

NOTE

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

I. INTRODUCTION

“When [posthumous conception] occurs without the [deceased] person’s consent, it deprives an individual of the opportunity to be the conclusive author of a highly significant chapter in his or her life.”

– Anne Reichman Schiff¹

On December 20, 2014, New York City Police Officer Wenjian Liu was murdered while stationed in his patrol car.² On July 25, 2017, he became the father of his first and only child.³ Though Officer Liu was pronounced dead at the hospital on that fateful night, his wife, Pei Xia (“Sanny”) Liu was able to keep one part of him alive.⁴ When doctors asked Sanny if she wanted to have her husband’s sperm retrieved from his corpse and frozen, she said “yes.”⁵ That same night, Sanny had a dream where she “saw an image of Wenjian Liu wearing a white robe and handing her a child, a girl.”⁶ Shortly after his death, she began to

1. 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, 53 (1999).

2. Al Baker & Benjamin Mueller, *Two Officers, Ambushed, Are Killed in Brooklyn*, N.Y. TIMES, Dec. 21, 2014, at A1, <https://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html>.

3. Joseph Goldstein, *Daughter of Slain Police Officer Is Born, Two Years After Her Father’s Death*, N.Y. TIMES, July 27, 2017, at A23, <https://www.nytimes.com/2017/07/26/nyregion/daughter-of-slain-police-officer-is-born-2-years-after-fathers-death.html>.

4. *Id.*

5. Mary Murphy, *A Miracle of Science Brings Smiles to NYPD Grandparents Whose Only Son Was Assassinated*, PIX11 (July 27, 2017), <http://pix11.com/2017/07/27/a-miracle-of-science-brings-smiles-to-nypd-grandparents-whose-only-son-was-assassinated>.

6. *Id.*

“quietly [start] the process of trying to conceive” their child.⁷ Two-and-a-half years later, she gave birth to their first child, a baby girl named Angelina.⁸

Sanny Liu had multiple reasons that influenced her decision to posthumously conceive Angelina.⁹ First, Sanny decided to do this in order to ease the grieving of her late husband’s parents.¹⁰ When Angelina was born, Wenjian’s parents were “very happy”—they “s[aw] their son in the baby” and felt that “the top of [Angelina’s] face look[ed] like [her] father.”¹¹ It was the first time that news reporters had seen Wenjian’s mother smile since the death of her son.¹² Second, Sanny chose to do this in order to carry out the plans that she and Wenjian had made for their life together.¹³ The couple was only married for three months at the time of the murder, and when she made the decision to have her husband’s sperm preserved, she did so with the intent that she “might one day have [his] child.”¹⁴ She was able to actualize their plans of starting a family, and she has “not ruled out the possibility of giving Angelina a little brother or sister in the future.”¹⁵ Third, Sanny made this decision to honor her late husband’s memory.¹⁶ In an interview, she explained that she “want[ed] him to have the child to carry on his legacy . . . [b]ecause [she] love[d] him.”¹⁷

Various motivations for having children are represented through the tale of Angelina Liu’s birth.¹⁸ Whether the decision to bring children into the world is made to instill happiness in grandparents, to create a family of one’s own, or to bestow honor upon someone’s memory, it often begins with the agreement of both parents.¹⁹ The ability to

7. *Id.*

8. *Id.* The baby’s name is derived from the word “angel” because the Liu family believes that Wenjian is now an angel. *Id.*

9. See *infra* notes 10-17 and accompanying text.

10. Murphy, *supra* note 5 (“Sanny quietly started the process of trying to conceive a grandchild for the grieving parents . . .”).

11. Goldstein, *supra* note 3, at A23.

12. Murphy, *supra* note 5.

13. *NYPD Detective Wenjian Liu’s Widow & New Mom: ‘I Will Show My Daughter That Her Father Was A Hero’*, CBS NEW YORK (July 31, 2017), <http://newyork.cbslocal.com/2017/07/31/sanny-liu-interview> (“The couple had always planned to have children, but their plans were cut short when the detective’s life was taken.”).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* Sanny plans to carry on her late husband’s memory by teaching her daughter about him and the “ultimate sacrifice [that he made] to make this world a safer place.” *Id.*

18. See *supra* notes 9-17 and accompanying text.

19. See generally Michael S. Broder, *Resolving the Question of Whether or Not to Have Children*, HUFFINGTON POST (Sept. 24, 2013, 11:39 AM), https://www.huffingtonpost.com/michael-s-broder-phd/resolving-the-question-of_b_3975478.html (discussing considerations

ascertain consent from the father, however, is greatly complicated when he is deceased and has not left a will or an advance directive expressing consent to posthumous fatherhood.²⁰ What should occur when there are conflicting accounts of the deceased's wishes?²¹ How should a request for retrieval be handled if it is made not by the spouse of the decedent but by his partner, parents, or by his surviving children?²² Despite more than three decades²³ of posthumous sperm retrieval ("PSR") and posthumous reproduction ("PHR") occurring in the United States, *there are no state or federal laws in existence that govern either process.*²⁴ Furthermore, both PSR and PHR often occur in the wake of the sudden death of a young man.²⁵ Young people do not typically engage in advanced care planning, and even when they do, their concern is what would be left behind and not what could manifest in the future.²⁶ How can the law raise awareness of PSR and PHR and generate meaningful opportunities for men to explicitly consent to both?²⁷

This Note proposes two legal solutions that allow both PSR and PHR to occur while simultaneously respecting the deceased's ability to be the "conclusive author"²⁸ of the fatherhood chapter of his life.²⁹ Part II of this Note delves into the scientific and legal backgrounds of PSR

couples take into account before deciding to have children together).

20. 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, 191 (2011) ("The ambiguity of unwritten consent poses the biggest problem on the threshold of PMSR—granting the initial request to extract sperm . . .").

21. See *infra* notes 156-61 and accompanying text (discussing the case of *Hall v. Fertility Institute* and the conflicting accounts presented of the decedent's desire to have children posthumously with his girlfriend).

22. See *infra* notes 62-66 and accompanying text; notes 95-106 and accompanying text (discussing both the conflict between the girlfriend and children of William Kane in *Hecht v. Superior Court* and the wish of a mother to obtain son's sperm in the case of Sergeant Keivan Cohen).

23. The first reported successful posthumous retrieval of sperm occurred in 1980. See Cappy Miles Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 J. FERTILITY & STERILITY 512, 512 (1980) (describing the first successful postmortem sperm retrieval procedure).

24. Sarah M. 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, 840 (2013).

25. See *infra* Parts II.B, III.C (discussing cases where young men whose sperm has been posthumously retrieved have died suddenly as a result of motorcycle accidents, bar fights, and other causes in their early twenties and thirties).

26. See Monica Mizzi, *I'm Young and Healthy: Why Do I Need An Advance Health Care Directive?*, HUFFINGTON POST (Apr. 13, 2017, 5:37 AM), https://www.huffingtonpost.com/entry/im-young-and-healthy-why-do-i-need-an-advance-healthcare_us_58ef23cbe4b04cae050dc4ba (highlighting the challenges of influencing young people to engage in advance care planning).

27. See *infra* Part IV.B.

28. Schiff, *supra* note 1, at 53.

29. See *infra* Part IV.

and PHR.³⁰ It discusses the history of both procedures and reviews the legal responses to each in France, England, Israel, and the United States.³¹ Part III of this Note considers the legal and ethical dilemmas that present in cases of PSR and PHR.³² Part IV recommends two distinct legal solutions.³³ The first legal solution endorses four amendments to the Uniform Anatomical Gift Act of 2006 (“UAGA”) that would explicitly address PSR and PHR and advocates for the adoption of each amendment throughout all fifty states.³⁴ The second legal solution is intended to raise awareness of PSR and PHR and to create a pathway for an explicit expression of consent to be given.³⁵ It recommends that state driver’s licenses be modified to include a section for the cardholders to designate their wishes for their gametes and that other forms of identification also be amended to include such a section as well.³⁶ Part V concludes this Note, hoping that the proposed legal solutions are adopted in order to aid the living in carrying out the reproductive wishes of the dead.³⁷

II. SCIENTIFIC AND LEGAL BACKGROUND OF POSTHUMOUS SPERM RETRIEVAL AND POSTHUMOUS REPRODUCTION

In order to fully comprehend the dilemmas that can arise in PSR and PHR, both procedures must be understood from their scientific and legal angles.³⁸ Subpart II.A provides a scientific overview of PSR and PHR.³⁹ Subpart II.A then discusses the inception of each procedure, the divergent categories of PSR, and the unique circumstances that prompt both men and women to choose PSR and PHR.⁴⁰ Subpart II.B illustrates the standards that could be employed by both physicians and judges when contemplating whether or not to grant a request for PSR or PHR.⁴¹ It also provides insight into the forms that United States PSR and PHR legislation could take through a review of prominent judicial cases and legislative responses to PSR and PHR around the world.⁴² Subpart II.B

30. *See infra* Part II.

31. *See infra* Part II.

32. *See infra* Part III.

33. *See infra* Part IV.

34. *See infra* Part IV.A.

35. *See infra* Part IV.B.

36. *See infra* Part IV.B.

37. *See infra* Part IV-V.

38. *See infra* Part II.A, II.B.

39. *See infra* Parts II.A.

40. *See infra* Part II.A.

41. *See infra* Part II.B.

42. *See infra* Part II.B.

next examines the full ban in France, the need for explicit prior consent in England, the implied consent standard in Israel, and the potential implications of the *In re Christy*⁴³ ruling on PSR and PHR in the United States.⁴⁴ The compelling stories of PSR and PHR in Subpart II.B are introduced to demonstrate that circumstances exist where the granting of certain PSR and PHR requests seem to be, intuitively, more permissible than the granting of others.⁴⁵

A. Scientific Background

PSR occurs when sperm is extracted postmortem from a deceased male.⁴⁶ In 1980, Dr. Cappy Rothman reported the first successful PSR procedure.⁴⁷ He was able to retrieve the sperm of thirty-three year old Robin Cranston, who died in an automobile accident.⁴⁸ In order to increase the likelihood that the decedent's sperm will be viable for PHR, the sperm must be retrieved within the first twenty-four to thirty-six hours after death.⁴⁹ Though this method of PSR is the primary focus of this Note, it is also crucial to understand an additional method by which sperm is posthumously retrieved, as it has been at the heart of numerous legal battles.⁵⁰ This second scenario of retrieval occurs when the decedent's sperm is deposited into a sperm bank during his lifetime and another person attempts to gain possession of that sperm after his death.⁵¹

Though many men decide to deposit their sperm to earn supplemental income or assist others in creating a family,⁵² others have made this decision to preserve their own chances of fathering children.⁵³

43. *In re Christy*, Case No. EQV068545 (Johnson Cty. Iowa Sept. 13, 2007).

44. *See infra* Part II.B.

45. *See infra* Part II.B.

46. *See Bahm, Karkazis & Magnus, supra* note 24, at 839.

47. *See Rothman, supra* note 23, at 512. In this paper, Dr. Rothman, a urologist, presents "a method . . . for obtaining sperm for . . . cryopreservation in the immediate postmortem state." *Id.*

48. Melissa Klein & Melkorka Licea, *These Women Chose to Have Children With Their Dead Husbands' Sperm*, N.Y. POST (July 29, 2017), <http://nypost.com/2017/07/29/these-women-chose-to-have-children-with-their-dead-husbands-sperm>; *see also* Justin Pritchard, *Ex-Sen. Alan Cranston Dead at 86*, ABC NEWS (Dec. 31, 2000, 10:30 PM), <http://abcnews.go.com/Politics/story?id=122146>.

49. Bahm, Karkazis & Magnus, *supra* note 24, at 839.

50. *See infra* notes 52-60 and accompanying text.

51. *See infra* notes 61-66 and accompanying text.

52. *See Tamar Lewin, 10 Things to Know About Being a Sperm Donor*, N.Y. TIMES (Nov. 3, 2016), <https://www.nytimes.com/2016/11/08/health/sperm-donor-facts.html> (highlighting that "[d]ozens of sperm banks across the country are recruiting men to help them build up a supply of frozen sperm to meet the growing demand from women looking to start families . . . [and] an active donor who produces specimens twice a week might make \$1,500 a month [from his deposits]").

