



# Present-day posthumous reproduction and traditional levirate marriage: two types of interactions

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## ABSTRACT

The paper studies the position of Jewish law on posthumous reproduction and its mutual interaction with the legal and bioethical discussion of this issue. It examines two types of interactions: a direct, legal-positive interaction and a meta-legal interaction, which may be defined as inspiration. The first relates to how Jewish law responds to the new technology, as reflected in the practical laws of levirate marriage, and how this new technology affects a wider spectrum of laws and conceptualizations from a religious-law perspective. The paper points to two interesting phenomena: (1) how a legal definition in the religious realm (fatherhood for the purpose of levirate marriage) affects legal definitions in the civil realm (eg, inheritance), and (2) the significance of value-based principles in framing Jewish law as a legal system whose ‘ways are ways of pleasantness’. The second (indirect interaction) deals with two rationales, individualistic and familial, behind the Israeli debate over posthumous sperm retrieval of fallen soldiers and their equivalents in the Jewish law discussion of the early ‘forefather’ of this technology: levirate marriage. The paper concludes that the complex interaction—both direct and indirect—provides us with a striking picture of the conjunction of modernity, law, and religion.

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## INTRODUCTION

Posthumous reproduction is at the forefront of today's bioethics discourse. The issue poses difficult dilemmas and raises conflicts concerning the right to procreate and the wish for continuity, on the one hand, and social and policy considerations in favor of restricting the use of this technique, on the other. The major considerations of this sort are the social consequences of bringing a child lacking at least one parent into the world, the psychological effect of being born as a living memory, together with philosophical and theological concerns regarding human intervention in life after death.<sup>1</sup>

Legal systems vary in their attitude towards posthumous reproduction. Some countries forbid it entirely. Others permit it in a very limited way. In some countries posthumous reproduction is not regulated by state legislation, but rather the use of this technology is based on public policies.<sup>2</sup> In either case, as noted above, society is faced with fundamental legal, ethical, social, and religious dilemmas.

Within this manifold dilemma, the objective of this paper is to ascertain the mutual interaction between Jewish law<sup>3</sup> and the modern legal and bioethical discussion of posthumous reproduction.<sup>4</sup> Through this, the paper seeks to reveal new conceptual dimensions of both Jewish law and the modern legal and bioethical discussion: the former, as regards parenthood definitions and the influence of value-based principles on

<sup>1</sup> See, eg, Belinda Bennett, *Posthumous Reproduction and the Meaning of Autonomy*, 23 MELB. U. L. REV. 286 (1999); Devon D. Williams, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval*, 34 CAMPBELL L. REV. 181 (2011). In addition to the specific arguments in favor of or against posthumous reproduction, considerations as to assisted reproduction in general may be applied here as well. See, for example, Bartholet's strong normative argument against the (international) rise of the use of assisted reproduction instead of adoption of already-born children (both national and international adoption): Elizabeth Bartholet, *Intergenerational Justice for Children: Restructuring Adoption, Reproduction and Child Welfare Policy*, 8 LAW & ETHICS HUM. RIGHT 103 (2014), and the literature cited *id.*

<sup>2</sup> For the background and a survey and comparative discussion of the legal status of posthumous sperm retrieval in the United States, Europe, and Israel, see Jon B. Evans, *Post-mortem Semen Retrieval: A Normative Prescription for Legislation in the United States*, 1 CONCORDIA L. REV. 133, 136–53 (2016). See also Rabbi J. David Bleich, *Survey of Recent Halakhic Periodical Literature: Posthumous Paternity* 49 TRADITION 72, 73–76 (2016); Shelly Simana, *Creating Life After Death: Should Posthumous Reproduction Be Legally Permissible Without the Deceased's Prior Consent?*, 5 J. L. & BIOSCI. 329 (2018), <https://doi.org/10.1093/jlb/lxy017> (accessed Jan. 22, 2019) (reviewing and comparing legislation governing posthumous reproduction in the United States, the United Kingdom, Australia, and Israel). For a preliminary comparison between Israel and a few other countries, see THE PUBLIC COMMISSION FOR THE EVALUATION OF FERTILITY & CHILDBIRTH 45 note 15 (2012) (henceforth: Mor-Yosef Commission) (Heb.).

<sup>3</sup> Henceforth also: halakhah, halakhic, etc.

<sup>4</sup> In keeping with this paper's objective, the discussion will focus on posthumous sperm retrieval followed by potential posthumous reproduction. Yet, many of the arguments pertain also to sperm extraction from a living man (followed by posthumous reproduction). The term posthumous reproduction will refer accordingly to sperm extraction from both a living man and a deceased, unless otherwise specified. When dealing specifically with posthumous reproduction resulting from sperm extraction from a deceased man, the term posthumous sperm retrieval will be used. The discussion is also partially relevant to posthumous ova fertilization and posthumous implementation of frozen embryos, which are beyond the scope of this paper, see AVISHALOM WESTREICH, ASSISTED REPRODUCTION IN ISRAEL: LAW, RELIGION, AND CULTURE (2018) at 24, notes 6–7 and the accompanying text (henceforth: WESTREICH, ASSISTED REPRODUCTION IN ISRAEL).

legal decisions; the latter, as regards familial versus individual forms of justification of posthumous reproduction.

Jewish law interacts with several Western legal systems.<sup>5</sup> The most intense interaction, however, especially in matters related to family law, is with Israeli law and the Israeli legal system.<sup>6</sup> In this respect, it would be useful to outline here briefly the position of Israeli law as regards posthumous reproduction.

Israel is quite open to assisted reproductive technologies (ARTs), and posthumous reproduction is no exception.<sup>7</sup> The subject was regulated until recently on the basis of the Attorney General Guidelines (October 2003), inspiration being drawn also from the recommendations of a few commissions, including the latest one (the Mor-Yosef Commission), which have not (yet) been transformed into legislation, but have been published and explicitly or implicitly influence the public and legal discourse.<sup>8</sup> In December 2016, the Israeli Supreme Court issued its decision, according to which there is a right to procreate that applies also to posthumous fertilization, but with a significant limitation. When there is a living will, it should be followed. But in case an explicit will was not made, according to the Court, the spouse of the deceased—and only the spouse—is entitled to decide on the process.<sup>9</sup>

As to Jewish law itself, a good starting point might be a general remark made by one of the leading contemporary Jewish law decisors, Rabbi Zalman N. Goldberg, regarding the position of Jewish law on issues of this sort:

We note that according to Jewish law we need a reason to forbid, and without such a reason the natural situation is to permit. In this regard, relevant also is the fact that the Torah afforded great importance to the human desire to leave a name and remembrance in the world, as we can learn from the laws of levirate marriage.<sup>10</sup>

This remark, as might be concluded from a review of a wide range of issues regarding assisted reproduction, seems to correctly reflect the attitude of Jewish law on this matter. Specifically, regarding posthumous sperm retrieval, Goldberg's starting point is that it should not be prohibited. He then adds an important reason, not only for permitting but also for encouraging this practice: the natural desire for procreation, 'to leave a name and remembrance', which was the basis for the laws of levirate marriage (as will be discussed below).

<sup>5</sup> For Jewish law in the United States, see, eg, Suzanne L. Stone, *In Pursuit of the Counter-Text: the Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 834 (1993). Various kinds of interaction are relevant to various religions and countries. See MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINIC COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST (2017); Bernard S. Jackson, *Transformative Accommodation and Religious Law*, 11 ECCL. L. J. 131 (2009).

<sup>6</sup> See, eg, Avishalom Westreich, *Accommodating Religious Law with a Civil Legal System: Lessons from the Jewish Law Experience in Financial Family Matters* 33 J. L. & RELIG. (forthcoming, 2019).

<sup>7</sup> See WESTREICH, ASSISTED REPRODUCTION IN ISRAEL, *supra* note 4 at 7–10.

<sup>8</sup> See THE PUBLIC COMMISSION FOR THE EVALUATION OF FERTILITY & CHILDBIRTH 43–50 (2012, Hebrew version, <http://www.health.gov.il/publicationsfiles/bap2012.pdf> (accessed Jan. 22, 2019)).

<sup>9</sup> See Family Appeal Request 7141/15 Plonit v. Plonit et al. (Dec. 22, 2016) (Heb.) (Isr.). The Court dealt with the request of the parents of Shaked Meiri, who died during his military service, to posthumously retrieve his sperm, against the widow's position. See below, section IIB.

<sup>10</sup> Zalman N. Goldberg, *On Egg Donation, Surrogacy, Freezing the Sperm of a Single Man, and Extracting Sperm from a Corpse: Response to the Commission for the Approval of Agreements for Carrying Embryos by Rabbi Zalman Nehemiah Goldberg*, 65-66 ASSIA 45 (1999) (Heb.).

Following this basic attitude, it is usually agreed that Jewish law permits posthumous reproduction (and, especially, posthumous sperm retrieval), although it is not unanimously accepted.<sup>11</sup> The discussion therefore focuses on secondary questions, such as the extent to which the deceased is considered the father of the child, whether there is a parental relationship between them, and if so, whether such a relationship exists from every legal aspect (inheritance, the fulfillment of the obligation to ‘be fruitful and multiply’, etc.).

How, if so, do civil law and Jewish law interact in this matter? In particular, how does Jewish law affect, and how is it affected by the civil discourse of posthumous reproduction? In what follows, I will examine two types of interactions: a direct, legal-positive interaction (section 1) and a meta-legal interaction, which I would define for the purposes of this paper as inspiration (section 2).

The first type (direct interaction) relates to how Jewish law responds to the new technology, as reflected in the practical laws of levirate marriage, and how this new technology affects a wider spectrum of laws and conceptualizations from a religious-law perspective. In this respect, the paper points to two interesting phenomena: first, a legal definition in the religious realm (fatherhood for the purpose of levirate marriage) that affects legal definitions in the civil realm (inheritance and family relations), and second, the significance of value-based principles in framing Jewish law as a legal system whose ‘ways are ways of pleasantness’ (as reflected in its rejection of the instable results that posthumous reproduction might lead to).

The second type (indirect interaction) has to do with two rationales, individualistic and familial, behind a specific modern debate over posthumous reproduction—the Israeli debate over posthumous sperm retrieval of fallen soldiers—and their equivalent in the halakhic discussion of the early ‘forefather’ of this technology: levirate marriage. The paper explores the representations of these two rationales within Biblical and Talmudic sources, and argues for a possible influence, or inspiration, of these sources and their rationales on the modern debate. The paper concludes that the complex interaction—both direct and indirect—provides us with a striking picture of the conjunction of modernity, law, and religion.

Before turning to the actual discussion, I would like to make a brief remark regarding the methodology of this research and the disciplines it belongs to. The object of the research is the interaction of law and religion and its implications for a bioethical dilemma, as reflected in the case of posthumous reproduction. The sources that are discussed in the research are of various genres, and belong to different historical periods. In order, therefore, to have a full and comprehensive understanding of the materials discussed, the research integrates a few methodologies that are used in the relevant disciplines: a literary examination of Biblical sources, a textual-historical review of Talmudic sources,<sup>12</sup> a modern Jewish law analysis, and a comparative civil legal examination. It is therefore an interdisciplinary research in respect of its research methods, which ought

<sup>11</sup> See Rabbi Goldberg, *supra* note 10, *Id.* For a disputing approach, see, eg, Rabbi Ig’al Shafran, *Posthumous Fatherhood*, 20 *TECHUMIN* 347 (2000) (Heb.), who strongly objects to this practice.

