

SECURING POSTERITY: THE RIGHT TO POSTMORTEM GRANDPARENTHOOD AND THE PROBLEM FOR LAW

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INTRODUCTION

On November 27, 2013, a baby girl came into the world. After she was weighed and thoroughly wrapped, the nurses handed her to her grandmother, standing just steps away. Minutes later, the baby was introduced to the rest of her father's family. This happy scene took place eleven years after her nineteen-year-old father was killed by a sniper during his military service.¹ Following his death, his parents had posted an advertisement in a newspaper that led them to the woman, chosen over 200 other applicants, who eventually carried and gave birth to their granddaughter that November day.²

In December 2015, another middle-aged couple made their way to the hospital to meet their granddaughter for the first time. It had taken them four years since their son died of cancer to find the woman they thought should bear their future grandchild.³ After almost three years of failed in vitro fertilization (IVF) attempts, they finally became grandparents for the third time.

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1 Karina Machado, *This Baby Girl Was Born 11 Years After Her Father Died*, MARIE CLAIRE AUSTL., Nov. 2015, at 92–96.

2 *Id.* at 94.

3 Eti Abramov, *Filling the Void*, YEDIOTH AHRONOTH – 7 DAYS (Dec. 29, 2015, 11:00 PM), <https://www.yediot.co.il/articles/0,7340,L-4746072,00.html> [<https://perma.cc/JT72-K7VR>].

And on December 25, 2016, two other women entered a hospital delivery room together: a bereaved mother, who fifteen years before lost her twenty-five-year-old son during a military operation, and the woman she chose to give birth to her granddaughter. The two women were holding hands and breathing together throughout the labor. Upon birth, the baby was named after her deceased father, whom neither she nor her birth mother would ever meet.⁴

These are the reproductive stories of some of the many families that are being formed these days with the help of assisted reproductive technologies (ART). Common to all these newly-formed families is a decision made by the parents of a deceased man⁵ to use their son's sperm in order to bring a grandchild into the world—after his death. This novel practice, known as postmortem grandparenthood (PMG), is at the center of this article. It is the latest development in the general practice of postmortem reproduction (PMR), a term used to describe a variety of circumstances under which gametes of deceased persons are used for reproduction.⁶

The normative discourse over the moral, ethical, and legal issues raised by postmortem reproduction in its various forms has until now largely focused on the interests and rights of the deceased man (the future genetic father) as the primary stakeholder in this reproductive practice. Specifically, concerns about acting against his wishes regarding the postmortem use of his genetic materials—wishes that in most cases remain unknown—are central to almost every debate over the regulation of PMR.⁷ These concerns raise separate and complex questions about both the *retrieval* of the sperm from the decedent and its subsequent *use* for the purpose of conceiving a child. The rights at stake are argued to include the rights to dignity, individual autonomy, and procreation.⁸ A second principal stakeholder identi-

4 Eitan Glickman & Noam Barkan, *The After Life*, YEDIOTH AHRONOTH, Apr. 10, 2017, at 15.

5 Referred to throughout this article also as “bereaved parents” or “would-be grandparents.”

6 Requiring scientific intervention “to bring about a human life,” PMR (also known as posthumous reproduction) is considered another form of Assisted Reproductive Technology (ART). Raymond C. O’Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL’Y 332, 333 (2009).

7 See, e.g., Anna Smajdor, *Perimortem Gamete Retrieval: Should We Worry About Consent?*, 41 J. MED. ETHICS 437 (2015); Frances R. Batzer et al., *Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement*, 79 FERTILITY & STERILITY 1263 (2003); John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1028, 1034 (1994).

8 Whether a deceased person indeed holds any right to autonomy—or any other right, for that matter—is an ongoing subject of philosophical debate. See, e.g., Thomas Nagel, *Death*, 4 NOÛS 73 (1970); Michael Birnhack, *The Rights of the Dead and the Freedom of the Living*, 31 IYUNEI MISHPAT 57 (2008).

fied in the normative discourse over PMR is the spouse, understood to have an interest in reproducing with the deceased man, and to proceed with their joint reproductive project. Finally, there is the future child, whose emotional, psychological, and physical well-being are considered to be at stake if brought into the world under such circumstances.

As for postmortem grandparenthood, the prevailing normative view has been that bereaved parents should have no say when it comes to postmortem reproduction, and that their desires do not “give them any ethical claim to their child’s gametes.”⁹ Although this normative stance has persisted over the years, in more and more cases of PMG, parents are successfully claiming the right to use their dead child’s sperm in order to become grandparents.¹⁰

The purpose of this article is to begin conceptualizing the interests and motivations of bereaved parents, or would-be grandparents, who wish to produce a grandchild following the death of an adult son. It argues that two characteristics of this reproductive practice—the experience of loss that precedes it and the familial relationship that lies between its consumers (the would-be grandparents) and its subjects (the deceased sons)—provide the social context in which parents’ personal motivations to pursue PMG can be understood.

Drawing on death studies, this article considers how PMG may facilitate the bereavement process by providing emotional comfort to parents who engage with it. PMG appeals to bereaved persons who wish to maintain a bond with the deceased and hope for continuity, in this case, through the form of a genetically-related grandchild. Focusing on the perspective and experience of bereaved parents, this analysis also accounts for ways in which producing genetic progeny is conceptualized by those pursuing it as a commemorative act. As part of this narrative, fatherhood is put forward as the deceased’s long-standing wish and a key feature of his personality, and PMG as the only way to make this wish come true.

9 Ethics Comm., Am. Soc’y for Reproductive Med., *Posthumous Retrieval and Use of Gametes or Embryos: An Ethics Committee Opinion*, 110 FERTILITY & STERILITY 45, 48–49 (2018) [hereinafter ASRM, *An Ethics Committee Opinion*].

10 See, e.g., Georgia Everett, *Woman Uses Dead Son’s Sperm for IVF Grandchildren*, BIONEWS (Feb. 19, 2018), https://www.bionews.org.uk/page_96375 [<https://perma.cc/9VGC-YDZ7>]; *Texas Woman Wins Right to Harvest Sperm from Dead Son*, FOX NEWS (Apr. 8, 2009), <http://www.foxnews.com/story/2009/04/08/texas-woman-wins-right-to-harvest-sperm-from-dead-son.html> [<https://perma.cc/X8GY-GWGJ>]; Aron Heller, *Family Gets OK to Use Dead Man’s Sperm*, WASH. POST (Jan. 29, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/29/AR2007012900427.html> [<https://perma.cc/QR5J-W893>]; Michael Leidig, *Russian Woman May Lose Grandson Conceived From Dead Son’s Sperm*, 332 BRIT. MED. J. 627 (2006).

Moving beyond the context of loss, this article argues that bereaved parents' motivation in pursuing PMG is also embedded in their perception of their parental role. Bereaved parents in pursuit of PMG claim to have both knowledge of their child's reproductive preferences and the decisional authority to act based on this knowledge. In doing so, they challenge traditional notions about the role of parents in their adult children's reproductive lives, which would otherwise exclude them from dictating the use of their child's sperm.

A second purpose of this article is to consider the legal implications of allowing the practice of PMG to develop. The interests and rights of PMR's direct stakeholders, i.e., the deceased, his spouse, assuming there is one, and the future child, are certainly at stake in PMG—for example, when the deceased did not give his consent to such use or when the spouse objects to it. Yet there are other broader implications for this reproductive practice. These mostly overlooked legal concerns regard the practical consequences of this type of interaction between law and reproduction, and the theoretical consequences of using PMG's potentially therapeutic effect on bereaved parents as grounds for judicial decision making or as legislative objectives.

Finally, in countries where PMR is still unregulated by law, courts and/or individual physicians have been on the front lines of this reproductive practice. This exploration may inform their decisions, as well as those of legislators and policy makers contemplating the regulation of PMR, by providing theoretical and practical insights into postmortem grandparenthood as an underexplored, but increasingly pursued, use of ART.

This article proceeds in three parts. Part I provides the necessary background on PMR, its emergence as a technologically feasible reproductive practice, and its biological and legal basics. This overview is followed by a brief discussion outlining the interests of PMR's direct stakeholders. This section focuses particularly on the United States and Israel, two countries that are often regarded as “possessing two of the most ART-friendly environments in the world [They] stand at the epicenter of fertility-related research and practice and support the supply and demand sides of the ART market with avidity.”¹¹ They therefore provide for a number of valuable case studies, specifically regarding the use of PMG, which I draw from throughout my analysis.

Part II begins by presenting the scenarios under which postmortem grandparenthood

11 Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 HEALTH MATRIX 65, 68 (2006). Of course, there are important differences between the two countries' reproductive landscapes; these differences and their effects on the way PMR and PMG are practiced within each territory will be highlighted throughout my analysis.

is commonly practiced and the challenges each scenario entails for those pursuing it. In light of these challenges, I offer three ways to conceptualize PMG. First, I show that both the critical timing in which parents must decide whether to pursue PMG and the emotional needs it gratifies suggest that PMG operates as a bereavement practice. Second, I consider these parents' efforts to conceptualize PMG as a work of legacy and how such an effort might also be viewed as part of the bereaved parents' process for managing loss. Third, I suggest that PMG may be conceptualized as an exercise of parental authority.

Part III introduces three concerns over the development of PMG as a reproductive practice. The first concern regards the way parents' bereavement is used to justify a court's ruling in their favor while raising questions about the desired limits of such compassionate uses of law. The second concern regards the *prescriptive* implications of legalizing PMG. Here, I analogize it with another reproductive practice that has gained a foothold in American law—Stillborn Birth Certificates, similarly understood to be tied in with a parent's bereavement process. The third concern addresses potential conflicts that may arise from the bereaved parents' attempt to claim greater involvement in their grandchild's life by virtue of their role in orchestrating her birth, and the challenges these conflicts pose for the law.

I. Postmortem Reproduction 101

A. The Biological Basics

Postmortem reproduction refers to “the process of conceiving children using the gametes of men and women who are dead or in a vegetative state”¹² by “fertilizing the gametes of the dead person in order to produce a child.”¹³

Most cases of PMR begin with another procedure that has been available since 1980,¹⁴ postmortem sperm retrieval (PMSR). In this process, “the sperm is surgically removed from the testes” of a deceased person and “then preserved in nitrogen vapor. In order for the sperm to be viable, it has to be retrieved within twenty-four to thirty-six hours of the man's death.”¹⁵ The retrieval procedure is performed by a medical team upon the request

12 BROWNE LEWIS, *THE ETHICAL AND LEGAL CONSEQUENCES OF POSTHUMOUS REPRODUCTION: ARROGANCE, AVARICE, AND ANGUISH 1* (Sheila A.M. McLean ed., 2017).

13 *Id.*

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

15 *Id.* The process of harvesting the sperm is also commonly referred to as Posthumous Sperm Retrieval

of family members, most commonly spouses of the deceased. These medical professionals were the first to confront the ethical and legal questions PMSR raised, which is why an overwhelming amount of the scholarly writing on PMSR, and PMR in general, comes from within the medical community.

To clarify, not every case of PMR involves PMSR.¹⁶ In some cases the sperm was stored by the deceased while he was still alive in order to hedge against future infertility. This practice is common not only among cancer patients undergoing treatments that may compromise their ability to procreate later in life,¹⁷ but also among persons with dangerous occupations that may affect their fertility, such as soldiers, police officers, and fire fighters.¹⁸ In other cases, sperm is stored intentionally for postmortem reproduction. These cases are usually accompanied by an explicit written document in which the deceased expresses his wish to become a genetic father after his death.¹⁹

The decision to *retrieve* sperm following the death of a loved one, if at all necessary, is separate from the decision to subsequently *use* it for reproductive purposes. Months or years may go by while the sperm—whether retrieved postmortem or deposited premortem—waits in storage. If the decision to proceed is made, family members, commonly bereaved spouses or parents, must then turn to available reproductive technologies such as in vitro fertilization (IVF) or intrauterine insemination (IUI) to bring about actual conception.

(PSR) and Postmortem Sperm Procurement (PMSP). For an explanation of the various methods to retrieve the sperm, see Zamir P. Patel et al., *Request for Posthumous Fatherhood with Perimortem Surgical Sperm Retrieval*, in ASSISTED REPRODUCTION TECHNIQUES: CHALLENGES & MANAGEMENT OPTIONS 353–55 (Khalidoun Sharif & Arri Coomarasamy eds., 2012).

16 Throughout this article, the term PMR refers to the use of sperm for the purpose of conceiving a child, without distinguishing cases in which PMSR was involved from those where sperm had been previously stored.

17 See generally Matrika D. Johnson et al., *Sperm Banking for Fertility Preservation: A 20-year Experience*, 170 EUR. J. OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 177 (2013).

18 In January 2016, for example, it was reported that “the Pentagon will start covering sperm and egg freezing for troops who want to preserve their gametes for future use.” Patricia Kime, *Military’s New Fertility Benefit Will Let Troop Freeze Their Sperm and Eggs*, MILITARY TIMES (Jan. 29, 2016), <https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2016/01/29/military-s-new-fertility-benefit-will-let-troops-freeze-their-sperm-and-eggs/> [https://perma.cc/Z5GY-G4C4].

19 The term “biological will” is often used to describe such legally binding documents indicating the deceased’s explicit consent to PMR. Behind this initiative is the Israeli NGO “New Family,” describing it as “a legal innovation . . . that documents any individual’s desires for use or disposal of sperm, ova and embryos in case of death.” *Biological Wills*, NEW FAMILY, <http://www.newfamily.org.il/en/biological-wills/> [https://perma.cc/5FJP-4UL9].

While the term “postmortem reproduction” can refer to cases involving either sperm or eggs that are used to produce a child following the death of a genetic parent, this article focuses on the former. Cases involving the use of a deceased woman’s eggs, though not unprecedented, are rare.²⁰ This discrepancy can be explained in part by the fact that it is nearly impossible to harvest “prime” eggs after a woman’s death;²¹ the likelihood of success for PMR does exist when the eggs were preserved during her lifetime.²²

Another explanation for the discrepancy between cases of PMR involving sperm and those involving eggs points to the gendered dimensions of PMR. Although this discussion lies beyond the scope of this paper, several scholars note that the “widely shared stereotype presenting men’s parental interests as minimal, only instrumental or financial in contrast to those of women,” alongside the “common belief that mothers make better parents,” leads to “more positive public attitudes” toward PMR involving deceased males than females.²³ A statement given during a discussion of PMR in an Israeli parliamentary committee illustrates the way these stereotypes are often expressed: “[A]ll men want is to pass on their genes . . . [w]omen want to raise their offspring.”²⁴

B. The Normative Landscape

Among the primary concerns in the regulation of PMR are the interests and rights of the deceased²⁵:

20 In one known case from 2011, Israeli parents asked to extract the eggs of a seventeen-year-old girl who was critically injured in a car accident. An Israeli court allowed for the extraction of the eggs, but the family eventually decided against pursuing PMR. Jacqueline Clarke, *Dying to Be Mommy: Using Intentional Parenthood as a Proxy for Consent in Posthumous Egg Retrieval*, 2012 MICH. ST. L. REV. 1331, 1333 (2012).

21 *Id.* at 1342.

22 Even in these cases, successful pregnancy is less likely since “cryopreservation of unfertilized eggs is more difficult than cryopreservation of fertilized eggs or embryos because of complications in freezing and successfully thawing the eggs, although the rate is now improving.” *Id.*

23 Yael Hashiloni-Dolev & Silke Schicktanz, *A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins-of-Life Perspectives*, 4 REPROD. BIOMEDICINE & SOC’Y ONLINE 21, 27 (2017).

24 This position was expressed by Rabbi Mordechai Halperin, then a consultant to the health minister, in a parliamentary committee discussion on PMR that took place on September 30, 2002. He reasoned this problematic position by describing it as an “evolutionary tendency.” Yael Hashiloni-Dolev, Daphna Hacker & Hagai Boaz, *The Will of the Dead: Three Case Studies*, 16 ISR. SOC’Y 31, 43 (2014).

25 Valarie K. Blake & Hannah L. Kushnick, *Ethical Implications of Posthumous Reproduction*, in THIRD

Posthumous conception redefines the content and outlines of the deceased's life. When it occurs without the person's consent, it deprives an individual of the opportunity to be the author of a highly significant event in his or her life Respect for autonomy requires that this procedure should not be permitted unless the deceased's consent is clear.²⁶

Contrary to this view, it has been argued that rights such as autonomy and dignity should not necessarily extend posthumously.²⁷ Another counterargument suggests that there is little harm to the deceased in becoming a father postmortem, since he will not carry any of the burdens associated with fathering a child.²⁸ Nevertheless, most societies have in place legal schemes "that allow us to control certain matters after death, such as the transfer of property, or the transplantation of organs."²⁹ Such norms make it harder to argue that a person's wishes should be ignored when it comes to the use of his reproductive materials. Indeed, in many of the regulatory frameworks that govern PMR, the wishes of the deceased are often considered a decisive factor in permitting PMR.

To be sure, the debate over the stakes men have in this reproductive practice is ongoing and continues to inform discussions over the regulation of PMR and PMSR. It perhaps can be said to have entered a new stage in recent years when scholars took it upon themselves to conduct qualitative empirical studies meant to provide data regarding "lay people's" attitudes toward PMR.³⁰

A second principal stakeholder is the spouse of the deceased man, assuming he had one. Her interest in becoming a mother via PMR is often framed as an exercise of her right to procreation and a continuation of the couple's joint reproductive project.³¹ Of course

PARTY REPRODUCTION: A COMPREHENSIVE GUIDE 197, 198 (J.M. Goldfarb ed., 2014).