53. Robert P. S. Jansen, *Sperm and Ova as Property*, 11 J. MED. ETH. 123, 125 (1985).

Some men decide to store their sperm in a bank after being diagnosed with a disease that can compromise their fertility.⁵⁴ One such illness that can cause this is cancer, where the chemotherapy and radiation used to treat it have the potential to leave the afflicted man infertile.⁵⁵ It is often important to these men that they “preserve their genetic potential in the event that they die as a result of their disease,” and the men “take comfort in the fact that [if] they have children, that it is not the end of [their] road genetically.”⁵⁶ In the case of *Woodward v. Commissioner of Social Security*, Warren Woodward made the decision to deposit his sperm into a bank after learning that he had leukemia.⁵⁷ Warren and his wife, Lauren, had only been married for three-and-a-half years when they discovered his illness, and they had no children together at the time.⁵⁸ After realizing that the treatment could render him sterile, the couple made arrangements to have Warren’s sperm banked and preserved for PHR.⁵⁹ Though Warren died nine months after his diagnosis, Lauren gave birth to their twin girls two years later.⁶⁰

In another instance, one man made the decision to deposit his sperm because although he planned to take his own life, he did not want to eliminate his chances of having children with his girlfriend.⁶¹ The case of *Hecht v. Superior Court* centers around the postmortem reproductive desires of William Kane, who committed suicide at the age of forty-eight.⁶² Before he took his life, he made fifteen deposits of his sperm into a bank, and his girlfriend, Deborah Hecht, accompanied him to the bank six of these times.⁶³ His intention for these deposits was for Deborah to be able to have their children after his death.⁶⁴ William made this intention for his sperm abundantly clear: “in his contract with the Cryobank, in his will . . . and in a suicide note to Ms. Hecht . . . [a]nd he reiterated his desire in a final letter to his two grown children.”⁶⁵ Though

54. *Id.*

55. *Id.*

56. *Id.* The Author also notes the “anguish” that young adult men experience when facing an untimely death from an “unfulfilment of their procreative instincts” and hypothesizes that the desire to fulfill these procreative instincts might motivate more young men to designate their sperm for PSR and PHR procedures during their lifetime. *See id.*

57. *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 260 (Mass. 2002).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 276-77 (Cal. Ct. App. 1993).

62. David Margolick, *15 Vials of Sperm: The Unusual Bequest of an Even More Unusual Man*, N.Y. TIMES, Apr. 29, 1994, at B18, <https://www.nytimes.com/1994/04/29/us/15-vials-of-sperm-the-unusual-bequest-of-an-even-more-unusual-man.html>.

63. *Hecht*, 20 Cal. Rptr. 2d at 276; Margolick, *supra* note 62, at B18.

64. Margolick, *supra* note 62, at B18.

65. *Id.* His children, William Everett Kane Jr. and Katherine Kane, are from his previous

Ms. Hecht desperately longed to have Mr. Kane's child, his former wife and children opposed this, and went to court fighting to determine the fate of the vials of sperm.⁶⁶

PHR occurs when a decedent's gametes are used for fertilization through artificial insemination after the decedent has died, and a child is born as a result of this.⁶⁷ Dr. Rothman was able to successfully achieve the first pregnancy of PHR eighteen years after the first successful event of PSR occurred.⁶⁸ Dr. Rothman made the decision to aid a woman, who decided to be inseminated with her husband's sperm fifteen months after his sudden death, in order to give the family "hope and [to help them] feel a little better" in the wake of his passing.⁶⁹ There are multiple reasons that a woman might choose to use PSR and PHR to conceive a child.⁷⁰ She might believe that using the deceased's sperm would bring honor to his memory and that conceiving his child posthumously would aid her grieving.⁷¹ In addition, she might choose to engage in PHR so that her future child would have a genetic connection with his or her biological father, which could enable the child to have "more peace of mind in knowing that he or she was conceived from a loving relationship rather than from an unknown sperm donor."⁷²

marriage to their mother, Sandra Irwin, who served as their lawyer in this case. *Id.* In the letter he wrote to his children, William wrote that he has been "assiduously generating frozen sperm samples" with the hopes that Deborah would decide to have a child by him after his death. *Id.*

66. *Hecht*, 20 Cal. Rptr. 2d at 276.

67. See John A. Robertson, Comment, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1027 (1994). Though the focus of this Note is on the use of sperm in posthumous reproduction, eggs have been retrieved and used in posthumous reproduction as well. See generally Charles P. Kindregan, Jr., *Genetically Related Children: Harvesting of Gametes from Deceased or Incompetent Persons*, 7 J. HEALTH & BIOMED. L. 147, 149-50, 158-59 (2011) (discussing posthumous gamete retrieval and posthumous reproduction in those who are not dead, but are incompetent to consent and/or have experienced brain death). For a more in-depth discussion of the implications of posthumous egg retrieval, see generally Jacqueline Clarke, *Dying to Be Mommy: Using Intentional Parenthood as a Proxy for Consent in Posthumous Egg Retrieval Cases*, 2012 MICH. ST. L. REV. 1331 (2012).

68. Jane E. Allen, *Woman Pregnant by Sperm from Corpse*, AP NEWS (July 16, 1998), <http://www.apnewsarchive.com/1998/Woman-Pregnant-By-Sperm-From-Corpse/id-af6f1754d1ea19d202e17a046220e373>.

69. *Id.* Dr. Rothman also stated that he found performing posthumous sperm retrieval procedures for grieving families "lessened their pain, lessened their grief and gave them something to focus on other than the death of their loved one." *Id.*

70. Williams, *supra* note 20, at 199.

71. *Id.*

72. *Id.* at 199-200.

*B. Legal Background:**International and Local Judicial Opinions and Legislative Responses*

1. France: Full Ban on Posthumous Insemination

When Alain Parpalaix was diagnosed with testicular cancer, he decided to deposit his sperm at the Centre d'Etude et de Conservation du Sperme Humain ("CECOS") in order to preserve its reproductive potential.⁷³ When Alain began to make the deposits, he and his girlfriend, Corinne, were living together.⁷⁴ The couple was officially married on December 23, 1983, but their marriage was short-lived—Alain died two days after the marriage.⁷⁵ After Alain's death, Corinne requested that CECOS release her husband's sperm deposits to her so that she could use them for PHR.⁷⁶ CECOS refused to release the sperm to her, arguing that there was no French law that could compel the release.⁷⁷ Corinne brought her case to the French Ministry of Health, but when the Ministry postponed its ruling on the matter, she and Alain's parents sued in court to gain control over the deposits.⁷⁸

The Tribunal de Grande Instance de Creteil held that "the fact that there was no prior written contract outlining the posthumous use of sperm did not necessarily indicate that Alain never intended for Corinne to use [it]."⁷⁹ Furthermore, the Tribunal determined that Alain's parents were the best people to ascertain the intent of their son, since he and his wife had only been married for two days, and Alain's parents supported the decision to have the sperm given to Corinne.⁸⁰ Thus, without an explicit lack of consent from Alain, the Tribunal was able to order CECOS to turn over Alain's sperm to Corinne.⁸¹ In response to this holding, CECOS adopted a policy that placed a ban on using deposited

73. Parpalaix c. Centre d'Etude et de Conservation du Sperme (CECOS), T.G.I. Créteil, Aug. 1, 1984, *Gaz. Du Pal.* 1984, 2, pan. jurispr., 560.

74. E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 *J.L. & HEALTH* 229, 229-30 (1986).

75. *Id.* at 230.

76. E.J. Dionne, Jr., *A French Widow Sues Over Sperm*, *N.Y. TIMES*, July 2, 1984, at A7, <https://www.nytimes.com/1984/07/02/world/a-french-widow-sues-over-sperm.html>. In court, CECOS' attorneys argued that "its only legal obligation is to return the sperm to the donor." *Id.*

77. *Id.*

78. *Id.*

79. See Gail A. Katz, Note, Parpalaix c. CECOS: *Protecting Intent in Reproductive Technology*, 11 *HARV. J.L. & TECH.* 683, 686 (discussing holding of the Tribunal that a lack of an explicit statement of Alain's intent did not preclude the release of his sperm to Corinne).

80. *Id.* at 687.

81. *Id.* The court also concluded that because Alain had "no way of knowing CECOS' policy with regard to deceased donor sperm, the absence of his written consent is not evidence that he did not consent to a posthumous child." *Id.*

sperm for PHR, and this policy was upheld by the French courts.⁸² Ultimately, France passed a law that banned posthumous insemination throughout the country.⁸³

2. England: Explicit Written Consent

In 1995, Stephen Blood fell into a coma as a result of contracting meningitis and was near death in the intensive care unit of a hospital.⁸⁴ While Stephen was alive, he read a magazine article where a widow expressed her desire to have a child using her deceased husband's frozen sperm.⁸⁵ Though he communicated to his wife, Diane, that if anything similar were to ever happen to him, that he hoped she would consider having his child alone, he never left any written record of his intention.⁸⁶ The lack of a written record did not complicate the retrieval of Stephen's sperm—when Diane requested that her husband's sperm be retrieved, her request was readily granted.⁸⁷ However, the Human Fertilisation and Embryology Authority (“HFEA”) of the United Kingdom denied Ms. Blood the “opportunity to use [her husband's] sperm for fertilization” in posthumous reproduction because he had not left written consent as required by the HFEA.⁸⁸

Diane fought for the right to take her husband's sperm abroad to Belgium, where the law would permit her to use the sperm for PHR.⁸⁹ The HFEA ruled that she could not be inseminated with her husband's sperm in England, nor could she export his sperm to Belgium because by doing so she would be “avoid[ing] the specific requirements of the Fertilization and Embryology Act.”⁹⁰ However, the Court of Appeals found that she “had the right to export her husband's sperm [to Belgium]

82. G. Bahadur, *Opinion: Death and Conception*, 17 HUM. REPROD. 2769, 2771 (2002).

83. *Id.* In 2016, a French tribunal permitted a woman to transport her dead husband's sperm from France to Spain to use in posthumous insemination. See James Brooks, *France Allows Export of Dead Man's Sperm*, BIONEWS (June 13, 2016), http://www.bionews.org.uk/page_658692.asp. This ruling was made despite the existing French ban on the exportation of gametes to other countries for the purpose of posthumous insemination. *Id.*

84. R v. Human Fertilisation & Embryology Auth., *ex parte* Blood (1997), 2 WLR 806, 806 (Eng.).

85. Emma Brockes, *Blood Lines*, GUARDIAN (Oct. 18, 2004), <https://www.theguardian.com/science/2004/oct/18/medicineandhealth.lifeandhealth>.

86. *Id.* Diane states that her reason for requesting the retrieval was to “preserve the possibility of having children. She wanted to keep the option alive so that, some time in the future, when she was in a calmer state of mind, she could make a decision.” *Id.*

87. *See id.* (“The doctors had never heard of such a request. But, knowing of no good reason why not to, they mechanically extracted some of Stephen's sperm and shortly afterwards he died.”).

88. Clarke, *supra* note 67, at 1352.

89. Brockes, *supra* note 85.

90. Kathryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 297-98 (2006).

under the European Community Treaty, which guarantees freedom of movement for goods and medical services among member states.”⁹¹ She left for Belgium fourteen months later and became pregnant with their son, Liam.⁹² After the decision in *ex parte Blood* was rendered,⁹³ the HFEA was amended to extend the written consent requirement to the retrieval of sperm from patients who are comatose, and PSR remains authorized only “with the valid, written consent of the deceased.”⁹⁴

3. Israel: Implied Consent

In 2002, Sergeant Keivan Cohen of the Israeli Defense Force was killed in an attack on the Gaza Strip.⁹⁵ Keivan was only twenty years old at the time of his death and his mother, Rachel, had the idea to preserve her son’s sperm only hours after learning he had been killed.⁹⁶ That same day, she contacted the local army office to request that her son’s sperm be extracted and that request was granted.⁹⁷ One year later, Rachel decided to seek out women who would be interested in serving as a surrogate for her son’s child and placed an advertisement in the local newspaper.⁹⁸ She received multiple responses from women who were willing to serve as the surrogate, but the hospital refused to release the sperm to her because she was Keivan’s mother.⁹⁹

In 2003, the Israel Attorney General published a set of guidelines that permitted requests for retrieval and insemination only to be honored when a partner of the deceased makes the request.¹⁰⁰ The guidelines then recommended that a court determines on a case-by-case basis if the deceased had ever demonstrated an intent to become a parent during his lifetime.¹⁰¹ If this determination was made, the court would hold that

91. *Id.* at 298.