<sup>12</sup> This is the Talmudic high textual criticism, in respect of comparing different layers of Talmudic sources. It is necessary for revealing hidden Talmudic approaches, as will be conducted below. As regards the Biblical sources, for the purpose of the current research, a literary harmonizing, rather than historical, point of view is required, as will be clarified below.

to clarify the complex interaction of law and religion as regards posthumous reproduction.

## I. DIRECT INTERACTION OF POSTHUMOUS REPRODUCTION AND RELIGIOUS LAW

### A. Levirate Marriage in Jewish Law

The desire for continuity, which stands at the basis of posthumous procreation, is not a modern phenomenon. Rather, it is well rooted in the history of human beings since the old Biblical commandment ‘Be fruitful and multiply’. Obviously, this desire could not be satisfied using posthumous reproduction until recent decades, but similar objectives could be achieved (at least partially) through classic family relations.

In the Jewish tradition, the laws of levirate marriage are the legal structure whereby the desire for continuity, and a few other objectives (like providing the widow with financial protection, an important social objective in a patriarchal society), could be satisfied.<sup>13</sup> In this respect, levirate marriage can be regarded as the ancient Biblical predecessor of the modern posthumous reproduction practice. But what exactly is the relationship between the present-day posthumous reproduction and levirate marriage? Before discussing this question, it is necessary to provide some basic background as regards levirate marriage.

According to Jewish law, if a married man dies childless his wife should marry his brother in what is defined as a levirate marriage. The purpose of levirate marriage is to ensure continuation for the deceased (both by reproduction and by preserving his land within the family),<sup>14</sup> as it is stated: ‘And the first son whom she bears shall succeed to the name of his brother who is dead, that his name may not be blotted out of Israel.’<sup>15</sup>

Formally, the union between the couple is sufficient to declare them married, without the need of a ritual wedding. In practice, however, at least as reflected in Talmudic law, levirate marriages were performed through a kind of ritual wedding, which preceded the union between the widow and her brother-in-law.<sup>16</sup>

According to Biblical law, if the brother-in-law refuses to marry the widow, they should perform the ritual act of *halitsah* (pulling the sandal off the brother-in-law’s foot,

<sup>13</sup> For various objectives (with a focus on their presence in the book of Ruth), see Bernard S. Jackson, *Ruth, the Pentateuch and the Nature of Biblical Law: In Conversation with Jean Louis Ska*, 75, 90 in *THE POST-PRIESTLY PENTATEUCH: NEW PERSPECTIVES ON ITS REDACTIONAL DEVELOPMENT AND THEOLOGICAL PROFILES* (Konrad Schmid & Federico Giuntoli eds., 2015) (henceforth: Jackson, *Ruth*). It should be noted that providing the widow with financial protection is not explicitly indicated in the Biblical commandment of levirate marriage (Deuteronomy 25:5–10; cited below), as correctly observed by two important modern traditional commentators, Rabbi Shimshon R. Hirsch and Rabbi David Z. Hoffman in their commentaries to this verse. In a wider Biblical context, however, it was one of the objectives of levirate marriage, even if not formally. It can be discerned, for example, in Naomi’s wish to assist Ruth in initiating a levirate marriage: ‘My daughter, should I not seek a home for you, that it may be well with you?’ (Ruth 3:1). The objective of the levirate marriage is, accordingly, to provide Ruth with what will be good for her. See Jackson, *Id*. See also Bernard S. Jackson, *Law and Narrative in the Book of Ruth: A Syntagmatic Reading*, in *Judaism, Law and Literature* 27 JEWISH L. ASS’N STUD. 100 (2017) (henceforth: Jackson, *Law and Narrative*).

<sup>14</sup> That is, by naming the child born from the levirate marriage after the deceased, and by providing the child or the levir with the deceased’s assets; see at length below, section IIA.

<sup>15</sup> Deuteronomy 25: 6 (Revised Standard Version translation, as are the following cited verses, unless stated otherwise).

<sup>16</sup> In Talmudic terms, a levirate wedding is called *ma’amar*. See Mishnah, *Yevamot* 5.

and a few additional ritual elements), and thereby unbind the tie between them.<sup>17</sup> The option of the widow's refusing to marry her brother-in-law and perform *halitsah* is not mentioned in the Biblical text. It was discussed, however, in the Talmud, and probably existed in certain circumstances.<sup>18</sup>

In the Talmudic<sup>19</sup> and early post-Talmudic<sup>20</sup> periods, both levirate marriage and *halitsah* were legally available, depending on the circumstances and the wish of the parties. In the medieval period,<sup>21</sup> however, the practical use of levirate marriage significantly decreased: in some Sephardic communities it was limited in various ways, such as limiting levirate marriage to cases in which the brother-in-law was not married.<sup>22</sup> In Ashkenazic communities, from the 12th century onward, levirate marriage was entirely rejected, and the alternative ritual of *halitsah* became mandatory (although according to the Biblical commandment this is only a secondary option).<sup>23</sup> In 1950, the Chief Rabbinate of Israel enacted a stipulation that *halitsah* would be mandatory for all Jewish communities, and indeed most Jewish communities follow this approach and do not practice levirate marriage at all.<sup>24</sup> As a partial counter approach, however, Rabbi Ovadya Yosef, who is considered to have been the most prominent Jewish law decisor in the second half of the 20th century and the beginning of the 21st century, advocated the renewal of levirate marriage for Sephardic and Eastern Jews.<sup>25</sup> His position, however, did not lead to a formal change of the Chief Rabbinate enactment, and *halitsah* still seems to be the most common practice, even among these communities.<sup>26</sup>

Levirate marriage thus became an almost completely theoretical practice. Its rationales (or the human desire behind it), however, are still relevant, and even if not practical, levirate marriage still has a central and influential place in Jewish thought, law, and culture. The laws of levirate marriage are even today an integral part of the Jewish world, and are intensively discussed and referenced in Israel and abroad. Not

<sup>17</sup> See Deuteronomy 25: 7–10: 'And if the man does not wish to take his brother's wife, then his brother's wife shall go up to the gate to the elders, and say, "My husband's brother refuses to perpetuate his brother's name in Israel"... then his brother's wife shall go up to him in the presence of the elders, and pull his sandal off his foot, and spit in his face; and she shall answer and say, "So shall it be done to the man who does not build up his brother's house." And the name of his house shall be called in Israel, The house of him that had his sandal pulled off.'

<sup>18</sup> See Babylonian Talmud, Ketubbot, 64a (regarding a 'rebellious' widow), and see (regarding the right of the wife to initiate unilateral divorce according to Talmudic law) AVISHALOM WESTREICH, TALMUD-BASED SOLUTIONS TO THE PROBLEM OF THE AGUNAH 4–24 (2012).

<sup>19</sup> I refer to the Talmudic period in its broader sense, ie from late Second Temple period (ca. 1st century B.C.E., and partially even earlier) to the late Amoraic period, ca. 6th–7th centuries C.E.

<sup>20</sup> That is, the Geonic period, ca. 8th to 11th centuries C.E.

<sup>21</sup> Ca. from the 11th century onward.

<sup>22</sup> See Elimelech Westreich, *Levirate Marriage in the State of Israel: Ethnic Encounter and the Challenge of a Jewish State*, 37 *ISR. LAW REV.* 427 (2003–2004) at 432–437. Eastern communities (mainly Jewish communities in Yemen, Iraq, and Iran) were more open to levirate marriage. See Westreich, *Id.*

<sup>23</sup> As reflected by the Biblical commandment, see *supra* note 17.

<sup>24</sup> See Westreich, *supra* note 22, at 429.

<sup>25</sup> *Id.*

<sup>26</sup> It should be noted that in Israel marriage is performed exclusively according to religious law; see (for Jewish couples) section 1 of the Rabbinical Courts Jurisdiction Law (Marriage and Divorce), 5713–1953. (Different laws apply to couples who belong to other religions: Muslims, Druze, and several Christian denominations.) Accordingly, if a Jewish man dies childless, his wife would not be able to remarry in Israel without *halitsah*. The couple can, however, live in cohabitation or perform civil marriage abroad, and be provided with most of, or all, the rights of married couples.

surprisingly, the laws of levirate marriage are a significant parameter in the discussion of posthumous reproduction in the Jewish world (again, in Israel and abroad, on a theoretical, not necessarily practical, level) in what seems to be a mutual interaction between the two. Posthumous reproduction, accordingly, affects parent–child relations, both civilly (for example, monetary relations)<sup>27</sup> and religiously (that is, a possible exemption from levirate marriage). And levirate marriage (in the Jewish law context) affects posthumous reproduction as a significant factor in crystalizing its criteria, in addition to—as will be shown—its direct effect on civil parent–child relations. This direct interaction will be discussed in the current section. The interaction, however, is even wider. We can find in levirate marriage the very rationale of posthumous reproduction, so that the former—as I will suggest—may inspire the discussion of the latter. The latter interaction will be discussed in section II.

### B. Fatherhood in Artificial Insemination and Posthumous Reproduction

A preliminary question—which is crucial to establishing parent–child legal rights and obligations, both civil and religious—is the definition of parenthood. This question might be the point of intersection of posthumous reproduction and levirate marriage, since, as will be discussed at length below, levirate marriage depends on the absence of a child, and if posthumous reproduction constitutes parent–child relations, then the deceased would be considered to have had a child and there would be no levirate obligation. In this respect, it should be noted that Jewish law does not formally recognize social parenthood (although it might encourage adoption and other forms of non-biological parenthood), so that the formal definition of parenthood, and in particular for our purpose, of fatherhood, is a necessary starting point for providing the parent and child with rights and obligations.<sup>28</sup>

Fatherhood in assisted reproduction is not clear-cut. Even before the posthumous element is taken into consideration, defining a sperm owner as the father in non-coital reproduction that does not include a sexual relationship, including artificial insemination and in vitro fertilization (IVF), is not unanimously accepted by Jewish law decisors. The Talmud discusses the option of fertilization without sexual relationships: in the Talmudic (theoretical) case, sperm was extracted from a man's body while washing in a bath, and a woman who later washed in the bath conceived from that sperm. The Talmud does not address the status of the sperm owner in this case,<sup>29</sup> but later commentators do. Two commentators to the *Shulkhan Arukh* (the classic 16th century Jewish law code) discuss whether there are parent–child relations in this kind of case. The first, Rabbi Moses Lima,<sup>30</sup> remained in doubt. The second, however, Rabbi Samuel ben Uri

<sup>27</sup> This appears to be a central discussion in states which allow posthumous reproduction. See Kathryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 293 (2006).