26 G. Bahadur, *Ethical Challenges in Reproductive Medicine: Posthumous Reproduction*, 1266 INT'L CONGRESS SERIES 295, 298 (2004).

27 See *supra* note 8 and accompanying text.

28 Robertson, *supra* note 7, at 1039–43.

29 Bahadur, *supra* note 26, at 298.

30 See, e.g., Jason D. Hans & Erin L. Yelland, *American Attitudes in Context: Posthumous Sperm Retrieval and Reproduction*, 4 J. CLINICAL RES. & BIOETHICS 1 (2013); Yael Hashiloni-Dolev, *Posthumous Reproduction (PHR) in Israel: Policy Rationales Versus Lay People's Concerns, A Preliminary Study*, 39 CULTURE, MED. & PSYCHIATRY 634 (2015).

31 Robertson, *supra* note 7, at 1034.

one may question whether the availability of other reproductive routes for her to become a mother “negate[s] her procreative interest.”³² The spouse’s procreative liberty is understood to be at stake even when her right to PMR is not in question. One common concern is over her ability to make her decision based “on thoughtful consideration of the treatment and consequences of assisted reproduction, rather than from a state of grief alone.”³³ Another concern regards the “potential risk of coercive efforts for the former wife to proceed with assisted reproduction.”³⁴ As we shall see, this latter concern is especially relevant to cases of postmortem grandparenthood in which bereaved parents’ wish to become grandparents do not coincide with that of the deceased’s spouse. The ways in which regulatory frameworks had taken into account these concerns range from mandatory waiting periods to medical and psychological consultations, as shown below.

Finally, there is the future child whose emotional and psychological well-being are arguably implicated by the adverse effects of being brought into the world under these particular circumstances. Concerns over the “pain and suffering” of children born to “planned orphanhood” as well as the risk of them becoming “a living monument to the memory of the deceased partner” have both been central to this debate.³⁵ Those advocating in favor of PMR argue that these concerns should be taken into account only where there is “clear evidence that children conceived through posthumous assisted reproduction suffer psychological damage that is significantly different and more serious than for children conceived through other” reproductive practices.³⁶ Nevertheless, these concerns over subjecting the child to “overwhelming grief on the part of the living” are one way in which the experience of loss and its effect on the decision to engage with PMR have been accounted for in legal decisions on PMR, and specifically PMG.³⁷

32 *Id.* at 1044. According to Robertson, the answer is no, “for the right to reproduce includes the right to choose with whom one will reproduce.” *Id.*

33 *Postmortem Sperm Retrieval (PMSR)*, WEILL CORNELL MED. UROLOGY, <https://urology.weillcornell.org/Postmortem-Sperm-Retrieval> [<https://perma.cc/BU5G-JSEU>]; see also ASRM, *An Ethics Committee Opinion*, *supra* note 9, at 47.

34 *Postmortem Sperm Retrieval*, *supra* note 33.

35 Ruth Landau, *Planned Orphanhood*, 49 SOC. SCI. & MED. 185, 188 (1999) (arguing against PMR based on psychological and social theories and empirical findings on widowhood and orphanhood).

36 ASRM, *An Ethics Committee Opinion*, *supra* note 9, at 47; see also Asa Kashner, *Planned Orphanage*, in MORAL DILEMMAS IN MEDICINE 221 (Rafi C. Almagor ed., 2002) (arguing that any judgment over whether it would be in the child’s best interest to be brought into the world under certain circumstances is baseless when the child has yet to even be conceived).

37 ASRM, *An Ethics Committee Opinion*, *supra* note 9, at 47.

Another aspect of the debate over the interests of the child is centered around its economic well-being. It finds expression in various cases that are concerned with survivors' benefits for children born through PMR. In the United States, a relatively long roster of cases concerned with social security benefits³⁸ culminated in a 2012 Supreme Court ruling³⁹ that, like many of the earlier cases, arose from an insurance benefits claim filed by a mother on behalf of her posthumously conceived children. Karen Capato gave birth to twin children, conceived using the sperm of their deceased father, eighteen months after he died of cancer.⁴⁰ Her application for social security benefits for the twins was denied by the Social Security Administration.⁴¹ After it became apparent that the statutory interpretation involved "was of recurring significance in the administration of social security benefits, and [that] the courts of appeal were divided," the U.S. Supreme Court decided to address it in this case.⁴² The Court determined that under the Social Security Act and Florida state law, posthumously conceived children are *not* entitled to social security survivors benefits.⁴³

Characterized as "a technical, black-letter examination of the relationship between the Act's provisions,"⁴⁴ the decision was criticized for failing to provide certainty surrounding the legal rights of posthumously conceived children, in part because it deferred to state intestacy laws.⁴⁵ It was also criticized for creating inequality among children who were

38 See, e.g., *Woodward v. Comm'r of Soc. Sec.*, 435 Mass. 536 (2002); *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), abrogated by *Astrue v. Capato ex rel.* B.N.C., 566 U.S. 541 (2012); *Vernoff v. Astrue*, 568 F.3d 1102 (9th Cir. 2009).

39 *Astrue v. Capato ex rel.* B.N.C., 566 U.S. 541 (2012).

40 *Id.* at 545–46.

41 *Id.*

42 Arianne Renan Barzilay, *You're on Your Own, Baby: Reflections on Capato's Legacy*, 46 IND. L. REV. 557, 564 (2013).

43 See *Capato*, 566 U.S. at 541. Karen Capato gave birth to twins eighteen months after her husband, Robert, died of cancer; her application for social security benefits for the twins was denied by the Social Security Administration, prompting the litigation which culminated in the Supreme Court's decision. *Id.* at 545–46.

44 Barzilay, *supra* note 42, at 564.

45 Mark Strasser, *Capato, ART, and the Provision of Benefits to After-Born Children*, 2013 MICH. ST. L. REV. 1341, 1368 (2014); see also Maya Sabatello, *Posthumously Conceived Children: An International and Human Rights Perspective*, 27 J. L. & HEALTH (ONLINE) 29 (2014); Jennifer Matystik, *Posthumously Conceived Children: Why States Should Update Their Intestacy Laws After Astrue v. Capato*, 28 BERKELEY J. GENDER L. & JUST. 269 (2013); Nicole M. Barnard, Note, *Astrue v. Capato: Relegating Posthumously Conceived Children to Second-class Citizens*, 72 MD. L. REV. 1039 (2013); Nathan Rick Allred, *The Uncertain Rights of the Unknown*

born following the death of a biological parent, but also among posthumously conceived children born in different states.⁴⁶

An interesting comparison can be made to a similar case that was decided in Israel in 2016, in which the National Labor Court entitled a child, conceived one year after her eighty-one-year-old father died, to survivors benefits.⁴⁷ The court held that posthumously conceived children should be treated like any other child; principles of both equality and non-discrimination lead to this result.⁴⁸ The court further explained that denying the child these benefits does not coincide with the state's permissive attitude towards PMR.⁴⁹

The difference between outcomes is illustrative of the different reproductive contexts in which these decisions were made and the cultural premises that underlie PMR in the United States and Israel. Both will be discussed in the following section.

Striking a balance between the interests of PMR's immediate stakeholders, and possibly with other public or state interests,⁵⁰ is a contested task, further complicated by the new set of interests PMG introduces to the debate over PMR. It explains the relative scarcity of binding regulatory frameworks that govern this reproductive practice, and preoccupation of the medical practice with its use, as illustrated below.

C. Policy & Practice

“Some [countries] have laws in place. Some don't. Some are permissive. Some aren't.

Child: Federal Uniformity to Social Security Survivors Benefits for the Posthumously Conceived Child After Astrue v. Capato, 66 OKLA. L. REV. 195 (2013). Similar cases involving social security benefits claims on behalf of posthumously conceived children continue to be litigated in state courts. Katie Christian, Note, “*It's Not My Fault!*”: *Inequality Among Posthumously Conceived Children and Why Limiting the Degree of Benefits to Innocent Babies is a “No-No!”*, 36 MISS. C. L. REV. 194, 199–201 (2017).

46 Christian, *supra* note 45, at 199–201.

47 NLC 40755-05-10 State of Israel v. G. M. M. 41 (Apr. 19, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.). In his will, drafted a day before he died, the husband expressed his wish that his sperm would be retrieved and transferred to his wife's possession, to be implanted in her. *Id.* at 7.

48 *Id.* at 36–38.

49 *Id.* at 39.

50 For example, “[t]he state might wish to prevent children from being born without a father. It might also wish to protect existing offspring from the turmoil of having a new sibling or half-sibling, or to protect existing patterns of inheritance that posthumous offspring would disrupt.” Robertson, *supra* note 7, at 1040.

It's a global mess."⁵¹ Postmortem reproduction poses a new challenge for law. Like many earlier reproductive practices and assisted reproductive technologies, it did not arise under any regulatory guidance. To date, there are no "standard national or international guidelines established" for regulating PMR.⁵² In some countries, PMR is prohibited. In Germany for example, the use of gametes after the death of their provider is generally forbidden.⁵³ Hungary also bans using the gametes of deceased persons for reproductive purposes.⁵⁴ In some Australian territories, such as South Australia and Western Australia, sperm may not be used if it was retrieved posthumously.⁵⁵

In 1983, Corrine Parpalaix of Marseilles, France, sought to use her husband's stored sperm in order to conceive a child several months after he died of cancer at age twenty-six. Her request was denied by the sperm bank where the sperm was being stored.⁵⁶ After a long and highly publicized legal battle, the French Tribunal de Grand Instance ruled in Parpalaix's favor and ordered the bank to release the sperm to a doctor of her choice.⁵⁷ Following this case, a policy that was later enacted into law in France limited the use of ART to cases in which both "[t]he man and the woman . . . [are] alive."⁵⁸

Outside of these and a few other examples, most countries around the world currently permit PMR, either as a matter of positive law or by default. Even so, limitations still apply in many of these jurisdictions. In the UK, for example, under the Human Fertilisation and

51 Jenny Morber, *Dead Man's Sperm*, NEW REPUBLIC (Apr. 26, 2016), <https://newrepublic.com/article/133067/dead-mans-sperm> [<https://perma.cc/7SKA-Y2YD>].

52 Christopher Brede & Edmund Sabanegh, Jr., *Medical Aspects of Posthumous Reproduction*, in *THIRD PARTY REPRODUCTION: A COMPREHENSIVE GUIDE* 183, 184 (J.M. Goldfarb ed., 2014).

53 See Hashiloni-Dolev & Schicktanzt, *supra* note 23, at 26 ("The country's Embryo Protection Law (ESchG), enacted since 1990, explicitly forbids the use of the sperm or eggs of a dead person for artificial insemination.").

54 LEWIS, *supra* note 12, at 30.

55 Benjamin Kroon et al., *Post-mortem Sperm Retrieval in Australasia*, 52 AUSTL. & N. Z. J. OBSTETRICS & GYNAECOLOGY 487, 488 (2012).

56 See E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-mortem Insemination*, 1 J.L. & HEALTH 229, 230 (1986).

57 *Id.* at 233. However, Corrine was not able to conceive due to the "small quantity and poor quality of the sperm." *Id.*

58 Jacques Lansac, *French Law Concerning Medically-Assisted Reproduction*, 11 HUM. REPROD. 1843, 1843 (1996).

Embryology Act of 1990 and the Human Fertilisation and Embryology (Deceased Fathers) Act of 2003, a man must give his written consent both for the retrieval *and* for the use of his sperm if postmortem reproduction is to be pursued legally.⁵⁹ In Australian territories where PMR is not prohibited, there is still a requirement to provide “some evidence that the dying or deceased person would have supported the posthumous use of their gametes,”⁶⁰ as stated in the Australian National Health and Medical Research Council guidelines.⁶¹ Canada similarly requires that the retrieval and use of “human reproductive material for the purpose of creating an embryo” be made only in cases where “the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.”⁶²

Countries that condition access to PMR on the deceased’s written consent, can be placed on the restrictive side of the spectrum of regulatory attitudes toward PMR. In contrast, there are countries where access to PMR is *not* conditioned upon the deceased’s explicit consent. Two prime examples of the latter are the United States and Israel, which I now discuss in turn.

1. PMR in the United States

Like many other types of assisted reproductive technology, postmortem reproduction is not directly regulated in the United States at either the federal or state level.⁶³ This legal void has left medical facilities, fertility clinics, and especially individual physicians as the “frontline responders tasked with deciding whether to honor or refuse requests for

59 Human Fertilisation and Embryology Act 1990, c. 37 (Eng.); Human Fertilisation and Embryology (Deceased Fathers) Act 2003, c. 121 (Eng.).

60 NAT’L HEALTH & MED. RES. COUNCIL, ETHICAL GUIDELINES ON THE USE OF ASSISTED REPRODUCTIVE TECHNOLOGY IN CLINICAL PRACTICE AND RESEARCH 80 (2017).

61 Kroon et al., *supra* note 55, at 488.

62 Christine E. Doucet, *From en Ventre Sa Mere to Thawing an Heir: Posthumously Conceived Children and the Implications for Succession Law in Canada*, 22 DALHOUSIE J. LEGAL STUD. 1, 4 (2013).

63 In 2007 an Iowa judge authorized postmortem sperm retrieval, while finding that under the Uniform Anatomical Gift Act (UAGA), adopted by most states, “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.” *In re Daniel Thomas Christy*, Johnson County (IA) Case No. EQVO68545 (Sept. 14, 2007), cited in 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).

posthumous reproduction.”⁶⁴ In an effort to assist physicians’ decisions regarding PMR,⁶⁵ organizations such as the American Society for Reproductive Medicine (ASRM) and private medical institutions such as the Weill Cornell Medical College have developed their own professional guidelines and protocols.⁶⁶ Over time, such protocols have become more prevalent among medical institutions; many either have them in place or are in the process of developing them.⁶⁷

Although these protocols are intended to provide third parties such as physicians with guidance regarding PMR, they are non-binding in the sense that it is ultimately up to the individual physician to decide whether to engage in PMR-related procedures: “In this way, it is much like other morally controversial practices in medicine (abortion, emergency contraception, physician-assisted suicide) about which physicians may invoke the right to conscientiously object in a morally pluralistic society.”⁶⁸ Nonetheless, the growing prevalence of these protocols helps to identify certain trends and attitudes toward PMR in the United States.

A starting point is the question of consent. While some protocols call for the deceased’s explicit written consent if his sperm is to be retrieved and/or used postmortem, most pro-

64 Blake & Kushnick, *supra* note 25, at 202; *see also* Eric Laborde et al., *Postmortem Sperm Retrieval*, 32 J. ANDROLOGY 467 (2011) (discussing the experiences of several urologists with requests for PMSR).

65 According to one report, “[a] total of 40 facilities (15.4%) reported receiving 82 requests for postmortem sperm procurement between 1980 and July 1995.” Susan M. Kerr et al., *Postmortem Sperm Procurement*, 157 J. UROLOGY 2514, 2155 (1997). This study was updated in 2002 and an increase of 60% in requests for PMSR was reported. Joshua M. Hurwitz & Frances R. Batzer, *Posthumous Sperm Procurement: Demand and Concerns*, 59 OBSTETRICAL & GYNECOLOGICAL SURVEY 806, 806 (2004).

66 *See Postmortem Sperm Retrieval*, *supra* note 33; ASRM, *An Ethics Committee Opinion*, *supra* note 9. *See also* the recommendations issued by the American Bar Association. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 205 (Feb. 2008) (AM. BAR ASS’N).

67 A 2013 study found that 11 institutions had protocols in place, out of 40 that were surveyed. Sarah M. Bahm et al., *A Content Analysis of Posthumous Sperm Procurement Protocols with Considerations for Developing an Institutional Policy*, 100 FERTILITY & STERILITY 839, 840 (2013). In 2016 another study was conducted, surveying “50 major academic medical centers,” finding that about a third of the fourteen medical centers that provided data on posthumous sperm retrieval have policies on PMSR. Nicholas J. Waler, *Policy on Posthumous Sperm Retrieval: Survey of 50 Major Academic Medical Centers*, 106 FERTILITY & STERILITY e44 (2016). A follow-up study conducted a year later, surveying seventy-five major academies’ medical centers, found that a third of them have PMSR policies in place. Nicholas J. Waler, *Policy on Posthumous Sperm Retrieval: Survey of 75 Major Academic Medical Centers*, 197 J. UROLOGY e1341 (2017).

68 Blake & Kushnick, *supra* note 25, at 203.

protocols will consider lower levels of proof such as verbal or inferred consent.⁶⁹ At the same time, however, most “low threshold” protocols fail to provide much guidance about what types of evidence should be considered in order to show that the deceased would have consented to these procedures.⁷⁰ For example, the Weill Cornell Medicine Guidelines (also commonly referred to as the New York Hospital Guidelines) take a relaxed approach, requiring that a request for sperm retrieval must be accompanied by “convincing evidence that the man would have wanted to conceive children this way.”⁷¹ They further recognize that the spouse of the deceased is “the primary provider of the deceased’s intentions to procreate and giving permission for PMSR.”⁷² This approach assumes that spouses are best situated to testify about the deceased’s “actions or discussions prior to death with respect to conception/pregnancy.”⁷³ “Their stated, written, or acted-on wishes prior to death should weigh significantly in any decision-making regarding PMSR.”⁷⁴ The prevalence of this inferred consent approach and its potential for broad interpretation are two principal reasons the United States can be located on the more permissive side of the PMR regulatory spectrum.