92. *See* Brockes, *supra* note 85.

93. *See* R v. Human Fertilisation & Embryology Auth., *ex parte Blood* (1997), 2 WLR 806, 820-23 (Eng.).

94. *See* Jon B. Evans, Comment, *Post-Mortem Semen Retrieval: A Normative Prescription for Legislation in the United States*, 1 CONCORDIA L. REV. 133, 140 (2016).

95. Joel Greenberg, *In Life a Soldier, in Death a Father?*, CHI. TRIB. (Jan. 29, 2007), http://articles.chicagotribune.com/2007-01-29/news/0701290159_1_insemination-procedure-sperm-israeli-soldier.

96. *Id.*

97. *Id.*

98. *Id.* Ms. Cohen requested that the woman be “willing to be inseminated with her son’s sperm and to ‘take the responsibility of being a mother.’” *Id.*

99. *Id.* Ms. Cohen received 200 responses to her newspaper advertisement, and she then narrowed her choices down to forty candidates. *Id.*

100. Vardit Ravitsky, *Posthumous Reproduction Guidelines in Israel*, 34 HEALTH CTR. REP. 6, 6-7 (2004).

101. *Id.* at 6.

there was a “presumed consent” to PHR.¹⁰² In 2005, an Israeli family rights group filed suit on behalf of the Cohen family, arguing for Rachel’s right to carry out her son’s express “will” to have children.¹⁰³ Keivan’s mother expressed that “[h]e would always talk about how he wanted to get married and have children. . . . He loved children and was especially connected to little ones.”¹⁰⁴ At trial, evidence that Keivan wanted to have children, which consisted of testimony and video footage, was presented to the court.¹⁰⁵ On January 15, 2007, the court ruled in favor of the Cohen family, but noted that the holding only applied to that specific case and that it should not be considered precedential in Israel.¹⁰⁶

4. United States: Sperm as an Anatomical Gift?

On September 9, 2007, Daniel Christy suffered severe brain trauma after a motorcycle accident.¹⁰⁷ His fiancée, Amy Kruse, realized that he would not recover from the brain damage and “began to consider the possibility of having Daniel’s sperm retrieved and saved.”¹⁰⁸ Daniel and Amy had planned to have children together someday, and after Amy discussed the possibility of PHR with Daniel’s parents, a sperm retrieval request was made.¹⁰⁹ Daniel’s physicians consulted with the hospital’s ethics committee, and when the committee could not come to a conclusion, the hospital refused to retrieve Daniel’s sperm absent a court order.¹¹⁰ This prompted his parents to file an emergency order

102. *Id.*

103. Greenberg, *supra* note 95.

104. *Id.*

105. Aron Heller, *Family Gets OK to Use Dead Man’s Sperm*, WASH. POST (Jan. 29, 2007, 6:33 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/29/AR2007012900427.html>. The evidence included a brief that stated Keivan was “afraid of dying [in Gaza] before fathering offspring.” Greenberg, *supra* note 95.

106. Greenberg, *supra* note 95. An Israeli court has also approved the retrieval of a deceased woman’s eggs for use in posthumous reproduction. See Mikaela Conley, *Israeli Court Allows Family to Harvest Dead Daughter’s Eggs*, ABC NEWS (Aug. 11, 2011), <http://abcnews.go.com/Health/israeli-family-permission-freeze-dead-daughters-eggs/story?id=14272156>. The eggs were that of a seventeen-year-old girl who had died in an accident, and the family of the victim planned to donate the eggs to the victim’s aunt, who suffered from infertility. See *Israeli Court Approves Harvesting of Dead Woman’s Eggs*, JEWISH J. (Aug. 8, 2011), http://www.jewishjournal.com/israel/article/israeli_court_approves_harvesting_of_dead_womans_eggs_20110808.

107. Bethany Spielman, *Post Mortem Gamete Retrieval After Christy*, 5 ABA HEALTH ESOURCE 2 (2008), https://www.americanbar.org/newsletter/publications/aba_health_esource_home/Volume5_02_spielman.html (citing *In re Christy*, Case No. EQV068545 (Johnson Cty. Iowa Sept. 13, 2007)).

108. *Id.*

109. *Id.*

110. *Id.*

compelling the procedure to be conducted in the Sixth District Court of Iowa.¹¹¹

Judge Martha Beckelman needed to determine whether or not current Iowa state law would permit the extraction of Christy's sperm without his explicit consent.¹¹² The State of Iowa has adopted the most recent version of the UAGA, the 2006 UAGA, as the law governing anatomical gifts in the state.¹¹³ The 2006 UAGA, unlike previous versions of the UAGA, defines "tissue" in a manner that does not explicitly exclude sperm from the definition.¹¹⁴ Sheldon Kurtz, a law professor from the University of Iowa and a principal drafter of the 2006 UAGA, submitted an affidavit to the court supporting an interpretation that sperm is encompassed within the definition of "tissue."¹¹⁵ Referring to the allowance of PSR, he wrote that it "is my opinion that this is a circumstance that was contemplated by the (law's commissioners) in adopting the new Uniform Anatomical Gift Act" and that the "[h]arvesting [of] Mr. Christy's semen with the intention to direct donation to his fiancée is legally permissible under the Iowa act."¹¹⁶

In consideration of the affidavit, Judge Beckelman ruled in favor of Daniel Christy's parents, stating that "[u]nder the act, an anatomical gift, including the gift of sperm, 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."¹¹⁷ Since Daniel was listed as an organ donor, Judge Beckelman decided that his sperm could be designated as an anatomical gift to Amy Kruse, and as such, his sperm could be retrieved.¹¹⁸ In holding this, she relied on additional statutory provisions within the 2006 UAGA, including UAGA Section 4, UAGA Section 7, and UAGA Section 9.¹¹⁹ After the ruling, Daniel's parents and fiancée signed a consent form, agreeing to only use the sperm for in vitro fertilization and

111. *See id.*

112. Bethany Spielman, *Pushing the Dead Into the Next Reproductive Frontier: Post Mortem Gamete Retrieval Under the Uniform Anatomical Gift Act*, 37 J.L. MED. & ETHICS 331, 332 (2009) (discussing basis for Judge Beckelman's ruling in *In re Christy*).

113. *See id.* at 333.

114. UNIF. ANATOMICAL GIFT ACT § 2(30) (UNIF. LAW COMM'N 2006).

115. *See* Samantha Miller, *Judge: Family May Take Dying Son's Sperm*, DAILY IOWAN, Sept. 14, 2007, at 1A.

116. *See* K. Fiegen, *Judge: Family Can Give Son's Semen to Fiancée*, IOWA CITY PRESS-CITIZEN, Sept. 14, 2007, at 4A.

117. *Id.*

118. Spielman, *supra* note 107.

119. Spielman, *supra* note 112, at 333 ("Her ruling clearly relies on UAGA 2006's § 2(30); § 4; § 7; and § 9, which establish an individual's authority to make a gift; the authority to refuse to make a gift; the authority of others to make a gift when the deceased had not done so before death; and the inclusion of sperm as something that may be donated.")

agreeing to not have the procedure done at the University of Iowa.¹²⁰ The sperm was extracted from Daniel on September 14, 2007, and once the removal was complete, his life support was turned off.¹²¹

Though Judge Beckelman's ruling in *In re Christy* is binding in the Sixth District Court of Iowa, the holding is not binding in other courts across the United States.¹²² Likewise, the rulings of international courts are not precedential in the United States, but merely serve as potential models for PSR and PHR legislation.¹²³ The sole attempt made in the United States to enact legislation pertaining to these procedures was made by New York State Senator Roy Goodman in 1998.¹²⁴ A bill was proposed to amend New York State Public Health Law to ban PSR unless the decedent gave explicit written consent prior to his death and to require that the request only be granted if the spouse or partner of the deceased requested the procedure.¹²⁵ The bill was only introduced to the Senate and Assembly's respective Health Committees and was never submitted to a vote in the legislature.¹²⁶ Thus, the United States remains without concrete legislation regulating either PSR or PHR.¹²⁷

120. Spielman, *supra* note 107.

121. *Id.*

122. *See id.* (noting that though the holding of *In re Christy* is not binding, the holding can have persuasive authority in other courts, as "judicial interpretations of uniform acts are considered persuasive authority in jurisdictions that have adopted the acts").

123. *See Katz, supra* note 90, at 297-311 (discussing the development of various protocols and approaches for posthumous gamete retrieval and posthumous reproduction created throughout the world).

124. Philip Cohen, *Life After Death – New York State Moves To Keep Dead Men's Sperm in the Family*, NEW SCI. (Mar. 21, 1998), <https://www.newscientist.com/article/mg15721263.600-life-after-death--new-york-state-moves-to-keep-dead-mens-sperm-in-the-family>. When Dr. Rothman, the urologist who pioneered both PSR and PHR procedures, was asked about this law, he described it as "cruel and unusual punishment" and argued that if any law were to be created to govern PSR or PHR, it should govern the "use of sperm, [and] not its retrieval." *Id.* Dr. Rothman also believed that Roy Goodman's law "[wasn't] anything to be proud of . . ." *Id.*

125. *See* A.B. 8043, 1999-2000 Reg. Sess. (N.Y. 1999); S.B. 1121, 1999-2000 Reg. Sess. (N.Y. 1999).

126. A.B. 8043, 1999-2000 Reg. Sess. (N.Y. 1999); S.B. 1121, 1999-2000 Reg. Sess. (N.Y. 1999); *see also* Cohen, *supra* note 124 (noting that at the time the bill was introduced to the N.Y. State Senate, Goodman hoped that it would "become law within a year"). Though the Senator had hopes for a start at passing PSR legislation within a short amount of time, twenty years after this effort, there is still no existing legislation pertaining to PSR or PHR. *See Bahm, Karkazis & Magnus, supra* note 24, at 840.

127. Bahm, Karkazis & Magnus, *supra* note 24, at 840.

III. LEGAL AND ETHICAL CONSEQUENCES OF UNREGULATED PSR AND PHR IN THE UNITED STATES

PSR and PHR present many issues that are both legal and ethical at their core.¹²⁸ Part III of this Note examines select issues complicated by the lack of United States PSR and PHR legislation.¹²⁹ Subpart III.A sheds light on constitutional considerations that must be taken into account when creating or restricting opportunities to PSR or PHR.¹³⁰ Subpart III.B discusses the current source of rules for PSR and PHR, which exists almost exclusively within hospital guidelines and protocols.¹³¹ Subpart III.B also describes the Cornell Guidelines and Stanford Protocols to illuminate how these guidelines can differ, and consequently, provide unequal opportunities of access to both procedures.¹³² Subpart III.C discusses in depth the holding in *In re Christy* and examines arguments that the UAGA as currently written cannot serve as a legal basis for allowing implied consent to PSR or PHR procedures.¹³³ Finally, Subpart III.D discusses ethical conundrums that can arise when one engages in PSR and PHR without the explicit consent of the decedent.¹³⁴ It will also analyze laws in the United States that give deference to the wishes of the decedent and argue that the same must be done in the construction of laws pertaining to PSR and PHR.¹³⁵

A. The Right to Procreate and a Right to Posthumous Reproduction in the United States

The full ban on PHR in France is not an isolated one—there are laws that place similar bans on both procedures in Germany, Sweden, and Taiwan.¹³⁶ Prior to enacting restrictive legislation in the United States, it must be considered whether or not PSR and PHR procedures are entitled to constitutional protection.¹³⁷ Though the United States Supreme Court has never specifically held that individuals have a

