain active up to 36 hours after a man's death.²⁷ MIESA begins with a microscopic incision typically made in the skin of the scrotum so that the epididymis can be located.²⁸ A special microscope is then used to view the tiny "tubules" of the epididymis where the spermatozoa is contained.²⁹ The tubule is dilated, and the fluid it contains is gathered and examined to determine the presence and health of

24. See *How It Works*, CAL. CRYOBANK, <https://www.cryobank.com/how-it-works/> [<https://perma.cc/LDA7-APHF>] (last visited Feb. 5, 2023).

25. See *Critical Review of Post-Mortem Sperm Retrieval (PMSR)*, NURSINGANSWERS.NET (Feb. 11, 2020), <https://nursinganswers.net/essays/critical-review-postmortem-sperm-retrieval-1010.php> [<https://perma.cc/M8H4-55NG>] (describing the various forms of the PSR Procedure).

26. See Christian P. Pavlovich & Peter N. Schlegel, *Fertility Options After Vasectomy: A Cost-Effective Analysis*, 67 J. FERTILITY & STERILITY 1 (1997) (showcasing various uses for MIESA including vasectomy reversal).

27. See Shai Shefi et al., *Posthumous Sperm Retrieval: Analysis of Time Interval to Harvest Sperm*, 21 J. HUM. REPROD. 2890, 2890–93 (2006).

28. See Robert M. Coward & Jesse N. Mills, *A Step-by-Step Guide to Office-Based Sperm Retrieval for Obstructive Azoospermia*, 6 J. TRANSLATIONAL ANDROLOGY & UROLOGY 730, 730–44 (2017).

29. *Id.*

the spermatozoa inside.³⁰ The fluid is then brought to the in vitro fertilization lab where it will then be processed for use.³¹ If the fluid is found not to contain any live spermatozoa, another sample will be taken from a different section of the epididymis.³² The search and examination techniques continue until enough live material is gathered for immediate use and storage.³³ The spermatozoa is then left frozen, serving as the last biological remnant of the recently deceased male.³⁴ Medical experts indicate that this method is capable of nearing an almost-perfect effectiveness rate and can be used in both living and deceased adult males.³⁵

II. THE LEGAL FRAMEWORK

The Weil Cornell Medical College said it best when researchers at Cornell's medical center indicated on their advisory website that "[c]urrently, . . . there are no national regulations or restrictions related to postmortem sperm retrieval . . ."³⁶ The reality of this profound statement, while startling, demonstrates a complete lack of uniformity amongst jurisdictions in the United States. With this understanding, it is critical to examine all areas of the law that could impact PSR including federal and state legislation, binding and persuasive case law, and hospital directives.

A. Federal Legislation

The Uniform Anatomical Gift Act (UAGA) is the only federal piece of legislation that courts have used to interpret the legality of postmortem sperm retrieval.³⁷ Congress passed the original iteration of the UAGA in 1968 in the aftermath of the first successful heart transplant in the United

30. *Id.* at 739.

31. *Id.*

32. *Id.* at 742.

33. *Id.*

34. *Id.*

35. See Shefi et al., *supra* note 27.

36. *Postmortem Sperm Retrieval (PMSR)*, WEILL CORNELL MED. UROLOGY, <https://urology.weillcornell.org/Postmortem-Sperm-Retrieval> [https://perma.cc/M2P9-9E35] (last visited Feb. 13, 2023).

37. See Jean Denise Krebs, *Any Man Can Be a Father, But Should a Dead Man Be a Dad: An Approach to the Formal Legalization of Posthumous Sperm Retrieval and Posthumous Reproduction In the United States*, 47 HOFSTRA L. REV. 775, 798–800 (2018) (describing the lack of federal legislation directed towards PSR).

States.³⁸ The legislative history of the UAGA speaks to the law's purpose by indicating that the law was originally promulgated as an attempt to outline the rules and parameters for the donation of organs in the United States.³⁹ These guidelines outline to the states which human materials are capable of being donated and the procedures that should be followed in doing so.⁴⁰ For the UAGA to take effect in any given state, each respective state's legislature must pass a piece of legislation either adopting or modifying the federal UAGA guidelines.⁴¹ At the time of this Article's publication, all states have adopted the most recent version of the UAGA, which expanded on next-of-kin hierarchy and do not resuscitate orders, but provides no clarification or guidance on posthumous reproduction.⁴²

The ability to donate both male and female reproductive entities has never been explicitly determined or defined. For the purposes of this Article's discussion of spermatozoa, the UAGA defines anatomical gifts involving "tissues" in a way that does not explicitly rule spermatozoa out as being eligible for donation.⁴³ This definition was famously realized in *In re Matter of Daniel Thomas Christy* where the Sixth Judicial District Court of Iowa held that "'under the [UAGA], an anatomical gift, including the gift of [spermatozoa], can be made by the donor, or, if the donor did not refuse to make the gift, by the donor's parents following the donor's death.'"⁴⁴ In that case, a man suffered severe brain trauma after a motorcycle accident, and the hospital denied his fiancée's request to preserve his spermatozoa, refusing to do so without a court order.⁴⁵ Oral

38. See Britta Martinez, *Uniform Anatomical Gift Act (1968)*, THE EMBRYO PROJECT ENCYCLOPEDIA (Aug. 5, 2013), <https://embryo.asu.edu/pages/uniform-anatomical-gift-act-1968> [<https://perma.cc/FX9G-RXTD>] (explaining the origins and history of the original iteration of the UAGA).

39. *Id.*

40. *Id.*

41. *Id.*

42. See *Real World Impacts of Our Acts: 50th Anniversary of the Uniform Anatomical Gift Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/aboutulc/spotlightulc#:~:text=The%20Uniform%20Anatomical%20Gift%20Act%20was%20subsequently%20adopted%20by%20all,and%20the%20District%20of%20Columbia> [<https://perma.cc/YG5P-ZFD3>] (last visited Mar. 5, 2023) (highlighting the widespread adoption of the 2006 revised version of the UAGA).

43. See Krebs, *supra* note 37, at 786.

44. See Antony Starza-Allen, *Sperm lawfully obtained from dying man unable to give consent*, PROGRESS EDUC. TR.: BIONEWS (Oct. 1, 2007), https://www.bionews.org.uk/page_90491 [<https://perma.cc/CKT2-5H7H>].