A second important issue addressed in these professional protocols is the identity of who may request PMR. Protocols often include a directive regarding the “[s]perm designee” or the person “to whom the sperm will belong after extraction.”⁷⁵ Some facilities only consider *spouses* who wish to procreate through the use of the deceased’s sperm to be eligible recipients of the sperm following its extraction.⁷⁶ Note that this limitation implicitly excludes the possibility of postmortem grandparenthood, and will be discussed further in Part II.

A third common feature of PMR protocols is delineating *when* the sperm may be used for reproduction. This is addressed through such mechanisms as mandatory waiting peri-

69 Bahm et al., *supra* note 67, at 840.

70 To be clear, the reference here is not to legal standards of evidence.

71 *Postmortem Sperm Retrieval*, *supra* note 33.

72 *Id.*

73 *Id.*

74 *Id.*

75 Bahm et al., *supra* note 67, at 841.

76 *Id.*

ods ranging from six months to one year, and/or counseling sessions.⁷⁷ For example, the Cornell Guidelines recommend, but do not appear to require, a postmortem quarantine period of one year before any attempts at assisted reproduction are made.⁷⁸ During this time, it is “expected that the wife will undergo medical and psychological evaluations/consultations to discuss the procedures involved with assisted reproduction, along with associated costs of such medical interventions.”⁷⁹ As mentioned before, this is one common example of how the best interest of the spouse can be considered in regulations of PMR.

In some instances, practitioners will turn to the court for guidance or require that the party requesting the PMR-related service obtain a court order before providing such service. *In re Estate of Kievernagel*, for example, the California Court of Appeal had to decide whether to allow a widow to use her late husband’s sperm after the latter signed an agreement with the storage company, providing that the frozen sperm should be discarded in the event of his death.⁸⁰ Joseph Kievernagel died in a helicopter crash in 2005. He and Iris had been married for ten years prior to his death, during which time they attempted to conceive through IVF treatments.⁸¹ They both had signed an agreement stating that “the sperm sample was Joseph’s sole and separate property and he retained all authority to control its disposition.”⁸² Nevertheless, after her husband’s death, Iris sought a vial of his sperm, and the fertility center refused to release it without a court order.⁸³ Relying on previous cases involving PMR, the court stressed the fact that Joseph, as the only gamete provider, had decisional authority over the use of his sperm.⁸⁴ The court further stressed that “[t]he disposition of Joseph’s frozen sperm does not implicate Iris’s right to procreative autonomy. That would be so only if she could show that she could become pregnant only with Joseph’s sperm.”⁸⁵

77 *Id.* at 840–41.

78 *Postmortem Sperm Retrieval*, *supra* note 33.

79 *Id.*

80 *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008).

81 *Id.*

82 *Id.*

83 *Id.* Joseph’s family also objected to the widow’s request, arguing that their son “did not wish to father a child posthumously.”

84 *Id.* at 316–17.

85 *Id.* at 317.

PMR has also made its way into United States courts via disputes among family members over the use of the deceased's genetic materials. Perhaps the best-known example of an American court ruling on PMR is the 1991 *Hecht* case,⁸⁶ which provided guidance for many subsequent cases, including *In re Estate of Kievernagel*, cited above. This case involved Deborah E. Hecht, who asked to use her partner's sperm, which had been stored premortem, in order to conceive after his death.⁸⁷ Before committing suicide, William E. Kane had made a deposit at a sperm bank and signed an "Authorization to Release Specimens" form, directing the sperm bank to release his sperm to either Hecht or her physician in the event of his death.⁸⁸ Kane had also specified in his will that he wished for Hecht to become impregnated with his sperm.⁸⁹ However, Hecht's attempt to execute Kane's will was challenged by his two children from a previous marriage.⁹⁰ A lengthy legal battle ensued with the court finally ordering that *all* of Kane's sperm vials be released to Hecht's possession.⁹¹

Relying on a previous decision concerning the disposition of pre-embryos,⁹² the California Court of Appeal found that "frozen sperm vials, even if not governed by the general law of personal property, occupies 'an interim category that entitles them to special respect because of their potential for human life.'"⁹³ As such, it provided that the deceased, who had explicitly expressed his wish that his sperm be used to inseminate his girlfriend after his death, had decision-making authority regarding the reproductive use of his sperm.⁹⁴

86 *Hecht v. Superior Court (Hecht II)*, 20 Cal.Rptr.2d 275, 281 (Cal. Ct. App. 1993).

87 *Id.* at 276–77.

88 *Id.* at 276.

89 *Id.* at 276–77.

90 *Id.* at 278.

91 *Hecht v. Superior Court (Hecht I)*, 59 Cal. Rptr. 2d 222, 228 (Cal. Ct. App. 1996), as modified (Nov. 19, 1996).

92 *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

93 *Hecht II*, 20 Cal. Rptr. 2d at 280.

94 The court was careful to limit its decision, according to which the sperm should be viewed as part of the deceased's estate. *Id.* at 283 ("[W]e do not address the issue of the validity or enforceability of any contract or will purporting to express decedent's intent with respect to the stored sperm [W]e also decline petitioner's invitation to apply to this case the general law relating to gifts of personal property or the statutory provisions for gifts in view of impending death."); *see also* Robertson, *supra* note 7, at 1039 (arguing that if the deceased gave no explicit directive for disposition of his semen, it should then become an asset of his estate, which his widow had the right to use).

Although it had been argued that Hecht should not be allowed to use the deceased's sperm on "public policy grounds"—repudiating both the artificial insemination of an unmarried woman, and the use of a deceased man's sperm⁹⁵—the court rejected both claims.⁹⁶

Most cases involving PMR do not make their way into the court system, but those that do can illuminate how and how often PMR is practiced in the United States, and the questions it raises at the intersection of law, medicine, and ethics. The Supreme Court decision in *Capato*, for example, revealed that by 2012, "[o]ver one hundred women ha[d] already applied on behalf of their posthumously conceived children for social security benefits."⁹⁷ Such insights are important because private medical facilities providing reproductive services usually are not required to report the extent and/or nature of the services they provide.⁹⁸ There is therefore limited data on the prevalence of PMR in the United States. Nevertheless, the medical community's preoccupation with PMR suggests the growing traction of this emerging reproductive practice. Much can also be learned from the extensive media coverage of these real-life dramas.⁹⁹

95 *Hecht II*, 20 Cal. Rptr. 2d at 284. See also *Hall v. Fertility Inst. of New Orleans*, 647 So.2d 1348 (La. App. 1994), where a similar argument that PMR is against public policy was used by family members of a deceased man, who objected to his girlfriend's request to use his sperm to conceive. In this 1994 Louisiana case, the sperm was deposited by the deceased prior to undergoing chemotherapy, in an attempt to preserve his ability to father children in the future. The deceased later executed an "Act of Donation . . . by which Hall purported to convey his interest in his frozen semen deposits to St. John, in consideration of his 'love and affection' for her." *Id.* at 1350. The Court of Appeals rejected the family's argument that "St. John's proposed artificial insemination would be *contra bonos mores*, or 'against good morals' in Louisiana." *Id.* at 1351.

96 *Hecht II*, 20 Cal. Rptr. 2d at 286–87, 289.

97 Barzilay, *supra* note 42, at 562.

98 NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 44–45 (2009) (noting that the success rates of IVF cycles performed in these facilities are excepted from this rule).

99 One recent example comes from New York, where in 2017, Sanny Liu, the wife of police officer Wenjian Liu, gave birth to a baby girl more than two years after Officer Liu was shot in the line of duty. Joseph Goldstein, *Daughter of Slain Police Officer is Born, 2 Years After Father's Death*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/26/nyregion/daughter-of-slain-police-officer-is-born-2-years-after-fathers-death.html> [<https://perma.cc/D2AY-ZPQ3>]; see also Larry Celona, *NYPD Cop's Daughter is Born Three Years After His Death*, N.Y. POST (July 25, 2017), <https://nypost.com/2017/07/25/widow-of-slain-nypd-cop-gives-birth-to-baby-girl/> [<https://perma.cc/X2KE-RATX>]. Wenjian had never given his consent to the postmortem retrieval or use of his sperm. Nevertheless, the medical staff at the Brooklyn Hospital where Officer Liu was admitted informed Sanny that it was possible to preserve her husband's sperm for the purpose of postmortem reproduction. Herman Wong, *Wife of an NYPD Officer Who Was Ambushed and Killed in 2014 Just Gave Birth to Their Daughter*, WASH. POST (July 26, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/07/26/an-nypd-officer-was-ambushed-and-killed-in-2014-his-wife-just-gave-birth-to-their-daughter>

2. PMR in Israel

In the mid-1990s, around the same time it was first reported that use of a deceased man's sperm had resulted in a successful pregnancy,¹⁰⁰ requests for PMR also began to appear in Israel, predominantly from surviving spouses.¹⁰¹ In 1996, for example, a widow petitioned the district court for an order instructing a sperm bank to release to her custody her deceased husband's stored sperm units.¹⁰² The couple had been undergoing fertility treatments when the husband was diagnosed with cancer.¹⁰³ A few days before he died he gave sperm to put in storage.¹⁰⁴ When the wife attempted to retrieve the sperm after his death, however, her father-in-law "strongly" objected.¹⁰⁵

In a short opinion, considering the novelty of these legal issues, the district court decided in favor of the widow. Its decision was based on the presumption that the deceased could have foreseen the possibility that his sperm would be used for fertilization; the timing of when he gave it for storage was taken as an "implied consent" to the use of his sperm.¹⁰⁶ The court found that sperm was not part of the deceased's estate and cannot be inherited in the same way as other types of property,¹⁰⁷ a finding reiterated in many subsequent cases.

[<https://perma.cc/QVP4-R3DJ>].

100 Philip Cohen & Michael Day, *Never Say Die: You Don't Need to Make Sperm or Even Be Alive to Be a Father*, 161 *NEW SCIENTIST* 5 (1999) (reporting that "for the first time, sperm taken from a dead man resulted in a human birth").

101 Vardit Ravitsky, *Posthumous Reproduction Guidelines in Israel*, 34 *HASTINGS CTR. REP.* 6 (2004).

102 CC (TA) 1922/96 Anonymous v. International Medical Services H.M.C. Ltd. 2 (Sep. 21, 1997), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

103 *Id.* at 1.

104 *Id.* at 2.

105 *Id.* The deceased's father was mainly concerned about his financial responsibility toward the future child. The court rejected these arguments while stressing that financial consequences will not stop the court from granting an order enabling the birth of a child. *Id.* at 6.

106 *Id.* at 4. In several cases that followed, the fact that sperm was deposited pre-mortem as part of the couple's attempt to have children together provided a strong support to the assumption that the deceased wanted to have children with his spouse, which in turn supported the assumption that he would have wanted children postmortem. *See, e.g.*, FC 11870/03 Family Court (Kfar Saba) Y. S. v. State of Israel (Sep. 29, 2003), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

107 CC (TA) 1922/96 Anonymous v. International Medical Services H.M.C. Ltd. 5 (Sep. 21, 1997), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

In 2003, after several requests for PMR were presented before medical practitioners, the Attorney General of the Government of Israel published a set of guidelines for regulating posthumous reproduction (hereinafter “IAG Guidelines”).¹⁰⁸ These guidelines provide a two-step framework detailing the processes through which requests for the retrieval and/or use of sperm shall be handled medically and legally.¹⁰⁹ A request to *retrieve* sperm from a deceased or dying man may be presented by his female spouse only.¹¹⁰ However, the IAG Guidelines stress that a “lenient” policy should lead to such requests usually being approved, given that they are time-sensitive and may be irreversible once viable sperm can no longer be found.¹¹¹ If the permissible course of action is unclear, the medical facility must turn to the court for further guidance.¹¹² Requests for the *use* of the sperm, on the other hand, are to be decided on a case by case basis by the court,¹¹³ and in each case the Attorney General will file its opinion about whether they should be approved or denied.¹¹⁴ The court is further advised to order that social services compile a report with “useful” information about the deceased and his spouse to inform its decision, including whether the spouse is acting out of her own free will and is not being pressured in making her decision.¹¹⁵ The IAG Guidelines require a waiting period, usually of one year between the time of death and the time a request to use the sperm is filed with the court.¹¹⁶

The IAG Guidelines provided the Ministry of Health and other service providers under its supervision and regulation with a basic protocol for the retrieval and/or use of sperm

108 *Guideline number 1.2202: Retrieving Sperm Postmortem and Its Use*, MINISTRY OF JUSTICE GUIDELINES OF THE ATTORNEY GENERAL OF THE GOV'T (Oct. 27, 2003), <http://www.justice.gov.il/Units/YoezMespati/HanchayotNew/Seven/12202.pdf> [<https://perma.cc/4AEP-NK8N>] [hereinafter *IAG Guidelines*].

109 *Id.* at Sections 23–26, 27–32.

110 *Id.* at Section 24.3, 26. The IAG Guidelines hold that a partner may be the woman to whom the deceased married, but also a woman with whom he had an ongoing relationship, which would have naturally led to having children together.

111 *Id.* at Section 23.

112 *Id.* at Section 24.4.

113 *Id.* at Section 23. In most cases, these requests are brought before family courts, as part of civil lawsuits filed against the District Attorney's Office and the medical facility holding the sperm. The Attorney General must file its opinion regarding each and every case.

114 *IAG Guidelines*, *supra* note 108, at Section 27.

115 *Id.* at Section 28.

116 *Id.* at Section 31.

postmortem. But in addition to providing a detailed description of the required procedures, the IAG Guidelines went further by presenting its official normative stance on PMR. This was intended to provide the courts with direction about how these cases should be decided. According to the IAG Guidelines, there are two principal stakeholders in this reproductive practice: the deceased and his spouse.¹¹⁷ As for the former, respect for his wishes regarding PMR, deriving from his right to autonomy and bodily integrity, is a principal consideration in each case.¹¹⁸ Therefore, “when the deceased has expressed an explicit objection, the courts are advised to view the objection as an overriding consideration and to deny the request.”¹¹⁹ However, in the absence of explicit consent or objection, decisions should be made based on the *presumed wish* of the deceased.¹²⁰ In assessing that presumption, courts are instructed to rely “on prior behavior and on the testimony of family and friends,”¹²¹ as well as on the assumption “that a man who lived in a loving relationship with a woman would want her to have his genetic child after his death even if he never had the opportunity formally to express such a desire.”¹²² This assumption is based on the premise that “couples who live together, whether in marriage or a common law union, naturally and almost invariably intend to have children at some time in the future.”¹²³ Israel is thus clearly situated on the permissive spectrum of attitudes toward PMR—even more enthusiastically than the United States.

After the IAG Guidelines were published in 2003, the assumption that a person in a long-term relationship would have granted his consent to PMR gained a foothold in Israeli law. Court decisions that permitted PMR based on the presumed wish of the deceased were accompanied, to different extents, by testimony of family members (mainly the spouse and the bereaved parents) and friends, regarding the deceased’s wish to have children.

In 2006, for example, the Tel Aviv District Court had to decide whether to allow a wid-

117 *Id.* at Section 9.

118 *Id.* at Sections 9–10.

119 Ravitsky, *supra* note 101, at 6.

120 *IAG Guidelines*, *supra* note 108, at Section 11.

121 Ravitsky, *supra* note 101, at 6.

122 *Id.*

123 Ruth Landau, *Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique*, 19 HUM. REPROD. 1952, 1953 (2004). Since their publication, many have criticized this assumption regarding attitudes of Israeli-Jewish men on the grounds that it is not supported by empirical data. See, e.g., Hashiloni-Dolev, *supra* note 30.

ow to use her husband's sperm after he died unexpectedly at age twenty-six, a month after their wedding.¹²⁴ The court framed its decision as having to balance her wish to exercise her right to parenthood, and the deceased's presumed wish regarding PMR, inferred from the factual background provided by her and other family members about the couple's plans to have children together.¹²⁵ What stood out most in the decision was the court's statement that retrieving sperm from the deceased while he was brain-dead and on life support constituted consent to PMR from both him and his wife.¹²⁶ This is one of several examples of the ease with which courts in the Israeli context have been able to reach decisions in favor of reproduction.

As for the second principal stakeholder identified by the IAG Guidelines—the surviving spouse—her wish to continue the couple's mutual aspiration to have a child together, as well as to preserve and commemorate her husband's memory, are both included as “strong proved interests.”¹²⁷ PMR is the only way she can exercise her right to parenthood with the deceased, a mutual desire thwarted only by death.¹²⁸ Under the IAG Guidelines, courts should consider her interests alongside the interests of the deceased. Much like American protocols that regulate PMR, the IAG Guidelines posit that the spouse is best situated to testify to whether her deceased partner wished to have children postmortem.¹²⁹

With regard to the future child, the IAG Guidelines note that PMR raises questions regarding her best interests or inheritance rights.¹³⁰ However, they fail to provide further direction in the matter other than detailing the process of registering posthumously conceived children as the deceased's children.¹³¹

The IAG Guidelines explicitly exclude parents of deceased men from using PMR, explaining that “despite the empathy to parents of a deceased man, whom their sorrow

124 FC (TA) 58540/05 K.B.L. v. Sourasky Medical Center in Ichilov 2 (Sep. 2, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

125 *Id.* at 4.