128. See *infra* Part III.

129. See *infra* Part III.

130. See *infra* Part III.A.

131. See *infra* Part III.B.

132. See *infra* Part III.B.

133. See *infra* Part III.C.

134. See *infra* Part III.D.

135. See *infra* Part III.D.

136. Yael Hashiloni-Dolev & Silke Schicktanz, *A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins-of-Life Perspectives*, 4 REPROD. BIOMEDICAL & SOC'Y. ONLINE 21, 25 (2017). Other nations that are regarded as having restrictive policies include Italy, France, Hungary, Slovenia, Norway, and Malaysia. *Id.*

137. See *infra* notes 138-61 and accompanying text.

fundamental right to PHR, it has rendered decisions in a number of cases that provide support to this inference.¹³⁸

First, the Court has implied the existence of a right to procreate under the Fourteenth Amendment.¹³⁹ The Fourteenth Amendment states that “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”¹⁴⁰ In *Meyer v. Nebraska*, Judge McReynolds discusses what the concept of “liberty” under the Fourteenth Amendment entails.¹⁴¹ The judge states that “[w]ithout doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, to establish a home and bring up children . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.”¹⁴² In *Skinner v. Oklahoma*, the Court invalidated Oklahoma’s Criminal Sterilization Act because it “deprive[d] certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring”—and violated the Equal Protection Clause.¹⁴³ The Supreme Court also determined in *Skinner* that the right to procreate is one that is a “fundamental” right.¹⁴⁴ The Supreme Court has also deliberately expanded reproductive rights throughout the twentieth century to include, among other rights, the rights of married and unmarried persons to use contraceptives and the right of a woman to obtain an abortion.¹⁴⁵

Though the Supreme Court has not specifically ruled on whether or not the use of assistive reproductive technology is constitutionally protected, arguments have been made that the language of *Skinner* is broad enough to extend protection to the use of assistive reproductive technology.¹⁴⁶ Moreover, federal court judges have declared that the

138. See Clarke, *supra* note 67, at 1343 n.69 (arguing that the Supreme Court has recognized a “right to procreate” since 1923).

139. See *id.* at 1343.

140. U.S. CONST. amend. XIV, § 1.

141. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

142. *Id.*

143. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

144. *Id.* at 541. Fundamental rights are those that are “implicit in the concept of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937). Furthermore, fundamental rights can only be infringed upon if a “compelling” governmental interest that is “narrowly tailored” to advance a state’s legislative objectives exists. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

145. See *Roe*, 410 U.S. at 164-67 (holding that a woman has the right to obtain an abortion before the fetus is viable without interference of state interests); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding that a married person’s right to use contraceptives extends to unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (holding that an individual’s right to privacy extends to married couples’ right to use contraceptives). However, abortion rights have also been limited after *Roe*. Cf. *Gonzalez v. Carhart*, 550 U.S. 124, 156 (2007) (upholding the constitutionality of the Partial Birth Abortion Act).

146. See John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure*

fundamental right to procreate does extend to the use of reproductive technology to bring about pregnancy.¹⁴⁷ In *Lifchez v. Hartigan*, Judge Williams declared that “[i]t takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy.”¹⁴⁸ It has further been argued that to not extend this fundamental right to procreate to those who are utilizing non-coital reproductive technologies, and only to those engaging in coital sex, could be in violation of the equal protection guaranteed by the United States Constitution.¹⁴⁹ In *Cameron v. Board of Education*, Judge Spiegel held that “the Supreme Court’s precedent [in regard to privacy rights] is clear. A woman has a constitutional privacy right to control her reproductive functions. Consequently, a woman possesses the right to become pregnant by artificial insemination.”¹⁵⁰

Lower courts throughout the United States have also addressed the question as to whether or not there is a right to PHR.¹⁵¹ The holdings in each of these cases determine that there is a right to use posthumously retrieved sperm for procreation and that there must be sufficient proof that the deceased would have consented to this use of his sperm.¹⁵² In the case of *Hecht v. Superior Court*, the court had to decide if the decedent’s girlfriend, Deborah Hecht, whom the decedent explicitly stated his intention to have children with, or his children, who wanted to destroy their deceased father’s sperm vials, should gain possession over the vials.¹⁵³ The court ultimately ruled to vacate the order seeking the

of the New Reproduction, 59 S. CAL. L. REV. 939, 958-60 (1986) (“If the Supreme Court would recognize a married couple’s right to coital reproduction, it should recognize a couple’s right to reproduce noncoitally as well. The couple’s interest in reproducing is the same, no matter how conception occurs, for the values and interests underlying coital reproduction are equally present.”).

147. See *infra* notes 148-50 and accompanying text.

148. *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990).

149. See Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J. L. MED. 455, 464 n.89 (1999) (“A failure to extend procreative liberties and rights to those employing noncoital reproductive methodologies might be construed as a denial of equal protection under the Constitution.”).

150. *Cameron v. Bd. of Educ.*, 795 F. Supp. 228, 237 (S.D. Ohio 1991).

151. See *infra* notes 152-61 and accompanying text.

152. See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 276 (Cal. Ct. App. 1993) (setting aside a trial court order that Kane’s sperm should be destroyed and not distributed to his girlfriend for use in posthumous reproduction); see also *Hall v. Fertility Inst. of New Orleans*, 647 So. 2d 1348, 1349, 1352 (La. Ct. App. 1994) (holding that it was appropriate for the Court to prevent the release of the sperm to decedent’s girlfriend without first determining his intent for the sperm).

153. *Hecht*, 20 Cal. Rptr. 2d at 276.

destruction of sperm.¹⁵⁴ The court asserted that “assuming that both Hecht and decedent desired to conceive a child using the decedent’s sperm, [his children] fail to establish a state interest sufficient enough to justify interference with that decision.”¹⁵⁵

Similarly, in *Hall v. Fertility Institute*, the Court of Appeal of Louisiana deliberated whether or not the sperm of the decedent, Barry Hall, should be released to his mother, Mary Alice Hall, or to his girlfriend, Christina St. John, in the face of conflicting accounts of Barry’s intent for his sperm.¹⁵⁶ Though St. John argued that Barry’s sperm had been gifted to her for use in posthumous conception, affidavits submitted by Barry’s family members stated their belief that Barry would have only wanted to have children with her while he was alive.¹⁵⁷ The trial court granted a preliminary injunction preventing the release of the sperm from the Fertility Institute in order to conduct a trial to determine Barry’s intent for his sperm.¹⁵⁸ The Court of Appeal affirmed the lower court’s decision, finding that ordering the sperm to be turned over to St. John, without first investigating Barry’s intent for his sperm, could have consequences beyond repair.¹⁵⁹ It opined that the “possible development of human beings is such a serious consequence that the irreparable nature of the risk at issue is clear . . . [and] the emotional damage to the decedent’s mother and Executrix should . . . children [be] sired against the wishes of her dead son is obvious”¹⁶⁰ Thus, without a demonstration of the decedent’s intent, the Court of Appeal held that the sperm should not be transferred to St. John for use in posthumous reproduction.¹⁶¹

*B. Hospital Guidelines and Protocols Lead to
Lack of Uniformity Across the United States*

Hospitals have been forced to develop their own protocols and guidelines for PSR and PHR procedures without any legislative instruction.¹⁶² Though many institutions have created these protocols, many have not yet developed and implemented protocols overseeing

154. *Id.* at 291.

155. *Id.* at 289.

156. *Hall*, 647 So. 2d at 1349.

157. *Id.* at 1350.

158. *Id.* at 1349.

159. *Id.* at 1351.

160. *Id.*

161. *Id.*

162. Evans, *supra* note 94, at 144.

either.¹⁶³ For instance, representatives from Woodhull Medical Center, where Wenjian Liu's sperm was extracted, declined to comment on whether or not Woodhull had a policy governing PSR or PHR requests.¹⁶⁴ The New York Hospital Guidelines for Consideration of Request for Post-Mortem Sperm Retrieval¹⁶⁵ ("Cornell Guidelines" or "Guidelines") and the Stanford Protocols¹⁶⁶ ("Protocol" or "Protocols") are the two most recognized sources of PSR and PHR guidance for hospitals, and both have been adopted by numerous medical institutions across the nation.¹⁶⁷ However, it is clear from an examination of each that there are vast differences between them.¹⁶⁸ This creates a lack of uniformity in procedures that can lead to disparities in access to PSR and PHR.¹⁶⁹

The Cornell Guidelines were developed in 1995 at New York Hospital.¹⁷⁰ A five-person panel of experts created these guidelines based upon four general considerations: "(1) issues of consent (2) medical contraindications (3) resource availability and (4) a one-year specimen waiting period for bereavement and recipient evaluation."¹⁷¹ First, the Guidelines state that "[s]perm retrieval after brain death can be ethical, provided that there is explicit prior or reasonably inferred consent."¹⁷² The Guidelines assert that the decedent's "actions and discussions prior to death with respect to intended pregnancy" should be assessed in order to determine whether or not it could be "reasonably inferred" that he would want to undergo PSR, and only men "undergoing fertility treatment, actively attempting conception, or who had specifically expressed their plans to attempt conception in the immediate future would be suitable candidates for retrieval."¹⁷³

163. See Bahm, Karkazis & Magnus, *supra* note 24, at 840 ("Many institutions do not yet have protocols in place, and those that are in place differ in important ways, including the standard of evidence regarding consent, wait time mandates before the use of the sperm, method of sperm retrieval, and logistics of sperm storage and payment for the procedure.").

164. See Klein & Licea, *supra* note 48.

165. *New York Hospital Guidelines for Consideration of Requests for Post-Mortem Sperm Retrieval*, WEILL CORNELL MED. COLL. JAMES BUCHANAN BRADY FOUND. DEP'T UROLOGY, <https://web.archive.org/web/20070927163735/http://www.cornellurology.com/uro/cornell/guidelines.shtml> (last visited Feb. 3, 2019).

166. See Bahm, Karkazis & Magnus, *supra* note 24, at 839.

167. Evans, *supra* note 94, at 144 ("Two of the best known guidelines are the Stanford Protocols and the New York Hospital Guidelines.").

168. See *infra* notes 170-85 and accompanying text.

169. See Bahm, Karkazis & Magnus, *supra* note 24, at 840.

170. *New York Hospital Guidelines for Consideration of Requests for Post-Mortem Sperm Retrieval*, *supra* note 165.

171. *Id.*

172. *Id.*

173. *Id.*

Second, the Cornell Guidelines recommend that only the decedent's wife should be able to provide consent for the retrieval of sperm and use the sperm in PHR.¹⁷⁴ The Guidelines also recommend that if PSR takes place, the man's death must have been sudden, and the procedure should be conducted within twenty-four hours of the decedent's death.¹⁷⁵ Third, the Guidelines state that there must be local sperm banks that are available to accept, process, and preserve the retrieved specimen.¹⁷⁶ Finally, the wife of the decedent must consent to a waiting period of one year before she can attempt to get pregnant using the retrieved sperm, and she "must [also] undergo medical and psychological consultations with discussion of the procedures necessary to achieve conception, including costs and medical interventions."¹⁷⁷

The Stanford Protocols were developed from an empirical analysis conducted on existing PSR and PHR procedures in place throughout the United States.¹⁷⁸ Bahm, Karkazis, and Magnus described two different approaches that could be adopted when devising standards governing these procedures.¹⁷⁹ The first Protocol mandates that a request for PSR not be granted unless those who request the procedure can prove that the deceased consented to it before his death.¹⁸⁰ In order for this to be proven, the deceased must have issued a notarized written directive that not only indicates the authorization of PSR but also specifically who is permitted to receive the sperm.¹⁸¹ This Protocol also requires that the person receiving the sperm locate a facility willing to store it and pay for its cryopreservation.¹⁸² The second Protocol, to contrast, does not require that the decedent has given explicit written consent.¹⁸³ Instead, his wife or partner is authorized to decide whether or not the sperm should be retrieved from the corpse.¹⁸⁴ Additionally, the second Protocol requires that the sperm is not used for PHR earlier than a year after the date of

174. *Id.*

175. *Id.* In addition, his death could not have been caused by any disease that is known to affect "spermatogenesis or effect transmission of disease." *Id.*

176. *Id.*

177. *Id.*

178. *See generally* Bahm, Karkazis & Magnus, *supra* note 24 (conducting a study amongst medical institutions to evaluate the best policies in developing protocol for posthumous sperm retrieval).