<sup>28</sup> As regards adoption, see Avishalom Westreich, *The Halakhic Status of Children Born by In Vitro Fertilization and the Prohibition of Yihud*, 91–92 ASIA 122, 129–34 (2012) (Heb.).

<sup>29</sup> See Babylonian Talmud, Hagiga 15a–b.

<sup>30</sup> Poland-Lithuania, 17th century. He is frequently mentioned as the 'Helkat Mehokek' after the name of his commentary to the *Shulkhan Arukh*.

Shraga Phoebus,<sup>31</sup> made a clear decision in favor of defining the sperm owner as the child's father for any legal matter.<sup>32</sup>

This Talmudic and classic discussion of what constitutes or creates paternity, genetics or coitus, was at that time merely theoretical,<sup>33</sup> but at the turn of the 20th century, when artificial insemination became practical, this discussion became an actual question: Would a genetic father of a child born by artificial insemination be considered the child's father for Jewish-law purposes? Some of the halakhic decisors, following the doubt of Rabbi Moses of Lima, avoided defining the genetic father as the father from a halakhic-legal perspective. Others, however, followed Rabbi Samuel Phoebus and determined that the genetic father is the father for every halakhic and legal matter.<sup>34</sup>

The debate notwithstanding, the dominant trend, at least today, seems to be to view the sperm owner as the father of the child. An indication of this trend can be found in the teaching of Rabbi Moshe Sternbuch, an ultra-Orthodox leader and past head of a well-known (private) rabbinical court, the *Edah Haredit* court. At first (in the 1980s and early 1990s), he expressed misgivings regarding the use of artificial insemination or IVF, although he admitted:

I could discuss this further but [...] here I shall stop writing and the chooser will choose [...] since I and those who are like me are not eligible to decide. And I think that if someone is lenient [and permits ART] he has what to base [his leniency] on, and we should not protest against him.<sup>35</sup>

Rabbi Sternbuch preferred at that stage to tacitly accept IVF and artificial insemination, although he himself (as is clear from this passage) was opposed to these techniques and had doubts regarding the status of the sperm owner.<sup>36</sup> He preferred, however, not to answer those who asked him whether the act is permitted, thereby hinting that if the questioners were to follow the permissive opinions, he would not object.

In recent years, however, Sternbuch has entirely changed his mind and explicitly permitted, even encouraged, the use of ART for married couples. As he writes, 'when I saw that the practice has spread... I changed my mind, and now I think that... a child born through IVF is surely considered the child of the sperm owner,' who thereby complies with the commandment to 'Be fruitful and multiply'.<sup>37</sup>

Posthumous reproduction is much more complicated than regular artificial insemination or IVF. The significant difference is, of course, the fact that it is performed

<sup>31</sup> Poland, 17th Century, frequently mentioned as the 'Bet Shmuel' after the name of his commentary to the *Shulhan Arukh*.

<sup>32</sup> See Rabbi Moses Lima, *Helkat Mehokek*, Even Ha'ezer 1:8; Rabbi Samuel Phoebus, *Bet Shmuel*, Even Ha'ezer 1:10.

<sup>33</sup> It was nevertheless discussed in Jewish law literature. See Simcha Emanuel, *Pregnancy Without Sexual Relations in Medieval Thought*, 32 J. JEW. STUD. 105 (2011).

<sup>34</sup> See Westreich, *supra* note 28, at 135–37.

<sup>35</sup> Rabbi MOSHE STERNBUCH, *TESHUVOT VE-HANHAGOT* 4:285 (1991–1992).

<sup>36</sup> See *Id.*, 4:283: the child is considered his child 'only [if he was born as a result of] marital relationships'.

<sup>37</sup> Rabbi MOSHE STERNBUCH, *TESHUVOT VE-HANHAGOT* 6:241 (2013–2014). This astonishing change occurred due to the fact that IVF and artificial insemination spread widely even among religious communities, which led Rabbi Sternbuch first to a pragmatic decision, and then to full approval of the practice. For a detailed discussion, see Avishalom Westreich, *Flexible Formalism and Realistic Foundationalism: An Analysis of the Artificial Procreation Controversy in Jewish Law* 31 DINE ISR. 157 (2017) (Heb.).



posthumously (especially in the case of posthumous sperm harvesting). The very fact that a dead person is involved in the process of procreation may lead to religious, ethical, and social concerns, together with conceptual challenges as regards the definition of parenthood, and halakhic-formal limitations as regards posthumous rights and obligations (eg levirate marriage).

Accordingly, in light of the above Jewish law perspectives, those who negate any parent–child relations between sperm owner and a child in regular assisted reproduction would surely regard posthumous sperm retrieval as not constituting parent–child relations. This would have implications for both the legal aspects of Jewish law, such as negation of inheritance rights and parent–child benefits, and its religious aspects, such as the levirate marriage obligation (that if the deceased is not the father, there is a levirate obligation, as will be discussed below).<sup>38</sup> Even at a more ideological level, if the sperm owner is not the father of the child, he does not comply with the commandment to be fruitful and multiply, so the practice would probably be less encouraged by Jewish law decisors.

Jewish law decisors, who do view the sperm owner as the father of the child in regular assisted reproduction, might similarly recognize parent–child relations in posthumous reproduction. They might, on the other hand, distinguish between the cases: although artificial insemination constitutes parent–child relations, it would not be so when it is performed posthumously, since a dead person is not eligible to create this kind of legal relationship. Some, indeed, make this argument, such as Rabbi Moshe Sternbuch, who argues that:

It might be that all concepts that the Torah determined for human beings, such as father and mother, a Jew and a non-Jew, the Torah determined it only for a person living in a body, but when he is not a living in a body, he is not considered human... therefore, in our case, where the fetus was conceived from sperm after the sperm-owner's death, the sperm-owner cannot become his father, because it is impossible for a dead person to become a father.

Others, however, accept the possibility of becoming a parent posthumously.<sup>39</sup> Accordingly, posthumous reproduction might constitute parent–child relations for every legal matter, including inheritance on the one hand and viewing it as complying with the religious commandment of ‘Be fruitful and multiply’ on the other.

But there is still an exception. The obligation of levirate marriage is different, even according to those who agree that the posthumous sperm owner should be defined as the father of the child. Despite the fact that the deceased has a genetic child, his widow and brother might still be bound by the obligation of either levirate marriage or *halit-sah*. And in a very interesting way, the very existence of the levirate marriage obligation widely affects (according to some) the complex issue of parent–child definitions (both conceptually and in practice), as will now be discussed.

<sup>38</sup> On the relationships between the ‘religious’ part of Jewish law and its ‘legal’ part, see MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 111–41 (Bernard Auerbach & Melvin J. Sykes, trans., 1994). It should be noted that distinguishing between the two aspects of Jewish law is not without difficulties and is used here merely for clarifying purposes.

<sup>39</sup> See, eg, Rabbi Shlomo Z. Auerbach, *Artificial Insemination* 1 NOAM 145, 155 (1958), and see further discussion below.

### C. Levirate Marriage in Posthumous Reproduction and its Effect on Definitions of Fatherhood

If a married man dies childless, his wife is obliged to go through the process of *halitsah*, or (what is less relevant today) to marry her deceased husband's brother in a levirate marriage. If a child born out of posthumous reproduction is considered the sperm-owner's child, this might result in retroactive cancellation of the levirate obligation (since the deceased finally has a child, albeit posthumously). This kind of retroactive decision is problematic from the perspective of legal policy, since it would undermine the stability of decisions in highly sensitive personal matters (levirate marriage) by changing the status of the parties (from parties who are bound by a levirate obligation to parties who do not have such a bond).<sup>40</sup> But can we delineate a separation between levirate marriage and parenthood, that is, considering the child the deceased's child while at the same time rejecting any retroactive change in the status of the widow (that is, not exempting her from a levirate obligation)?

Rabbi Prof. J. David Bleich reviewed various approaches regarding posthumous reproduction in Jewish law, in particular regarding the obligation of levirate marriage in this case.<sup>41</sup> Bleich pointed to a wide range of opinions: starting from those who argue that there are no parent-child relations in posthumous reproduction, for which reason having a child posthumously would not exempt the widow from levirate marriage, and ending with those who determine full parent-child relations, for which reason the widow is exempt from levirate marriage if her deceased husband has a child posthumously.<sup>42</sup> In the middle, some concede that there are parent-child relations, but nevertheless negate any implication of posthumous reproduction for the levirate marriage obligation (that is, the widow still has to go through levirate marriage or perform *halitsah*). Bleich, it should be noted, hinted that this opinion might be incoherent, since levirate marriage depends on the absence of offspring of the deceased, so if the child is considered the deceased's child for the purpose of inheritance, there should not be any levirate obligation.<sup>43</sup>

In what follows, I would like to focus on two dimensions, derived from the above discussion: first, the mutual interaction of law and religion as reflected here, and second, the place of value-based principles in constituting religious law in the current discussion. I will do so through an analysis of a responsum by Rabbi Saul Israeli.

Rabbi Saul Israeli (died 1995) was considered a halakhic leader of the Israeli Modern Orthodox movement. He dealt intensively with conflicts between the modern state and

<sup>40</sup> See Rabbi Israeli's argument based on the principle: 'Her ways are ways of pleasantness', *infra* text to notes 49–55.

<sup>41</sup> See Bleich, *supra* note 2, at 76–89. For an extended Hebrew discussion of the various approaches regarding the obligation of levirate marriage in posthumous reproduction, see Yossi Green, *Post Mortem Procreation by Means of In Vitro Fertilization and Yibum and Halitsah*, 2 NETANYA ACAD. COLL. L. REV. 207 (2001–2002). Green, *Id.*, at 230–240, discusses, *inter alia*, the case of fertilized ova which were implemented posthumously, and very interestingly (although without a positive basis) suggests that it will exempt from levirate marriage for a limited period of one year after the death of the sperm owner. His discussion focuses on the status of fertilized ova as human beings, which is beyond the scope of the current paper.

<sup>42</sup> The first opinion is ascribed to Rabbi Yehezkel Landau (Poland – Prague, 18th century; known as the Noda Bihudah), who dealt with the matter theoretically. It was later adopted by Rabbi Shaul Israeli (Israel, 20th century) whose view will be discussed below. The second is ascribed to Rabbi Yosef S. Elyashiv (Israel, 20th–21st centuries). See Bleich, *supra* note 2, at 76–89.

<sup>43</sup> See Bleich, *supra* note 2, at 86.

Jewish law. Among his writings he discussed posthumous reproduction. In a halakhic article on fatherhood in artificial insemination,<sup>44</sup> Rabbi Israeli first discusses the status of the father in regular cases of artificial insemination. Following Rabbi Moses Lima and other writers, he raises some doubts and leaves the question of the status of the father in artificial insemination without a decision. He nevertheless argues, in the second part of his article, that even if we determine that the sperm owner *is* the legal halakhic father of the child, he would *not* be considered the father in posthumous reproduction. What is interesting is his reasoning: there is a linkage between levirate marriage and other aspects of parenthood, such as inheritance and family relations, and if the child is not considered the sperm-owner's child as regards levirate marriage, he or she would not be so considered the sperm-owner's child as regards the other aspects of parenthood.