126 *Id.* at 7.

127 *IAG Guidelines*, *supra* note 108, at Section 11.

128 *Id.*

129 *Id.* at Section 17.

130 *Id.* at Section 36.

131 *Id.* at Section 35.

and grief knows no limits,” such an intimate and private decision is only for the couple to make.¹³² Parents therefore have no legal standing regarding the sperm of their deceased child.¹³³ Yet since 2003 Israel has witnessed an overwhelming growth in requests for PMR presented by *bereaved parents*. In many of these cases the Attorney General consented to the use of sperm of deceased men, despite its official stance, while in others, the court ruled in favor of the parents despite of the Attorney General’s opinion that they should be denied.¹³⁴

To round out the picture of the policy and practice of PMR in Israel, two recent rulings of the Israeli Supreme Court over PMG, further discussed in the following sections, limited bereaved parents’ access to PMR in cases where the deceased was married or in a long-term relationship. Read together, they provide that under such circumstances only the spouse would be allowed to use the deceased’s sperm for reproduction.¹³⁵ A recently proposed bill titled the “Law of Continuity,” which was presented before the Israeli Knesset on June 19, 2017, attempts to override these decisions by granting parents of deceased *soldiers* the right to access PMR, in cases where they were single or where their spouse decided against PMR.¹³⁶

This overview of the policy and practice of PMR in Israel and the United States suggests one difference between the two jurisdictions that can be tied to the “cultural features”

132 *Id.* at Sections 20–21.

133 *IAG Guidelines*, *supra* note 108, at Sections 20–21.

134 See FA (CT) 7457-05-11 M. A. v. H. M. 12 (Oct. 17, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (listing examples of both kinds of cases, provided by the Attorney General). In 2012, a governmental committee published its recommendation for a unified legislation in the matter of assisted reproduction in Israel. The Committee’s recommendations reaffirmed most of the Guidelines’ instructions regarding PMR, including that which denies parents from using their son’s sperm. MINISTRY OF HEALTH, RECOMMENDATIONS OF THE PUB. COMM’M REGARDING EXAMINATION OF LEGISLATIVE REGULATION: THEME OF FERTILITY AND BIRTH IN ISRAEL (May 2012), <http://www.health.gov.il/publicationsfiles/bap2012.pdf> [<https://perma.cc/49CG-V39S>].

135 FAR 7141/15 Anonymous v. Anonymous 37 (Dec. 22, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.); FAR 1943/17 Shahaar v. State of Israel 9 (Aug. 15, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

136 Draft Bill for Fallen Soldiers’ Families Law (Pensions and Rehabilitation) (Amendment – Use of Fallen Soldiers’ Sperm), 5710–1950, HH (Gov.) No. P4312/20, http://fs.knesset.gov.il/20/law/20_lst_386535.docx [<https://perma.cc/PTQ3-EA6T>] (Isr.) [hereinafter Draft Bill for Fallen Soldiers’ Families Law]; see also AVISHALOM WESTREICH, ASSISTED REPRODUCTION IN ISRAEL: LAW, RELIGION AND CULTURE 28–30 (2018) (discussing the bill and the Supreme Court decision that preceded it).

that shape the reproductive landscapes in each respective country.¹³⁷ Although medical professionals were the first ones to confront requests for PMR in Israel, unlike in the United States, this issue soon became a public cause of concern, prompting a series of discussions orchestrated by the Israeli Ministry of Justice which resulted in the publication of the IAG Guidelines.¹³⁸ This is partly because medical facilities concerned with forensic and reproductive medicine and assisted reproductive technologies are highly regulated by the Israeli Health Ministry.¹³⁹ Most fertility clinics offering IVF treatments, for example, operate within public hospitals.¹⁴⁰

The Israeli government's involvement in the fertility industry is not limited to regulatory oversight, but also finds expression in the elaborate public funding provided by the state for nearly all reproductive medical services,¹⁴¹ contributing, *inter alia*, to Israel having the world's highest number per capita of IVF clinics.¹⁴² In the United States, by contrast, not only is the ART industry overwhelmingly under-regulated, but most reproductive medical procedures, such as IVF, are not covered by public health plans or even by most private health plans.¹⁴³

The regulatory vacuum in which America's *private* "multibillion-dollar fertility industry" mostly operates is commonly attributed to its commitment to individual choice and autonomy.¹⁴⁴ According to Professor Ellen Waldman, "[b]ioethics, the field most instrumental in shaping medical advances, including ART, has particularly strong links to liberal individualism," which dates back to the civil rights movements of the 1960s, and the

137 Waldman, *supra* note 11.

138 See, e.g., KNESSET SCI. & TECH. COMM., POSTMORTEM SPERM RETRIEVAL 97 (Sept. 30, 2002), https://www.nevo.co.il/law_word/law103/mada2002-10-22.doc [<https://perma.cc/F3E6-BS4X>].

139 See, e.g., Public Health (Sperm Bank) Regulations, 5739–1979, KT 3996 p. 1448 (Isr.).

140 Ruth Landau, *Israel: Every Person Has the Right to Have Children*, in *THIRD PARTY ASSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL AND ETHICAL PERSPECTIVES* 129 (Eric Blyth & Ruth Landau eds., 2003).

141 *Id.* at 131 ("Reproductive rights are viewed as part of Israelis' health rights . . . treatment for assisted conception is an integral part of the 'health basket' funded by [the National Health Insurance Law (1994)]. The health funds are required to fund fertility treatments of all types up to the birth of two living children.")

142 Daphna Birenbaum-Carmeli, *Thirty-Five Years of Assisted Reproductive Technologies in Israel*, 2 *REPROD. BIOMEDICINE & SOC'Y ONLINE* 16, 17 (2016).

143 HENRY T. GREELY, *THE END OF SEX AND THE FUTURE OF HUMAN REPRODUCTION* 57–58 (2016).

144 Dov Fox, *Reproductive Negligence*, 117 *COLUM. L. REV.* 149, 164 (2017); Waldman, *supra* note 11, at 75–77.

struggle to enhance patient rights.¹⁴⁵ In the case of PMR, it may be argued that regulatory intervention will secure, rather than implicate, the right to autonomy, by ensuring that the deceased's wish was to become a genetic father postmortem.

Israel's pronatalism, on the other hand, is attributed to a demographic policy conceived in its early years in order to achieve a high birth rate among Jewish women.¹⁴⁶ This "Jewish Israeli familism" is also attributable to the trauma of the Holocaust, seeing the revival of the Jewish people as part of a national and individual healing process.¹⁴⁷ Finally, there is the biblical commandment to "be fruitful and multiply," viewed as "construing procreation as a key constituent of a Jewish person's moral integrity."¹⁴⁸ This cultural context not only explains the state's involvement in the fertility industry, but also its permissive attitude toward the use of reproductive technologies and its commitment to making more and more reproductive routes available to Israeli women.¹⁴⁹ Its relatively relaxed policy regarding PMR is no exception to this rule.¹⁵⁰

145 Waldman, *supra* note 11, at 76. Yet as Waldman explains, "[f]ear that reproductive technology might lead to the overthrow of traditional family forms . . . have led to a relatively unregulated legal environment, pockmarked by case law and statutory initiatives that accept ART use for married heterosexuals, but express hostility to the myriad novel family forms that ART helps bring into being." *Id.* at 77.

146 Nitza Berkovitch, *Women of Valor: Women and Citizenship in Israel*, 2 *ISR. SOC.* 277, 284–85 (1999). For an earlier (though not identical) English version of this article, see Nitza Berkovitch, *Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel*, 20 *WOMEN'S STUD. INT'L F.* 605 (1997).

147 See Daphna Birenbaum-Carmeli & Yoram S. Carmeli, *Reproductive Technologies Among Jewish Israelis: Setting the Ground*, in *KIN, GENE, COMMUNITY: REPRODUCTIVE TECHNOLOGIES AMONG JEWISH ISRAELIS* 7 (Daphna B. Carmeli & Yoram S. Carmeli eds., 2010) (describing the origins of the Jewish Israeli familism and pronatalism and their characteristics).

148 *Id.* at 6.

149 See generally SUSAN MARTHA KAHN, *REPRODUCING JEWS* 1 (2012).

150 The IAG Guidelines explicitly refer to the biblical commandment while discussing the centrality of reproduction within Israeli society, and the desire of most individuals to procreate. *IAG Guidelines*, *supra* note 108, at Section 6. A reference is also made to another biblical practice, levirate marriage, according to which "when a man dies childless, his brother is obliged to marry his widow and their first child is to carry the name of the deceased and be his heir . . . [t]he traditional justification for this abandoned practice has to do . . . with the continuity of the man who dies childless, so that his name will be carried on and his 'seed will be raised.'" Hashiloni-Dolev, *supra* note 30, at 636.

II. Disassembling Postmortem Grandparenthood

A. Breaking New Ground

In most cases where postmortem grandparenthood is pursued, bereaved parents are seeking out a woman who wishes to become a mother and raise the child herself, but prefers a non-anonymous sperm donor.¹⁵¹ Described often as a harmonious coming-together of interests, this scenario allows bereaved parents to fulfill their wish to become grandparents, while providing single women a practical route to parenthood. Less frequently, parents of the deceased wish to use their son's sperm in order to conceive a child to raise themselves, as her legal parents. Under such circumstances, parents will need an egg donor and a surrogate in order to pursue their reproductive project.

Parents who wish to become grandparents via PMR in the United States and Israel must overcome several challenges that highlight the groundbreaking nature of PMG. To begin, the legal void in which PMG is currently practiced creates an unpredictable atmosphere; parties have no way of knowing when a court might decide to draw a line and deny a case only because of its relative novelty.

The legal instability surrounding PMG is illustrated by the first ruling of the Israeli Supreme Court on PMR. In 2013, Haderet and Roni Meiri wanted to use their twenty-eight-year-old son's sperm for reproduction, after he was killed in a military training exercise.¹⁵² He had been married for three months prior to the accident.¹⁵³ The family court where the case was initially litigated ruled in favor of the parents and against the widow, who objected to PMG because in her view the deceased would not want to produce children he would not be able to raise, let alone through a woman he did not know.¹⁵⁴ The court found that the

151 One way for the parties to find each other is through ads the bereaved parents place in newspapers; another is through organizations such as *New Family*, providing legal advocacy services in the area of family law, specifically for grandparents' rights. See *Grandparents Rights*, NEW FAMILY, <http://www.newfamily.org.il/en/grandparents-rights/> [<https://perma.cc/5UCV-BXJ2>].

152 Rahel Jaskow, *Dead Reservist's Parents May Use His Sperm, Against Widow's Wishes*, TIMES OF ISRAEL (Mar. 25, 2015, 11:46 PM), <https://www.timesofisrael.com/dead-reservists-parents-may-use-his-sperm-against-widows-wishes/> [<https://perma.cc/NJ48-JAY3>].

153 *Id.*

154 FC 31344-09-13 Family Court (Petah Tikva) Anonymous v. State Attorney Office 5 (Mar. 18, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

bereaved parents better represented their son's reproductive wishes.¹⁵⁵ The district court later affirmed this decision.¹⁵⁶ Both the widow and the state appealed the decision to the Supreme Court, which in a 4–1 decision ruled against the parents.¹⁵⁷ Although by this time bereaved parents were able to successfully claim the right to PMG in several cases, it was the first time the wife of the deceased *objected* to PMR. This seems to have been of crucial importance for the court—but also for the state in filing its objection.¹⁵⁸

The fact that PMR often involves court litigation presents another challenge to the process of finding a woman with whom to engage in this reproductive practice. As Israeli parents Julia and Vlad Pozniansky learned while interviewing several candidates who showed interest in having their deceased twenty-five-year-old son's child, some women were deterred by the lengthy legal process PMR involves.¹⁵⁹

Legal hurdles aside, there are other, more practical, difficulties involved in achieving PMG. These challenges vary in ways that reflect the differences between the reproductive landscapes in Israel and the United States. A prime example is the costs associated with PMG. In 2016, the minimum price of an IVF cycle in the United States ranged from \$12,000 to \$15,000.¹⁶⁰ “Various bells and whistles—ICSI, assisted hatching, embryos freezing, and PGD, among others—can easily add another \$5,000 to \$15,000.”¹⁶¹ For parents wishing to raise their grandchildren themselves, there is the additional cost of egg donation, which costs about \$15,000.¹⁶² Those who use a paid gestational surrogate pay another \$40,000 to

155 *Id.*

156 FA (CT) 7457-05-11 M. A. v. H. M. 21 (Oct. 17, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

157 FAR 7141/15 Anonymous v. Anonymous 110–111 (Dec. 22, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

158 *Id.* at 19–20. During these proceedings, the Attorney General shifted its opinion from one deferring to the factual findings of the lower court regarding the deceased's wishes, to the one expressed in the court's ruling.

159 Abramov, *supra* note 3, at 23; see also Nicola Abé, *Raising Israel's Posthumously Conceived Children*, SPIEGEL ONLINE (Mar. 28, 2018, 4:11 PM), <http://www.spiegel.de/international/world/ivf-treatment-leads-to-children-conceived-after-parent-death-a-1194747.html> [<https://perma.cc/F7DE-LDHB>].

160 GREELY, *supra* note 143, at 58.

161 *Id.*

162 *Id.*

\$60,000 for such service.¹⁶³ For Americans, PMG, like many other reproductive services,¹⁶⁴ will thus only be available to people with a certain socio-economic status. The Evans case discussed throughout this article is illustrative of this point. Missy Evans, a single mom from Texas who lost her twenty-one-year-old son in a fight outside of a club, realized that she did not have the funds to engage with PMG, after completing the process of retrieving his sperm.¹⁶⁵ A sizable donation that she finally agreed to take, as well as her decision to have the embryo implanted inside herself in an attempt to mitigate the costs, allowed her to go through at least one round of IVF, which was unsuccessful.¹⁶⁶

In Israel, the costs associated with PMG are significantly lower, at least for parents who contract with a third party woman to carry and raise their grandchild. IVF treatments are funded by the state for women aged eighteen to forty-five, covering up to two children.¹⁶⁷ Parents who wish to raise their grandchild themselves, however, will have to find recourse in a country more accommodating to their reproductive aspiration—and bear the costs associated with these services in that particular state. This is because the law governing surrogacy forbids entering into an agreement under circumstances where the intended father will not be genetically related to the child.¹⁶⁸

Moreover, raising sufficient funds, finding the right people, and getting judicial permission if necessary do not mean that the road to grandparenthood is assured. There are still service providers, such as physicians and other medical professionals, who must agree to get on board with this reproductive choice. Bereaved parents are more likely to encounter this as a challenge in the American context, where medical facilities providing reproductive services are free to self-regulate the terms under which they provide certain reproductive services. In 2012, for example, Jerry and Rufus McGill wanted to harvest their nineteen-year-old son's sperm to produce a grandchild after he was critically injured in a

163 *Id.*

164 *Id.* at 56–60.

165 See Dan P. Lee, *The Good Seed*, GQ (Dec. 22, 2011), <https://www.gq.com/story/nik-evans-sperm-paternity-fight-story-marissa-evans> [<https://perma.cc/2G5B-BRU6>]; see also Morber, *supra* note 51.

166 Lee, *supra* note 165.

167 Birenbaum-Carmeli, *supra* note 142, at 17.

168 Embryo Carrying Agreement (Agreement Authorization & Status on the Newborn Child) Law, 5756–1996 (Isr.). Other relevant factors that affect the decision whether to allow a couple to contract with a surrogate are the couple's age and their number of children. See generally D. KELLY WEISBERG, *THE BIRTH OF SURROGACY IN ISRAEL* (2005).

car accident in Virginia.¹⁶⁹ Even after finding a University of Virginia Medical Center urologist who was willing to perform the procedure, the parents reportedly had to give up their “quest,” as their son was pronounced dead before they were able to obtain a court order.¹⁷⁰

In Israel, in comparison, the IAG guidelines instruct medical facilities that a “lenient” policy should lead to requests for sperm retrieval to be usually approved, regardless of the requesting party’s identity. This provision, alongside the requirement to bring decisions regarding the retrieval and use of sperm postmortem before a court, helped shape PMR in general, and PMG in particular, as a primary concern for the legal rather than medical practice in Israel.

Clearly, postmortem grandparenthood is currently a difficult and complicated reproductive route to take. Nonetheless, bereaved parents still choose it for themselves, endure the various challenges it entails, and persist in their struggle. But in light of these challenges, how should we understand their conviction that they have a right to postmortem grandparenthood? To answer this, the following section seeks to capture PMG as a phenomenon by accounting for the distinctive circumstances under which this form of reproduction is pursued.