179. *Id.* The two protocols are labeled the "limited role" protocol and the "family centered" protocol. *Id.* at 841.

180. *See id.* at 842 fig.1.

181. *Id.*

182. *Id.* The Protocol states that the requestor can take responsibility for the retrieved sperm by signing a consent form. *Id.*

183. *Id.*

184. *Id.*

retrieval and mandates that the requestor undergoes psychological counseling prior to using the sperm for PHR.¹⁸⁵

*C. Legal Tradition of Respect
for the Wishes of the Incapacitated and the Dead*

In *Arising from the Dead: Challenges of Posthumous Procreation*, Ann Reichman Schiff explains that “in posthumous reproduction the family may have a strong procreative interest which may or may not coincide with the interest of the deceased.”¹⁸⁶ The dilemma that Schiff describes is illustrated in the following narratives.¹⁸⁷ On April 5, 2009, Nikolas Evans died in a fight outside of a bar at the age of twenty-one years old.¹⁸⁸ After Nikolas’s death, his mother, Missy, agreed to have five of his organs donated.¹⁸⁹ In addition to organ donation, she decided that she would have his sperm extracted so that it could be used to conceive a grandchild.¹⁹⁰ When discussing the five anatomical gifts that Missy gave from her son’s body, she described the extraction of her son’s sperm as a gift to herself, stating, “Why can’t I have a gift? Why do I lose everything?”¹⁹¹ She also asserted that her son “would want [her] to do whatever [she] needed to do and [she] wanted something to live on.”¹⁹²

To compare, one wealthy British couple “bypassed British law” and “created a ‘designer grandson’ after harvesting the sperm from their dead son.”¹⁹³ The sperm was retrieved two days after his death and immediately frozen.¹⁹⁴ One year later, the sperm was transported to the United States where Dr. David Smotrich then utilized donor eggs and a surrogate in order to conceive their grandchild.¹⁹⁵ The fertility specialist “understood their son had not given formal consent to the extraction and

185. *Id.*

186. Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 953 (1997).

187. *See infra* notes 188-97 and accompanying text.

188. Susan Donaldson James, *Sperm Retrieval: Mother Creates Life After Death*, ABC NEWS (Feb. 23, 2010), <http://abcnews.go.com/Health/Wellness/mother-murdered-son-hopes-create-grandchild-post-mortem/story?id=9913939>.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Gemma Mullin, ‘Desperate for Heir’: Wealthy Brit Couple Created ‘Designer Grandson’ After Harvesting Sperm from Dead Son Who Was Killed in Motorbike Crash, SUN (Sept. 9, 2018, 5:27 AM), <https://www.thesun.co.uk/news/7212088/british-couple-designer-grandson-sperm-dead-son>.

194. *Id.*

195. *Id.*

use of his sperm in the event of his death.”¹⁹⁶ Despite this lack of formal consent, the couple was desperate to “find someone who would be able to create an heir” for their family and, through gender-selection, create a grandson.¹⁹⁷

It is evident that both sets of parents’ own desires motivated them to preserve their sons’ sperm, and it is plausible that their sole motivation was not to fulfill their sons’ reproductive wishes, but to actualize their own desire to have a grandchild.¹⁹⁸ However, United States legal tradition places value on individual freedom and autonomy, even when the individual can no longer speak for themselves or be aware of the decisions that are made on their behalf.¹⁹⁹ This translates to certain legal rights and protections being afforded to the incapacitated and the deceased through state and federal laws and should translate to laws that value and prioritize the reproductive intentions of the decedent and not the intentions of those who survive him.²⁰⁰

At the federal level, the passage of the Patient Self-Determination Act of 1990 (“PSDA”) demonstrates Congress’s intent to protect the ability to control one’s course of medical treatment.²⁰¹ The PSDA requires that hospitals, nursing homes, home health care agencies, and health maintenance organizations provide patients with information about health care planning, health care decision-making, and advance health care directives (“advance directives”).²⁰² The PSDA mandates that health care providers administer to the patient information about their state’s health care decision-making rights and requires that the health care provider inquire as to whether or not the patient has an

196. *Id.* “Legal experts claim this means the couple may have committed a criminal act and could face prosecution.” *Id.* A former chairman of the British Fertility Society, Professor Allan Pacey, stated that “[i]f the son in this case wasn’t being treated by a clinic, and has not signed the necessary consent forms for the posthumous retrieval, storage and use of his sperm, then a criminal act has probably taken place.” *Id.*

197. *Id.* The couple selected the gender of their grandson to be male, and in the United Kingdom, gender selection is not legal. *Id.*

198. *See supra* notes 188-97 and accompanying text.

199. *See* Edward J. Larson & Thomas A. Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient-Self Determination Act*, 32 WAKE FOREST L. REV. 249, 249 (1997) (“Our legal tradition values individual freedom and autonomy. Over the past generation, this tradition has applied with increasing force in the context of medical care.”).

200. *See generally* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763 (2009) (discussing the different legal rights afforded to decedents in the United States).

201. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 § 4206, § 4751, 104 Stat. 1388, 1388-115-117, 1388-204 (codified at 42 U.S.C. (1990)); *see also* Larson & Eaton, *supra* note 199, at 250 (“Society’s preference for advance directives is reflected in the Patient Self-Determination Act.”).

202. *Health Care Advance Directives: What is the Patient Self-Determination Act?*, AM. BAR ASS’N (Mar. 18, 2013), https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/patient_self_determination_act.html.

existing advance directive.²⁰³ It also prohibits the health care provider from requiring the patient to have or create an advance directive and prevents discrimination against those patients who do not wish to have one.²⁰⁴

The passing of the PSDA was largely stimulated by the ethical dilemmas presented in the Supreme Court decision of *Cruzan v. Director, Missouri Department of Health*.²⁰⁵ In *Cruzan*, Nancy Cruzan fell into a persistent vegetative state (“PVS”) after a severe car accident in 1983.²⁰⁶ Her parents desired to remove the feeding tube that was keeping her alive, but the hospital refused to remove it without a court order.²⁰⁷ The Supreme Court of Missouri held that “because there was no clear and convincing evidence of Nancy’s desire to have life-sustaining treatment withdrawn under such circumstances, her parents lacked authority to effectuate such a request.”²⁰⁸ When the case was appealed to the Supreme Court, the Court had to decide whether or not it was constitutional for the State of Missouri to require “that evidence of an incompetent’s wishes as to withdrawal of treatment be proved by clear and convincing evidence.”²⁰⁹ Ultimately, the Supreme Court determined that the evidentiary standard was constitutional and determined that the Cruzan family was required to present “clear and convincing evidence” that Nancy would want her feeding tube removed in order to discontinue her life support.²¹⁰ Her parents continued to advocate for her wishes to be honored, and the tube eventually was removed, but not until eight years after Nancy initially fell into the PVS.²¹¹

203. *Id.*

204. *Id.*

205. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 *passim* (1990); Larson & Eaton, *supra* note 199, at 255.

206. *See Cruzan*, 497 U.S. at 266 (“Nancy Cruzan lost control of her car as she traveled down Elm Road in Jasper County, Missouri. The vehicle overturned, and Cruzan was discovered lying face down in a ditch without detectable respiratory or cardiac function.”).

207. *Id.* at 267-68.

208. *Id.* at 265.

209. *Id.* at 280.

210. *See id.* at 280-84.

211. Tamar Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. TIMES, Dec. 27, 1990, at A1, <https://www.nytimes.com/1990/12/27/us/nancy-cruzan-dies-outlived-by-a-debate-over-the-right-to-die.html>. In the Missouri court that denied the Cruzans’ request for removal of a feeding tube, it had discounted a claim from Nancy’s former roommate that she would not want to be kept on life support, finding that the statements were “unreliable for the purposes of determining her intent.” *Cruzan*, 497 U.S. at 268. However, when the case was remanded back to the Missouri court, the judge heard new testimony from three more friends of Nancy regarding her wishes, and the judge deemed this to be “clear and convincing evidence.” *Nancy Cruzan’s Accomplishment*, N.Y. TIMES, Dec. 27, 1990, at A18, <https://www.nytimes.com/1990/12/27/opinion/nancy-cruzan-s-accomplishment.html>. On August 17, 1996, thirteen years after Nancy’s accident and six years after the feeding tube was removed, Nancy’s father committed suicide. Marc

Nancy's PVS rendered "[t]he areas of her brain that once thought, felt, and experienced sensations" badly degenerated, and the damage was "irreversible, permanent, progressive and ongoing."²¹² She would never "meaningfully interact with her environment again," and she would remain "oblivious to her surroundings" until her death.²¹³ Yet, the Supreme Court and the State of Missouri prioritized what Nancy would have wanted, even though her deteriorated condition made it impossible for her to ever become aware of the decision made.²¹⁴ In ruling that a state may require "clear and convincing evidence" in order to remove the feeding tube, the Supreme Court upheld the state court's decision that Cruzan's feeding tube could not be removed absent "clear and convincing" evidence of her wishes and enabled a protection of incompetent patient's wishes.²¹⁵ Though a "deceased person is a bright line past being an incompetent patient, it seems states also would be enabled to require such 'a high standard of evidence' before allowing posthumous conception to occur."²¹⁶ Indeed, Schiff evokes the "clear and convincing" evidentiary standard in her arguments against PHR without consent of decedent.²¹⁷ She states that "[i]n light of the potential that exists for a conflict of interests on the part of the family, a "clear and convincing" standard of evidence of the deceased's prior wishes—satisfied either by a written or oral statement—is preferable to a substituted judgment standard."²¹⁸

In addition, states have created legislation intended to honor the medical treatment wishes of deceased and incapacitated persons.²¹⁹ For example, the Family Health Care Decisions Act of New York State ("FHCD") permits relatives and close friends to serve as medical decision-making surrogates for those patients who are incapacitated and unable to make these decisions for themselves.²²⁰ Though the surrogate

Peyser, *A Father's Sorrow*, NEWSWEEK (Sept. 1, 1996, 8:00 PM), <https://www.newsweek.com/fathers-sorrow-177730>. Though right to life protestors contended that his suicide was due to guilt over removing Nancy from life support, the Cruzan family insists that her father never regretted his decision. *Id.*

212. *Cruzan*, 497 U.S. at 301 (Brennan, J., dissenting).

213. *Id.*

214. *See id.* at 280-84 (majority opinion).

215. *See id.* at 284-85.

216. Michele L. Brenwald & Kay Redeker, *A Primer on Posthumous Conception and Related Issues of Assisted Reproduction*, 38 WASHBURN L.J. 599, 611 n.49 (1999).

217. Schiff, *supra* note 186, at 953.

218. *Id.* One state's understanding of its "clear and convincing evidence" standard may be more or less flexible than that of another state. *See, e.g.*, Conservatorship of Wendland, 28 P.3d 151, 157, 175 (Cal. 2001) (holding that the "clear and convincing evidence" standard was not met despite the decedent mentioning to his brother that he would not want to live in a vegetative state).

219. *See infra* notes 220-25 and accompanying text.

220. N.Y. PUB. HEALTH L. § 2994-d (McKinney 2017).

is given the power to make these decisions, their standard of decision-making must be in accordance with what the incapacitated patient would want, and not what the surrogate wants to occur.²²¹ First and foremost, the surrogate “shall make health decisions in accordance with the patient’s wishes, including the patient’s religious and moral beliefs.”²²² If that patient’s wishes are not “reasonably known and cannot with reasonable diligence be ascertained,” the decisions must be made in accordance with the patient’s best interest and the decisions that are rendered must be “consistent with the values of the patient.”²²³ All fifty states and the District of Columbia have enacted laws that address medical decision-making for patients that are incapacitated.²²⁴ Furthermore, each of the state statutes demand that surrogates employ decision-making standards that are in accordance with the interests and values of the incapacitated patient.²²⁵

D. In re Christy and the 2006 Uniform Anatomical Gift Act as Basis for Permitting Implied Consent for PSR and PHR Procedures

The National Conference of Commissioners of Uniform State Laws (“NCCUSL”) creates model legislation that lawmakers can adopt in the crafting of their own legislation.²²⁶ The goal of the UAGA is to promote uniformity amongst the states in regard to laws controlling organ, eye, and tissue donation.²²⁷ Indeed, the UAGA has been successful in its goal of uniformity—by 1971, all fifty states and the District of Columbia had adopted the original UAGA with few modifications, and as of 2012, forty-five states, the District of Columbia, and the U.S. Virgin Islands have adopted the 2006 UAGA.²²⁸ Though a majority all of the states have adopted the 2006 version of the Uniform Anatomical Gift Act, there are three versions of the UAGA that still remain in place in some

221. *Id.* § 2994-d(4).