For the purpose of levirate marriage, the moment of death is crucial: if at that moment the deceased does not have children (or if his spouse was not pregnant at that time)—the levirate obligation comes into force. This can be deduced from the Biblical commandment of levirate marriage: 'If brothers dwell together, and one of them dies and has no son',<sup>45</sup> that is: if he does not have a child when he dies, the levirate marriage obligation takes effect, even if—as Rabbi Israeli deduced—the situation would later change, and his widow would conceive posthumously. But since that child is not considered the deceased's child for the purpose of exempting his mother from levirate marriage, the child would not be considered his child for any other legal matter. In his words:

If he is not a 'son' for the purpose of [exempting his mother from] levirate marriage, he is not a son for any other matter, and is not considered a relative for anything, including the laws of incest [that is, the child is not prohibited from marrying relatives of his or her 'father'], brotherhood, etc. because he does not have any relationships to the father nor to his family for any matter. [We rule in this way] because family laws are learned from the laws of levirate marriage, and one cannot be separated from the other.<sup>46</sup>

The link is fascinating. In principle, we could distinguish the obligation of levirate marriage from other legal matters. It is possible to expose the rationale of this religious commandment (as will be done in the next section), and to differentiate it from other aspects of the parent–child relationship. For example, even if we decide that for the purpose of levirate marriage this child is not considered the deceased's child, he or she might be considered as such as regards family ties and restrictions on marrying relatives. But Rabbi Israeli does not take this direction, and prefers a uniform definition of fatherhood for every legal matter,<sup>47</sup> and this definition is determined on the basis of considerations that are relevant to levirate marriage (rather than other, no less important, family matters).<sup>48</sup>

<sup>44</sup> RABBI SHAUL ISRAELI, HAVOT BINYAMIN, 3:107.

<sup>45</sup> Deuteronomy 25:5. The full Biblical passage will be discussed in section II.

<sup>46</sup> ISRAELI, *supra* note 44, at 52.

<sup>47</sup> Compare Avishalom Westreich, *Changing Motherhood Paradigms: Jewish Law, Civil Law, and Society*, 28 HASTINGS WOMEN'S L. J. 97, 111–16 (2017) (the use of different criteria for defining the mother of a child in different legal realms).

<sup>48</sup> On the influence of the 'religious' part of Jewish law on its 'legal' part, see ELON, *supra* note 38, at 111–22.

This is not, however, the only innovative aspect of this approach. No less important is the justification that Rabbi Israeli provides for determining the moment of death as the key moment for defining fatherhood in levirate marriage. We mentioned above the basis of this decision in the words of the Biblical commandment ('and one of them dies and has no son'), but Rabbi Israeli is not satisfied with this argument, and adds an additional, value-based argument that explains this position.<sup>49</sup> This argument is based on a related Talmudic discussion, as follows.

The Babylonian Talmud discusses the following case:<sup>50</sup> basically, if a deceased man does have a child when he dies, his wife is exempt from levirate marriage. If the child later dies, the law theoretically could have applied the levirate obligation then, since the deceased becomes childless at that moment. This option (later application of the levirate obligation) is, however, rejected (although in other, similar halakhic matters the halakhic status can be changed upon later death<sup>51</sup>). The Talmud explains that this is so because of the Biblical principle, according to which 'Her ways [that is, the ways of the Torah, or: Jewish law] are ways of pleasantness, and all her paths are peace'.<sup>52</sup> The widow might have remarried without *halitsah* after her husband's death (since she had a child). Were we to oblige her to perform *halitsah* upon the death of the child,<sup>53</sup> it might have a negative effect on her new relationships, contradictory to the principle of 'Her ways are ways of pleasantness'. This value-based argument, according to the Talmud, is the reason behind determining the moment of the husband's death as the single criterion for establishing the levirate obligation. It is, it should be noted, an astonishing explanation. Jewish law, despite its usual tendency towards formalism, bases its legal criteria on values. Values, or moral considerations, according to this explanation, shape its policy, and lead to crystalizing the laws of levirate marriage in a more limited way (that is, without future application, even if the deceased then becomes childless).<sup>54</sup>

Rabbi Israeli applies this argument to posthumous reproduction, with the opposite result. If a person dies childless, the widow might marry her brother-in-law in a levirate marriage (if they do not perform *halitsah*). If we were to consider a child that is born posthumously as the deceased's child, the widow would be retroactively discharged from the levirate obligation, and her marriage to the brother-in-law would be

<sup>49</sup> Others take a more formalistic interpretative approach, and see the literal meaning of the Biblical commandment as a sufficient basis for this position. See Auerbach, *supra* note 39, *Id.*

<sup>50</sup> Babylonian Talmud, Yevamot 87a–b.

<sup>51</sup> According to Jewish law, a priest is eligible to eat certain types of grain heave offering (*terumah*). His wife is similarly eligible as long as her husband is alive, and if they have a child—as long as their child is alive (even after the priest's death). As opposed to levirate marriage, in this case the later death of the child changes the legal situation, and disqualifies his or her mother from being eligible to eat the heave offering. The Talmud explains this difference on the basis of the below value-based principle, which is irrelevant in the case of an offering.

<sup>52</sup> Proverbs 3:17.

<sup>53</sup> Levirate marriage is irrelevant here, since she is already married to another person. Obliging her to divorce was not considered as an option at all.

<sup>54</sup> On the character and significance of the principle 'Her ways are ways of pleasantness' for levirate marriage and its impact on cases of posthumous fertilization, see Green, *supra* note 41, especially at 217–19. My discussion below on the principle 'Her ways are ways of pleasantness' contributes to Green's discussion in two important aspects: first, by analysing the sophisticated use of this principle by Rabbi S. Israeli, and second, by analysing the complex (and contradictory) uses of this principle within the discussion on the obligation of levirate marriage in posthumous reproduction.

considered illegitimate.<sup>55</sup> This, according to Rabbi Israeli, is contradictory to the principle of ‘ways of pleasantness’. We must, therefore, determine that posthumous reproduction has no effect on the levirate obligation, so the obligation exists even if the deceased at this moment has a child (posthumously conceived).

I would like to highlight three important points emerging from this explanation. First, the case about which Rabbi Israeli is concerned is very rare, and almost completely irrelevant today, since most people do not perform levirate marriage, but Rabbi Israeli still considers it as a basis for his value-based argument. That is, despite its being a very infrequent scenario, it is still a valid argument within the theoretical framework of the Jewish law discussion on the status of the child. Second, his use of the argument ‘Her ways are ways of pleasantness’ is innovative. It does not have an explicit Talmudic source, but is based merely on analogy to similar Talmudic cases. Third, his argument leads to an opposite result than the Talmudic one: while in the Talmudic case, in order to ensure the Torah’s ‘ways of pleasantness’, the widow is exempt from levirate marriage, here she is obliged to do so. Alongside these innovative aspects, Rabbi Israeli was driven by a fear—a fear that posthumous reproduction would result in family instability, which is contradictory to ‘Her ways are ways of pleasantness’. He decides, accordingly, to negate the fatherhood status of the sperm owner, and as discussed above, this affects not only the levirate obligation, but also the whole range of father–child relations.

The nature of value-based arguments is that they can be taken in multiple, sometimes contradictory, directions. This is what happens with ‘Her ways are ways of pleasantness’, which is used by several decisors for competing opinions. While Rabbi Israeli bases his ruling that posthumous reproduction does not affect the levirate marriage obligation (and therefore does not constitute any parent–child relations) on this principle, others reach a different conclusion. Rabbi Prof. Yigal Shafran, an expert on medical ethics and on medicine and halakhah, totally objects to the practice of posthumous sperm retrieval.<sup>56</sup> He bases his arguments on several halakhic and ethical considerations. Among them, as mentioned in his conclusion, is the need to honor the deceased by providing him with the option of resting in peace without disgracing his body by sperm harvest, and in this way the widow might be able to find solace in her mourning. The title Shafran provides to this concluding remark is: ‘Her ways are ways of pleasantness’.<sup>57</sup>

Rabbi Shafran uses the ‘ways of pleasantness’ argument to base his strenuous objection to posthumous sperm retrieval. Rabbi Israeli takes the ‘ways of pleasantness’ argument in the same direction, but in a more moderate way: not to fully reject posthumous sperm retrieval, but rather to limit its effect on parent–child relations. A third opinion takes the ‘ways of pleasantness’ argument in the very opposite direction. Rabbi Yitzhak Minkovsky, a 19th century Talmudic commentator,<sup>58</sup> argues that a child born out of posthumous reproduction is considered the sperm-owner’s child and exempts

<sup>55</sup> According to Jewish law, it is forbidden to marry the husband’s brother (even after divorce or the husband’s death). Marrying the brother-in-law other than in a levirate marriage (when the deceased dies childless) is considered incest, and may result in a declaration of the children born from these relationships as bastards. See Maimonides, *MISHNEH TORAH, Issurei Bi’ah* (Forbidden Sexual Relations) 2:1.

<sup>56</sup> Shafran, *supra* note 11, at 352.

<sup>57</sup> *Id.*, at 352.

<sup>58</sup> Belarus, 19th century; known as the Keren Orah.

his mother from levirate marriage or *halitsah*. He did not deal with the modern technologies of posthumous reproduction (which were not available in his time), but rather with a case in which the husband died right after having sexual relations with his wife, and the actual fertilization occurred after his death.<sup>59</sup> In this case, he argues, the widow is exempt from levirate marriage, since for the purpose of levirate marriage, ‘dead [children] are considered alive’, and as if the deceased’s child dies after his death, his wife is still exempt from levirate marriage,<sup>60</sup> so if she conceived after his death, she would be exempt from levirate marriage. The reason, according to Rabbi Minkovsky is: ‘all [= both cases] is because “Her ways are ways of pleasantness”’.<sup>61</sup> As opposed to Rabbi Israeli, who uses the value-based principle to reach a conclusion opposite to the Talmudic case, Rabbi Minkovsky uses it in a way similar to the Talmudic argument: in order to establish parent–child relations. While Rabbi Israeli wields the ways of pleasantness argument to cement legal stability by preserving the levirate marriage obligation and disregarding any parent–child relations in posthumous reproduction, Rabbi Minkovsky uses it to preserve parent–child relations and exempt the widow from the levirate marriage obligation.

#### D. Direct Interaction: Concluding Remarks

Posthumous reproduction is an enormous challenge to society and its legal system. It is an even greater challenge from the perspective of religious law: it involves not only civil aspects (like child benefits and inheritance rights) but also the status of the relevant religious commandment (the laws of levirate marriage). The fascinating phenomenon that we have viewed here is a constructive interaction between the two: posthumous reproduction poses new dilemmas to religious law; religious law confronts these dilemmas, while constructing new definitions of parent–child relationships; the new constructions are applied (according to some) not only to religious aspects, but also to the whole range of parent–child relations (family status, monetary matters and more).

Within this process, we witness the significant place of value-based principles. Jewish law characterizes itself as being based on ‘ways of pleasantness’, and therefore when its laws contradict ‘ways of pleasantness’, it might amend them accordingly. In our case, according to Rabbi Saul Israeli, the ‘ways of pleasantness’ principle demands stability, and therefore we must determine that parent–child relationships—for every legal matter—cannot be constituted posthumously.