B. Managing Loss

The background provided in Part I suggests two ways in which the normative debate surrounding PMR and the policies that govern its use takes into account how death triggers the decision to engage with this practice: first, by considering how being in a state of grief may cloud the judgment of surviving *wives* in making the decision whether to take on this reproductive route; second, and importantly, by questioning how the surviving family members’ experience with grief will affect the well-being of the future *child*. Indeed, in several of the cases discussed below, courts closely examine bereaved parents’ process of managing loss as part of an inquiry over the future child’s best interest. It is one way in which the analysis offered in this section, which conceptualizes PMG as bereavement

169 David Arthur, *Parents’ Quest to Use Seriously Injured Son’s Sperm for Grandchildren Ends After He’s Taken Off Life Support*, DAILY MAIL (Nov. 21, 2012), <http://www.dailymail.co.uk/news/article-2229639/Parents-quest-use-seriously-injured-sons-sperm-grandchildren-end-hes-taken-life-support.html> [https://perma.cc/H6UV-PHTW] (noting also that the facility where the son’s body was being held was reportedly in the process of developing a policy for PMSR); see also *Critically Injured Virginia Teen Dies Before Parents Can Harvest Sperm*, FOX NEWS (Nov. 8, 2012), <http://www.foxnews.com/us/2012/11/08/critically-injured-virginia-teen-dies-before-parents-can-harvest-sperm.html> [https://perma.cc/GMX7-G6UJ].

170 Arthur, *supra* note 169.

practice, maps onto the process of weighing parents' interest in becoming postmortem grandparents against other interests such as those of the future child. Other ways will be discussed in Part III, in which I consider several broader legal implications of PMG.

1. PMG as Bereavement Practice

Bereavement practices are generally understood to be “those actions that the bereaved construct and repeatedly participate in which provide some kind of necessary gratification of need.”¹⁷¹ Such needs are integral to the process of managing loss, providing various means through which one can express “emotion or ideas that a death induces.”¹⁷² Different bereavement practices or mourning rituals are known to have the effect of facilitating this process by providing comfort and solace. Indeed, mourning rituals can come in the form of:

any activity—sacred or secular, public or private, formal or informal, traditional or newly created, scripted or improvised, communal or solitary, prescribed or self-designed, repeated or one-time only—that includes the symbolic expression of a combination of emotions, thoughts, and/or spiritual beliefs of the participant(s) and that has special meaning for the participant(s).¹⁷³

Mourning rituals often include “visiting the grave, displaying photographs of the deceased, showing photos and speaking about the loved one to others, taking up an interest the deceased enjoyed . . . , creating a memorial of some kind, or even planting something in memory of the deceased.”¹⁷⁴ Funerals are a familiar example of ritualized behavior practiced in almost every society in different variations, based on the “social norms, personal styles and cultural prescriptions” that provide the context in which these rituals emerge.¹⁷⁵

171 Laura Lewis & William G. Hoy, *Bereavement Rituals and the Creation of Legacy*, in GRIEF AND BEREAVEMENT IN CONTEMPORARY SOCIETY: BRIDGING RESEARCH AND PRACTICE 315, 315 (Robert A. Neimeyer et al. eds., 2011).

172 *Id.* at 315–16.

173 Jason Castle & William L. Phillips, *Grief Rituals: Aspects that Facilitate Adjustment to Bereavement*, 8 J. LOSS & TRAUMA 41, 43 (2003).

174 Lewis & Hoy, *supra* note 171, at 316.

175 Heather Conway & John Stannard, *The Honours of Hades: Death, Emotion and the Law of Burial Disputes*, 34 U. NEW SOUTH WALES L.J. 860, 865 (2011).

Over time, mourning practices evolve in relation to the available means through which individuals can engage in such ritualized behaviors. Photography is one example of a technology whose development allowed new practices of mourning to evolve alongside it.¹⁷⁶ Other more contemporary examples of the evolution of mourning practices can be found in the emergence of social networks.¹⁷⁷ For instance, different functions now offered on Facebook open new ways to mourn by allowing people to interact with a deceased person's profile page, such as visiting the profile, posting on the page to share memories, or even sending a private message.¹⁷⁸ Facebook also offers the option to designate a "legacy contact," a person who will be able to run the deceased's profile.¹⁷⁹ In this way, close family and friends as well as those outside the "inner-circle" have new ways to "work through grief" that function similarly to "traditional" ways of mourning, such as attending a wake or visiting the grave.¹⁸⁰ Technological developments, then, allow for novel ways to manage loss. It is in this context that we should begin thinking about PMG as a bereavement practice.

Bereavement practices often respond to the specific needs that arise after experiencing loss. However, these practices are widely understood to serve several purposes in coping with grief and facilitating the mourning process. For example, rituals may provide emotional comfort or relieve the tension that accompanies such difficult times.¹⁸¹ For some, mourning rituals help to facilitate a bond with the deceased and "allow people to be in

176 Carol Sanger, *The Birth of Death: Stillborn Birth Certificates and the Problem for Law*, 100 CAL. L. REV. 269 (2012). Sanger explains how postmortem photography—the practice of professionals taking “portrait-like” after-death pictures of loved ones—emerged at a point in time when “[p]hotography was a relatively new medium and cameras and chemicals required were not household items.” *Id.* at 284. These portraits offered a “visual remembrance” to families that were unlikely to possess a photograph of a loved one, a widely recognized artifact of mourning. *Id.* at 285.

177 The effect of social media on the practice and experience of mourning is now widely acknowledged and documented in scholarly writing. *See, e.g.*, Rhonda N. McEwen & Kathleen Scheaffer, *Virtual Mourning and Memory Construction on Facebook: Here Are the Terms of Use*, 33 BULL. SCI. TECH. & SOC’Y. 64 (2013); Natalie Pennington, *Tie Strength and Time: Mourning on Social Networking Sites*, 61 J. BROADCASTING & ELECTRONIC MEDIA 11 (2017); James Meese, *Selfies at Funerals: Mourning and Presencing on Social Media Platforms*, 9 INT’L J. COMM. 1818 (2015).

178 Pennington, *supra* note 177, at 14.

179 *Id.*

180 *Id.* at 14, 20.

181 Lewis & Hoy, *supra* note 171, at 316.

touch with the essential essences of the deceased's being that are longed for."¹⁸² Individuals are said to have "an internal desire for continuity with deceased loved one, particularly evidenced at the junctures of major developmental milestones (e.g., graduations, marriages, and the birth of a grandchild)."¹⁸³

These theoretical insights and the analysis that follows both focus on the emotional needs, to which mourning practices respond in the process of managing loss and its psychological dimensions. However, it is important to acknowledge that the decision to engage with a certain practice can be attributed to needs that are embedded in social and cultural prescriptions as well.¹⁸⁴ In analyzing the anthropological underpinnings of the mourning process, for example, Professor Shai Lavi suggests that we understand this process as a "state of affairs that binds together the living and the dead and persists until the mourners fulfill their duty toward the deceased, helping to heal the broken cycle of life and death."¹⁸⁵ According to Lavi, postmortem sperm retrieval is a practice that is embedded in the need to perpetuate this cycle.¹⁸⁶

It is against this brief background of bereavement practices and their purposes that I consider how the process of producing a grandchild following the loss of an adult son provides comfort and solace to grieving families. In making this argument, I focus on the timing in which the decision to take this reproductive route is made, and the emotional needs it responds to in the bereaved. To be clear, my purpose here is not to make a normative argument regarding the *desirability* of PMG, in terms of its ability to facilitate or disrupt the process of coming to terms with death. Instead, my purpose is to investigate how the experience of loss and the process of managing it operate as a motivation for parents in pursuing PMG.

182 *Id.* at 317.

183 *Id.*

184 See, e.g., Kara Thieleman, *Epilogue: Grief, Bereavement, and Ritual Across Cultures*, in *THE WORLD OF BEREAVEMENT: CULTURAL PERSPECTIVES ON DEATH IN FAMILIES* 287, 288 (Joanne Cacciatore & John DeFrain eds., 2015) (explaining how ritualized responses to death vary across cultures and can be organized, for example, "on a continuum of death-denying and death-accepting orientations.").

185 Shai Lavi, *The Mourning After: Posthumous Sperm Retrieval and the New Laws of Mourning*, in *LAW AND MOURNING* 36, 45 (Austin Sarat & Martha Umphrey eds., 2017).

186 *Id.* at 55.

a. Timing

In cases where the deceased son did *not* freeze his sperm before his passing, family members will confront the decision whether to engage with PMG within hours after being notified about their loss. As stated earlier, the decision to harvest the sperm must be made within the limited time frame, ranging from twenty-four to thirty-six hours. Accordingly, families come across the idea of PMR “at the peak of their grief.”¹⁸⁷ Cases involving PMG offer different accounts of how bereaved parents came to the idea of PMG and made their decision to pursue it. These accounts begin to explain how PMG becomes entangled in the process of managing loss.

Missy Evans described the moment her son’s doctor told her that he was brain-dead, when she instantly decided “she wanted—she needed—Nik’s sperm.”¹⁸⁸ In fact, even before her son was pronounced brain-dead she decided that if “the worst thing possible happens,” she will “have Nikki’s child for him.”¹⁸⁹ Missy sought a court order allowing her to harvest the sperm out of her son’s body after the medical staff at the hospital had refused to do so at her request.¹⁹⁰

For Ludmila, an Israeli single mother, it was when the military officials broke the news of her only son’s death in a terror attack that she responded with the request that his sperm be retrieved: “I got chills all over my body, and in my head there were only two words: save sperm.”¹⁹¹ She admitted to being unable to explain how she got the idea to retrieve and preserve her son’s sperm at that moment.¹⁹²

Rachel Cohen, the mother of a nineteen-year-old Israeli soldier who was killed by a sniper in the Gaza strip, recalled the moment she decided she wanted to harvest his sperm for reproductive purposes: “And suddenly, it was as if I heard him . . . Mom, he said to me, it’s not too late. There’s still something you can take from me . . . What about the sperm?”

187 *Id.* at 37.

188 Lee, *supra* note 165.

189 *Id.*

190 *In re Estate of Nikolas Colton Evans, Deceased*, No. C-1-PB-09-000304, 2009 WL 7729555 (Tex. Prob. Apr. 7, 2009).

191 Glickman & Barkan, *supra* note 4, at 15.

192 *Id.* at 13.

Don't you want it?"¹⁹³ His voice came to her just as she received the news about his death and was standing in her son's room "while the casualty notification unit was still in the family's living room."¹⁹⁴

All three accounts, echoed in other cases as well, invoke the idea of a created ritual. A kind of ritual made up for a certain individual or a set of circumstances, which can be "intuitively adapted from ceremonies from other culture, developed in collaboration with a counselor or therapist, or inspired by meditation, dream work, or journal writing."¹⁹⁵ However, not all parents are able to offer such a detailed description of how the idea of PMG came to mind. Israeli Irit Shahar, who lost her twenty-five-year-old son in a car accident in 2012, asked that his sperm be retrieved minutes after receiving news of his death.¹⁹⁶ In an interview a few years later she could not explain how or why she thought of PMG at that moment, but described it as a "small miracle."¹⁹⁷ Realizing that this "miracle" might not happen for other parents, she decided to make her personal story public, so that "it will sit in the back of the mind of parents," in case such tragedy should befall them.¹⁹⁸

The short time frame in which the decision to engage with PMR must be made became a cause of concern at the time when PMR was pursued mainly by spouses. As explained, both American and Israeli protocols responded to this concern by creating a mandatory waiting period before the sperm may be used, ranging from a few months to a year. It is unclear, much like everything else related to PMG, whether these waiting time periods apply to parents as well, although some cases suggest they do.¹⁹⁹

193 Sari Makovar-Belikov, *Living Memory*, YEDIOTH AHRONOTH – 7 DAYS, October 17, 2014, *quoted in* Lavi, *supra* note 185, at 45.

194 *Id.*

195 Castle & Phillips, *supra* note 173, at 43.

196 Noam Barkan, "As Long as I am Alive I Will Not Give Up Hope on Raising a Child from My Son's Sperm," YEDIOTH AHRONOTH (Sep. 4, 2016), <https://www.yediot.co.il/articles/0,7340,L-4850281,00.html> [<https://perma.cc/QG2T-RM8V>].

197 Eran Navon, "We Will Never Give Up," ISRAEL HAYOM (Feb. 2, 2017, 7:55 PM), <https://www.israelhayom.co.il/article/449223> [<https://perma.cc/C67Z-XVPF>].

198 Barkan, *supra* note 196; *see also* Renee Ghert-Zand, *Israeli Couple Wins Right to Produce and Raise Grandchild from Fallen Soldier Son's Sperm*, TIMES OF ISRAEL (Nov. 16, 2016), <https://www.timesofisrael.com/israeli-couple-wins-right-to-produce-and-raise-grandchild-from-fallen-soldier-sons-sperm/> [<https://perma.cc/8XZU-D9MX>].

199 *See* Smadar Shir, "I Trusted Ilan's Promise That He Will Never Leave Me Alone," YEDIOTH AHRONOTH – 24 HOURS (July 1, 2017), <https://www.yediot.co.il/articles/0,7340,L-4983309,00.html> [<https://perma.cc/>]

b. Needs

Even if waiting periods apply, and in turn have the effect of making parents' decision to engage with PMR less emotionally driven, they do little to disengage PMG from the process of managing loss. Several cases from the past fifteen years illustrate this connection and its persistence even where it takes years for these parents to become grandparents.

One of the earliest cases that brought PMG to the fore was the 2002 Israeli *Cohen* case involving nineteen-year-old Keivan. His parents' request to harvest his sperm hours after he died ignited a legal battle spanning six years, in which the bereaved parents fought for their right to use his sperm to bring a grandchild into the world.²⁰⁰ At least in the beginning, PMSR provided Rachel, Keivan's mother, a way of coping with the loss of a tangible relationship with her son. Explaining her decision to harvest his sperm, she described how she was looking at his photo hours after he died and said to him: "What will remain of you? How can I hold on to something of you? You're about to be buried, there'll be nothing left of you."²⁰¹ Later on, when a woman was finally able to conceive from Keivan's sperm, it provided emotional comfort and relief, which according to her were unattainable until that point: "Every year I'd say at his memorial service, 'Next year I won't be here, I'll be dead.' The stress was so intense . . . It's been 10 years, but this year, I don't want to die."²⁰² Her husband, Yaacob, offered a similar account.²⁰³ After the birth of their granddaughter, who was named Osher (Hebrew for happiness), Rachel admitted that for the first time she did not visit her son's grave, but went to see her granddaughter instead.²⁰⁴

Although mourning practices are thought to assist in "the transformation of the relationship that is lost from one of physical contact with the deceased to one of symbolic and

WW2G-NNFR] (reporting that an Israeli single mother, who asked to retrieve her son's sperm after he died in a drowning accident, said she was told by the hospital that performed the procedure that she would be able to use the sperm in one year).

200 Machado, *supra* note 1, at 93. Aside from the legal novelty of their claims, what was perhaps most unusual about this case was the honesty and openness with which the couple brought their story into the public eye. Through a series of articles in major newspapers, television interviews, and most recently a documentary entitled *Seed of Life*, they offered a detailed look into their experience with PMR. *Id.*

201 *Id.*

202 *Id.* at 96.

203 *Id.*

204 *Id.*

spiritual connection,”²⁰⁵ PMG provides bereaved parents with much more: their own flesh and blood.

The importance and meaning of PMG to the Cohens’ ability to cope with their son’s death is evident in their detailed recollections of their experience during the process. However, not all family members shared this feeling. On one occasion, their eldest son, who seemed reluctant to speak about Keivan’s death, expressed his frustration with PMG’s entanglement in the family’s mourning process: “The baby is a bonus, [but] I miss Keivan. They’re two different things completely. You can’t take the bereavement and mix it with joy, they’re totally separate.”²⁰⁶ His response suggests that this practice does not carry the same meaning for him as it does for his parents and may not have the gratifying and positive function it appears to carry in their own process of managing loss.²⁰⁷

The way PMG functions within an individual’s bereavement process is illustrated in other prominent Israeli cases. About two years ago, appeared on the cover of a major Israeli newspaper a photo of Julia Pozniansky, together with her four-year-old son Erik and her month-old granddaughter Shira.²⁰⁸ “They were both born out of the death of a young man,” read the article, “Baruch Pozniansky was his name.”²⁰⁹ Baruch died of cancer when he was twenty-five years old; seven years later, his daughter was born.²¹⁰ Describing her first meeting with her granddaughter, Baruch’s mother offered her account of what becoming a grandmother postmortem meant to her ability to come to terms with her son’s death: “When I saw my granddaughter I felt like my heart is beating again. Since Baruch died, it was as if it had stopped.”²¹¹

Julia and Vlad’s story differs from the Cohens’ in that they had Baruch’s biological will, written just three days before his passing, in which he explicitly expressed his wish to

205 Lewis & Hoy, *supra* note 171, at 316.

206 Machado, *supra* note 1, at 94. Keivan’s sister expressed her concern that her niece “will have issues” as a result of not knowing her father, as well as from the stigma that may attach to her as a “test-tube baby.” *Id.* at 96.

207 Lewis & Hoy, *supra* note 171, at 317.

208 Abramov, *supra* note 3.

209 *Id.* at 22.