45. See *Judge Rules Fiancee of Dying Man Can Harvest His Sperm*, FOX NEWS (Jan. 13, 2015, 3:47 PM EST), <https://www.foxnews.com/story/judge-rules-fiancee-of-dying-man-can-harvest-his-sperm> [<https://perma.cc/26LS-XGQX>].

arguments in the case brought forth heated debate about the intentions of the UAGA drafters, with advocates for the procedure arguing that Iowa's Sixth Circuit should support an interpretation of the UAGA "that sperm is encompassed within the definition of 'tissue.'"⁴⁶ Iowa judge Martha Beckelman was then tasked with determining whether the version of the UAGA adopted by the state of Iowa would permit such extractions without the explicit consent of the deceased donor.⁴⁷ Judge Beckelman concluded that the "[h]arvesting [of] Mr. Christy's semen with the intention to direct donation to his fiancée was legally permissible under the Iowa act," thus granting the fiancée's request⁴⁸

While the reasoning in *In re Christy* provides some helpful persuasive authority for other jurisdictions to follow, the decision is only binding within the jurisdiction of the Sixth Judicial Circuit of Iowa and provides little help for families across the United States who may be struggling with similar issues as the Christy family. Previous literature suggests there is no other helpful piece of federal legislation to strengthen or corroborate the UAGA, and instead the burden is shifted to each individual state to both: (1) incorporate a version of the UAGA in their respective legislatures; and (2) handle the legality of PSR.

B. State Legislation

The reality in the United States is one of legislative silence. To date, no state has ever passed a law that explicitly addresses the legality of PSR or the consent standard that should apply to its use. Previous literature suggests only one such case where a state legislature moved to legislate the donation of spermatozoa within their borders.⁴⁹ In January 1999, New York state senator Roy Goodman introduced a bill in the state legislature forbidding the practice of PSR unless the deceased male had explicitly consented to the procedure in writing.⁵⁰ According to the legislative history of the 1999 New York legislative session, the bill died in committee and currently serves as the only example of a state legislature speaking on the issue of PSR.⁵¹ Absent both federal and state directives, the burden has shifted to medical associations and hospital boards to

46. See Krebs, *supra* note 37, at 786.

47. See *id.*

48. *Id.* (alterations in original).

49. See Carson Strong et al., *Ethics of Postmortem Sperm Retrieval: Ethics of Sperm Retrieval After Death or Persistent Vegetative State*, 15 J. HUM. REPROD. 739 (2000).

50. *Id.* at 742.

51. *Id.*

provide clarity for both American citizens and medical professionals who are unsure of the requirements and regulations surrounding the procedure.

C. Hospital Directives

In many instances, hospitals have no policies for spermatozoa donation listed at all. In one review published in the 2013 American Journal of Fertility and Sterility, biomedical ethicists contacted over 40 hospitals about their policies and guidelines related to PSR.⁵² Only six produced complete records, and over 60% of respondents reported they had no policy in place or were unaware PSR even existed.⁵³ While the study extrapolated from a seemingly small sample size of only 40 hospitals, it still speaks volumes to the lack of preparedness hospitals have when a deceased individual's loved ones request this procedure. In an attempt to alleviate some concern, market leader medical institutions within the United States have developed two sets of national guidelines that some hospitals have adopted when confronted with a PSR request.⁵⁴ It is essential to explore both of these guidelines in turn, as these are oftentimes the only oversight or guidelines for medical professionals in the vast majority of jurisdictions in the United States.

1. The Stanford Protocols

Often considered the stricter approach of the two aforementioned guiding directives, the Stanford Protocols consider six factors when determining a PSR issue, including: "(1) standards of evidence; (2) terms of eligibility; (3) sperm designation; (4) restrictions on use in

52. See Jenny Morber, *Widows and parents want to preserve dead men's sperm—but what are the rights of the deceased?*, QUARTZ (May 8, 2016), <https://qz.com/678484/widows-and-parents-want-to-preserve-dead-mens-sperm-but-what-are-the-rights-of-the-deceased/> [https://perma.cc/M4FB-JXAP].

53. *Id.*

54. See Jon B. Evans, *Post-mortem Semen Retrieval: A Normative Prescription for Legislation in the United States*, 1 CONCORDIA L. REV. 133, 133 (2016); see also *Postmortem Sperm Retrieval (PMSR)*, *supra* note 36 (showcasing a website maintained by Cornell listing their guidelines and standards for evaluating PSR); see also *Sperm Extraction for Azoospermia*, STANFORD MED. HEALTH CARE, <https://stanfordhealthcare.org/medical-conditions/mens-health/azoospermia/treatments/sperm-extraction.html> [https://perma.cc/Q4FR-8GUY] (last visited Feb. 13, 2023) (showcasing a website maintained by Stanford listing their guidelines and protocols for evaluating PSR).

reproduction; (5) logistics; and (6) contraindications.”⁵⁵ These guidelines emphasize limitations rather than liberal usage and impose several requirements surrounding both donor consent and the subsequent spermatozoa storage.⁵⁶ Under the Stanford Protocols, those requesting the procedure must present a notarized written directive that authorizes the retrieval of spermatozoa and a clear designation of who will receive the spermatozoa after the retrieval.⁵⁷ In addition, this written directive must be made by the donor before the time of his death.⁵⁸ The specified recipient must also assume all financial and logistical responsibility for the transfer and storage of the retrieved male substance by signing a consent and liability form with the hospital, indicating the recipient will be responsible for all fees associated with preservation.⁵⁹

2. *The Cornell Guidelines*

Conversely, the Cornell Guidelines take an alternative family-centered approach and are often referred to in the medical community as the more liberal standards.⁶⁰ In developing their guidelines, Cornell researchers focused on four key components: (1) resource availability; (2) medical contraindications; (3) issues of consent; and (4) waiting periods that limit the ability of the recipient to use the spermatozoa.⁶¹ In direct contrast with the Stanford Protocols, hospitals that adhere to the Cornell Guidelines do not require the explicit prior consent of the deceased donor. Rather, the standards are much more permissive, as hospitals do not require a specific next-of-kin to be named at the time of death. Instead, hospitals leave the next-of-kin standard open to interpretation, which is then typically embodied by surviving family members.⁶² The sole tenant of the Cornell Guidelines that may appear stricter than the Stanford Protocols is the recommendation requiring hospitals to advise patients to adhere to a one-year waiting period for bereavement and recipient evaluation before the reproductive material can be used.⁶³ On balance

55. See Evans, *supra* note 54, at 145; see also Sarah M. Bahm et al., *A Content Analysis of Posthumous Sperm Procurement Protocols with Considerations for Developing an Institutional Policy*, 100 J. FERTILITY & STERILITY 839, 839 (2013).