Value-based arguments, however, are quite flexible in nature, and may be used to justify different, sometimes contradictory, opinions. ‘Her ways are ways of pleasantness’, accordingly, is the basis for Rabbi Yigal Shafran’s complete objection to posthumous sperm retrieval and is used by Rabbi Yitzhak Minkovsky to justify parent–child relations in posthumous reproduction, both in contradiction with the middle-way view of Rabbi Israeli: the legitimization of posthumous sperm retrieval, but without having it constitute parent–child relations between the sperm owner and (his) child.

<sup>59</sup> This is the case about which Rabbi Yehezkel Landau argues that the child is not considered the sperm-owner’s child, and does not exempt his mother from the levirate obligation, see *supra* note 42. Rabbi Minkovsky objects to Rabbi Landau’s view.

<sup>60</sup> See *supra* text accompanying notes 50–53.

<sup>61</sup> RABBI YITZHAK MINKOVSKY, KEREN ORAH, *Yevamot* 87b.

## II. RELIGIOUS LAW AND POSTHUMOUS REPRODUCTION: INSPIRATION

### A. Two Rationales of Levirate Marriage

In addition to the direct interaction discussed in the previous section, levirate marriage and posthumous reproduction share similar rationales and objectives. In the following section, I will examine the rationales of levirate marriage in classic Jewish law sources (in the Biblical context and in Talmudic and post-Talmudic sources). I will argue that this practice has two different rationales, and that the tension between them has significant legal implications. Based on this, I will show the relevancy of this distinction for today's discussions, at least as a cultural (or metalegal) inspiration.

The Biblical commandment states:

If brothers dwell together, and one of them dies and has no son, the wife of the dead shall not be married outside the family to a stranger; her husband's brother shall go in to her, and take her as a wife, and perform the duty of a husband's brother to her.

And the first son whom she bears **shall succeed to the name of his brother who is dead**, that his name may not be blotted out of Israel.<sup>62</sup>

The explicit object of levirate marriage is to 'succeed to the name of his brother who is dead'. But what does this mean?<sup>63</sup> One possible, literal, interpretation is that the first-born would be named after the deceased. Alternatively, to 'succeed to the name of his brother' might be a form of continuation for the deceased in its broader sense.<sup>64</sup> In a wider Biblical context, 'name' might mean the inheritance of the dead person, as in the case of the daughters of Zelophehad son of Hephher who asked to inherit their father (who died without a son):

Why should **the name of our father** be taken away from his family because he had no son? **Give to us a possession** among our father's brethren.<sup>65</sup>

It seems to be a classical interpretative dilemma, between the literal, textual meaning of 'name' and its contextual interpretation. Interestingly, it seems that the Bible itself provides us with these two interpretive options, which were implemented (sometimes simultaneously) in a wider Biblical context.

<sup>62</sup> Deuteronomy 25:5–6.

<sup>63</sup> For an extensive discussion on the meaning of 'name' in this and the following sources, including reference to diachronic aspects of Biblical law as regards the objectives of levirate marriage, see Jackson, *Ruth*, *supra* note 13, at 106–10; Bernard S. Jackson, *Ruth and Ezra-Nehemiah in Dialogue* in *THE DYNAMICS OF EARLY JUDEAN LAW: STUDIES IN DIVERSITY AND CHANGE IN ANCIENT LEGAL SOURCES* (S. Jacobs ed., forthcoming) (draft available at: [https://www.academia.edu/35927464/Ruth\\_and\\_Ezra-Nehemiah\\_in\\_Dialogue](https://www.academia.edu/35927464/Ruth_and_Ezra-Nehemiah_in_Dialogue)) (accessed Jan. 22, 2019).

<sup>64</sup> Its rendition in the ancient Greek translation of the Bible, the Septuagint, is close to the literal meaning of 'name', although still not decisive: 'And it shall be that the child that she might bear **shall be established from the name of the deceased**, and his name shall not be blotted out from Israel' (Deut. 25:6; NETS). The Latin Vulgate, however, more clearly follows the literal meaning of 'name': 'And the first son he shall have of her **he shall call by his name**, that his name be not abolished out of Israel' (*id.*; The Douay–Rheims Bible). I thank Zev Farber for providing me with these translations and verifying their accuracy.

<sup>65</sup> Numbers 27:4.

The broad meaning of ‘name’ in respect of levirate marriage is dominant in the story of Ruth and Boaz (Ruth 4). The characters in this story sought to provide family continuity by a new marital relationship, together with the ‘redemption’ of the deceased’s land: Then Bo’az said, ‘The day you buy the field from the hand of Na’omi, you are also buying Ruth the Moabitess, the widow of the dead, in order to restore the name of the dead to his inheritance.’<sup>66</sup> Towards the end of the narrative, however, it appears that restoring the property of the deceased was not the sole objective of the marriage of Boaz and Ruth. Rather, there was the particular object of giving birth to a child who would continue, perhaps substitute for, the deceased: the child born to Ruth and Boaz was named as the son of Naomi (the mother of Mahlon, Ruth’s deceased husband): ‘And the women of the neighborhood gave him a name, saying, a son has been born to Na’omi.’<sup>67</sup>

Despite this end, it seems that Ruth’s marriage to Boaz reflects the broad understanding of ‘name’ as succeeding the deceased. The narrative of Tamar and Judah’s family (Genesis 38), on the other hand, supports the first interpretative option, the literal meaning of ‘name’. In that story, Judah’s first son, Er, married Tamar, but died since he was ‘wicked in the sight of the Lord’. Judah requested his second son, Onan, to perform the levirate obligation, but he refused and died as his brother had died. Judah feared that his third son, Shelah, would also die; thus, he did not let him perform levirate marriage with Tamar. When Tamar understood that she would not marry Shelah, she maneuvered Judah into engaging in sexual intercourse with her, from which they had two children: Perez and Zerah.

The refusal of Judah’s second son, Onan, to impregnate Tamar was because ‘Onan knew that the offspring would not be his’,<sup>68</sup> that is, the child would be considered the child of his deceased brother, Er. The right to inherit Er is an irrelevant parameter in this kind of fear, and surely would not lead to not consider the born child as Onan’s. Onan’s fear is best understood as derived from naming the child after Er, or considering the child as Er’s. Astonishingly, according to 1 Chronicles, the son of Shelah (Judah’s third son) was called Er, probably after Shelah’s deceased brother, Er. Shelah was not the one who performed levirate marriage with Tamar (but only supposed to do so), but the fact that he named his child after his brother’s name emphasizes the importance of this practice. It is reasonable to assume, therefore, that the act of naming echoes the object of levirate marriage, that is, the first interpretative option.<sup>69</sup>

It should be noted that both narratives (Ruth and Judah) are not formal levirate marriages (at least not as set forth in Deuteronomy 25) but their narratives are those of levirate marriage, and therefore they can shed light on the interpretation of this customary law.<sup>70</sup> In this respect, they emphasize the strength of the ideas of personal and family continuity in the Biblical context.

<sup>66</sup> Ruth 4:5. For various interpretations of this verse (according to its different writing and reading traditions) and their implication on the levirate laws and objectives, see Jackson, *Law and Narrative*, *supra* note 13, at 123–26.

<sup>67</sup> Ruth 4:17. The child was named as Naomi’s son, but was not given the actual name of her deceased’s son (Mahlon) but rather ‘Obed’.

<sup>68</sup> Genesis 38:9.

<sup>69</sup> 1 Chronicles 4:21. My thanks to Avigail Zohar for this reference.

<sup>70</sup> There obviously is a deep connection between the legal aspects of Jewish law and the Biblical narratives. See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983–1984).



In Talmudic law, this interpretative dilemma became a positive-legal one, with practical implications. Both the textual and the contextual interpretations of 'name' are discussed in the Talmud (and in other Talmudic-era sources), which considers that it should be adopted from a halakhic perspective. The Talmud cites a Tannaitic source, which examines the two interpretations of the Biblical verses, and concludes:

'Shall succeed to the name of his brother,' in respect of inheritance.

You say: 'in respect of inheritance,' perhaps it does not [mean that], but 'in respect of the name': [if the deceased, for instance, was called] Joseph [the child] shall be called Joseph; if Johanan he shall be called Johanan! – Here it is stated, 'shall succeed to the name of his brother' and elsewhere it is stated, 'They shall be called after the name of their brethren in their inheritance,' as the 'name' that was mentioned there [has reference to] inheritance, so the 'name' which was mentioned here [also has reference] to inheritance.<sup>71</sup>

The Talmud, thus, acknowledges the two options as possible interpretations of 'name', but adopts the contextual one based on contextual considerations, which takes a step further. A no less challenging part of the Biblical passage is the word 'brother' in the verse: 'shall succeed to the name of **his brother** who is dead'—who succeeds to the name of whom? If it is the child that would be born from the levirate marriage, this child is not the brother of the deceased person.<sup>72</sup> If it is the brother-in-law who marries the widow in the levirate marriage, the first part of the verse cannot be correctly interpreted, since he is not 'the first son whom she bears'. The difficulty in interpreting the verse led to the two interpretations: the born child and the brother.

Clearly, if we interpret 'name' literally (naming), we must interpret 'his brother' as the first option, namely, the child, who is named after the deceased. We do find child–parent relations that are defined as brotherhood, and this is probably the meaning here.<sup>73</sup> The born child, although biologically the child of the brother-in-law, is named after the deceased brother, and is considered his child. If we interpret 'name' as inheritance, the two options of 'his brother' are possible: either the child or the levir inherits the deceased.

Apparently, the dominant interpretation in the Talmudic and post-Talmudic sources is that 'his brother' refers to the brother-in-law, who performed the levirate marriage, and, by force of this marriage, is entitled to inherit his deceased brother, rather than the child who would be born from the levirate marriage. The statement in the Mishnah: 'If one marries his deceased brother's wife he acquires his brother's estate' was adopted in the Talmud as the binding law.<sup>74</sup> The Talmud, however, admits that there are interpretative difficulties in this understanding: 'Said Rava: although throughout

<sup>71</sup> Babylonian Talmud, Yevamot 24a.

<sup>72</sup> Some modern and ancient translations (including the Septuagint and the Vulgate, *supra* note 64) omit the possessive determiner 'his', which is present in the Hebrew text. It is much more difficult to interpret the verse as referring to the born child with the possessive determiner. A possible solution is to say that the subject of the verse is changed in its middle: the first son would succeed to the name of 'his brother', i.e. the levir's brother, who is dead. Some commentators adopt this option, see below.

<sup>73</sup> See Genesis 31:46, in which the Hebrew word *le-ehav* (literally, 'unto his brethren', as this is rendered in the King James translation) refers to his sons.