210 Abé, *supra* note 159.

211 Abramov, *supra* note 3, at 22.

become a father postmortem.²¹² In most cases, the deceased has not given his explicit consent to become a father postmortem; our knowledge regarding the deceased's reproductive preferences is usually limited to his intention or wish to father children at some point in his life. While it is evident that fulfilling Baruch's wish motivated his parents in pursuing PMG, the couple was also candid about their own needs in having another grandchild—or child—after losing their son. After one attempt with PMG fell through, the Pozniansky's, both in their fifties, decided to become parents themselves. When asked about his own motivation for becoming a father at that point in his life, Vlad answered: "Giving birth to Eric was completely irrational. It was an answer to Hamlet's question, to be or not to be."²¹³

Nevertheless, there appears to be an ambivalence between the sense of meaning and fulfillment parents expect from the birth of another child and the persisting presence of pain and stress resulting from their experience of loss.²¹⁴ Julia Pozniansky's account of her experience becoming a grandmother—and a mother—vividly illustrates this tension. Reflecting on the process of managing the loss of her son, she said: "When I was pregnant with Eric and also now, when Shira was born, I was hoping one of them would look like Baruch . . . Maybe this thought, to bring Baruch back through these children, is something that is never going to happen."²¹⁵

212 Abé, *supra* note 159.

213 Abramov, *supra* note 3, at 23. This is not the only case where parents decided to conceive a child of their own while still fighting for the right to become postmortem grandparents. In August 2017, a fifty-three-year-old Israeli single mother welcomed a newborn son a year after she lost her only other son, Ilan, in a drowning accident. She explained both of her decisions—to become a mother and a grandmother—by referring to her own mourning process in the weeks that followed Ilan's death. After the hospital refused to allow the use of the sperm within a year of Ilan's funeral and realizing there was no guarantee that the court would eventually grant permission for her to use her son's sperm, she decided to become a mother herself for the second time. Shir, *supra* note 199. Svetlana was aided by an Israeli organization named "Or Families" (in Hebrew, "Or Lamishpachot Association") that aims "to serve as a comprehensive family bereavement support program" and operates a program that helps bereaved parents of fallen IDF soldiers who wish to expand their family by offering medical consultation as well as funding. OR FAMILY, <http://www.or-family.org.il/EN> [<https://perma.cc/V36J-BYC9>].

214 See, e.g., Yaira Hamama-Raz, Sarah Rosenfeld & Eli Buchbinder, *Giving Birth to Life—Again!: Bereaved Parents' Experiences with Children Born Following the Death of an Adult Son*, 34 DEATH STUDIES 381, 397–98 (2010) (explaining an Israeli study aimed at understanding the meanings attributed by parents who lost an adult son during his military service to giving birth to another child).

215 Abramov, *supra* note 3, at 24.

2. PMG as a Work of Legacy

Acts of commemoration are widely understood to establish the memory or legacy of the deceased, “in the minds and hearts of current and future generations.”²¹⁶ For example, mourners may erect monuments, plant trees, or endow gardens, scholarships, or buildings in the name of the deceased.²¹⁷ These public acts of commemoration have the purpose of perpetuating the memory of the deceased by publicizing certain “features of the deceased’s identity and personhood,”²¹⁸ or specific aspects of their life, or simply their name within a broader community.²¹⁹

Unlike public commemoration, private commemoration is directed primarily at family members and those within the inner circle of the deceased. Displaying his or her picture, creating “memorial corners” in one’s house, and making home videos of the person’s life are common private, tangible acts of commemoration.²²⁰ However, they have a similar purpose: perpetuating the death of the deceased in a way that is symbolic of the deceased or the circumstances of her death.²²¹

Within academic death studies, private acts of commemoration are associated with loss of an infant child, rather than an adult child.²²² This is partly due to the fact that such losses have been characterized as private deaths to be mourned within the privacy of one’s home. But as in the case of stillbirths, changes in the perception of such deaths allowed for public acts of commemoration to emerge in this and other contexts involving infant loss.²²³

216 Lewis & Hoy, *supra* note 171, at 319.

217 *Id.*

218 *Id.*

219 Chaya Possick et al., *Reconstructing the Loss: Hantzacha Commemoration Following the Death of a Spouse in a Terror Attack*, 12 J. LOSS & TRAUMA 111, 117 (2007); see also Meira Weiss, *Bereavement, Commemoration, and Collective Identity in Contemporary Israeli Society*, 70 ANTHROPOLOGICAL Q. 91, 91 (1997).

220 Possick, *supra* note 219, at 115. Intangible acts of commemoration will “pass on the legacy of the deceased without the use of a physical symbolic object.” *Id.* at 120.

221 *Id.* at 115.

222 See, e.g., Leslie A. Grout & Bronna D. Romanoff, *The Myth of the Replacement Child: Parents’ Stories and Practices After Perinatal Death*, 24 DEATH STUDIES 93, 96 (2000); Helen Keane, *Foetal Personhood and Representations of the Absent Child in Pregnancy Loss Memorialization*, 10 FEMINIST THEORY 153 (2009).

223 See Sanger, *supra* note 176, at 283–86.

It is in this spirit that I wish to consider postmortem grandparenthood as a similarly private act of commemoration. Both the process of creating the object of commemoration as well as its continued existence gratifies needs which arise in the process of managing loss among bereaved persons.²²⁴ In this sense, bereavement practices and commemorative acts are interconnected, to the extent that the latter may be viewed as a *subcategory* of the former. The theoretical background offered in the beginning of Part II on bereavement practices and their function within the process of managing loss applies to commemorative acts as well. More specifically, “memorial behavior and objects at an individual and family level represent a way of transforming the inner representation of the deceased as well as keeping a connection to her or him.”²²⁵ Such acts “confirm the earthly existence of the deceased,” and “may help in necessary role transitions or in the redefinition of self without the living presence of the loved one.”²²⁶

But realizing that bereavement practices and commemorative acts similarly facilitate the mourning process, this section focuses instead on the process of construing PMG as an act of commemoration by bereaved parents. Put differently, in the following paragraphs I consider how parents frame their decision to utilize sperm for the purpose of creating a child postmortem, both within and apart from the legal realm, as an act that embodies the legacy of the deceased and is a fulfillment of his long-standing wish—which is more often inferred than known.

Emphasizing the longing of the deceased to become a father is a feature common to most cases where PMG is being pursued by family members seeking permission to use the deceased’s sperm. Parents often recall conversations they had with their children about having children of their own and becoming parents in the future. These statements are supported by notes, love letters, or portions of their diaries, in which deceased persons had expressed their desire to father children. Close friends will provide additional support based on their own memories and experiences with the deceased. Of course, one reason for the elaborate efforts parents make to prove their children’s desire for parenthood is the extent to which the wish of the deceased is a determinant factor in decisions about access to PMG. As explained earlier, in both the Israeli and American contexts, courts and physicians search for any indication that PMR is something the deceased would have wanted for himself.

224 Possick, *supra* note 220, at 115–16.

225 *Id.* at 123; *see also* Lewis & Hoy, *supra* note 171, at 319.

226 Lewis & Hoy, *supra* note 171, at 322.

At the same time, wanting to become a father over the course of one's life does not necessarily mean wanting to become one after death; and wanting to become a father after death with a person you have known and loved is not the same as wanting a woman you have never met to bear your child. It is certainly not the same as wanting your parents to become your child's primary caretakers. These distinctions currently make little difference in the judicial and medical decision-making process that precedes PMG. Instead, questions about the deceased's reproductive preferences all merge into a single inquiry over his generic wish to have children. As we shall see, the same is true for the non-legal framing of PMG as a work of legacy, in which it appears crucial to show not only that the deceased wanted children, but that his wish to become a parent was so central to his being—such a prominent feature of his personality—that it justifies going to such great lengths to commemorate this particular aspect of his life. In fact, in most cases it is evident that parents have little to support this conviction and their choice to create their son's legacy via PMG.

a. Narrating

Consider the American *Evans* case. Moments after receiving the news that her son “could not and would not survive,” Missy was sitting outside the hospital telling her son's friends and family how “crazy” the idea of having Nik's child sounded.²²⁷ Missy then moved on to recall her last conversation with her son, when “[t]hey talked about Nik's girlfriend and his plans to attend film school in Los Angeles that fall He told Missy how grateful he was that she'd had him young. He said, as he often did, that he wanted the same: to be a young father. He wanted three boys.”²²⁸ According to Missy's own recollection there was nothing unique about the conversation she had with her son, twenty-one at the time, two weeks before his passing. Indeed, it is common in cases involving PMG that routine conversation and musings about the future acquire different and perhaps overstated meaning postmortem, providing grounds for bereaved parents' conviction to produce a genetic offspring, sometimes framed as nothing less than having the deceased “son's dream fulfilled.”²²⁹

In the Israeli *Meiri* case discussed earlier, over the course of several proceedings the parents went to great lengths to convince the court that becoming a father was their son's *only* dream. Their testimony included detailing a dream he shared with them of a “little girl

227 Lee, *supra* note 165.

228 *Id.*

229 Jaskow, *supra* note 152.

with red curls running on the beach.”²³⁰ They also asked several of the deceased’s close friends to provide support for their claims. At least three of them testified about how great the deceased was with children, how much he loved them, and how he would never have wanted to die without having had the chance to leave his mark on this world in the form of a genetically-related child.²³¹ Furthermore, in portions of the deceased’s diary, which he wrote to his wife while traveling abroad, he shared personal thoughts and feelings regarding their relationship and plans for the future. These were also introduced as evidence of his love and longing for children.²³²

The univocal view that parents try to put forward is not always shared by others who had close and intimate relationships with the deceased, such as spouses, siblings, and friends. In the *Meiri* case the deceased’s spouse challenged the narrative portrayed by her late husband’s parents. Although she did not doubt that the deceased wanted to be a father one day, she was convinced, based on their longtime relationship, that he would not want his sperm to be used by anyone other than her.²³³ Nonetheless, the family court found that the widow’s account of whether the deceased would have agreed to PMG was unreliable, because she had “found a [new] relationship and had two children, and stopped coming to memorials and memorial days and ‘disappeared from the view.’”²³⁴ In overruling both decisions, the Israeli Supreme Court rejected this finding and found instead that the parents in this case provided no evidence to contradict the widow’s assertion.²³⁵

Other examples similarly illustrate how parents frame PMG as creating a legacy by honoring the deceased’s wishes and dreams to father children. In an early contentious case of a twenty-two-year-old Israeli man who died of cancer, the deceased had been asked to

230 FA (CT) 7457-05-11 M. A. v. H. M. 14 (Oct. 17, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

231 *Id.* at 16.

232 FC 31344-09-13 Family Court (Petah Tikva) Anonymous v. State Attorney Office 14–15 (Mar. 18, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.), *aff’d*, (FA (CT) 7457-05-11 M. A. v. H. M. 21 (Oct. 17, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.)).

233 *Id.* at 5.

234 *Id.* at 13. The family court also found that her testimony was contradicted by the testimonies of four “objective witnesses” (the deceased’s friends), according to whom he would have wanted to have children at all costs. *Id.* at 19.

235 FAR 7141/15 Anonymous v. Anonymous 51–52 (Dec. 22, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

deposit his specimen before undergoing chemotherapy.²³⁶ He later shared his experience: “before they start dripping all these disgusting substances into my body I was asked to drip the future generation into a cup . . . and when we were done, I handed my parents their grandchildren in a plastic cup.”²³⁷ This statement, written as part of a humorous column, together with another statement the deceased made on his death bed (“I promise you, life will not stop, they will continue. Life cannot be stopped.”²³⁸), motivated his parents to pursue PMG with a third-party woman. They explained that it would fulfill his wish to have a child: “My wife and I want to continue what he started.”²³⁹ Against the parents’ contentious convictions, the state and the medical center where the man was hospitalized stressed that “sperm donation prior to chemotherapy is a standard procedure whose aim is to help prevent future infertility. . . . One cannot ascertain from that a desire to father children from a stranger after death.”²⁴⁰

But if parents insist on defining PMG as a work of legacy or a commemorative act, without being able to point to “specific traits or ideals of the deceased” that postmortem reproduction embodies, could it be that “[i]t is simply (‘bottom line’) the children’s existence that perpetuates the dead parent”?²⁴¹ On the one hand, both bereaved parents and those who advocate for legalizing PMG try their best to distance themselves from this view in which children function as living memorials—as a means rather than as an end.²⁴² On the other hand, reading these cases, one gets the sense that “[i]t is the concrete, physical representation and continuation of the deceased that is significant,” rather than the way parenthood or reproduction embodies a central feature or ideal of the deceased’s identity.²⁴³

236 FC 13530/08 Family Court (Krayot) *New Family Org. v. Rambam Medical Center* 4 (Dec. 6, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

237 *Id.* at 5; see also Idan Snir, *Cancer. Because Everyone Else Already Has a Dog*, YNET (Dec. 3, 2007, 2:05 PM), <https://www.ynet.co.il/articles/0,7340,L-3374027,00.html> [<https://perma.cc/5VUE-C5Z4>]; Fadi Eyadat, *Haifa Court Allows Woman to Use Frozen Sperm of Deceased Man She Never Met*, HAARETZ (Dec. 7, 2009 2:56 AM), <https://www.haaretz.com/1.5053589> [<https://perma.cc/MEW6-UYRV>].

238 *Court: Israeli Woman Can Use Deceased Man’s Sperm to Get Pregnant*, Haaretz (Dec. 6, 2012, 5:26 PM), <https://www.haaretz.com/1.5069570> [<https://perma.cc/PEV6-Z8S8>].

239 *Id.*

240 *Id.*

241 Possick, *supra* note 219, at 122.

242 See, e.g., Landau, *supra* note 140; Evelyne Aziza-Shuster, *A Child at All Costs: Posthumous Reproduction and the Mearning of Parenthood*, 9 HUM. REPROD. 2182 (1994); Blake & Kushnick, *supra* note 25, at 202.

243 Possick, *supra* note 219, at 122.

Indeed, the word *continuity* is often used to describe the objective of PMR, and the “right to continuity” is a recent iteration in bereaved parents’ attempt to legally frame their claim for PMG, at least in the Israeli context.

Notwithstanding this proposition, it may also be the case that framing PMG as an attempt to fulfill the deceased’s wishes and create his legacy because he no longer can (even when there is little indication that he wanted this) should be viewed as the parents’ attempt to rationalize to themselves their decision to pursue it in the first place. A study that examined how “family decision makers gained meaning from the decision to donate a loved one’s tissues,” found that fulfilling their family member’s wish was the first way they conceptualize the act of donation.²⁴⁴ Believing that they fulfilled their loved one’s wish provided comfort during their bereavement process.²⁴⁵ These findings support the claim that establishing PMG as a commemorative act is one way for parents to rationalize their decision to pursue PMG—vested less in their son’s wishes than in their own. In this way, PMG should be viewed, like in the previous section, as operating within parents’ own *personal* bereavement process, responding to their own need to preserve the memory of the deceased in their private familial sphere.

C. Exercising Parental Authority

Moving past the context of loss and death in which PMG is practiced, this section focuses instead on another characteristic of this reproductive route—that is, the familial relationships between those in pursuit of PMG and its subjects. It offers a view of PMG as an exercise of parental authority or control over their child’s life, particularly over a specific and unconventional aspect of it: their reproductive capacity. This conceptualization of PMG is expressed in the rhetoric used in cases involving PMG, where parents invoke their *parental status* in claiming to have knowledge of their child’s reproductive preferences and claim the right to act based on this knowledge following their death. In doing so, they attempt to undermine a premise underlying both Israeli and American protocols, which conceives of reproduction as an intimate project shared only by the deceased and their surviving partner, and as an area of life in which parents have no ethical claim.

To begin with, parents attempted to legally frame their claim to use their children’s sperm as an exercise of their “Right to Grandparenthood.” This vehicle proved to be of

244 Nancy S. Hogan et al., *Making Meaning in the Legacy of Tissue Donation for Donor Families*, 23 *PROGRESS IN TRANSPLANTATION* 180, 184–85 (2013).

245 *Id.* at 186.

little use given the ambiguity over what this right actually entails. Israel and the United States share a similar history of not recognizing an “autonomous ‘right’ of grandparents to a relationship with their grandchildren without the approval of the parents of the grandchild (except in situations in which both parents were deceased or were found to be legally unfit).”²⁴⁶ By the 1970s, things began to change with the enactment of statutes that either created a legal right for grandparents to visit their grandchildren,²⁴⁷ or recognized their right to standing in cases involving visitation rights, as was the case in Israel.²⁴⁸ These statutes acknowledge, to various degrees, grandparents’ legal right to *maintain a relationship* with their grandchild. However, they were enforced only where “such contact is in the best interest of the minor,”²⁴⁹ and had to be balanced against the right to parent one’s children, which at least in the American context had the status of a constitutional right.²⁵⁰ Striking a balance between grandparents’ rights, parents’ fundamental rights, and children’s best interests has proven to be a contested task for courts, resulting in narrow and inconsistent protection for grandparents’ visitation rights.

But even in jurisdictions where rights of grandparents are better protected and consistently enforced, they are currently limited to the context of maintaining a relationship with grandchildren *who already exist*. As the Chief Justice of the Israeli Supreme Court made clear in her decision after surveying relevant statutes from the United States, England, Canada, and Israel, none of these countries recognize the right of “parents’ parents to claim the *birth* of their grandchildren.”²⁵¹

Alongside the rhetoric that invokes the right to grandparenthood, at least in the Israeli context there is another kind of rhetoric at play—one in which parents invoke their parental

246 Israel “Issi” Doron & Galia Linchitz, *The Legal Standing of Grandparents to Visitation Rights with Their Grandchildren: The Israeli Story*, 6 ELDER L. REV. 1, 3 (2010).