56. See *Sperm Extraction for Azoospermia*, *supra* note 54.

57. See Evans, *supra* note 54, at 145.

58. *Id.*

59. *Id.*

60. See *Postmortem Sperm Retrieval (PMSR)*, *supra* note 36.

61. See Evans, *supra* note 54, at 146–47.

62. *Id.* at 147.

63. See *Postmortem Sperm Retrieval (PMSR)*, *supra* note 36.

though, this is simply a recommendation, and recipients of the spermatozoa are free to make their own autonomous decision about the storage and use of their loved one's reproductive materials.

3. *Varying Outcomes*

The potential for a drastic difference in outcomes is apparent, as the type of directive a hospital follows could directly impact the ability of a deceased individual's loved one to have their PSR request approved. For example, if a grieving spouse requested the procedure from a hospital following the Stanford Protocols, they would likely be turned away if they did not have a written directive such as a will explicitly authorizing the PSR procedure. However, this same scenario would be permissible under the Cornell Guidelines regardless if there was an explicit authorization of extraction. This inconsistency highlights the desperate need for clarity in a system that currently breeds confusion. Since time is of the essence with these procedures, patients must be informed about the type of protocol that hospitals nearby offer before the possibility of sperm extraction disappears permanently.

Thus, in evaluating the historical background, medical mechanics, and current legal framework relating to this procedure, it is now imperative to analyze some of the issues and growing debate in society today so as to offer a more comprehensive and compelling solution to improve current policy in the United States.

III. ISSUES IN THE STATUS QUO

While the deceased individual's premortem consent remains the core issue at the crux of the debate between advocates and detractors of PSR, issues related to cost, morality, and hospital liability are worth exploring, as these issues present barriers to both families requesting the procedure and the medical professionals providing it.

A. *Issues with Consent*

The debate between advocates and detractors of PSR remains ever constant. The arguments surrounding a deceased individual's premortem consent typically revolve around whether the deceased had to provide express consent for their spermatozoa to be harvested before their death.⁶⁴ Currently, the Stanford Protocols and Cornell Guidelines are the only

64. See, e.g., Simana, *supra* note 11, at 329 (describing the present debate surrounding the consent standard required for PSR).

guiding directives for this issue, and even advocates for PSR are torn between which standard to follow.⁶⁵ When determining the level of consent required to fulfill a request for PSR, courts and hospitals have weighed several factors, including: (1) whether consent must be explicit or verbal; (2) whether a surviving loved one can provide consent; and (3) what the threshold of the evidentiary standard for consent is.⁶⁶ Since federal and state courts and legislatures in the United States have been silent on the issue, it is essential to turn to the medical community to find persuasive arguments on both sides of the issue.

Advocates for policies requiring prior written consent by the donor fall in line with the Stanford Protocols, and many argue that failing to do so robs the donor of the opportunity to be “the conclusive author” of one of the most significant chapters of their life.⁶⁷ These advocates put forth some “slippery-slope” arguments, indicating that presumed consent is a dangerous notion for the medical community to embrace and would likely be considered unacceptable as a matter of policy given the nature of spermatozoa as a reproductive entity.⁶⁸ On balance though, this argument fails to consider the reality that many instances of PSR occur after a sudden accident or unforeseen death and can often occur without the deceased having the opportunity to provide their written consent in the form of a note or living will.

Conversely, experts in the medical community advocate for policies that would likely fall under the umbrella of the Cornell Guidelines by reasoning that the surviving partner’s wishes are, in effect, the only condition that needs to be considered for there to be a legitimate moral case for these procedures.⁶⁹ These experts argue that when explicit consent is impossible to obtain, a presumed consent standard should be used solely for the spouse or partner of the recently deceased.⁷⁰ They approach the idea of consent through a lens of morality by arguing that a deceased male

65. *Id.*

66. *See* Evans, *supra* note 54, at 139; *see also* Starza-Allen, *supra* note 44.

67. *See* Anne Reichman Schiff, *Posthumous conception and the need for consent: We should require prior consent to safeguard the interests of the deceased*, 170 *MED. J. AUSTL.* 53, 54 (1999); *see also* Krebs, *supra* note 37, at 775.

68. *See, e.g.*, Frederick Kroon, *Presuming Consent in the Ethics of Posthumous Sperm Procurement and Conception*, 1 *REPROD. BIOMED. & SOC’Y ONLINE* 123 (2016).

69. *See* Kelton Tremellen & Julian Savulescu, *A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception*, 1 *REPROD. BIOMED. & SOC’Y ONLINE* 6, 6–13 (2016).

70. *See id.*

has a moral obligation to his widow to provide a “continuation of his ‘bloodline.’”⁷¹ While this argument may appear patriarchal to some, some experts suggest that the reasoning behind this moral obligation is tied to the covenant of marriage and further that the same standard of presumed consent should not be applied liberally to any surviving family member or friend.⁷²

In sum, the issue of consent requires legislative clarity to avoid a broken application of any consent standard or requirement. In the current iteration of the status quo, no policy, recommendation, or directive stops a grieving loved one from requesting that the deceased be transported to a hospital that will permit the procedure under a lower consent standard, such as the Cornell Guidelines described above. The literature suggests that there exists a necessity for clarity in this area.⁷³ The forthcoming solution will attempt to find a commonsense approach to the issue by finding a middle ground between written prior consent and presumptive consent.

B. Issues with Cost

As discussed in Part I, there are a wide variety of retrieval techniques wildly ranging in cost and effectiveness.⁷⁴ The most common forms of PSR procedures include MIESA, testicular sperm aspiration, conventional open biopsy, and percutaneous epididymal sperm aspiration, all of which require different institutional medical devices and costs for materials.⁷⁵ According to members of the industry who facilitate the procedure, the average cost for a postmortem removal is close to \$3,000,⁷⁶ with additional cryogenic storage costs ranging from \$100 to \$500 a year.⁷⁷ These costs vary drastically depending on the availability of storage space, length of

71. *Id.* at 6.

72. *Id.* at 9–11.

73. *See* discussion *supra* Part I.

74. *Id.*

75. *See* Andrew R. Zinkel et al., *Postmortem Sperm Retrieval in the Emergency Department: A Case Report and Review of Available Guidelines*, 3 CLINICAL PRAC. CASES EMERGENCY MED. 405, 405–08 (2019).

76. *See* James, *supra* note 1.