<sup>74</sup> Mishnah, Yevamot 4:6; Babylonian Talmud, Yevamot 40a.

the Torah no text loses its ordinary meaning, here the *gezerah shavah* [= an interpretative method of expounding the Biblical text by comparing two separate passages] has come and entirely deprived the text of its ordinary meaning', but nevertheless accepts it as the law.<sup>75</sup> The Talmud seems to make a clear-cut interpretative decision. Yet, as David Henshke shows, there were other Talmudic sources that adopted the other, textual interpretation, that of naming the child after the deceased.<sup>76</sup>

Classic, post-Talmudic, commentators also moved between the two options, such as, on the one hand, the 11th-century French commentator Rabbi Shlomo Itzhaki (Rashi), who interprets 'name' as inheritance (following the conclusion of the Babylonian Talmud passage cited above), and, on the other, the 12th-century French commentator Rabbi Joseph Bekhor Shor, who adds to the Talmudic interpretation that the simple meaning of the text is giving the born child the name of the deceased.<sup>77</sup> Interestingly, another classic commentator of that period, Rabbi Joseph Kara (French, 10th–11th centuries) testifies to a custom of Ashkenazic communities that, in practice, adopt the two options—the literal meaning of 'name' and the contextual meaning (which was adopted by the Talmud): 'The Jews in Mainz and Worms practiced that, God forbid, when such a thing happened in their time [that is, a man died childless and his wife underwent levirate marriage], they require fulfilment [of the commandment by] the actual giving of [the deceased's] name [to the born child], and also by inheritance [of the deceased by his brother,] to fulfil the Soferic [interpretation.]'<sup>78</sup>

These two related interpretive dilemmas ('name' and 'brother') are accordingly significant for understanding the purpose of the laws of levirate marriage. I would like to suggest that these two interpretive options of the Biblical text fulfill two different objectives: personal and familial. Astonishingly, they exist in various layers of interpretation—from the simple meaning of the Biblical text (textual and contextual), continuing with Talmudic sources and post-Talmudic commentators. The first objective focuses on personal continuity, that is, the born child continues the deceased or even replaces him (emotionally or metaphysically).<sup>79</sup> According to the other option, levirate marriage is a form of familial continuation. First, by focusing on family possessions: inheritance of the land, which has symbolic and substantive familial importance, especially in an ancient agricultural culture.<sup>80</sup> Second, even more clearly, in that it does not focus on the genealogical (in modern terms: genetic) links to the deceased person,

<sup>75</sup> Babylonian Talmud, Yevamot 24a.

<sup>76</sup> See David Henshke, *Two Subjects Typifying the Tannaitic Halakhic Midrash* 65 TARBIZ 417, 420–27 (1996) (Heb.). For the two options in Josephus, see *Id.*, at 422 and note 19.

<sup>77</sup> See Rashi, s.v. 'Yakum' and Bekhor Shor, s.v. 'Yakum' to Deuteronomy 25:6.

<sup>78</sup> Rabbi Joseph Kara, Deuteronomy 25:6, s.v. 'Vehayah'. One or two generations later, however, Ashkenazic communities stopped practicing levirate marriage, and made *halitzah* mandatory. See *supra* text accompanying notes 19–23.

<sup>79</sup> The view of the child as a replacement for the deceased is preferable from a Kabbalistic point of view, as reflected in the *Zohar*. See ZOHAR, Ra'aya Meheimana, 3, Numbers, 215b. I thank Roni Bar-Lev for this reference.

<sup>80</sup> On the significance of the land in these Biblical stories, within the family, tribe, and nation, see Jackson, Ruth and Ezra-Nehemiah in Dialogue, *supra*, note 63, section 5 ('Land Claims'). Jackson refers, *inter alia*, to Sara Japhet, 'ישׁוּב וְיָרַד' (Isa 56:5) – A Different Proposal', 8 MAARAV 69–80 (1992), who observes that in the semantic field of land possession, 'name' figures prominently, as in both the levirate context and inheritance of daughters (the plea of the daughters of Zelophehad).

but rather on the wider familial ties: the one who continues the deceased is his brother, who marries his widow and inherits him.

The two objectives of levirate marriage are close to two different modern concepts of posthumous procreation. We find the tension between them in the Israeli context, in the modern debate on the posthumous sperm retrieval of fallen soldiers. We will now examine this debate.

## B. The Modern Debate over Posthumous Sperm Retrieval: The Israeli Case of Fallen Soldiers

Shaked Meiri was a reserve soldier who died during a military exercise when he was 27 years old (September 2004). Meiri wed only three months prior to his death and was childless, which made his death that much more tragic. Following the recommendation of army officials, and with the agreement of his widow (who later changed her mind) and the active support of his parents, his sperm was extracted and frozen. Had the widow agreed to continue with the process and be inseminated from his sperm, that probably would have been approved by the court on the basis of the Attorney General's Guidelines.<sup>81</sup> According to the Guidelines, the desire for continuation is a fundamental desire of most parts of the Israeli society, and has deep roots in Jewish tradition and Jewish law (including the Biblical narratives of the Patriarchs and Matriarchs of the Jewish people and the obligation of levirate marriage).<sup>82</sup> According to the Guidelines, the deceased's spouse commonly and naturally shares this desire for continuation. Therefore, as regards posthumous sperm retrieval, if the deceased explicitly expressed his will before he died, that should be approved. But even if this was not explicitly expressed, the agreement of the spouse to the process is decisive: it reflects the deceased's presumed will, and thus, according to the Guidelines, the process would be approved.<sup>83</sup>

In several cases in recent years, family courts approved posthumous sperm retrieval, when there was an explicit will of the deceased or his or her spouse, following the Attorney General's Guidelines, when either soldiers or civilians were involved.<sup>84</sup> In Shaked Meiri's case, however, a conflict arose. The involvement of soldiers in this and the second difficult case (which will be discussed below) made the conflict much more complex. It moved the issue to the center of the public discourse, and challenged the approach designated by the Attorney General, both conceptually and in practice.

<sup>81</sup> See the Attorney General's Guidelines (Oct. 2003); Vardit Ravitsky, *Posthumous Reproduction Guidelines in Israel* 34 HASTINGS CENT. REP. 6 (2004).

<sup>82</sup> *Id.*, sections 5–6. The fascinating linkage between posthumous procreation and levirate marriage is explicit in the Guidelines. In what follows I will develop and deepen the various aspects of this linkage.

<sup>83</sup> *Id.*, sections 8–19. As concluded by Ravitsky, *supra* note 81, at 7: 'A country such as the United States that emphasizes the value of personal autonomy may find the "presumed consent" assumption inappropriate. However, Israeli culture tends to encourage genetic parenthood at almost all costs. In that cultural atmosphere, these new guidelines are likely to be welcomed by the courts and accepted by public opinion'. Cf. Yael Hashiloni-Dolev, Daphna Hacker, & Hagai Boaz, *The Will of the Deceased: Three Israeli Case Studies*, 16 ISRAELI SOCIOLOG. 31, 39–45 (2014). The writers criticize the concept of presumed consent in the context of posthumous reproduction. They argue that the presumed consent is in fact an expression of the will of the living, which sometimes violates the will of the deceased. For a stronger criticism, see *infra* note 99.

<sup>84</sup> See, eg, the following two cases in which the deceased explicitly expressed his will for posthumous reproduction: Family Court File (Krayot) 13530-08, *New Family et al. v. Rambam Medical Center and Attorney General* (Dec. 6, 2009); Family Court File (Tel Aviv) 14217-06-14, *New Family et al. v. Hadassah Hospital and Attorney General* (Apr. 15, 2015). The courts, in both cases, approved the process.

Shaked Meiri's widow remarried, had her own children from the new relationship, and objected to the process. His parents requested to use his sperm to impregnate another woman (either as an anonymous sperm donation or to a woman who would agree to raise the child of the deceased), and their request was approved by the family court. The widow's appeal to the district court was rejected, and the case came before the Supreme Court.<sup>85</sup>

In a lengthy and reasoned verdict, the Supreme Court denied the right of the parents to decide regarding the use of their dead child's sperm and gave his widow the exclusive right to make such a decision. The court reasoned that parents should not be involved in their child's decision to procreate, and that this is a private decision of the couple. Since the widow in that case objected to the process, the court ruled that the parents are not allowed to proceed with the use of their son's sperm.<sup>86</sup>

Omri Shahar was a 25-year-old promising career officer when he died in a tragic road accident (June 2012). His sperm was extracted from his body and frozen right after his death, and his parents later appealed to a family court to permit them to have a child from his sperm using an egg donation with a surrogate mother and to raise the child as their own. In a precedent-setting decision, a family court approved their request in September 2016.<sup>87</sup> In February 2017, however, following the Supreme Court's decision in the Meiri case, the District Court reversed this decision, and disallowed the use of Omri Shahar's sperm.

The District Court denied Omri Shahar's parents' right to continue with the procreation process using their son's sperm. The court reasoned that, following the decision in the Meiri case, the right to procreate is reserved exclusively for the spouse. Omri Shahar had a permanent partner, but they did not formally establish their relationship (although they intended to do so). His spouse supported the process, but she did not want to be an active participant. The District Court consequently reasoned that, despite her support, the process could not be performed by the parents.<sup>88</sup> The decision was approved by the Supreme Court, which rejected a request to submit an appeal to the District Court decision, reasoning that the decision in the Meiri case applied here as well, so that the parents cannot initiate the process of sperm retrieval without the participation of the spouse (even if she agrees to the process).<sup>89</sup>

There are significant differences between the cases, and especially the fact that Shahar did not have a formal spouse, but rather a partner who did not object to the process (although not wanting to participate in it). The District Court, however, with the

<sup>85</sup> For the details of the case, see Family Appeal Request 7141/15 Plonit v. Plonit et al. (Dec. 22, 2016) (Heb.) (Isr.), sections 1–6 of Justice Hayut's opinion. For a media report, see, eg, Jeremy Sharon, *Supreme Court Prevents Use of Dead Soldier's Sperm*, <http://www.jpost.com/Israel-News/Supreme-Court-s-use-of-dead-soldiers-sperm-486082> (accessed Jan. 22, 2019) (Apr. 4, 2017).

<sup>86</sup> See Family Appeal Request 7141/15, *supra* note 85. This is also the position of the Mor-Yosef Commission, at 44–46, and the position of the Sperm Banks Proposed Legislation, 2016, sections 68–74. The Ethics Committee of the Israel Fertility Association has recently published its recommendations regarding posthumous sperm retrieval, and, for the most part, adopted a similar position. See POSITION PAPER ON THE USE OF SPERM FROM THE DECEASED: THE RECOMMENDATIONS AND CONCLUSIONS OF THE ETHICS COMMITTEE OF THE ISRAEL FERTILITY ASSOCIATION, Nov. 2017.

<sup>87</sup> See Family Court File 16699-06-13 Shahar v. Attorney General (Sept. 27, 2017) (Heb.) (Isr.).

<sup>88</sup> For the District Court's decision, see Family Appeal 45930-11-16 The State of Israel v. Shahar (Jan. 27, 2017) (Heb.) (Isr.).

<sup>89</sup> See Family Appeal Request 1943/17 Shahar v. The State of Israel (Aug. 15, 2017) (Heb.) (Isr.).

agreement of the Supreme Court, rejected these differences. The court refused to use a limiting interpretation of the negation of the parents' right to perform sperm retrieval and approve the parents' request, but rather applied here the Meiri ruling in its entirety.

