



# Posthumous gamete retrieval and reproduction: Would the deceased spouse consent?



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## ABSTRACT

Policy and medical decision-making has been hindered by the absence of reliable data on attitudes toward having one's own gametes retrieved posthumously and used to produce a child in the event of an untimely death. The purpose of this study is to directly and empirically examine whether the presumption against consent is justified in the case of posthumous gamete retrieval following sudden death. Respondents ( $N = 2064$ ) were contacted using a random-digit dialing method that gave every household telephone in the continental United States an equal probability of being contacted, and were asked: "Suppose you were to experience an early death and your spouse wanted to have a biological child with you. Would you or would you not want your spouse to be able to use your sperm/eggs following your death to have a child with you?" Among reproductive age respondents (18–44 years), 70% of males and 58% of females wanted their spouse to be able to use their gametes and, for the most part, attitudes were fairly consistent across demographic characteristics. Religiosity was the best predictor of attitudes—those who described themselves as more religious were less likely to desire posthumous gamete retrieval—but the majority (58%) of respondents who were *very religious* approved of retrieval. Overall, these data indicate that abandoning the prevailing presumption against consent in favor of a presumption of consent on the part of the deceased will result in the deceased's wishes being honored two and three times more often for females and males, respectively. Three main arguments against a presumption of consent in this context are discussed: autonomy of the deceased, conflict of interest, and the decision-making capacity of a grieving spouse.

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## 1. Introduction

The ethical dilemmas surrounding posthumous reproduction have been described as "the most challenging, difficult, and sensitive ... in the field of medicine" (Bahadur, 2002, p. 2769), and a growing body of literature examines posthumous reproduction from legal and philosophical frameworks. Rather than producing yet another philosophical analysis, the purpose of this study is to provide empirical evidence documenting the proportion of Americans who, in the event of an early death, would want their gametes posthumously retrieved for reproductive purposes if so desired by their surviving spouse.

In contrast to several Western countries—Canada, France, Germany, Norway, Sweden, among others—where posthumous conception has been banned due to ethical and legal concerns, the United States has taken a relatively *laissez-faire* approach to the posthumous reproduction and Israel has taken a decidedly

progressive stance. One fundamental distinction that sets Israel apart is a presumption of consent from the deceased when a widowed spouse requests posthumous sperm retrieval (Goldberg, 2011). Laws, policies, and practice elsewhere, including the United States, start from a presumption against consent on the part of the deceased (Collins, 2005). Although the presumption against consent is perhaps justifiable when the death could be anticipated, such as due to illness or war, posthumous gamete retrieval is most commonly requested following a sudden accidental death that could not have been anticipated (Kerr et al., 1997), and individuals of reproductive age with no clear reason to anticipate an impending death rarely plan for or discuss their wishes in the event of death (Leming and Dickinson, 2011; Stillion, 1995). The paradox, then, is that the circumstance in which posthumous gamete retrieval for the purpose of assisted posthumous reproduction is most likely to be requested is the same circumstance where the deceased's wishes are least likely to be known.

Numerous legal and philosophical analyses have been published concerning consent of the deceased in the context of posthumous

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reproduction, with arguments ranging from marriage as implicit consent given the high rate of procreation that occurs within marriage (Simpson, 2001) to never being able to intuit consent even if death occurred while in the act of attempting to procreate (Robertson, 1994). Kahan et al. (1999) took a legal perspective and concluded that posthumous sperm procurement should be limited to cases where the decedent made the request in writing prior to death. In contrast to the prevailing presumption against consent, a few medical decision-making processes for assessing posthumous sperm retrieval requests have been proposed that provide for a presumption of consent from the deceased (Hostiuc and Curca, 2010; New York Hospital Guidelines, 1995).

The most direct philosophical analysis of the presumption of non-consent for posthumous gamete retrieval following sudden death concluded that the presumption is unjustified when death could not have been anticipated (see Collins, 2005). The caveat in this conclusion, however, was that philosophical analysis had been substituted for empirical evidence because no data was available to inform a presumption for or against consent; that is, no data were available to assess the probability that the deceased would have consented to posthumous gamete retrieval and reproduction if he or she had an opportunity to do so prior to an untimely death. The author suggested that empirical evidence, once available, should trump the results of the philosophical analysis.