77. *See* Amin Sedaghat Herati, *Sperm Banking*, JOHN HOPKINS MED., <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/sperm-banking#:~:text=How%20much%20does%20it%20cost,physician%20to%20understand%20the%20costs> [https://perma.cc/GD6Z-Y24Q] (last visited Apr. 2, 2023).

storage, and the geographical location of the individual who wishes to store the spermatozoa.

Without the help of an inheritance, health savings account, or above-average income, these costs arguably act as a gatekeeping device to low-income and no-income Americans who may still wish to have this procedure conducted. Thus, this realization prompts the quintessential question behind virtually all policy recommendations: who should cover the costs? Historically, insurance companies do not typically cover the costs of elective fertility treatments for the living, such as embryo preservation, as those procedures are often deemed elective and non-essential.⁷⁸ In fact, as of August 2020, only 19 states have mandated any type of fertility insurance coverage at all, with only 10 states possessing any fertility preservation laws on the books.⁷⁹ It is perhaps possible for grieving family members in these states to request that the deceased's insurance company perform PSR as an act of fertility preservation. However, for most Americans, the likelihood of success for this request is not high.

A critical question remains for states that maintain fertility preservation requirements for insurance companies. Is an individual still covered by their health insurance policy after the point of their death? Of course, this is a moot question if the procedure occurs when a dying male is on a life support mechanism of some form and still exhibiting brain functions. However, scenarios involving freak accidents, military deaths, and other extreme occurrences pose a different set of problems, as the patient may have already died before the procedure can be performed.

Other postmortem services such as autopsies and external examinations are neither covered under Medicaid, Medicare, nor the vast majority of other insurance plans and yet post almost identical costs to PSR, totaling around \$3,000 for these postmortem services.⁸⁰ In addition, the use of coroners and funeral homes are virtually never covered by public or private health care plans, leaving the burden of costs solely on

78. See Michelle Andrews, *Cancer Treatment Can Make People Infertile, But Insurance Companies Aren't Always Willing to Help*, VICE (Oct. 12, 2018, 4:04 PM), <https://www.vice.com/en/article/8xjb7p/does-insurance-cover-fertility-treatments-for-people-with-cancer> [<https://perma.cc/5VAL-3EQB>].

79. *Infertility Coverage by State*, RESOLVE: THE NAT'L INFERTILITY ASS'N, <https://resolve.org/what-are-my-options/insurance-coverage/infertility-coverage-state/> [<https://perma.cc/LQZ6-6U35>] (last visited Feb. 13, 2023).

80. See generally *Post Mortem: Autopsy 101*, PBS (Feb. 1, 2011), <https://www.pbs.org/wgbh/pages/frontline/post-mortem/things-to-know/autopsy-101.html> [<https://perma.cc/YK5N-6HLR>] (describing the costs of an autopsy procedure in the United States).

the estate of the deceased or loved ones.⁸¹ Thus, with public and private insurance failing to cover other types of postmortem costs, it is difficult to raise the argument that they should provide this benefit under the deceased's health plan, as there are no other precedents in the marketplace for them to do so.

Alternatively, advocates for insurance coverage would likely argue that the PSR procedure should fall under the umbrella of fertility preservation as described above. To be sure, it is difficult to believe that this argument would spark the drastic change in the insurance space that would warrant a coverage option for families, thus pointing to the probable outcome of PSR remaining an out-of-pocket expense for families of the deceased.

C. Issues with Morality and Religious Ethics

Scholars argue that the populace's religious beliefs are a critical piece of the conversation when evaluating the legality of PSR, as these populations make up the electorate of the representatives that will ultimately make the legislative determination regarding PSR.⁸² Studies suggest that religious beliefs hold a significant impact on voting behavior amongst legislators, making the topic of religious morality and ethics critical to discuss.⁸³ Exploring some of the largest organized religions in the United States composing of Evangelical Christianity, Roman Catholicism, Mormonism, and Islam are critical for discussion, as they have the greatest potential for impacting the implementation of the forthcoming policy recommendation.⁸⁴

First, studies on PSR directed towards Evangelical Christians found that highly religious respondents were substantially less likely to base their

81. *See id.*

82. *See* Eric W. Dolan, *Study finds religious beliefs have an enduring influence on senators' legislative behavior*, PSYPOST (Sept. 26, 2018), <https://www.psypost.org/2018/09/study-finds-religious-beliefs-have-an-enduring-influence-on-senators-legislative-behavior-52222> [<https://perma.cc/4BXN-CV7X>]; *see also* Martha B. Alexander, *The Influence of Religious Beliefs on State Legislators' Voting Behavior* (Oct. 2019) (Ph.D. dissertation, Northeastern University) (ProQuest).

83. *Id.*

84. *See Religious Landscape Study*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/> [<https://perma.cc/MKA6-DC3L>] (last visited Feb. 13, 2023) (denoting the largest populations of religious believers in the United States).

decision to oppose PSR on grounds of ethics or morality.⁸⁵ Looking beyond the results of these studies, the norms and conventions of the church may paint a clearer picture of whether the procedure will be considered acceptable to the greater protestant community. Evangelicals battle conflicting concepts regarding PSR: (1) the biblical commandment to procreate; and (2) the idea that sexual reproduction only occurs within the confines of a biblical view of marriage.⁸⁶ While there is little to no literature surrounding the concept of PSR in the context of a Christian community, it is logical to assume this procedure would be considered acceptable as a practice between a wife and her late husband for the purpose of biblical procreation.

Second, groups such as Roman Catholics follow a much narrower set of guidelines, especially after the announcement by Pope Pius XII in 1956 that any and all artificial or unnatural human reproduction was banned for members of the Catholic Church, including the usage of condoms, virtually all contraceptives, and in-vitro fertilization.⁸⁷ There are no official or specific indications of the legality of PSR within the Catholic diocese, thus leaving many Catholics in difficult positions attempting to reconcile their desire to procreate like their Evangelical siblings in Christ, with the command of a past Pope indicating that any separation between sexual intercourse and reproduction is immoral.⁸⁸

Third, the Church of Latter-Day Saints finds itself at a crossroads of moral dilemmas. According to their website, the official Mormon Church policy discourages the artificial insemination of single women,⁸⁹ which is, of course, the only way to utilize sperm conducted in a postmortem procedure. However, advocates within the Mormon community argue that, according to the teaching of the Church, a woman is only allowed one husband in her lifetime and that having children is necessary for her entry to the highest degree of heaven, thus making PSR a necessity if a husband

85. See Jason D. Hans & Ilya Okhotnikov, *Attitudes Toward Posthumous Reproduction Among Christians* (Nov. 2015) (NCFR Conference Paper) (Research Gate).