247 Judith L. Shandling, *The Constitutional Constraints on Grandparents’ Visitation Statutes*, 86 COLUM. L. REV. 118, 119 (1986) (arguing that constitutional protection of parents’ interests in raising their children limits judicial interpretation of grandparent visitation statutes).

248 Doron & Linchitz, *supra* note 246, at 3.

249 Damon E. Martin, *Grandparent Visitation Rights*, 32 AM. J. FAM. L. 1, 1 (2018); *see also* Doron & Linchitz, *supra* note 246, at 5–6.

250 *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) (establishing that “the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children”); *see also* Martin, *supra* note 249, at 2–3.

251 FAR 7141/15 Anonymous v. Anonymous 34–35 (Dec. 22, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

status in order to claim the right to PMG. This rhetoric is used as part of parents' attempt to prove that the deceased would have consented to PMR, rather than as an independent claim. Nonetheless, it is interesting to examine how the parental status is employed in both the judicial and legislative arenas to claim the right to PMG.

1. Modern Parents

One way in which parents have attempted to claim knowledge and authority over their children's reproductive capacity is by providing evidence for their *actual* rather than *assumed* role in their adult children's lives. One example is found in the Israeli *Shahar* case. In support of their claim, the couple testified about the close relationship they had with their son Omri, and about having an "active role" in planning his future.²⁵² They also argued that because their son was about to embark on a successful military career, which would have kept him frequently away from home,²⁵³ his mother would have been the one helping care for his theoretical children regardless.²⁵⁴ The judge found that the family's testimonies over the nature of the relationship between the deceased and his parents, and the active role they planned to take in raising his future children, provided clear evidence for the deceased's wish that his parents produce and raise his posthumously conceived children.²⁵⁵

In the *Meiri* case, the deceased's father made similar arguments about the dominant role he played in his child's life, which made him best situated to testify to—and decide—his son's reproductive aspirations: "I raised him for twenty-seven and a half years, he lived with me . . . he lived in my house, ate my food, breathed my air, I know, I can know what my son would have wanted."²⁵⁶ These testimonies supported the parents' claim that their son would have wanted them to use his sperm to fertilize a woman other than his widow (despite her testimony to the contrary). The court found additional support in the fact that the deceased used to consult with his parents and had great respect for them.²⁵⁷

252 FC 16699-06-13 Family Court (Petah Tikva) *Shahar v. Attorney General* 14 (Sep. 27, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

253 *Id.*

254 *Id.* Their daughter's intention to move into the parents' house for similar reasons was introduced in support of this contention.

255 *Id.* at 15.

256 FA (CT) 7457-05-11 M. A. v. H. M. 15 (Oct. 17, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

257 *Id.* at 17.

These characterizations of the relationship between parents and their adult children can be seen as reflecting a “continuation of the parental role and its ongoing importance to older parents’ identity, well-being, and psychological experience.”²⁵⁸ This view is perhaps more familiar in the Israeli context, which is “known to be a highly familial and close-knit society with close contact between the generations . . . As compared with North America, in Israel, adult intergenerational relationships appear more intense and commonplace.”²⁵⁹ A study exploring Israeli parents’ perceptions about their parental role, for example, characterized their experiences as an ongoing attempt to balance competing notions of their role, such as “valuing the autonomy of their adult children and wanting to fully be there for them.”²⁶⁰ Nevertheless, there is a growing recognition of the importance of intergenerational relationships in the United States, and the “instrumental forms of support ranging from financial assistance to child care and housework,” that such familial ties provide.²⁶¹

But regardless of whether such perceptions apply to these and other cases in which parents claim to know their children’s reproductive preferences, both cases illustrate the court’s high deference to parents’ depictions of their relationship with their deceased children. These depictions or testimonies, in turn, allow parents to portray reproduction as a familial project, rather than one shared only between the deceased and his spouse.

2. Fallen Soldiers

In the case of deceased soldiers, parental status gains yet another dimension that is worth pointing out when examining the ways this status may operate to provide bereaved parents access and motivation to postmortem grandparenthood. Consider, for example, this statement from a bereaved mother directed against the decision to deny her the right to PMG:

258 Naama Levitzki, *Parenting of Adult Children in an Israeli Sample: Parents Are Always Parents*, 23 J. FAM. PSYCHOL. 226, 227 (2009).

259 *Id.* (finding that this characterization is “attributed to the country’s historical background (e.g., the Holocaust), its culture (e.g., the place of religion and tradition in society), geographical proximity of family members in a small country, and tensions and dangers related to military service and terrorist activity.”).

260 *Id.* at 230.

261 Teresa Toguchi Swartz, *Intergenerational Family Relations in Adulthood: Patterns, Variations, and Implications in the Contemporary United States*, 35 ANN. REV. SOC. 191, 192 (2009); see also Ye Luo et al., *Grandparents Providing Care to Grandchildren: A Population-Based Study of Continuity and Change*, 33 J. FAM. ISSUES 1143 (2012).

Parents are good enough when their son is alive, but become meaningless with his death. We raise children, love them, nurture them, care for them . . . and when they turn 18 we give them to the state, for military service, and if something happens to them our parenthood is taken away . . . we become nothing.²⁶²

Implied here is the idea that PMG is or should be a way for the state to *compensate* surviving parents for making the ultimate sacrifice by sending their children to the military. This conceptualization may, again, be grounded in the Israeli context, where military service for all young adults is mandatory and where many of the cases of PMR (specifically PMG), involve deceased soldiers.²⁶³ However, the relation between PMR and military service is hinted at in the American context as well. In 2008, for example, an article published in the *Army Lawyer* by a U.S. Army judge called on the United States Military to adjust its protocols to accommodate the possibility of PMR for soldiers. Major Maria Doucettperry suggested that “[s]oldiers preparing to deploy should be briefed on cryopreservation as part of their Soldier Readiness Process Training.”²⁶⁴ According to Major Doucettperry, “issues concerning posthumous reproduction are of greater concern for service members anticipating deployment.”²⁶⁵

As mentioned earlier, a proposed new bill in Israel is attempting to legalize PMG for bereaved parents of deceased soldiers. In the explanatory remarks, the bill states, *inter alia*, that the state of Israel “owes a moral obligation to the bereaved families who have lost what is most precious to them.”²⁶⁶ Its responsibility cannot be limited to material compensation, but “must be expressed also in affording the possibility of making use of advanced technologies that will enable the bereaved families to have offspring from the deceased

262 FAR 7141/15 Anonymous v. Anonymous 22–23 (Dec. 22, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

263 Ya’arit Bokek-Cohen & Vardit Ravitsky, *Soldiers’ Preferences Regarding Sperm Preservation, Posthumous Reproduction, and Attributes of a Potential “Posthumous Mother,”* OMEGA—J. DEATH & DYING (Aug. 11, 2017).

264 Maria Doucettperry, *To Be Continued: A Look at Posthumous Reproduction As It Relates to Today’s Military*, ARMY LAWYER, May 2008, at 1, 21.

265 *Id.* at 22; see also Browne Lewis, *Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously*, 60 CASE W. RES. L. REV. 1159, 1169–70 (2010).

266 WESTREICH, *supra* note 136, at 19–20.

and to maintain [the dead soldier's] continuity."²⁶⁷ PMG is described in the bill as a "small gesture" toward the deceased's family.²⁶⁸

Conceptualizing parents' interests in using their children's sperm as an opportunity for "continuity" allows the state to expand further its responsibility toward bereaved parents; novel uses of ART function as yet another "survivors benefit." While this characterization may seem unsettling at first, it should be viewed in the context of Israel as a country that is overwhelmingly invested in the bereavement, memorialization, and rehabilitation processes that follow the death of a soldier.²⁶⁹ Also, the relation between reproduction and bereavement is already being facilitated by the state—for example, by offering bereaved parents monetary assistance for fertility treatments or surrogacy.²⁷⁰ The Israeli pronatalist ethos discussed earlier, which views reproduction as "a public works project,"²⁷¹ provide additional context in which to view this state's intervention in providing Israelis with access to ARTs.

As in the previous instance, by paving the way for parents to execute their children's reproductive futures, the proposed bill sets forth an understanding of reproduction as a familial project, this time through the concept of "continuity." A similar observation was made by Avishalom Westreich, who argues in a recent book that the new Israeli bill reflects a conceptualization of the right to postmortem reproduction as a "familial right," and is based on "familial and communal argumentations" in favor of that right.²⁷² In this sense, the parental status of those in pursuit of PMG is not only employed as part of the inquiry over the deceased's wishes, where parents claim to have more knowledge due to the actual extent of their parental role. Rather, their status as bereaved parents of fallen soldiers also provides them with an ethical claim over their children's gametes.

267 *Id.*

268 Draft Bill for Fallen Soldiers' Families Law, *supra* note 136.

269 See generally Udi Lebel, *Postmortem Politics: Competitive Models of Bereavement for Fallen Soldiers in Israeli Society*, 5 J. MOD. JEWISH STUD. 163 (2006) (discussing the "hegemonic bereavement model" that prevailed in Israel, narrowing the available routes for bereaved parents to express grief and remembrance).

270 *Funding for Fertility Treatments / Surrogacy*, DEP'T OF FAMS. & COMMEMORATION, MINISTRY OF DEF., https://www.mishpahot-hantzaha.mod.gov.il/mhn/parents/generalbenefits/health/Pages/tipoli_poriut_pondakot.aspx [<https://perma.cc/42A6-XRTK>].

271 Waldman, *supra* note 11, at 87.

272 WESTREICH, *supra* note 136, at 29.

III. Three Substantive Concerns

Set against the conceptualizations of postmortem grandparenthood offered in Part II, the following considers the implications of PMG developing into yet another available reproductive route. Part III.A. considers the questions that using PMG in order to provide bereaved parents comfort and solace raises for the role of the law; Part III.B. considers the prescriptive quality PMG may gain once it becomes legalized or otherwise officially entrenched; and Part III.C. considers the legal and practical consequences of affording bereaved parents control over their children's reproductive capacity.

A. "Therapeutic Use of Law"

Bereaved parents are understandably met with great empathy when they turn to the court asking to retrieve and/or use their son's sperm following his death. Yet in some cases, the desire to offer petitioners some comfort or to alleviate their pain becomes a *justification* for granting parents access to PMG. In 2016 the parents of a man who had died in a car accident tried to become grandparents with the help of a third-party woman.²⁷³ The deceased had been married at the time of his death, and although his widow initially asked that his sperm be retrieved, she eventually decided against using it.²⁷⁴ While she did not object to the parents' request, she did express her view that the deceased would be *against* allowing a woman other than her to use his sperm.²⁷⁵ The family court ruled in favor of the parents while stressing "[t]hese are parents, to whom the deceased was an only child . . . it is not enough to express empathy and we need to consider practical ways to relieve their suffering."²⁷⁶

Another example of how the status of bereaved parents is expressed in the legal justification for PMG is found in Israeli Supreme Court Justice Hanan Melcer's minority opinion in the *Meiri* case. In siding with the parents, Justice Meltzer reasoned that while the parents' all-consuming loss remains, "the widow has the . . . possibility to move on with her life and to rehabilitate. Under these circumstances, not only the heart goes to the

273 FC 27169-11-13 Family Court (Jerusalem) Anonymous v. Deceased 3 (Jan. 20, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

274 *Id.*

275 *Id.* at 14. The Israeli Attorney General objected to granting parents access to PMG under circumstances where the deceased's wife objects.

276 *Id.* at 15.

respondents . . . but the law is also on their side.”²⁷⁷ In contrast, Chief Justice Esther Hayut, writing for the majority, stressed that despite her empathy for the bereaved parents’ plea, the widow does not lose her status as the person best situated to testify to the deceased’s wishes just because she was able to move on with her life.²⁷⁸

What are the ramifications of this compassionate use of law? One consequence illustrated in both examples is that the desire to offer bereaved parents comfort and solace by granting them access to PMG may overshadow the interests of this practice’s immediate stakeholders (i.e., the deceased, his spouse, and the future child). Some members of the court were willing to disregard the testimony of the deceased’s *widow* that he would be against allowing another woman to use his sperm, in order to offer his parents “practical” remedies for their pain. Under circumstances where the widow was able to move on with her life while the parents were still struggling to come to terms with their loss, several judges similarly disregarded her testimony regarding the deceased’s wishes.

To underscore the way PMG’s rehabilitative and gratifying effect on parents’ process of managing loss infiltrates the legal decision-making process, we also return to the precedential *Shahar* case. The family court that first ruled in favor of the parents cited in support of its decision the mother’s testimony, in which she explained that bringing a child into the family was a rehabilitative act and would bring life into her home.²⁷⁹ In overturning this decision, district court Judge Zvi Weizman similarly took notice of the fact that the respondents were bereaved parents, still in the process of mourning the loss of their son. Yet surprisingly, it led him to a much different conclusion: When there is no evidence supporting the claim that the deceased would have wanted his child to be raised without knowing either of his biological parents, a judge’s desire to provide bereaved parents with comfort and solace cannot come at the expense of infringing upon the deceased’s “true autonomic will.”²⁸⁰

277 FAR 7141/15 Anonymous v. Anonymous et al. 98 (Dec. 22, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

278 *Id.* at 50–51.

279 FC 16699-06-13 Family Court (Petah Tikva) *Shahar v. Attorney General* 28–29 (Sep. 27, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.); *see also* Ghert-Zand, *supra* note 198 (reporting on the decision to allow the parents to use the sperm).

280 FA (CT) 45930-11-16 *State of Israel v. Shahar* 54–55 (Jan. 29, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.), *aff’d*, FAR 1943/17 *Shahar v. State of Israel* 9–10 (Aug. 15, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

The proposed Israeli bill to legalize PMG in cases when either deceased *soldiers* were single at the time of death, or their spouse decided against PMR, could possibly conflict with this decision.²⁸¹ While stating that PMR is “first and foremost” a continuation of the fallen soldier, but also “a small gesture to the family that can help rehabilitate . . . the spouse and the parents of the fallen,” the bill explicitly furthers a view of PMG as inherently part of the commemoration and rehabilitation process of bereaved families.²⁸²

Nevertheless, there are broader issues to consider when the court—and the legislature—recognizes PMG’s ability to respond to bereaved parents’ emotional needs as a legal ground in the judicial decision-making process. To some extent, underlying this is the idea of therapeutic jurisprudence, which considers the “outcomes of laws and judicial decisions and the effect of these on the mental health of individuals involved in the legal process: offenders, victims, plaintiffs, and respondents.”²⁸³ Part II of this article illustrated how decisions over access to PMG can certainly be viewed in this context as having a beneficial psychological effect on bereaved parents.

Yet PMG is one instance in which it is especially important to question the “appropriate scope of legal compassion.”²⁸⁴ The intersection between law and reproduction is often emotionally laden; the concern over a slippery slope, like the one expressed by the Israeli Attorney General over growing demands for PMR by family members other than parents and spouses,²⁸⁵ is quite real if judges are motivated by a decision’s ability to respond to grief. Even more importantly, decisions over PMG result in more than just emotional relief for bereaved parents, but also in the birth of a child. Regardless of whether there are

281 Draft Bill for Fallen Soldiers’ Families Law, *supra* note 136.

282 *Id.*

283 Tali Gal & Dahlia Schilli-Jerichower, *Mainstreaming Therapeutic Jurisprudence in Family Law: The Israeli Child Protection Law as a Case Study*, 55 FAM. CT. REV. 177, 177 (2017) (considering the contribution of therapeutic jurisprudence to the theoretical legal debate and proposals for reform of the Israeli child protection laws); *see also* Sanger, *supra* note 176, at 295–300 (discussing Missing Angels Acts, providing parents with birth certificates to their stillborn babies, as an example for therapeutic jurisprudence or a “therapeutic use of law”). Another related body of work is that of law and emotions. *See generally* Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2003 (2010) (providing an overview of the history of law and emotions scholarship, suggesting that it began by arguing that “emotions have a vital role to play in legal thought and decisionmaking”).

284 Sanger, *supra* note 176, at 297.

285 FAR 1943/17 *Shahar v. State of Israel* 6 (Aug. 15, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

adverse effects to being born under the circumstances PMG usually involves, the concern here is over children becoming a means rather than an end in the hands of the *law*.

B. Prescribing Postmortem Grandparenthood

The second concern regards the prescriptive quality of postmortem grandparenthood as a reproductive practice. If conceptualized and formalized as a practice that is integral to parents' bereavement process, PMG may become a template for how parents are *supposed* to respond to their children's death.

The most direct way for bereavement practices to take on a prescriptive quality is by becoming officially entrenched or even endorsed through legislation, official guidelines, or even private institutional protocols, which would position PMG as a favorable reproductive route amid grief. An analogy to another reproductive practice that emerged out of parents' experience with loss and grief—stillborn birth certificates—illustrates the process through which a bereavement practice, as well as the consequences it may produce, becomes legally entrenched as Carol Sanger explains in her illuminating investigation of this practice.