The District Court adduced an additional reason, based on the formal requirements of Israeli law: Omri Shahar's parents request to use their son's sperm and to raise the child needed the participation of both an egg donor and a surrogate mother. Israeli law permits surrogacy in certain circumstances.<sup>90</sup> According to the law, however, a genetic tie of one of the intended parents is required in order to approve surrogacy.<sup>91</sup> When the deceased's spouse agrees to the process and will be the intended parent, according to the Attorney General Guidelines, even if she (in the case of sperm retrieval) does not have any genetic or physical connection to the child (ie both an egg donor and a surrogate mother would participate in the fertilization process) the spouse's 'tie to the [deceased's genetic] tie' satisfies the law. But in the Shahar case, neither the intended father nor the intended mother (Asher and Irit Shahar, Omri's parents) had this kind of tie, and therefore the process cannot be approved.<sup>92</sup> The court could have used a creative widening interpretation and view the parents as having a sufficient tie, but decided to reject this option: 'The Respondents cannot be deemed as having a tie to the tie, and only the partner of the deceased can meet this requirement.'<sup>93</sup>

Public acceptance of the two decisions was mixed. The cases are frequently mentioned and debated in the public sphere, with (according to the author's impression) an apparent tendency to accept the parents' demand. The Israeli public is sympathetic to Omri Shahar's parents' claimed right to raise a child from their son's sperm, and feels they are capable of doing so.<sup>94</sup> Shaked Meiri's case is more complex because of the refusal of his widow to the process. Some participants to the debate argue that the widow, who established a new relationship and has children from that relationship, should not be afforded the right to negate continuity for her deceased husband, but others dispute it.<sup>95</sup>

The court's decisions, however, were not the final word on this issue. Proposed legislation was submitted to the Knesset (the Israeli parliament) in June 2017 regarding the

<sup>90</sup> See Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756–1996 (henceforth: Embryo Carrying Agreements Law); WESTREICH, ASSISTED REPRODUCTION IN ISRAEL, *supra* note 4, at 1.11.

<sup>91</sup> See Embryo Carrying Agreements Law, section 2(d); WESTREICH, ASSISTED REPRODUCTION IN ISRAEL, *supra* note 4, at 14–16.

<sup>92</sup> Family Appeal 45930-11-16, *supra* note 88, sections 59, 62, 66 of Judge Weitzman's opinion.

<sup>93</sup> *Id.*, section 66.

<sup>94</sup> This is the author's impression, on the basis of several media sources and public discussions (see a few references in the next note). It is also reflected in the wide support of the proposed legislation among Knesset members from the entire political spectrum (see below).

<sup>95</sup> See, eg, the debate between Prof. Shalom Rosenberg, whose expertise is Jewish philosophy, and Rabbi Yuval Cherlow, who has done extensive work in the field of Jewish ethics, in the SHABBAT weekly magazine of the MAKOR RISHON newspaper: the former unequivocally supports the parents' requests, while the latter hesitates (Shalom Rosenberg, *A Grandchild without a Father*, SHABBAT -MAKOR RISHON, May 5, 2017, <http://preview.tinyurl.com/yc7xahfz>; Yuval Cherlow, *The Characteristic of Sodom? – Response*, SHABBAT-MAKOR RISHON, May 19, 2017, <https://tinyurl.com/y8sf5cqj>; Shalom Resenberg, *When a Right Turns Cruel*, SHABBAT-MAKOR RISHON, May 26, 2017, <https://tinyurl.com/yanqqtd> (accessed Jan. 22, 2019)) (Heb.). Prof. Assa Kasher, in a dissenting opinion to the recommendations of the Mor-Yosef Commission regarding posthumous reproduction (Mor-Yosef Commission, at 46–48), too, argues that the parents should be provided with the right to decide regarding the procreation of their deceased son, using his sperm. It is noteworthy that Kasher's son was killed in an accident during his military service, which led to almost full solidarity and complete identification with the parents' demand.

right to posthumous sperm retrieval of fallen soldiers.<sup>96</sup> Knesset members from across the political spectrum supported entitling the parents of deceased soldiers to use their son's sperm. Indeed, it is not a governmental proposal but rather a private one, but Knesset members of various political orientations joined it, thus clearly indicating its political and public support.

The explanation appended to the proposed legislation provides the rationale behind the proposal by indicating some unique aspects of deceased soldiers' cases that justify the exceptional arrangement in their case, and especially the justice in providing parents with this right. There is great public sensitivity regarding fallen soldiers, which is at the basis of the public debate, as mentioned in the explanatory section of the proposed law of the proposal.<sup>97</sup> Thus, the special features of cases that involve dead soldiers, especially due to Israeli society's shared feelings of bereavement, are the main catalyst of this proposal.<sup>98</sup> It is also true that the proposed change would accordingly be applied only to soldiers. Nevertheless, for justifying this change the proposal uses a different rationale. We see that the transformation between the two rationales—the 'classic' and the one proposed for soldiers—touches upon the very conceptualization of posthumous reproduction, and is directly related to our discussion on the religious commandment of levirate marriage. I would like to explore this argument.

### C. The Supreme Court vs. Proposed Legislation: Two Concepts

The Supreme Court decision in Shaked Meiri's case focused on will—that of the deceased person. Providing his widow with the right to decide was described as a means for revealing his presumed will. His parents' request, supported by public opinion, on the other hand, focused on different kinds of argument: continuity, the parents' feelings, and society's collective responsibility to the soldier and his family. This is emphasized in the explanation of the proposed legislation, which goes in this direction:

The proposed legislation is meant to regulate the continuity of the soldier who died during his military service and did not leave offspring, by giving his wife, his permanent partner, or his parents the right to take sperm from him after his death and to use it to conceive a child.

The State of Israel, which is experienced in the pain of bereavement, has lost its finest sons and daughters who fell in the defense of the country's security. The lives of young soldiers were cut short in their prime, and the State of Israel owes a moral obligation to the bereaved families who have lost what is most precious to them [...] The responsibility of the State that sends its sons to defend its security [...] 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 and to maintain [the dead soldier's] continuity.

<sup>96</sup> Fallen Soldier's Sperm Retrieval Law. The proposal was submitted as an amendment to the Fallen Soldiers' Families Law (Pensions and Rehabilitation) 5710–1950, section 35b.

<sup>97</sup> This sensitivity is discussed in the scholarly literature. See, eg, Eliezer Witztum, Ruth Malkinson, & Simon Shimshon Rubin, *Death, Bereavement and Traumatic Loss in Israel: A Historical and Cultural Perspective*, 38 *ISR. J. PSYCHIATRY & RELAT. SCI.* 157 (2001).

<sup>98</sup> See Meira Weiss, 'We Are All One Bereaved Family': *Personal Loss and Collective Mourning in Israeli Society*, 14 *STUDIES IN CONTEMPORARY JEWRY—COPING WITH LIFE AND DEATH: JEWISH FAMILIES IN THE TWENTIETH CENTURY* 178 (1999).

These two sources—the court and the proposal—reflect different kinds of argumentations, or two types of conceptualizations of the right to posthumous reproduction. The first focuses on the will of the deceased individual. This conceptualization may be defined as an *individualistic right to reproduce* posthumously. The second focuses on family continuity, feelings of responsibility, and the need to compensate the families. It may be defined as a *familial right to reproduce* posthumously.<sup>99</sup> Individualistic right refers here to the right of the deceased to reproduce. Whether dead people have rights is an intensive philosophical debate; some support the existence of posthumous rights, while others reject it.<sup>100</sup> Defining the right in our case as an individualistic one is more clearly identified with the supportive opinion, but I would not make a decisive argument on this issue. It is also possible not to recognize absolute posthumous rights, but rather to view the right to posthumous reproduction as a right of the living person which continues after his or her death,<sup>101</sup> or as an interest of the deceased which is borne by living agents.<sup>102</sup> Anyway, this right focuses on the deceased, contrary to a familial right.

The term familial right refers here to a right based on the interest of the family. In this respect, it is a legal aspect of familism. Familism is a concept used to describe a sociological form that gives priority to the family over the interest of the individual.<sup>103</sup> Although familism is not necessarily identified with the interest of the larger group (but rather with the family), in the Jewish (and especially the Israeli) context, the two are related. That is, the interest of the wider group (community and nation) is based on, identified with, and strengthened by the interest of the family, by viewing the society as ‘an extended family’.<sup>104</sup> In our context, the terms individual right and familial right represent two different conceptualizations of the right to posthumous reproduction.

It should be emphasized that the issue is not only that of a change in the discourse within the social sphere. Rather, the proposal builds a different justification of posthumous reproduction, one that is based on shared communal values rather than individualistic ones. The result is a dramatic conceptual change, from an individual right to

<sup>99</sup> A different analysis of the current legal situation is proposed by Yael Hashiloni-Dolev and Zvi Triger. Hashiloni-Dolev and Triger use a critical approach to argue that the current legal discourse which focuses on revealing the ‘will’ of the deceased is based on patriarchal views and pronatalism. They argue, accordingly, that the discourse should shift to discussing the right of the spouse and the presumed agreement of the deceased. See Yael Hashiloni-Dolev & Zvi Triger, *Between the Deceased’s Wish and the Wishes of His Surviving Relatives: Posthumous Children, Patriarchy, Pronatalism, and the Myth of Continuity of the Seed*, 39 IYUNEI MISHPAT (TAU L. REV.) 661 (2016). My argument here differs in two aspects. First, it uses a functionalist approach to analyse the current legal discourse, and therefore focuses on the rationale behind the current arguments within the rights discourse. Second, it suggests an internal distinction within the rights discourse, between individualistic and familial right.

<sup>100</sup> For the supportive opinion, see Joel Feinberg, *Harm and Self-Interest*, in 285 LAW, MORALITY AND SOCIETY (Peter Michael, Stephan Hacker, & Joseph Raz, eds., 1977); JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF CRIMINAL LAW* ch. 2 (1984). For the rejecting opinion, see James S. Taylor, *The Myth of Posthumous Harm*, 42 AM. PHIL. Q. 311 (2005). For a comprehensive review of the literature and a discussion see Daphna Hacker, *The Rights of the Dead through the Prism of Israeli Succession Disputes*, 11 INT. J. L. CONTEXT, 40, 4–45 (2015).

<sup>101</sup> See Michael Birnhack, *The Rights of the Dead and the Liberty of the Living*, 31 IYUNEI MISHPAT (TAU L. REV.) 57, 60–61 (2008) (Heb.).

<sup>102</sup> See Joan C. Callahan, *On Harming the Dead*, 97 ETHICS 341 (1987).

<sup>103</sup> Hizky Shoham, *You Can’t Pick Your Family: Celebrating Israeli Familism around the Seder Table*, 39 J. FAM. HISTORY 239, 240 (2014).