86. See *1 Corinthians* 7:2, 7:8–9 (showcasing biblical scripture explicitly stating sexual relations are confined to heterosexual marriage).

87. See Frances R. Batzer et al., *Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement*, 79 J. FERTILITY & STERILITY 1263, 1263–69 (2003).

88. *Id.*

89. See *An ethical Mormon life*, BBC (Oct. 8, 2009), https://www.bbc.co.uk/religion/religions/mormon/socialvalues/ethics_1.shtml [<https://perma.cc/724M-3XEF>].

dies unexpectedly.⁹⁰ This juxtaposition makes for an interesting discussion, as federal lawmakers in “LDS voting bloc”⁹¹ states could see further support for taking legislative action in order to comply with the churches reproductive requirements.

Fourth and finally, scholars suggest that those of the Islamic faith are similar to Evangelical Christians in that their religious teachings reinforce the importance of family formation and procreation.⁹² In fact, within the teachings of Islam there exists a religious duty to seek infertility treatment if a couple cannot procreate naturally.⁹³ However, this religious requirement is only applicable to a living and breathing married couple as teachings indicate that “[i]f a marriage has come to an end through divorce or death of a husband, artificial reproduction cannot be performed on the woman even with sperm cells from her former husband.”⁹⁴ Other scholars further this argument by stating “[t]he strict view is that marriage ends at death, and procuring pregnancy in an unmarried woman is forbidden by religious laws.”⁹⁵ This position is quite similar to the Roman Catholic position described above⁹⁶ and could pose challenges to wide-spread PSR implementation, as these religious communities comprise more than 21% of the U.S. population.⁹⁷

After reviewing four of some of the most prevalent religions in the United States, a few core themes emerge. Members of these religious communities value a sense of marriage and sexual fidelity, but many also believe that this marriage ends at death. Several of the religions described even go as far as to articulate that any intervention in natural reproduction is inherently immoral and could pose religious penalties for those who

90. See *Posthumous Sperm Retrieval*, IMPACT ETHICS (Oct. 22, 2018), <https://impactethics.ca/2018/10/22/posthumous-sperm-retrieval/> [<https://perma.cc/4PU2-MEKL>].

91. See generally Alex Thompson & Laura Barron-Lopez, *Mormons rejected Trump as blasphemous. Now he likely can't win without them.*, POLITICO (Sept. 13, 2020, 12:14 PM EDT), <https://www.politico.com/news/2020/09/13/trump-biden-mormons-church-412234> [<https://perma.cc/QPQ4-LKYE>] (describing political persuasion power of LDS voting blocs in Arizona, Nevada, and Utah).

92. See Batzer et al., *supra* note 87, at 1268.

93. See also Fatima A. Husain, *Reproductive issues from the Islamic perspective*, 2 J. HUM. FERTILITY 124, 124–28 (2000).

94. J.G. Schenker, *Women's Reproductive Health: Monotheistic Religious Perspectives*, 70 INT'L J. GYNECOLOGY & OBSTETRICS 77, 77–86 (2000); see Husain, *supra* note 93, at 124–28.

95. See Batzer et al., *supra* note 87, at 1268; see also Husain, *supra* note 93, at 124–28.

96. See discussion *infra* Part III.C.

97. See *Religious Landscape Study*, *supra* note 84.

seek to disobey the religion's teachings. While the purpose of this Article is not to explore the tenants and frameworks of religion in the United States, it is still important to review how these religious entities view PSR, as members of these religious bodies make up the electorate legislatures across the United States, which in turn create policies that could make PSR a reality for Americans across the country.

D. Issues with Hospital Liability

There is a litany of cases in the United States concerning hospitals refusing to grant a request for PSR. For example, in the aforementioned case *In re Christy*, an Iowa hospital rejected a grieving wife's retrieval request for her deceased husband's sperm, thus prompting litigation.⁹⁸ The same is true for Nikolas Evans mentioned in the introduction of this Article, whose mother was denied the procedure on the grounds that PSR had never been performed at the specific hospital Evans's mother found herself in.⁹⁹ These stories of rejection are not uncommon amongst hospitals who either follow the Stanford Protocols or Cornell Guidelines or simply have no policy at all. This unfortunate reality requires further discussion regarding the liability these hospitals may face if they systematically decline to perform these procedures. While instances of medical malpractice sprouting from surgical errors are plentiful in the United States,¹⁰⁰ there are very few examples of hospitals being truly penalized for failing to comply with a PSR request.¹⁰¹ Thus, the only relevant research this Article can examine are examples of hospitals refusing to comply with medical procedures in general.

Generally speaking, doctors and hospitals are allowed to refuse certain procedures related to fertility on religious grounds, often citing their own religious code of ethics in refusing to perform certain medical procedures such as vasectomies, in-vitro fertilization, or abortion procedures.¹⁰² In

98. See *Judge Rules Fiancee of Dying Man Can Harvest His Sperm*, *supra* note 45.

99. See James, *supra* note 1.

100. See Thomas L. Rodziewicz et al., *Medical Error Reduction and Prevention*, NAT'L LIBR. OF MED. (updated Dec. 4, 2022), <https://www.ncbi.nlm.nih.gov/books/NBK499956/> [<https://perma.cc/325L-T7HL>] (indicating at least four thousand surgical errors occur each year in the United States alone).

101. *Id.*

102. See generally *A Doctor's Refusal to Treat a Patient May Lead to Malpractice Liability*, WAIS VOGELSTEIN FORMAN KOCH & NORMAN, LLC (Feb. 12, 2016), <https://www.malpracticeteam.com/blog/2016/february/a-doctors-refusal-to-treat-a-patient-may-lead-to/> [<https://perma.cc/FSL4-LENJ>]; see also Rikha Sharma Rani, *Worried about abortion laws? Catholic hospital mergers also seen*

most states, the point of liability to constitute a viable case of medical malpractice begins when a medical professional's lack of medical action results in the injury or death of the patient.¹⁰³ In the case of PSR, the patient is already deceased, rendering arguments for the existence of medical malpractice more difficult to raise. This reality requires advocates of PSR to seek different legal remedies against these hospitals and providers who deny the procedure based on religious grounds.