222. *Id.* § 2994-d(4)(a)(i).

223. *Id.* § 2994-d(4)(a)–(b).

224. *Health Care Decision-Making Authority: What is the Decision-Making Standard?*, AMER. BAR ASS’N (July 2015), https://www.americanbar.org/content/dam/aba/administrative/law_aging/What_is_the_Decision_Making_Standard.authcheckdam.pdf.

225. *See id.* (presenting a chart in which all standards for laws for health care agents and court appointed guardians for each of the fifty states are outlined).

226. *See About the ULC*, UNIF. L. COMMISSION: THE NAT’L CONF. OF COMMISSIONERS ON UNIF. ST. LAWS, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Feb. 3, 2019).

227. *Anatomical Gift Act (2006) Summary*, UNIF. L. COMMISSION: THE NAT’L CONF. OF COMMISSIONERS ON UNIF. ST. LAWS, [http://www.uniformlaws.org/ActSummary.aspx?title=Anatomical%20Gift%20Act%20\(2006\)](http://www.uniformlaws.org/ActSummary.aspx?title=Anatomical%20Gift%20Act%20(2006)) (last visited Feb. 3, 2019).

228. Britta Martinez, *Uniform Anatomical Gift Act (1968)*, THE EMBRYO PROJECT ENCYCLOPEDIA (Aug. 5, 2013), <https://embryo.asu.edu/pages/uniform-anatomical-gift-act-1968>.

states: the 1968 UAGA, the 1987 UAGA, and the 2006 UAGA.²²⁹ Furthermore, legislators can add specific provisions to the Act in accordance with the needs of their state.²³⁰ The NCCUSL recommends that all states adopt the 2006 UAGA for numerous reasons.²³¹ Revisions made to the 2006 UAGA strengthen “first person consent,” which is an individual’s decision to donate their organs, eyes, or tissues after death, and it is more difficult under the 2006 UAGA for others to amend or revoke their anatomical gift.²³² Additionally, gifts that are made through donor registries and through state-issued identification cards are specifically authorized under the Act, and the 2006 UAGA is meant to harmonize with “federal law, current technology and practice, and Advance Medical Directives.”²³³

In her article, “Pushing the Dead Into the Next Reproductive Frontier: Post Mortem Gamete Retrieval Under the Uniform Anatomical Gift Act,” Bethany Spielman scrutinizes the ruling of *In re Christy* and the use of the 2006 Uniform Anatomical Gift Act as a means for permitting PSR and PHR.²³⁴ The rule of Judge Beckelman was unique, according to Spielman, because (1) she interpreted a uniform act, and (2) “[the ruling] did not explicitly attend to the reproductive potential of gametes, either by stating that conception fell under the purposes of UAGA, or by stating that the purposes of UAGA were not of central importance and could be overlooked.”²³⁵ Spielman also indicates that Judge Beckelman was not the first to consider whether or not the UAGA could be construed to permit posthumous gamete retrieval.²³⁶ Schiff found that the 1987 UAGA could not be construed to permit posthumous gamete retrieval because PHR is not a stated purpose of the Act—“the stated purposes for donation and for ‘transplantation, therapy, medical or dental education, research, or advancement of medical or dental research.’”²³⁷ Susan Kerr observed this as well, noting that the UAGA’s

229. *Anatomical Gift Act (2006) Summary*, *supra* note 227.

230. *About the ULC*, *supra* note 226.

231. *Why States Should Adopt UAGA*, UNIF. L. COMMISSION: THE NAT. CONF. OF COMMISSIONERS ON UNIF. ST. LAWS, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UAGA> (last visited Feb. 3, 2019).

232. *Id.*

233. *Id.*

234. See Spielman, *supra* note 112, at 331, 334 (arguing that Judge Beckelman’s ruling in *In re Christy* could have serious implications for posthumous gamete retrieval and posthumous reproduction throughout the United States and that her interpretation of the Uniform Anatomical Gift interpretation is flawed).

235. *Id.* at 333-34.

236. *Id.* at 332.

237. Schiff, *supra* note 186, at 928.

stated purpose does not include conception.²³⁸ Spielman also rehashes criticisms made by Brock and Mastroianni, who acknowledge the possibility that gametes could be “legally distinguishable” from organs due to their life-creating capabilities.²³⁹ Furthermore, Brock and Mastroianni argue that decisions involving the donation of gametes imply the “right to procreate and corresponding right not to procreate [which] are well established as fundamental and personal decisions deserving constitutional protection.”²⁴⁰

Though the UAGA is a model act and not official law, in order for the Act to have its “objective of uniformity,” there must be “consistent judicial interpretation[s]” of it.²⁴¹ Therefore, the NCCUSL includes a “uniformity of interpretation” provision in the UAGA that tasks state judges to interpret the UAGA consistently and requires the rulings of state courts on the UAGA to be treated as persuasive authorities in other state courts.²⁴² Due to this, Spielman anticipates that courts will view the *In re Christy* ruling as persuasive authority when considering cases of PSR and PHR.²⁴³ Spielman also notes that the *In re Christy* case presented the “best-case scenario for when such requests should be granted” since Daniel was listed as an organ donor, his family desired the procedure to take place, and the facility storing Daniel’s sperm was willing to store it.²⁴⁴ It is important for legislators, judges, and medical professionals alike to contemplate Spielman’s critiques of the *In re Christy* decision when determining whether or not the PSR and PHR should be permitted in more ethically challenging cases.²⁴⁵

IV. LEGAL SOLUTIONS: PRIORITIZING THE CONSENT OF THE DECEASED

Anne Reichman Schiff argues that allowing a person to “control the fate of his or her gametes is arguably even more significant than allowing a person to control the fate of his or her cadaveric organs, because procreation is essential to an individual’s identity in a way that organ donation is not.”²⁴⁶ The legal solutions proposed in Part IV of this

238. See Susan Kerr, *Postmortem Sperm Procurement: Is It Legal?*, 3 DEPAUL J. HEALTH CARE L. 39, 64-65 (1999).

239. Lisa V. Brock & Anna C. Mastroianni, *Sperm and Egg Retrieval for Posthumous Reproduction*, in CONTEMPORARY ENDOCRINOLOGY: OFFICE ANDROLOGY 267, 274 (P. E. Patton & D. E. Battaglia eds., 2005).

240. *Id.*

241. Spielman, *supra* note 112, at 334.

242. *Id.*

243. *Id.*

244. *Id.* at 332, 334.

245. See *id.* at 339-40.

246. Schiff, *supra* note 186, at 933-34.

Note are proposed with the goal of enabling the living to control their gametes even after death.²⁴⁷ Subpart IV.A proposes four amendments to the 2006 UAGA that explicitly regulates PSR and PHR.²⁴⁸ The first amendment alters the purpose of the UAGA to include procreation through PHR.²⁴⁹ The second amendment provides a definition for the term “gamete.”²⁵⁰ The third amendment permits PSR without explicit or implied consent from male patients, but mandates that hospitals provide an opportunity for them to opt out of PSR while they are still alive.²⁵¹ The fourth amendment mandates that a hospital ethics committee make a recommendation as to whether or not the sperm should be authorized for use in PHR.²⁵²

Subpart IV.B proposes a legal solution that would raise awareness of PSR and PHR and promote opportunities to consent to PSR and PHR.²⁵³ Inspired by efforts to increase organ donation by the fields of law and technology, this Note proposes a law that would create a section on state driver’s licenses where individuals could indicate consent to their gametes being used in PHR.²⁵⁴ This recommendation is made with the hope that other forms of identification will be altered to include such a section.²⁵⁵ This includes, but is not limited to, military identification cards, police identification cards, and motorcycle licenses.²⁵⁶ These efforts would target populations that are vulnerable to sudden deaths, would provide accessible and simple opportunities to consent, and would expose people to the possibility of PHR and PSR.²⁵⁷

247. See *infra* Part IV.

248. See *infra* Part IV.A.

249. See *infra* Part IV.A.1.

250. See *infra* Part IV.A.2.

251. See *infra* Part IV.A.3. Though it is plausible to retrieve sperm from the corpse of a male from a site other than a hospital, “[t]raditional organ donation requires a person to be in a hospital and on a ventilator when they are pronounced brain dead.” *Donation Process*, CTR. FOR ORGAN RECOVERY & EDU., <https://www.core.org/understanding-donation/donation-process> (last visited Feb. 3, 2019). As such, this proposed amendment for gamete donation is specific to a hospital setting. See *id.* Moreover, if a person has not stored their gametes in a bank, it is most likely that their sperm will be posthumously retrieved after a sudden and tragic death in a hospital. See *supra* Parts II.B, III.C (discussing cases where young men whose sperm has been posthumously retrieved have died suddenly as a result of motorcycle accidents, and bar fights, and other causes in their early twenties and thirties).

252. See *infra* Part IV.A.4.

253. See *infra* Part IV.B.

254. See *infra* Part IV.B.

255. See *infra* Part IV.B.

256. See *infra* Part IV.B.

257. See *infra* Part IV.B.

*A. Amendments to the Uniform Anatomical Gift Act
to Explicitly Permit PSR and PHR*

1. “Posthumous Reproduction” as a Purpose for Making an
Anatomical Gift Prior to Death

According to the UAGA, there are four stated purposes for which a person can make an anatomical gift during their lifetime.²⁵⁸ These four purposes are “transplantation, therapy, research, [and] education.”²⁵⁹ Spielman recommends that the NCCUSL amend the Uniform Anatomical Gift Act to indicate whether or not the Act should be construed as to govern PSR and PHR.²⁶⁰ This Note supports Spielman’s assertion but additionally recommends that the term “posthumous reproduction” be defined within Section 2 of 2006 UAGA.²⁶¹ The comments to Section 4 of the UAGA note that the four stated purposes of an anatomical gift are not defined in the UAGA, but are “defined by their common usage in the communities in which they apply.”²⁶² Using gametes in PHR is uncommon, and as such, the donation’s reproductive purpose should be defined.²⁶³ Thus, Section 4 and Section 2 of the 2006 UAGA should be amended as follows:

SECTION 4. WHO MAY MAKE AN ANATOMICAL GIFT
BEFORE DONOR’S DEATH.

Subject to Section 8, an anatomical gift of a donor’s gamete may be made during the life of the donor for the purpose of posthumous reproduction in the manner provided in Section 5 by:

- (a) donor, if the donor is at least eighteen years of age.²⁶⁴

258. UNIF. ANATOMICAL GIFT ACT § 4 cmt. (UNIF. LAW COMM’N 2006).

259. *Id.*

260. Spielman, *supra* note 112, at 339.

261. *See infra* notes 262-64 and accompanying text.

262. UNIF. ANATOMICAL GIFT ACT § 2.

263. *See* R. D. Orr & M. Siegler, *Is Posthumous Semen Retrieval Ethically Permissible?*, 28 J. MED. ETHICS 299, 299 (2002).

264. *See* UNIF. ANATOMICAL GIFT ACT § 4. This amendment is modeled after the language of Section 4 of the Uniform Anatomical Gift Act which defines when an anatomical gift can be made for the currently stated purposes of the UAGA. *Id.* The age is designated at eighteen years of age because all people aged eighteen and older can register to be an organ, eye, and tissue donor. *See Organ Donation FAQs*, DEP’T MOTOR VEHICLES, <https://www.dmv.org/organ-donation/faqs.php> (last visited Feb. 3, 2019). Though people can become organ donors if they are younger than eighteen, “authorization by a parent or guardian is generally necessary for individuals under [eighteen] who have died to become an actual donor.” *Id.*

SECTION 2. DEFINITIONS.