<sup>104</sup> BERNARD SUSSER & CHARLES LIEBMAN, *CHOOSING SURVIVAL: STRATEGIES FOR A JEWISH FUTURE* 111 (1999); Shoham, *supra* note 103, at 239–42.

reproduction to a familial (or even a communal) right, which makes it possible to provide family members (in addition to the spouse) with the right to initiate posthumous reproduction.

Defining the argumentations as individualistic vs. familial (or, in a wider definition in the Jewish and Israeli context, communal) views them as two different ideal types. In reality, however, they are intermingled (that is, we can find traces of the familial arguments in the Supreme Court decision, and traces of an individualistic approach in the proposed legislation). The issue, however, is which is more dominant among the two. And here, we view a fascinating move from the individualistic argument to the communal one. The Supreme Court focused on individualistic arguments. This enabled the court to exclude the parents from the right to decide regarding their deceased child's procreation. The proposed legislation focuses on familial and communal argumentations, and therefore provides the parents with this right.

An interesting point in this respect is that the proposed legislation does not intend to adopt this argumentation for all cases of posthumous reproduction, but rather to limit it to fallen soldiers. Thus, it accepts that individualistic argumentations are at the center of the discussion, but makes fallen soldiers an exception by providing legitimacy to familial arguments.<sup>105</sup> Solidarity plays an important role in biomedicine in general.<sup>106</sup> But in the case of fallen soldiers it takes a much more significant place. Due to the sensitivity of the issue and the shared bereavement feelings that it arouses,<sup>107</sup> the interest of the family in particular and that of society in general become an essential consideration.<sup>108</sup>

Time, however, will tell if the proposal's conceptualization—the communal right to posthumous procreation—will be adopted in practice for soldiers, or even whether it would be expanded in the next step to cases involving civilians, as well. Meanwhile, the two conceptualizations coexist in the political, public, and intellectual domains. But are they merely a development of the challenges of modern biotechnology? In my opinion, their roots are much deeper.

Clearly, the two different concepts of posthumous sperm retrieval are close to the two objectives of levirate marriage. As discussed above,<sup>109</sup> there are two possible interpretations of the verse 'shall succeed to the name of his brother who is dead', and these interpretations reflect different objectives of levirate marriage. The literal meaning of 'name' as naming the child after the deceased views levirate marriage as a form of continuation, or replacement, of the deceased by the born child, and is close to our first conceptual definition of posthumous sperm retrieval as an individualistic right. 'Name' as inheritance rights, following the second interpretation, is meant to secure the interest of the family in the deceased's property (in particular regarding his land, as reflected in

<sup>105</sup> For cases other than fallen soldiers, the Supreme Court decision, the Attorney General Guidelines, the recommendation of the Mor-Yosef Commission, and the Sperm Banks Law Proposed Legislation (see *supra* note 86) would still be applicable. There is accordingly no contradiction between the two legislation proposals.

<sup>106</sup> See BARBARA PRAINSACK & ALENA BUYX, *SOLIDARITY IN BIOMEDICINE AND BEYOND* (2017).

<sup>107</sup> See *supra* text to notes 97–98.

<sup>108</sup> In this context, see Ya'arit Bokek-Cohen & Vardit Ravitsky, *Soldiers' Preferences Regarding Sperm Preservation, Posthumous Reproduction, and Attributes of a Potential 'Posthumous Mother'*, *OMEGA* (published online, Aug. 11, 2017, <https://doi.org/10.1177/0030222817725179> (accessed Jan. 22, 2019)). Bokek-Cohen and Ravitsky's study examines the view of Israeli soldiers regarding posthumous reproduction. It finds a relatively high predisposition for posthumous reproduction, and considerable influence of the soldiers' parents on soldiers' willingness for such a process.

<sup>109</sup> See *supra* section A.



the story of the daughters of Zelophehad).<sup>110</sup> It is even more clearly the case according to the Talmudic interpretation of the Biblical text as providing the levir, the deceased's brother (rather than the child) with the deceased's inheritance rights.<sup>111</sup> This objective is thus close to the familial or communal conceptualization of posthumous sperm retrieval.

In antiquity, the two objectives could be achieved (and encouraged) via levirate marriage. As science developed, we witness the practice of posthumous sperm retrieval as a new way to achieve them. Is this merely an interesting incidental similarity, or are there stronger links between levirate marriage and posthumous sperm retrieval? In other words, is the modern debate over posthumous sperm retrieval directly influenced by the ancient tradition of levirate marriage?

It is plausible that the objectives of levirate marriage underlie the modern debate over posthumous sperm retrieval. Culture and tradition obviously affect the discussion of assisted reproduction in general: the commandment 'to be fruitful and multiply' is one of the main cultural catalysts of ART from a Jewish perspective,<sup>112</sup> in addition to other historical and cultural factors, such as in the post-World War II period—the restoration of the Jewish people after the Holocaust.<sup>113</sup> Culture and tradition probably also influence the discussion of posthumous sperm retrieval in particular.<sup>114</sup> The strong cultural heritage of levirate marriage (both the religious commandment as it was developed in Jewish law and the Biblical narratives and their cultural heritage), too, is probably part of the culture and tradition that influence this discussion. The equivalence in rationales, together with the general openness of Jewish law to assisted reproduction, cannot be overlooked. It is reasonable to assume, therefore, that ancient tradition has, at the very least, inspired the contemporary debate on posthumous sperm retrieval.<sup>115</sup>

In other words, the tension between the two different conceptualizations within the modern debate over posthumous sperm retrieval, which this article analysed, is linked to the laws of levirate marriage. It is implicitly derived from, or at least culturally inspired by, the ancient hermeneutical debate about the objectives of the traditional commandment and practice of levirate marriage: whether as a form of individualistic continuation or as a means of preserving familial interest.

One closing word. The tension between individualism and familism became explicit in the Israeli context of posthumous sperm retrieval of fallen soldiers. Its roots, however,

<sup>110</sup> See *supra* text to note 65.

<sup>111</sup> See *supra* text to note 74.

<sup>112</sup> On the religious status and importance of the commandment to be fruitful and multiply as a basis for the discussion of procreation (including artificial procreation) from a feminist view, see RONIT IRSHAI, FERTILITY AND JEWISH LAW 25–52 (Joel A. Linsider, trans., 2012). For further references, see WESTREICH, ASSISTED REPRODUCTION IN ISRAEL, *supra* note 4, at 7–9.

<sup>113</sup> See references *Id.*

<sup>114</sup> Including the above elements (mainly, 'to be fruitful and multiply') and others. See, eg, the elements discussed in the Attorney General's Guidelines, *supra* text to notes 81–82.

<sup>115</sup> Similar integration (and sometimes tension) between two very proximate aspects may be found, in my opinion, in classic Jewish law sources on marriage. For example, according to one of the most important codes of Jewish law, *Arba'ah Turim* of Rabbi Jacob ben Asher (Germany and Spain, 13th–14th centuries), marriage combines the individualistic desire for partnership ('It is not good that the man should be alone' [Gen. 2:18] and procreation (to 'be fruitful and multiply' [Genesis 1:28]), which has more of a societal character. See Avishalom Westreich, *Book Review: Melanie Landau, Tradition and Equality in Jewish Marriage: Beyond the Sanctification of Subordination* 28 NASHIM 147, 149 (2015).

as argued here, are much earlier, and are deeply rooted in classic Jewish tradition. This, in addition to the place of familism in Western cultures,<sup>116</sup> ensures that we will witness similar conflicts (with differing features) as regards posthumous reproduction in other societies, as well. Moreover, this tension characterizes other realms, and influences (or may influence) other biotechnological debates (again, with necessary differing features), such as organ donation: Do we focus on the explicit or presumed individual consent, or does the family of the deceased have a right to decide whether to donate the deceased's organs or not? Opinions vary in this respect, and at least *prima facie*, the individualism vs. familism conceptualization seems to clarify the tension here, as well.

### SUMMARY

The modern technology of posthumous reproduction raises social, legal, and bioethical dilemmas. Alongside these difficult concerns, it intersects with a no less important normative system: religion, which has been the focus of this paper.

The paper has discussed the interaction between Jewish law and posthumous reproduction. It defined two types of interactions: direct and indirect. The first focuses on how Jewish law responds to the new technology, and how this new technology affects a wider spectrum of laws and conceptualizations from a religious-law perspective. The effect, according to my analysis in this paper, starts with a particular religious law commandment, which is directly related to posthumous reproduction: the obligation of levirate marriage. Here we saw how opinions vary, from those who consider posthumous reproduction to be a reason for cancelling the levirate obligation to those who object to it. The effect, however, has spread to a wider spectrum of the law: the questions of whether, according to Jewish law, a child born posthumously is entitled to inheritance rights, and whether there are family relations between the child and the sperm owner. From here, it's but a short way to what in my opinion is a highly interesting question, which stands above the two: how the definition of fatherhood is challenged (and consequently formed) by the new technology of posthumous reproduction.

During our discussion, we pointed to two interesting phenomena that are related to the interaction between Jewish law and posthumous reproduction. First is the mutual interaction of the religious and civil dimensions within Jewish law. In this respect, we have seen how a legal definition in the religious realm (fatherhood for the purpose of levirate marriage) affects legal definitions in the civil realm (inheritance, etc.). Second is the significance of value-based principles in framing Jewish law. In this respect, we noticed how the moral character of Jewish law as a legal system whose 'ways are ways of pleasantness' directly affects the law (in its rejection of the unstable results that posthumous reproduction might lead to).

The interaction of posthumous reproduction and Jewish law is not only direct. In the second part of this paper we pointed to a second kind of interaction: an indirect one. We examined the rationales behind a specific modern debate over posthumous reproduction: the Israeli debate over posthumous sperm retrieval of fallen soldiers. Having identified two rationales—individualistic and familial—we argued that the individualistic rationale characterizes the limiting approach, which is found in the Israeli Supreme Court decisions and other legal sources that deny the right of the parents to initiate and

<sup>116</sup> See Don Browning, *Critical Familism, Civil Society, and the Law*, 32 HOFSTRA L. REV. 313 (2004).

perform posthumous reproduction. The familial rationale characterizes public opinion, which was probably the catalyst of a proposed legislation submitted to the Knesset, which recognizes the right of the parents to initiate and perform posthumous sperm retrieval of their fallen child.

The analysis of the modern debate, as the paper has argued, reveals an equivalence to the two rationales of posthumous reproduction, which are found in the early ‘fore-father’ of this technology: levirate marriage. Within the Biblical and Talmudic sources, we found representations of—one might even say: a competition between—these very two rationales: the individualistic and familial. We argued accordingly that this old tradition influences the modern discussion over posthumous sperm retrieval, directly or indirectly, as a form of inspiration: the two rationales coexist in the Jewish heritage and culture, and both play a role in shaping modern positions as regards posthumous reproduction.

To sum up, posthumous reproduction poses an interesting challenge to religious law. This paper’s discussion analysed the characteristics and implications of this challenge. The complex interaction which the paper found—both directly, such as the shaping of definitions of fatherhood and the effect of moral arguments within the law, and indirectly, such as the cultural inspiration that religious law draws upon for modern positions—provides us with a striking picture of the conjunction of modernity, law, and religion.

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