A creative argument PSR advocates could raise to substantiate a case of medical malpractice relies on the Federal Emergency Medical Treatment and Active Labor Act (EMTALA),¹⁰⁴ a 1986 law applying to all hospitals accepting uninsured, Medicare, or Medicaid patients.¹⁰⁵ Subsection (a) of the EMTALA states that when

any individual . . . comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department . . .¹⁰⁶

The statute furthers this argument by stating in § 1395dd(d)(2)(a) that “[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury[.]” thus providing recourse for victims.¹⁰⁷

Families who file lawsuits relying on the EMTALA in connection with overturning denial of their PSR requests climb an uphill battle when proving their claim. According to the statute, plaintiffs must demonstrate that the hospital: (1) did not provide an appropriate medical screening for the potential donor; and (2) that the donor suffered personal harm as a

as threat to women's health care, USA TODAY (Dec. 27, 2019, 12:08 PM ET), <https://www.usatoday.com/story/news/2019/12/27/worried-abortion-laws-more-catholic-hospitals-also-seen-threat/4269242002/> [<https://perma.cc/P53M-B2CA>].

103. See B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPAEDICS RELATED RSCH. 339, 339–47 (2008).

104. See 42 U.S.C. § 1395dd.

105. See *Understanding EMTALA*, AM. COLL. OF EMERGENCY PHYSICIANS, <https://www.acep.org/life-as-a-physician/ethics--legal/emtala/emtala-fact-sheet/> [<https://perma.cc/K62V-6EPL>] (last visited Mar. 7, 2023) (explaining how EMTALA automatically applies to hospitals accepting both Medicare and Medicaid).

106. See 42 U.S.C. § 1395dd(a).

107. See *id.* § 1395dd(d)(2)(a).

result.¹⁰⁸ This concept of personal harm may be difficult for plaintiffs to prove, as the arguments likely to be raised focus on how the harm to the deceased is not purely to their physical person but to their ability to create physical persons. On one hand, these advocates could point to the notion that the denial of future procreation efforts is actual, tangible harm and that by failing to perform the procedure hospitals are denying the patient one of their most basic opportunities: to reproduce. On the other hand, a hospital's argument in response is fairly straightforward. All a hospital must demonstrate is that an appropriate medical screening for the patient was provided using all services routinely found within the emergency room. Unfortunately for potential plaintiffs, the types of tools necessary for spermatozoa extraction are not typically found within an emergency room and are largely classified as highly specialized equipment by the medical community, thus allowing hospitals to fulfill the second element of the EMTALA statute.¹⁰⁹ In regard to a plaintiff's potential argument of personal harm, it is likely that hospitals will argue that the lack of reproductive ability in an indeterminate future is not enough to constitute the real personal harm standard that the EMTALA statute requires.

Thus, plaintiffs are likely left with little to no remedies when hospitals refuse PSR procedures, as hospitals can: (1) qualify for religious exemptions based on the nature of PSR; and (2) likely fulfill all the requirements of the EMTALA. With virtually no liability for hospitals that deny the procedures, families of the recently deceased are left at a crossroads, thus prompting the discussion of serious reforms that could render all of the aforementioned issues moot.

IV. POLICY RECOMMENDATION

When considering a policy recommendation, it is necessary to reconcile all of the above factors including hospital liability, cost, and perhaps most importantly—the issue of prior consent. There exists currently one proposed policy recommendation within the legal community to amend the UAGA to reclassify and redefine spermatozoa as a renewable tissue, thus allowing sperm to be donated.¹¹⁰ However, this plan is limited due to the solution's required mechanics, as each and every state would then have to adopt the revised UAGA, taking a significant

108. *Id.*

109. See Batzer et al., *supra* note 87, at 1264–65 (explaining how MIESA and other forms of PSR require specific tools uncommon in emergency room settings).

110. See Morber, *The Moral Maze of Using a Dead Man's Sperm*, *supra* note 18 (showcasing examples of previous policy recommendations advocating for the amendment of the UAGA to reclassify sperm as a renewable tissue).

period of time with no guarantees for success. Thus, the forthcoming solution will seek to find a middle ground for all aforementioned issues while enabling PSR to be applicable in all hospitals, regardless of whether they follow the Cornell Guidelines or Stanford Protocols.

The policy recommendation is as follows: state governmental agencies should include a section on all application forms for state identification cards that denote the holder of that license designation as to whether they wish to donate their spermatozoa, even after the event of their death. Under the policy recommendation, license holders would have the autonomy to elect whether: (1) their spermatozoa could be extracted posthumously solely for the purpose of being retained by a designated beneficiary; or (2) whether extraction could occur posthumously for purposes of sperm donation. By allowing those who seek state identification to “opt-in” to PSR, states effectively eliminate issues concerning consent by empowering individuals to choose whether they would like their sperm to be preserved after their death at the time of licensure. While the mechanics for the policy recommendation will likely require additional policy experts to assist with implementation, this plan’s purpose is to envision a system where the option to choose PSR would be just as effortless as checking the box to become an organ donor at an individual’s local driving licensure location. The forthcoming Subparts will discuss identified advantages and potential limitations of this policy recommendation if implemented. While the forthcoming list is non-exhaustive, it still serves as an adequate starting point for state and federal legislatures in determining whether this policy would be beneficial in their respective jurisdictions.

A. Advantages

This solution comes with a litany of benefits that include raising awareness about the existence of PSR, prioritizing the explicit consent of the deceased, addressing the growing international sperm shortage, and adding additional procreative liberties for American families. The forthcoming Subpart seeks to analyze each benefit in turn before addressing some potential disadvantages of adopting the policy recommendation.

1. Raising Awareness and Enumerating Additional Procreative Liberties

By allowing registrants to select the option of becoming sperm donors after their death, states will inherently increase the general public’s level

of education concerning PSR. Of course, accompanying the policy recommendation will be an expectation that states educate their populations about the benefits and limitations of postmortem sperm donation similar to the way many states inform their citizens about organ donation at the time of driving licensure.¹¹¹

In addition, by raising awareness, American families are given additional procreation and planning choices. The implementation of the policy recommendation changes everything for the procreative liberty movement by cementing another tool in the toolbox for reproductive rights activists. By increasing education, Americans will now be armed with the information necessary to make their own critical choices well before the deaths of their loved ones and have greater confidence in their newfound anatomical rights.