“Posthumous reproduction” means a procedure which utilizes artificial reproductive technology to use a gamete extracted from a decedent after their death in order to conceive a child.²⁶⁵

2. Including a Definition of “Gametes”
in the Uniform Anatomical Gift Act

The critical difference between the donation of a gamete for posthumous reproduction and the donation of a tissue to a living person is rooted in their core biological functions and capabilities.²⁶⁶ While most cells in the body are somatic cells, gametes are germ cells.²⁶⁷ Somatic cells comprise the non-reproductive cells of the body, including tissue cells, nerve cells, and blood cells of the human body.²⁶⁸ Only germ cells are used in sexual reproduction and undergo meiosis, and the fusion of the sperm and egg germ cells enable the body to create a zygote.²⁶⁹ The zygote then undergoes mitosis in order to produce the somatic cells, which reproduce to create all other parts of the human body.²⁷⁰ The intrinsic difference between gametes and the organs, eyes, tissues, and parts of the human body is that while the latter are *comprised* of cells, a gamete *is* a cell.²⁷¹ Furthermore, while the donation of an organ, eye, or tissue is *life-sustaining*, the donation of a gamete is *life-creating*.²⁷² If PHR is to be permitted under the 2006 UAGA, “gamete” warrants its own distinct definition from “part.”²⁷³ This definition must not only acknowledge the gamete as a cell, but must also encompass the reproductive and life-creating potential of it.²⁷⁴ Thus, Section 2 of the 2006 UAGA should be amended as follows:

SECTION 2. DEFINITIONS:

(11) “Gamete” means a sperm or egg cell which enables human reproduction and the creation of life. The gamete is essential to the

265. This definition was modeled after the definition of posthumous reproduction provided earlier in this Note. See Robertson, *supra* note 67, at 1027.

266. See Lakna Panawala, *Difference Between Somatic Cells and Gametes*, PEDIAA (July 25, 2017), <http://pediaa.com/difference-between-somatic-and-germ-cells>.

267. *See id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *See id.*

272. See Schiff, *supra* note 186, at 932 (“Gamete donation differs from organ donation in that it is life-creating rather than life-sustaining or life-enhancing. As a result, different interests are at stake for the individual, the family and the state, and the legal framework appropriate [for] . . . cadaveric organs is not necessarily transferable to . . . cadaveric gametes.”).

273. *See infra* note 275 and accompanying text.

274. *See infra* note 275 and accompanying text.

creation of all other parts of the human body, including tissues, organs, eyes, and other parts of the body, as defined under the 2006 UAGA.²⁷⁵

3. PSR Requests Should Be Granted Unless Patient Opt's Out of Procedure When Alive

In her article, *Parenthood From the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, Kathryn Katz recommends that, “in order to protect the decedent’s reproductive rights,” a PSR request should not be granted unless there is explicit prior consent from the decedent to do so.²⁷⁶ However, rather than endorsing such a restrictive view of PSR, this Note proposes that the procedure also be granted if it is requested by the spouse, fiancé or fiancée, or partner of the decedent.²⁷⁷ Parents, such as Missy Evans and Rachel Cohen, would not be permitted to make such a request, and would not be permitted to use the posthumously retrieved sperm for PHR in order to conceive a grandchild.²⁷⁸ Though this Note expands on Katz’s

275. See Panawala, *supra* note 266; see also UNIF. ANATOMICAL GIFT ACT § 2 (UNIF. LAW COMM’N 2006).

276. Katz, *supra* note 90, at 316.

277. See *infra* notes 278-85 and accompanying text. Assistive reproductive technologies (“ARTs”)

make[] possible a variety of novel family situations, from donor gametes and surrogacy, to posthumous reproduction and reproduction by single persons and gays. Some persons condemn, and some countries ban all or some of those procedures . . . [However, b]anning those procedures will mean that persons who are otherwise competent and able child-rearers but who due to infertility, widowhood . . . or sexual orientation are not able to reproduce with their own gametes, will not have offspring.

John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 12-13 (2004). As such, this Note acknowledges and embraces the use of ART in order to enable gay couples’ abilities to procreate through PSR and PHR. See *supra* text accompanying notes 246-57.

278. See James, *supra* note 188; see also Greenberg, *supra* note 95. In order for a parent to achieve PHR and create a grandchild, the parent must hire a surrogate. See, e.g., Greenberg, *supra* note 95 (detailing Rachel Cohen’s hiring of a gestational surrogate to be inseminated with Keivan’s sperm and to carry her grandchild). Though there are countries where gestational surrogacy is legal, such as Israel, in the United States, both gestational and traditional surrogacy are not legal in every state. *Surrogacy Laws*, SURROGACY EXPERIENCE, <http://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html> (last visited Feb. 3, 2019). For instance, New York law forbids surrogacy, and those who engage in a surrogacy contract can be fined or be found guilty of a felony. *Id.* As such, the current legal climate only permits certain parents in certain states to engage in PHR to conceive a grandchild. *Id.*; see also *Surrogacy in Israel*, NEW FAMILY, <http://www.newfamily.org.il/en/surrogacy-in-israel> (last visited Feb. 3, 2019). One might argue that if a couple seeks to enforce a surrogacy contract in a state where surrogacy is not legal, the drafters of the contract could use a choice of law clause in order to state shop and utilize the laws of a state where the practice is legal. See Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLIAMETTE L. REV. 459, 486 (2015). However, this action comes with risks, as the state court could deem the clause to be unenforceable and could hold that choosing the law of a different state is against public policy interests. *Id.* Nevertheless, it is possible to proceed in states

recommendation as to who should be able to request the posthumous retrieval of sperm, this Note agrees with Katz's assertion that "[n]o right of parents to control the reproductive decisions of their adult progeny is recognized by the law."²⁷⁹

This Note also endorses an "opt-out" rather than an "opt-in" procedure for two additional reasons.²⁸⁰ First, sperm is only viable for PHR for a limited amount of time after death—it must be retrieved between twenty-four to thirty-six hours after death to be successful in PHR.²⁸¹ If the patient's intent is determined to be that he would want his sperm used in PHR, then that sperm will have been retrieved at the optimal time, increasing the likelihood that PHR attempts will be successful.²⁸² If it is revealed that the deceased would not have wanted his sperm to be used for PHR, the collected sample can simply be destroyed.²⁸³ Second, the granting of PSR can be accomplished through much less intrusive procedures, which do not have the capability of being as "invasive, destructive, and disfiguring" as those involving the harvesting of organs, eyes, and tissues from the body.²⁸⁴ Section 9 of the UAGA should be amended to include:

SECTION 9. WHO MAY MAKE ANATOMICAL GIFT OF DECEDENT'S BODY OR PART.

(1) In the event that the decedent, or a party who is the spouse, fiancé or fiancée, or partner of the decedent makes the request for the posthumous retrieval of sperm, the request will be granted without need for a showing of explicit or implied consent to the procedure.

(2) If, when brought to the hospital, the male patient is incapable of revoking consent to the procedure due to his incapacitation, the absence of his express consent will not prevent his spouse, fiancé or fiancée, or partner from obtaining the sperm.

(3) Hospitals must provide information to all male patients that their sperm could be extracted from their body postmortem and used for PHR if his spouse, fiancé or fiancée, or partner requests the posthumous sperm retrieval procedure. The hospital must then provide the opportunity to opt out of consenting to this procedure.

(4) Before the hospital transfers the posthumously retrieved sperm to the requestor, the ethics committee of the hospital where the procedure

where surrogacy agreements are enforceable. *Id.*

279. Katz, *supra* note 90, at 307.

280. See *infra* notes 281-85 and accompanying text.

281. Bahm, Karkazis & Magnus, *supra* note 24, at 839.

282. See *id.*

283. See *Sperm Storage*, CAMBRIDGE IVF, <http://www.cambridge-ivf.org/patients/andrology-services/sperm-storage> (last visited Feb. 3, 2019).

284. Katz, *supra* note 90, at 306.

has taken place shall make a recommendation as to whether or not the decedent would have intended his sperm to be used for PHR. If the requestor is not satisfied with the decision of the ethics committee, the decision can be appealed in a court of law.

(5) The requestor must take full responsibility for the storing of the sperm.²⁸⁵

4. Determining Whether or Not Posthumously Retrieved Sperm Should Be Used in PHR

In the United States, hospital ethics committees have been established to handle and contemplate medical issues that present both medical and ethical predicaments to their staffs.²⁸⁶ Though these committees were virtually nonexistent throughout the majority of the twentieth century, by the late 1990s, more than ninety percent of hospitals had instituted them.²⁸⁷ The rapid growth of these institutions was heavily influenced by the emergence of specific ethical issues, such as access to dialysis, within hospital systems.²⁸⁸ Now, the Joint Commission on the Accreditation of Healthcare Organizations requires that hospitals have a “mechanism” for handling ethical issues in order for the hospital itself to be an accredited institution.²⁸⁹ This Note recommends that the ethics committee include, like the committee that promulgated the Cornell Guidelines, a psychologist, a legal expert, a reproductive technology expert, an institutional representative, a male infertility expert, and a medical ethicist.²⁹⁰

285. See UNIF. ANATOMICAL GIFT ACT § 4 (UNIF. LAW COMM’N 2006). This amendment is influenced by the Limited-Role and Family-Centered Protocols advanced in the Stanford Protocols. See Bahm, Karkazis & Magnus, *supra* note 24, at 842 fig.1 (proposing both that the wife or partner of the decedent can make the request for the sperm and that the requestor must take responsibility, including financial responsibility, for the storage of the retrieved sperm).

286. See Mark P. Aulio, *Why Did Hospital Ethics Committees Emerge in the US?*, 18 AM. MED. ASS’N J. ETHICS 546, 546 (2016).

287. *Id.*

288. Thaddeus Mason Pope, *Multi-Institutional Healthcare Ethics Committees: The Procedurally Fair Internal Dispute Resolution Mechanism*, 31 CAMPBELL L. REV. 257, 261-65 (2009).

289. See Aulio, *supra* note 286, at 550 (“[I]n 1992, the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) changed its *recommendation* that hospitals have some ‘mechanism’ for dealing with ethical issues in clinical care to a *requirement*.”). The Joint Commission “accredits approximately 4,477 general, pediatric, long term acute, psychiatric, rehabilitation and specialty hospitals.” *Facts About the Hospital Accreditation*, JOINT COMM’N (Sept. 12, 2018), https://www.jointcommission.org/facts_about_hospital_accreditation. “Approximately 77 percent of the nation’s hospitals are currently accredited by The Joint Commission, and approximately 88% percent of hospitals that are accredited in the United States are accredited by The Joint Commission.” *Id.*

290. See *New York Hospital Guidelines for Consideration of Requests for Post-Mortem Sperm Retrieval*, *supra* note 165. This Note acknowledges, however, that there are a variety of

The issues surrounding PSR and PHR are legal, medical, and ethical.²⁹¹ Thus, this Note recommends the 2006 UAGA be amended to require the hospital's ethics committee where the decedent's sperm is retrieved to assess whether or not he would have willed his sperm to be used in PHR and to make a recommendation as to whether or not it should be used in posthumous reproduction.²⁹² A requestor must offer evidence to the ethics committee to show that the deceased would have willed his sperm to be used posthumously.²⁹³ The most compelling offering of proof would be of prior explicit consent, which could manifest in the form of a will, an advance directive, or a contract.²⁹⁴ However, other evidence, such as testimony from the requestor and/or other interested parties, video footage, phone conversations, and text messages could be used to demonstrate proof of intent.²⁹⁵ Furthermore, those who have conflicting accounts of the decedent's intent for his sperm would be permitted to discuss this with the committee before the committee renders its recommendation.²⁹⁶ Once the recommendation of this committee has been rendered, if either party is not satisfied with it, the decision can be appealed in a court of law.²⁹⁷

This Note recommends the hearing of these matters first by an ethics committee for a number of reasons.²⁹⁸ First, an ethics committee could be readily available to the requestor and other interested parties, and this could prevent the requestor from experiencing long courtroom

professionals who can compose a hospital ethics committee.