Born out of a campaign led by parents of stillborn babies and the Mothers in Sympathy and Support (MISS) Foundation, stillborn birth certificates are legalized in thirty-four states in the United States to date.²⁸⁶ What is innovative—and to some, unsettling—about these birth certificates is that they are being issued to stillborn children (born after at least twenty weeks of pregnancy²⁸⁷). Before stillborn birth certificates became a legal possibility through the enactment of “Missing Angels Acts,” stillbirths were followed only by the issuance of *death* certificates.²⁸⁸ It was the experience of Joanne Cacciatore, who asked for her daughter's birth certificate following her stillbirth and was faced with “Arizona's dispiriting bureaucratic response” that such a certificate would not be issued, that led to the development of the movement under her leadership.²⁸⁹ This was back in 1993, and after succeeding in changing Arizona law regarding the documentation of stillbirths, the MISS

286 *State Chart*, M.I.S.S. FOUND., http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=76&Itemid=61 [<https://perma.cc/BZ2Q-QU3C>].

287 *Facts About Stillbirth*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/stillbirth/facts.html> [<https://perma.cc/EBS2-X9J8>]; see also Fernanda Tavares Da Silva et al., *Stillbirth: Case Definition and Guidelines for Data Collection, Analysis, and Presentation of Maternal Immunization Safety Data*, 34 VACCINE 6057, 6057 (2016).

288 Sanger, *supra* note 176, at 272.

289 *Id.* at 279–80.

Foundation began assisting other parents across the country in their lobbying efforts for Missing Angels Acts.²⁹⁰ As a result, “[i]n state after state, Missing Angel legislation has received overwhelming support across party lines,” with each of the thirty-four states providing “for some form of a stillborn birth certificate.”²⁹¹

Although PMG has yet to reach the magnitude of the stillborn birth certificate phenomenon, the emergence of PMG as a practice has run parallel in several regards. The advocacy draws directly from bereaved parents’ experience with loss and their discontent with the range of tangible, legal possibilities available to them in their suffering. In addition, both practices are understood to carry meaning in parents’ bereavement process. Stillborn birth certificates have a commemorative value for parents. Much “[I]ike a lock of hair or a photograph,”²⁹² they help alleviate the pain that follows stillbirth, and they provide parents with comfort and solace.²⁹³ Furthermore, much like in the context of PMG, parents requesting stillborn birth certificates assume the role of acting on their children’s behalf, voicing their wishes, and honoring their memory. As Sanger explains, “[m]issing Angel advocacy powerfully locates the authority of parental pain . . . within noble appeals to law—‘[W]e are the voices of the children who cannot speak for themselves. We do it for them, in their honor and on their behalf.’”²⁹⁴

One set of concerns over legalizing stillborn birth certificates is centered on the ability of the law to influence social practices. By using the example of a pamphlet informing women about “California’s Certificate of Still Birth,” Sanger argues that “[t]his publication goes beyond informing women The statements define stillbirth as a particular kind of event and suggest what suffering mothers of stillborn children need (or are supposed to need) and how they can get it.”²⁹⁵ The idea here is that the official nature of such a statement, along with its content, creates an expectation for a specific response to stillbirths that women should have:

290 *Id.* at 280 (“To this end, the MISS Foundation offers parents media packs, suggestions for ‘Meeting with your Legislators,’ sample letters and testimony, talking points on how to frame the issue with local legislators, and tips on how to move a bill through to passage.”).

291 *Id.* at 281.

292 *Id.* at 286.

293 Sanger, *supra* note 176, at 296.

294 *Id.* at 280.

295 *Id.* at 300.

[O]ne can be guided to expressions of grief and expectations of solace, just as one can be guided to expressions and expectations of vengeance and closure in the case of victim impact statements: “this must be what a loving survivor does at trial because the law has provided for it.”²⁹⁶

I suggest that in the context of PMG we should be similarly concerned with its ability to become an expectation of bereaved parents who are mourning the loss of an adult son. As one bereaved mother succinctly expressed in an early debate over the legalization of PMR in Israel: “The Commemoration of a lost son is an almost obsessive act for parents. It does not resemble anything logical, rational that a person would do. I cannot imagine even one family of mourning parents that will be able to afford not to use this option.”²⁹⁷

To be sure, unlike Missing Angel Acts, there are currently no laws enacted that explicitly create the legal right to practice PMG in Israel or the United States. But before we take comfort in the fact that PMG has yet to become a legislative phenomenon, there are two things to consider. First, note that in less than two decades, what began as one mother’s struggle for recognition of her stillborn daughter turned into a national phenomenon. In the Israeli context, only several months separated the Supreme Court’s decision to deny PMG from one couple of bereaved parents for the first time, and the presentation of a new bill overriding this decision before the Israeli legislature.²⁹⁸ Although recognized as problematic, “[l]egislatures most often make egregious mistakes when they try to rule on single, high-visibility cases for politically expedient purposes.”²⁹⁹ It is perhaps especially true in “areas saturated with sentiment” where we often find an “enthusiastic enactment of new forms of legislation.”³⁰⁰

Second, practices may become officially entrenched even before they turn into legislative acts. For example, PMG may take on a prescriptive quality when it becomes part of the protocol for hospitals to offer bereaved parents the option to harvest sperm for reproductive purposes. Reportedly, this is already the case for some bereaved spouses. Recall the NYPD

296 *Id.* at 301.

297 Lavi, *supra* note 185, at 47.

298 WESTREICH, *supra* note 136, at 28–30.

299 Amy Gutmann, *Foreword: Legislatures in the Constitutional State*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* ix (Richard W. Bauman & Tsvi Kahana, eds., 2006), cited in Carol Sanger, *Legislating with Affect*, in *PASSIONS AND EMOTIONS* 46 (James E. Fleming ed., 2012).

300 Carol Sanger, *Legislating with Affect: Emotion and Legislative Law Making*, 53 *NOMOS* 38, 41 (2013).

cop mentioned earlier who was killed in the line of duty, where Brooklyn Hospital's doctors "asked his stricken wife if she wanted his semen preserved so that she might someday have his child."³⁰¹ It is unclear whether the doctors were acting under certain guidelines or protocols directing them to offer PMR, and under which circumstances they would choose to do so. Where the hospital offering this possibility is a public hospital (as are most Israeli hospitals) the prescriptive effect may be even greater. The point is that even before the law steps in and makes PMG a legal reality, there are other, subtler ways in which it can gain a prescriptive quality in the eyes of its potential consumers.

C. Redefining Grandparenthood

The third concern over postmortem grandparenthood regards the effect of granting parents control over their children's reproductive capacity. Whether we find parents categorically best (or equally well) situated to testify about their children's reproductive wishes, or we think that parents have the right to make decisions over their reproductive futures postmortem, how might their role in bringing this child to life affect their status once she is born? Could they demand greater involvement in the grandchild's life? Will their rights as grandparents be similarly weighed and balanced against the parental rights of the woman chosen to carry out this reproductive project? Such dilemmas—as well as the limits of the legal tools courts might have at their disposal to resolve them—are at the center of several cases involving PMG.

In September 2007, twenty-three-year-old Daniel Christy was involved in a motorcycle accident that left him brain-dead. While he was hospitalized, his fiancée, Amy, "saw a baby and began to consider the possibility of having [Daniel's] sperm retrieved and saved."³⁰² However, his parents were his "medical surrogate decision makers" and were therefore the ones responsible for making the decision to retrieve and subsequently use their son's sperm.³⁰³ After being granted a court order allowing them to proceed with the procedure, and after finding a storage facility willing to store the retrieved sperm, Amy and Daniel's parents signed a "consent form, agreeing to use the sperm only for in vitro fertilization."³⁰⁴ According to one news report, Amy, twenty-three, said she was planning on using the

301 Celona, *supra* note 99.

302 Spielman, *supra* note 63, at 332.

303 *Id.*

304 *Id.*

sperm in “about two years.”³⁰⁵ Let us suppose, for the purpose of this discussion, that Amy carried out her plan to use her deceased fiancé’s sperm, which resulted in the birth of a child. Surely, without Thomas and Sherry Christy’s consent and subsequent actions, she would not have been able to use Daniel’s sperm. How might this fact affect the way the Christys would perceive their role as grandparents? In thinking about this question, consider also the fact that Daniel was an only child, and that being able to become a postmortem grandparent was something his father considered nothing less than a “second miracle.”³⁰⁶

The risk of bereaved parents misunderstanding their role when becoming grandparents via PMR has been identified in the Israeli context, especially in cases where parents wished to contract with a third-party woman who would eventually mother their future grandchild. Social services are often asked by family courts to conduct interviews with bereaved parents, which are meant to ensure that they understand their future role within the newly formed family—and report back to the court.

In one case, it became apparent through the social worker’s reports that there were “substantial disagreements” about the ways in which the future grandmother and the woman with whom she contracted perceived the former’s role in the grandchild’s life.³⁰⁷ The bereaved mother hoped the mother and grandchild would move into her house after the birth, and that she would become the child’s caretaker once the mother returned to work.³⁰⁸ The future mother, on the other hand, was undecided at that point how involved the grandmother should be in the upbringing of her child.³⁰⁹ Additional disagreements were discovered regarding the future child’s involvement in her father’s commemoration. While the grandmother expected the grandchild to participate in memorials and commemorative activities for the deceased, the potential mother was “disturbed” by the presence of a memorialization room in the house.³¹⁰ The social worker then summed up her report by noting that

305 Jennifer Hemmingsen, *Judge Says Dying Man’s Family Can Harvest Sperm for Fiancée*, GAZETTE, Sept. 14, 2007, at 1A.

306 *Id.* at 6A. Amy might have been reassured by the fact that Thomas Christy was cited saying that he “would support her decision 10,000 percent” even “if she later decided not to go through with it.” Spielman, *supra* note 63, at 332.

307 FC 12977-01-14 Family Court (Kiryat Shmona) Anonymous v. Ministry of Health 7–10 (Jan. 6, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

308 *Id.*

309 *Id.*

310 *Id.*

the bereaved mother “does not fully understand the difference in the legal status between the biological mother and her as a grandmother.”³¹¹ Despite such warning signs, the court granted its approval for PMG.³¹²

In order to provide clarity for bereaved parents regarding their legal status as grandparents, Israeli courts have added a requirement that in order to be approved, requests to make use of a deceased man’s sperm must be accompanied by an agreement, or a “memorandum of understandings” signed by both parties.³¹³ These memorandums detail, to varying degrees, the nature and limits of the relationship the grandparents will have with their future grandchild. In the abovementioned example, the agreement included a provision stating that “the grandmother agrees not to take any action in any area concerning the grandchild unilaterally and/or without the mother’s approval.”³¹⁴ In another example, the agreement provided that the grandparents’ visitation rights would be agreed upon between the parties, and in the absence of such an agreement visitations would take place once every three weeks.³¹⁵ In some cases, parents have negotiated additional authority over their future grandchild’s life than what they are entitled to as grandparents. For example, a provision requiring that the grandparents give their consent for the appointment of an additional guardian for the child or to her adoption was added to an agreement between bereaved parents and a third-party woman.³¹⁶

To be sure, bereaved parents are in some cases upfront about their desire to have a more meaningful or even exclusive role in the upbringing of their future grandchild. In the *Shahar* and *Evans* cases discussed throughout this article, the parents chose to become the sole caregivers of their future grandchildren, and the role of the gestational mother was finite in time. The Shahars were explicit about their objection to having other people take part in raising their son’s offspring, explaining that any other woman would be less capable

311 *Id.* at 10–11.

312 *Id.* at 37.

313 FC 12977-01-14 Family Court (Kiryat Shmona) Anonymous v. Ministry of Health 33–34 (Jan. 6, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The legal status of these documents or their enforceability is in question; for one reason, because they are concerned with issues relating to the child’s best interest, which cannot be contracted around.

314 *Id.* at 34.

315 FC 14217-06-14 Family Court (Tel-Aviv) New Family Org. v. Hadassah Ein Kerem Hospital et al. 10 (Apr. 15, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

316 *Id.*

as a parent than they could be, at least “to this specific child,” apparently because of their relationship to the deceased.³¹⁷

Whether PMG agreements signed between prospective grandparents and a prospective mother are effective in preventing the former from overstepping their role as grandparents is a question that it is still too early to answer, as such familial disputes have yet to reach the court. We know that for the most part they tend not to go into much detail or cover the range of issues the parties may be in disagreement over, such as relocation, religious upbringing, or a new spouse, to name just a few historically contentious examples.³¹⁸ As with omitting terms from contracts generally, perhaps parents are concerned with what may surface once these questions are raised, especially after finally finding the “right” woman to embark on this journey.³¹⁹ Or maybe they trust that the law will be able to provide answers to future dilemmas as they arise. It is safe to assume that courts will employ legal principles and standards that were established in the context of grandparents’ visitation rights, or even divorce custody agreements.³²⁰ The question is whether and how a bereaved parent’s role in orchestrating this reproductive “event” will weigh in the balance between their grandparental rights, the mother’s parental rights, and the child’s best interest.

D. Finding Balance

In realizing the consequences of allowing PMG to expand as a reproductive practice, this article does not wish to make a case against PMG. Rather, the purpose here is to cast light on a new set of concerns PMG introduces to the debate over PMR, which should in

317 FC 16699-06-13 Family Court (Petah Tikva) *Shahar v. Attorney General* 29 (Sep. 27, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

318 See, e.g., Robert E. Oliphant, *Relocation Custody Disputes—A Binuclear Family Centered Three-Stage Solution*, 25 N. ILL. U.L. REV. 363 (2005); Rebecca Korzec, *A Tale of Two Religions: A Contractual Approach to Religion as a Factor in Child Custody and Visitation Disputes*, 25 NEW ENG. L. REV. 1121 (1991).

319 See generally Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641 (2003) (suggesting several reasons for why parties enter into incomplete contracts, specifically in relational contracts).

320 See *supra* notes 246–249 and accompanying text; see also Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 L. & CONTEMP. PROBS. 69 (2014) (explaining the persistence of the child’s best interest standard as the prevailing legal rule in child custody disputes between divorcing couples, despite its deficiencies). However, courts may also develop new standards or presumptions when presented with these cases. See, e.g., Jennifer Garvin, *Remembering the Best Interest of the Child in Child Custody Disputes between a Natural Parent and a Third Party—Grant v. Martin*, 757 So. 2d 264 (Miss. 2000), 21 MISS. C.L. REV. 311 (2002).

turn inform the process of balancing the interests and rights at stake, whether it is made on a case-by-case basis or in the process of conceiving a regulatory framework.

For example, fully understanding the extent of the relation between PMG and bereavement allows us to see that parents have an actual interest in the comfort and solace that this practice can provide them. Instead of viewing their state of grief as incidental to the set of interests and rights that are at stake, it can—and should—be openly weighed against the interests of the deceased, his spouse, and the future child. In this way, the “gut feeling” responses PMG often triggers in judges and medical practitioners can be properly channeled into their decision-making process. Courts may consider whether the potential for “significant problems for the life the [posthumously conceived] child will lead” is outweighed by the benefits becoming postmortem grandparents hold for the bereaved parents.³²¹ These benefits can also be weighed against the potential harm that acting against the deceased’s wishes may result in. This proposed framing of the interests at stake accounts for the fact that the wishes of the deceased are usually unknown, and that inquiries into his presumed wish are often limited to his desire to have children at all, rather than postmortem.

The broader concerns discussed above, over the role of law in providing emotional relief, as well as its ability to constitute PMG as a bereavement practice, should also be weighed against would-be-grandparents’ interests. These public interests become more consequential when contemplating an appropriate regulatory framework to govern PMR in its various uses.

Until such regulatory framework is in place, and from a practical standpoint, the extent to which PMG can be legally executed considering the specific circumstances of each case, should also be weighed against parents’ interests. One example for such practical difficulty is found in the previous section, discussing the complex relationship between prospective grandparents and a prospective mother, and the unusual agreements that presume to regulate it. Another, which I do not discuss here, is found in laws and regulations governing other reproductive practices. Strict regulatory frameworks governing surrogacy, egg donation, or sperm storage and insemination—or the lack thereof—may result in PMG becoming legally unattainable in certain jurisdictions, if it entails access to these reproductive services.

CONCLUSION

For many people, there is something unsettling and even alarming about a world where

321 ASRM, *An Ethics Committee Opinion*, *supra* note 9, at 47.

children, or grandchildren, are being produced using the gametes of dead people. Yet taking stock of what is at stake for those who seek to engage with PMG provides a corrective to that initial reaction to this unusual application of assisted reproductive technology. Producing a grandchild provides bereaved parents with comfort and relief by allowing them to maintain a relationship with their deceased child through a relationship with that child's own children. Focusing on the perspective and experience of bereaved parents further illuminates how their perception of the parental role motivates and facilitates their claim of decisional authority over their children's reproductive lives. Realizing these personal motivations allows us to see that these are parents who have lost not only a child, but also the future they imagined that child would bring for them. They want to secure that unique posterity by using the technology not to experiment futuristically, but to connect with old-fashioned values of familial continuity.

Nevertheless, this sobering entanglement of law, bereavement, and reproduction raises broad questions about the role of law and its ability to shape people's responses to death and new life. Judges and policy makers are evidently not indifferent to PMG's ability to provide their litigants comfort and solace, even when there are other—*legal*—justifications tilting the scale against it, namely the interests of PMG's immediate stakeholders. At the same time, the law is currently ill-equipped to address the challenges these newly formed families pose to traditional categories of parenthood, and more importantly *grandparenthood*, and the legal rights each of these categories entail. The theoretical and practical insights here intend to inform decisions made by judges, legislators, and medical professionals, granting bereaved parents the right to legally become postmortem grandparents.