2. Prioritizing Explicit and Written Consent

If the policy recommendation is implemented, those who elect to become postmortem sperm donors will be able to receive a PSR procedure regardless of which standard the hospital their body arrives at utilizes. This is because the deceased male will have already provided explicit consent by noting their intentions on their driver's license application form. This is beneficial for both the families and the hospitals of the recently deceased, as families will now know for certain the intentions of their loved ones, and hospitals who follow the Stanford Protocols will be able to satisfy the strict consent standards the protocol dictates. By providing their consent far in advance, adult males will effectively avoid many of the issues described in Part III.¹¹²

3. Solving the International Sperm Shortage

Over the last several years, groundbreaking articles indicate one of the United States's most rapidly growing exports to the nation's allies is not goods or materials—but instead sperm.¹¹³ For example, in the United Kingdom, the shortage of native sperm donors has led to over 7,000 sperm samples being imported primarily from the United States each year in

111. See DEP'T OF HEALTH & HUM. SERV. OFF. INSPECTOR GEN., ORGAN DONOR REGISTRIES: A USEFUL, BUT LIMITED, TOOL (Russell W. Hereford et al. eds., Feb. 2002).

112. See discussion *supra* Part III.

113. See Soo Youn, *America's hottest export? Sperm*, THE GUARDIAN (Aug. 15, 2018, 6:00 EDT), <https://www.theguardian.com/science/2018/aug/15/america-hotest-export-sperm-fertility> [<https://perma.cc/4XQX-Q26N>].

order to keep up with the demand from fertility clinics.¹¹⁴ These articles further provide that families seeking a donation face critical issues in the U.K., including wait times that can be over a year and limited sperm sample selections for parents.¹¹⁵ Some British policymakers have advocated for what seemed at the time to be a radical idea: allowing British men to donate their sperm after death through posthumous contributions.¹¹⁶ Perhaps after reviewing the issues presented in this Article, future readers will realize this idea may not be as radical as previously thought.

Another example of the international sperm shortage comes from northern Australia, where sperm clinics report the necessity of importing donations of spermatozoa from the United States due to a shortage of Australian volunteers.¹¹⁷ To put the shortage in perspective, the northern territory of Australia has a population of just over 250,000 people, yet a fertility clinic in the territory only received four Australian native sperm donations over the last three years.¹¹⁸ To account for the deficit, sperm banks in the region relied on donations from anonymous American men that were recruited by the banks in an effort to keep Australian services afloat.¹¹⁹

The United Kingdom and Australia are not the only countries facing this issue, with reports of mass social media campaigns in Canada, Denmark, Finland, and France encouraging male citizens to help contribute their sperm to the crisis. Moving stateside, the United States's closest ally geographically has been experiencing some significant sperm shortages of their own.¹²⁰ Canada has been experiencing a serious shortage of sperm due to legislation passed by the Canadian government in 2004 banning the practice of offering

114. See Ian Sample, *Let men in Britain donate sperm after death, say ethicists*, THE GUARDIAN (Jan. 21, 2020, 1:30 EST), <https://www.theguardian.com/science/2020/jan/21/let-men-in-britain-donate-sperm-after-death-say-ethicists> [<https://perma.cc/59EF-YG6F>].

115. *Id.*

116. *Id.*

117. See Eliza McPhee, *Australia turns to American for sperm donors after massive shortage of Aussie blokes*, DAILY MAIL AUSTRALIA (Feb. 1, 2020, 7:33 PM EST), <https://www.dailymail.co.uk/news/article-7956511/Australia-turns-American-sperm-donors-massive-shortage-Aussie-blokes.html> [<https://perma.cc/6R9T-XRH9>].

118. *See id.*

119. *Id.*

120. See Theresa Boyle & Eric Andrew-Gee, *Sperm donor shortage forces Canadians to look to U.S.*, TORONTO STAR (updated Apr. 15, 2015), https://www.thestar.com/life/health_wellness/2015/04/07/sperm-donor-shortage-forces-canadians-to-look-to-us.html [<https://perma.cc/5NVP-XDSQ>].

financial compensation to sperm donors.¹²¹ In fact, less than ten percent of all sperm donated in Canada is Canadian native, thus forcing Canadian families to turn to American sperm for their fertility needs.¹²²

By allowing American men to make their own choices in electing to become postmortem sperm donors, the United States can increase the production of sperm for both families and the nation's allies who are struggling. The implementation of the policy recommendation could serve as a powerful step towards increasing the United States's status as a world leader by providing one of the most powerful gifts to neighboring countries' citizens: the gift of life.

4. Improving Reproductive Abilities of American Military Personnel

An additional benefit of adopting the policy recommendation is that the policy promotes the likelihood of PSR requests in communities of military personnel in the United States, which has an active-duty population of over one million male service members.¹²³ There are examples of PSR providing comfort to the families of fallen military members around the world, such as in Israel, where reserve soldier Shaked Meiri died during a military exercise when he was only 27 years old.¹²⁴ Mr. Meiri's widowed wife requested a PSR procedure, and Israeli courts granted her request, indicating that the likelihood of death for soldiers granted military families very broad discretion in the use of their loved one's organs and sperm.¹²⁵

Shaked Meiri's story paints a beautiful picture of what could be the reality for the hundreds of American families who lose their loved ones every year to dangerous professions such as firefighting, community policing, and

121. *Id.*

122. See Paul Hsieh, *The Market Solution To The Great Canadian Sperm Crisis*, FORBES (Mar. 31, 2016, 8:05 AM EDT), <https://www.forbes.com/sites/paulhsieh/2016/03/31/canadian-sperm-crisis/?sh=4e1f34bf1c7b> [<https://perma.cc/G9LV-CK3E>].

123. See DEP'T OF DEF., OFF. OF THE DEPUTY ASSISTANT SEC'Y OF DEF. FOR MIL. CMTY. & FAM. POL'Y, PROFILE OF THE MILITARY COMMUNITY 2018 DEMOGRAPHICS 24 (2018), <https://download.militaryonesource.mil/12038/MOS/Reports/2018-demographics-report.pdf> [<https://perma.cc/8FFJ-T852>].

124. See Avishalom Westreich, *The debate over postmortem sperm retrieval of fallen soldiers*, THE JERUSALEM POST (Nov. 22, 2017, 9:45 PM), <https://www.jpost.com/israel-news/the-debate-over-postmortem-sperm-retrieval-of-fallen-soldiers-514994> [<https://perma.cc/5PSL-TXJE>].

125. *Id.*

active-duty military service.¹²⁶ If American men involved in these professions were allowed the opportunity to become elective postmortem sperm donors, they could provide their families with an incredible sense of peace as they engage in what is largely considered some of the most physically dangerous professions in society.

B. Potential Implications

While the advantages of allowing for elective postmortem sperm donation are plentiful, this Article would be critically lacking if it failed to explore some potential implications and disadvantages the policy recommendation may offer. Critics of this plan may point to some potential drawbacks to implementation, such as: (1) the potential for a development of a black market in spermatozoa trading and donation; and (2) the possibility of a difficult implementation process. This Subpart seeks to explore each of these limitations in turn before offering some valuable counterpoints in favor of the policy recommendation.