291. Bahadur, *supra* note 82, at 2775.

292. *See infra* notes 293-96 and accompanying text (discussing features of the mandated ethics committee hearing). This amendment to the 2006 UAGA was included in the suggested revisions to Section 9 in Part IV.A.3 of this Note. *See supra* Part IV.A.3 (“(4) Before the hospital transfers the posthumously retrieved sperm to the requestor, the ethics committee of the hospital where the procedure has taken place shall hold a hearing to determine whether or not the decedent would have intended his sperm to be used for PHR.”).

293. *See infra* notes 294-96 and accompanying text.

294. *See, e.g.,* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 276-77 (Cal. Ct. App. 1993) (disclosing that William Kane expressed his intent in a “Specimen Storage Agreement” and in his will).

295. *See, e.g.,* Heller, *supra* note 105 (discussing that video evidence and testimony were introduced to support the assertion that Keivan would have wanted to have children posthumously).

296. *See, e.g.,* Hall v. Fertility Inst. of New Orleans, 647 So. 2d 1348, 1350 (La. Ct. App. 1994) (highlighting that the decedent's family members were able to submit affidavits at trial that contradicted his girlfriend's account of his wishes for his sperm).

297. *Cf. R. Landau, Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique*, 19 HUM. REPROD. 1952, 1952-54 (2004) (describing the Israel Attorney General's recommendations that though “[p]ermission to use the sperm is to be determined on a case by case basis in a court of law, in keeping with the man's dignity and ‘presumed wishes.’ . . . [The court should] appoint a social worker to provide an objective report assessing the deceased man's wishes”).

298. *See infra* notes 299-302 and accompanying text.

delays and from acquiring an abundance of legal fees while trying to support their case.²⁹⁹ Secondly, the ethics committee, comprised of members of different professions and expertise, could furnish the requestor with more information and perspectives about their choice to proceed with PHR.³⁰⁰ Third, current guidelines for PSR recommend a waiting period before the sperm is used in PHR.³⁰¹ The institution of an ethics committee hearing would generate a waiting period during which a requestor could not only gather evidence to establish the decedent's intent, but also could consider her choice to proceed with PHR.³⁰²

As stated previously, the most compelling evidence in favor of a decedent's intent to use their sperm for PHR would be if the decedent indicated explicit prior consent to the procedure before their death.³⁰³ However, most young people do not engage in advance care planning, and it is unlikely that they would have indicated explicit prior consent through a will.³⁰⁴ Subpart IV.B of this Note recommends the repurposing of current law created to ameliorate the shortage of organ donors in the United States that would create a method and opportunity for a person to indicate their consent to PHR.³⁰⁵

B. Laws to Create Opportunities for Expressions of Consent

A lack of available organ donors throughout the United States has led state legislatures to create laws in an attempt to boost organ donor enrollment numbers.³⁰⁶ In 2012, the New York State Legislature passed "Lauren's Law."³⁰⁷ Lauren's Law requires those applying for a driver's license to check off a box indicating whether they would like to register

299. See *In re Quinlan*, 355 A.2d 647, 668-69 (N.J. 1976) (quoting Karen Teel, *The Physician's Dilemma: A Doctor's View: What the Law Should Be*, 27 BAYLOR L. REV. 6, 8-9 (1975)).

300. See, e.g., *New York Hospital Guidelines for Consideration of Requests for Post-Mortem Sperm Retrieval*, *supra* note 170 (describing the different professions composing the committee that drafted the Cornell Guidelines).

301. See *id.* ("Prior to sperm retrieval, the deceased man's wife should consent to a one year waiting period before the use of the retrieved sperm."); see also Bahm, Karkazis & Magnus, *supra* note 24, at 842 fig.1 ("Sperm cannot be used for 1 year after retrieval during which time the wife/partner must undergo psychological counseling.").

302. Many women decide not to go through with posthumous reproduction, though they request that posthumous sperm retrieval take place. See James, *supra* note 188 ("Only about 1 in 500 requests [of posthumously retrieved sperm] are utilized.").

303. See *supra* note 294 and accompanying text.

304. See *supra* note 26 and accompanying text.

305. See *infra* Part IV.B.

306. See Allison Dunne, *Lauren's Law in NY Becomes Permanent, Focuses on Organ Donation*, WAMC: MIDDAY MAG. (Oct. 28, 2017), <http://wamc.org/post/laurens-law-ny-becomes-permanent-focuses-organ-donations>; see also N.Y. VEHICLE AND TRAFFIC LAW § 502 (2018).

307. Dunne, *supra* note 306.

as an organ donor.³⁰⁸ Furthermore, on the back side of the New York State Driver's License, there is a box that a licensee can check off to consent to making an anatomical gift, and that consent is affirmed with a signature.³⁰⁹ New York has a low number of organ donor enrollees and a lengthy list of people waiting for organ transplants.³¹⁰ Lauren's Law is a part of New York State's efforts to increase organ donation efforts, and in 2017, more than 84,000 New Yorkers registered for the Donate Life Registry through these expanded outreach efforts.³¹¹ Nearly all states throughout the United States have permanent icons that can indicate organ donor status on a driver's license—the organ donor icon is on at least forty-seven state driver's licenses in the United States.³¹² This Note proposes that legislation such as Lauren's Law also be amended to permit licensees to indicate whether or not the cardholder consents to posthumous gamete retrieval and subsequent PHR.³¹³

There are several benefits to amending laws, like Lauren's Law, to allow someone to indicate their desire to be a gamete donor.³¹⁴ First, an indication of an intent to be a donor on the registration for a license or the license itself provides a space where the decedent could indicate the desire to become a parent posthumously.³¹⁵ This indication of consent on a driver's license could serve as affirmative evidence at a hospital ethics committee hearing.³¹⁶ Secondly, this would generate awareness of PHR and PSR available to a large portion of the United States population—in 2009, there were 210 million licensed drivers, and this number has increased since then.³¹⁷ Third, it could lead to the initiation of conversations about PSR and PHR, and even if the decedent doesn't ultimately decide to indicate a preference on their license, the conversations could provide the decedent's spouse or significant other

308. *Id.*

309. *New York's Organ Donation Rate Still Low*, N.Y.S. ASSEMBLY, <http://assembly.state.ny.us/mem/William-A-Barclay/story/61907> (last visited Feb. 3, 2019).

310. *Id.*

311. *New York State Aims to Increase Organ Donation*, US NEWS (Oct. 16, 2017, 1:42 PM), <https://www.usnews.com/news/best-states/new-york/articles/2017-10-16/new-york-state-aims-to-increase-organ-donation>.

312. See Jessie Halladay, *Organ Donor Icon Now on Licenses in 47 States*, USA TODAY (Jan. 22, 2013, 4:03 PM), <https://www.usatoday.com/story/news/nation/2013/01/22/organ-donation-drivers-licenses/1855871>.

313. See *infra* notes 314-35 and accompanying text. Though this Note focuses on the posthumous sperm retrieval for posthumous reproduction, it also endorses this solution as a method for expression of consent to posthumous egg retrieval for reproduction.

314. See *infra* notes 315-35 and accompanying text.

315. See *supra* Part IV.A.4.

316. See *supra* Part IV.A.4.

317. *Our Nation's Highways: 2011*, U.S. DEP'T TRANSP. FED. HIGHWAY ADMIN. (Nov. 7, 2014), <https://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/chapter4.cfm>.

with an idea of their wishes for their gametes.³¹⁸ Fourthly, this initiative could be adopted in other fields outside of the law.³¹⁹ This is exemplified in Donate Life America's partnership with Apple.³²⁰ The iOS 10 Apple Software for the iPhone updates the Health application to allow people to sign up to be an organ, eye, and tissue donor.³²¹ This application makes it easier for people to register as an organ donor and to have access to information about becoming an organ donor. It also enables people to "carry their decision with them wherever they go," and these applications could be updated to include a preference for gamete donation.³²² Finally, this solution could be expanded to other types of identification, including, but not limited to, police identification cards, military identification cards, and firefighter identification cards.³²³

V. CONCLUSION

In the United States, PSR and PHR are procedures that "cr[y] out for guidelines."³²⁴ The enactment of legislation governing PSR and PHR procedures is legitimately warranted at the level of public policy because of its widespread potential impact on the living.³²⁵ Undoubtedly, this legislation would serve the interests of women seeking to retrieve and use the sperm of a deceased male in PHR procedures.³²⁶ It would simultaneously serve the interests of other living people and institutions that are involved in both the PSR and PHR decision-making process and procedures.³²⁷ This legislation would benefit hospitals and doctors across the nation.³²⁸ Both have grappled with the legal, moral, and ethical questions surrounding PSR and PHR without much, if any at all, input from the government.³²⁹ Additionally, the legislation would function to

318. See, e.g., Brockes, *supra* note 85 (noting that after Stephen Blood became aware of posthumous reproduction and posthumous sperm retrieval from reading a magazine, he indicated to her that he would consent to PSR or PHR).

319. See *infra* notes 320-23 and accompanying text.

320. Apple & Donate Life America Bring National Organ Donor Registration to iPhone, APPLE (July 5, 2016), <https://www.apple.com/newsroom/2016/07/apple-and-donate-life-america-bring-organ-donation-to-iphone>.

321. *Id.*

322. *Id.*

323. These solutions could be applied to people such as Officer Liu or Sergeant Keivan Cohen. See *supra* Part II.C-D (discussing how each man died in the line of duty of their respective professions).

324. Katz, *supra* note 90, at 315.

325. See *infra* notes 326-31 and accompanying text.

326. Evans, *supra* note 94, at 155.

327. See *infra* notes 328-31 and accompanying text.

328. Evans, *supra* note 94, at 155.

329. See Katz, *supra* note 90, at 316.

“relieve hospitals and doctors of unnecessary legal liability by outlining the appropriate policies and procedures that hospital ethics committees should follow.”³³⁰ Furthermore, the “very process of drafting, debating and passing” PSR and PHR legislation would benefit the American society at large through raising awareness of and allowing people to become more informed about PSR and PHR procedures.³³¹ However, legislation is not only warranted at the level of public policy because it protects the interests of the living—it is also warranted because it protects the interests of the dead.³³²

Schiff notes that “[d]espite the finality of death, the relationship of the living does not altogether cease with the grave[,] [and] [t]o some extent, it continues on through the actions of the living as they carry out the last wishes of the dead.”³³³ The last wishes of the dead previously involved the disposal of the deceased’s body and the execution of their will.³³⁴ Now, reproductive technology has transformed these wishes into something much more—the ability to defy death.³³⁵ As medical reproductive technology constantly advances, the United States legal system must attempt to keep up with it.³³⁶ The number of requests for PSR have been rising and have been more frequently granted by physicians.³³⁷ It is likely that this “upward trend”³³⁸ will continue, and thus, it is imperative that the law takes steps to ensure that the living who are carrying out the “wishes” of the deceased are *actually doing so* when requesting PSR and PHR procedures.³³⁹ The hope of this Note is that through the enactment of the legal solutions proposed in Part IV, the living will be able to strengthen “the special relational trust [that the deceased has] placed in the[ir] hands” when making the decision whether or not their sperm should be retrieved through PSR and used in future PHR.³⁴⁰ As Schiff states, “[t]here is perhaps no greater way that

330. Evans, *supra* note 94, at 155.

331. *Id.*

332. See *infra* notes 333-41 and accompanying text.

333. Schiff, *supra* note 186, at 965.

334. See *supra* Part III.C.

335. See *supra* Part II.

336. See Williams, *supra* note 20, at 203 (“It is inevitable that medicine will always be a step ahead of the law, but the least the legal community can do is attempt to keep up with the modern advances in technology.”).

337. See Joshua D. Hurwitz & Francis R. Batzer, *Posthumous Sperm Procurement: Demand and Concerns*, 59 OBSTETRICAL GYNECOLOGICAL SURV. 806, 806 (2004) (finding that between 1997 and 2004, the documented requests for posthumous sperm retrieval increased by sixty percent and that the approval rate of such requests rose to sixty-eight percent).

338. Evans, *supra* note 94, at 154-55.

339. See *supra* Part IV.

340. See Schiff, *supra* note 186, at 965.

the living can honor the dead than by safeguarding the pre-death intentions of those who are now deceased, in a matter as fundamental as procreation.”³⁴¹

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341. *Id.*

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