Indeed, a utilitarian ethic suggests that once the general population's attitude toward posthumous reproduction is known, then the prevailing presumption concerning whether the deceased would consent should be concordant with the majority perspective to maximize desirable outcomes (Collins, 2005). A few studies have been published that provided tangential evidence of some Americans' thoughts about having their gametes posthumously used for reproductive purposes. For example, 57% of respondents in a sample of Utah residents indicated that they would be "comfortable donating their own or partner's oocytes for fertilization and transfer of the resulting embryos to a couple desiring pregnancy" in the event of death (Mizukami et al., 2005). In another study, Pastuszak et al. (2013) examined the preferences of men who banked sperm at Baylor College of Medicine due to infertility or cancer and found that 86% had consented to postmortem use of their sperm. In a similar study based on data collected in a Boston hospital in the mid-1990s, 76% of men with a girlfriend or wife wanted their cryopreserved sperm released to their partner in the event of death, and 59% of women cryopreserving embryos wanted the embryos released to the male progenitor in the event of their own (the female's) death (Styer et al., 2003). In New York, 85% of males and 72% of females obtaining a fertility consultation indicated that they "would permit their spouse to harvest their [own] eggs/sperm for the purpose of conceiving a child after their death" (Nakhuda et al., 2011). Importantly too, 79% of females and 71% of males correctly predicted their spouse's response to this question. Finally, among a convenience sample of reproductive-aged individuals recruited from a preexisting pool of internet survey respondents, 41% indicated that they "were opposed to emergency gamete retrieval in themselves" (Barton et al., 2012).

Although these studies suggest that Americans may generally be comfortable with posthumous reproduction, the Utah study has limited generalizability due to the large Mormon population in Utah and the study focused on anonymous posthumous gamete donation rather than donation to a surviving partner. Similarly, the focus on men and couples presenting for a fertility consultation and preservation in the New York, Boston, and Baylor studies cannot be generalized to the reproductive-aged population who have not pursued fertility services, and a convenience sample drawn from a preexisting pool of internet survey respondents cannot be generalized to the general population. Therefore, the literature is void of

any empirical investigation that directly assesses the likelihood that a random person of reproductive age who experiences a sudden death would consent to his or her gametes being retrieved and preserved for the purpose of procreation with his or her widowed spouse.

A few studies have assessed normative attitudes toward posthumous gamete retrieval using large probability samples of the United States population and found that attitudes are largely favorable under some contextual circumstances but decidedly mixed under other contextual circumstances (Hans, submitted for publication; Hans and Yelland, 2013). For example, attitudes were more favorable when the deceased was male than female, when the couple was married than cohabiting, when the deceased's parents were supportive than unsupportive of the surviving partner's request for posthumous gamete retrieval, and when the deceased had consented to the procedure in the event of death than when the deceased's wishes were unknown. All other factors aside, roughly 75–83% of respondents believed posthumous gamete retrieval should be allowed when the deceased had provided oral or written consent to the procedure, compared to about 55–57% when the deceased's wishes were unknown. These data can be taken to imply that, although the attitudes of roughly a quarter of respondents were dependent upon explicit consent from the deceased, the majority of Americans believe posthumous gamete retrieval should be allowed even when the deceased's wishes are unknown. Nevertheless, these studies examined normative beliefs about what should be done in someone else's situation rather than whether the respondents themselves would want their gametes to be retrieved and used posthumously by a surviving spouse to produce a child in the event of an untimely death. In short, the existing literature allows for speculation but does not directly and empirically assess whether the existing de facto presumption against consent is justified in the case of posthumous gamete retrieval following a sudden death.

The absence of generalizable data on attitudes toward having one's own gametes retrieved posthumously and used by a surviving spouse to produce a child has hindered policy and medical decision-making in cases where the deceased's wishes are unknown. The purpose of the current study is to overcome this limitation in existing data by directly and empirically assessing the likelihood that a random person of reproductive age who experiences a sudden death would consent to his or her gametes being retrieved and preserved for the purpose of procreation with his or her widowed spouse in the event of an untimely death.

## 2. Method

### 2.1. Sample

In accordance with an IRB-approved protocol, respondents were contacted in 2010 using a random-digit dialing method that gave every household telephone in the continental United States an equal probability of being contacted. To reduce within-unit sampling bias, the respondent within each household was randomly selected according to the youngest or oldest adult of a given sex living in the household. These procedures resulted in a response rate of 20%, which compares favorably to current telephone survey response rates and, although low relative to past decades, does not compromise the representativeness of the sample (Pew Research Center, 2012).

The sample consisted of 2064 respondents, ranging in age from 18 to 97 years ( $M = 50$ ,  $SD = 16$ ). The majority of respondents were female (61%), married (64%), Caucasian (85%), and had children (76%). Highest level of formal education was diverse: 23% had a post-bachelor's degree, 25% had a bachelor's degree, 30% had

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