First, underground economic markets seeking to circumvent regulations surrounding the sale of human organs have existed for centuries, and the black-market sale and distribution of reproductive human properties are of no exception.¹²⁷ Examples in France and China paint a picture of underground and unregulated sperm donation where shortages in sperm bank supplies force recipients to turn to the black market to acquire

126. See CONG. RSCH. SERV., IF10899, TRENDS IN ACTIVE-DUTY MILITARY DEATHS FROM 2006 THROUGH 2021 1 (updated Sept. 9, 2022), <https://fas.org/sgp/crs/natsec/IF10899.pdf> [<https://perma.cc/3QRB-ZXMK>] (detailing the annual number of military deaths); see also Rita F. Fahy & Jay T. Petrillo, *Firefighter fatalities in the United States*, NAT'L FIRE PROT. ASSOC. (Aug. 2022), <https://www.nfpa.org/News-and-Research/Data-research-and-tools/Emergency-Responders/Firefighter-fatalities-in-the-United-States#> [<https://perma.cc/HDN2-9K6M>] (detailing the annual number of firefighter deaths); see also *FBI Releases 2019 Statistics on Law Enforcement Officers Killed in the Line of Duty*, FBI (May 4, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-statistics-on-law-enforcement-officers-killed-in-the-line-of-duty#> [<https://perma.cc/TSR6-XYSR>] (detailing the annual number of police deaths).

127. See J.S. Taylor, *Black markets, transplant kidneys and interpersonal coercion*, 32 J. GLOB. MED. ETHICS, 698, 698–701 (2006) (explaining history of black market existing for human body parts); see also Clare Considine, *The off-white nectar: investigating the status of spunk in 2020*, THE FACE (Feb. 6, 2020), <https://theface.com/life/sperm-bank-donation-uk-ivf-fertility-tech> [<https://perma.cc/6WA4-RAZ3>] (explaining an example of a black market for sperm).

samples.¹²⁸ By having an abundance of sperm in the marketplace, it is difficult to predict what the impact will be on both the United States and the international black market. On one hand, it is logical to reason that a significant increase in sperm donation would drive sperm black markets “out of business,” as the need to pursue sperm outside of the medical community would then be nullified by the abundance of sperm created by the policy recommendation. On the other hand, stipulations, medical regulations, and costs to acquire will still exist for those seeking sperm donations, thus allowing a customer base for the spermatozoa black market to survive. Since the concept of a black market is so secretive, it is difficult to predict what the ultimate outcome would be with the implementation of the policy recommendation, but it is still critical to consider these issues in the greater context of PSR.

Second, some detractors of the policy recommendation may argue that it will be logistically difficult to implement the policy in all 50 U.S. states due to the necessity of legislative approval and the political nature of the legislative process. While this argument has merit, research suggests that this recommendation would be welcomed because there is already a precedent for postmortem donations. For example, in virtually all United States jurisdictions, there is an opportunity to register as an organ donor at each state’s driving licensure office for the purpose of allowing for postmortem donations of body parts such as lifesaving organs, hair and nails, and certain muscle tissues.¹²⁹ However, these elective donations are not enough, as the U.S. Department of Health indicates that the more than 100,000 people awaiting organ donations are losing their lives on the waitlist, and the list continues to grow daily.¹³⁰ In virtually every state, administrative departments regulating motor vehicles attack this issue head-on by informing drivers about the possibility of becoming an organ

128. See Serena Dai, *China’s Black Market for Sperm Is as Creepy as It Sounds*, THE ATL. (Oct. 10, 2012), <https://www.theatlantic.com/international/archive/2012/10/chinas-black-market-sperm-creepy-it-sounds/322674/> [https://perma.cc/V2XC-XSCS]; see also Louise Nordstrom, *Inside France’s black market for sperm*, FR. 24 NEWS (Sept. 2019), <https://webdoc.france24.com/france-black-market-sperm/chapitre1.html> [https://perma.cc/L6TY-WXWE].

129. See *What it means to have “organ donor” on your driver’s license*, GEISINGER (May 26, 2021), <https://www.geisinger.org/health-and-wellness/wellness-articles/2017/03/22/14/48/what-it-means-to-have-organ-donor-on-your-drivers-license> [https://perma.cc/9U2D-A7AH].

130. See *Organ Donation Statistics*, HEALTH RES. & SERV. ADMIN. (Mar. 2022), <https://www.organdonor.gov/statistics-stories/statistics.html> [https://perma.cc/V4LX-5GZ7].

donor and providing that designation in the driving licensure process.¹³¹ Federally funded national campaigns and advocacy groups disseminate marketing strategies to increase organ donation registration in the hopes of closing the widening gap and saving American lives.¹³² Thus, because the precedent of donations after death already exists, state legislatures may remain open to the idea of allowing other body materials such as spermatozoa to be donated after death as well.

In sum, the policy recommendation will not be without critics. However, the benefits of increasing American bodily autonomy, eliminating consent issues with deceased donors, bolstering the export of sperm to American allies, and empowering the families of the nation's service members strengthens the likelihood that this policy recommendation will be implemented. While additional research will be necessary to explore more implications of implementing this policy, this Article serves as an additional piece in the puzzle of clarifying the growing conversation surrounding PSR in the United States.

CONCLUSION

In February 2015, Missy Evans welcomed the birth of her first grandchild, Anita Margaret Evans, a full five years after the death of her late son Nikolas. Anita's birth, along with many others', marks the beginning of a new era in medical technology that comes with its own set of risks and rewards. This Article sought to explore the historical and procedural background, legal framework, and critical issues surrounding PSR before offering a tangible and effective policy recommendation that has the potential to fundamentally change the way the United States views organ donation and reproductive autonomy. In addition, this Article sought above all else to boldly envision a world where every licensed male could have the opportunity to make their own reproductive decisions in their current life and even in the next. Moving forward, it is critical that further literature, research, and policy recommendations be discussed as the conversation around human autonomy develops. After all, who knows? Any American could be in the shoes of the Evans family someday.

131. See Denise-Marie Ordway, *Do frustrating experiences with the Department of Motor Vehicles discourage organ donor registrations?*, THE JOURNALIST'S RES. (Feb. 26, 2016), <https://journalistsresource.org/studies/society/public-health/dmv-experience-organ-donor-registration/> [<https://perma.cc/G544-YEPR>].

132. See *id.*