BE FRUITFUL AND MULTIPLY AFTER DEATH, BUT AT WHOSE EXPENSE?: SURVIVOR BENEFITS FOR THE POSTHUMOUSLY CONCEIVED CHILDREN OF FALLEN SOLDIERS

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INTRODUCTION

Imagine the following scenario: a 19-year-old soldier, unmarried and single, suffers a fatal injury as a result of being shot by an enemy sniper. The young man dies in a hospital with his two distraught parents by his side. Fraught with grief, the parents plead with doctors to perform postmortem sperm retrieval on their son in the hopes of preserving his chance of fathering a child. While never having obtained the fallen soldier’s formal consent, the doctors perform the procedure and freeze a sample of the young man’s sperm. After five years of intense legal battles with the court system, the parents are able to obtain their son’s sperm from the hospital. In response to a newspaper advertisement placed by the fallen soldier’s parents, 200 women come forward to be interviewed for the opportunity to conceive and raise a child of the deceased. The parents select a candidate, and after years of attempts at in vitro fertilization, a baby girl is born to a woman whom the fallen soldier had never met.

While this scenario may appear to be nothing more than futuristic science fiction, it is in fact an accurate account of the events following the death of Sergeant Keivan Cohen of Petah Tikva, Israel. Stories like the one described above, made possible by Israel’s revolutionary stance on the issue of posthumous conception, raise a series of legal and ethical questions. This Note focuses on the issue of posthumous conception as it pertains to fallen soldiers. More specifically, it investigates the “survivor benefits” afforded to the posthumously conceived children of male soldiers who die during their military service.

This Note proceeds in three main sections. The first section intro-

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2 See infra Part III.A (Israeli Global Precedents).
3 This Note is limited to discussions of posthumous conception as it pertains to male soldiers because of the lack of precedent regarding posthumous conception and female soldiers. To date, there has only been one case of posthumous maternity resulting in a live birth. In 2011, a baby was born to a surrogate mother, who gestated an embryo created by a married couple before the wife died of cancer. See Danya, The Biological Will™: A New Paradigm in Art?, NEW FAMILY (Feb. 25, 2013), http://www.newfamily.org.il/en/4905/the-biological-will%e2%84%a2-%e2%80%93-a-new-paradigm-in-art/.
4 See MAJ. MARIA DOUCETTEPERRY, U.S. DEP’T OF THE ARMY, TO BE CONTINUED: A LOOK AT POSTHUMOUS REPRODUCTION AS IT RELATES TO TODAY’S MILITARY 14 (2008) (“Survivor benefits include several different allowances that surviving spouses, children, and other dependents are eligible to receive due to the death of their service member provider.”).
roduces the issue of posthumous conception generally, touching upon some of the ethical considerations involved, as well as the existing legal and medical frameworks for its regulation. The second section addresses posthumous conception in the military setting, discussing government benefits afforded to the surviving family members of fallen soldiers and the different regulations in place around the world for determining when posthumously conceived children of fallen soldiers receive survivor benefits. The final section of this Note introduces recent developments in posthumous conception jurisprudence in Israel. These developments raise difficult legal and ethical questions about the distribution of survivor benefits to posthumously conceived children in Israel and foreseeably many other nations in the future. This Note aims to address these questions and to propose an Israeli survivor benefits regulation that fairly balances the various public policy considerations involved.

I. POSTHUMOUS REPRODUCTION AND CONCEPTION

A. Background

Posthumous reproduction occurs when a baby is born after at least one of its genetic parents has died. While posthumous reproduction has presumably taken place from the beginning of mankind, with women dying during childbirth and men dying before their partner has given birth, advances in Assisted Reproductive Technologies (ART) have allowed for a relatively new phenomenon known as posthumous conception. Posthumous conception has been defined as “the beginning of the human gestation process after the death of one or both biological parents.”

One of the essential technologies that allows for the conception of a child after a male parent’s death is sperm cryopreservation, a process by which sperm, frozen at a temperature of -196°C, can be preserved.

6 Id.
indefinitely. Male cancer patients often utilize this "sperm-banking" procedure prior to cancer treatment, acknowledging the likelihood that the treatment may render them infertile as well as the possibility that they may die prior to being able to reproduce. Similarly, some men choose to have their sperm cryopreserved before undergoing vasectomies, recognizing that they may wish to father a biological child after becoming sterile. As will be discussed in greater detail, military men have begun to take advantage of ART in order to preserve their capacity to reproduce should they become infertile or die as a result of going to war.

Most cases of posthumous conception involve sperm voluntarily submitted by men to sperm banks prior to their deaths. However, there are a growing number of cases in which sperm is extracted from men postmortem for the purposes of posthumous conception. The technology necessary to perform these procedures has only been available for a few decades, but interest in postmortem sperm retrieval (PMSR) is growing. Posthumous conception and PMSR in particular, raise significant ethical questions that must be considered in order to implement appropriate legal standards. Several of these ethical questions will be discussed in the following section.

B. Ethical Considerations

There are a myriad of ethical considerations surrounding the posthumous reproduction debate. These considerations generally revolve around one of two principles: [1] "the autonomy of persons to decide about reproduction" and [2] "the principle of beneficence as expressed

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9 See DOUCETTPERRY, supra note 4, at 2.
10 Id.
12 See DOUCETTPERRY, supra note 4.
13 Id.
14 Id. at 2; see also FRANCIS RAZIEL, M.D. ET AL., NATIONWIDE USE OF POSTMORTEM RETRIEVED SPERM IN ISRAEL: A FOLLOW-UP REPORT 2693-95 (2011), http://www.ferstert.org/article/S0015-0282(11)00679-0/fulltext (reports of early postmortem sperm retrieval).
16 Id.
17 See id.
in the concern for the welfare of the child. 18

While decisions regarding childrearing are typically considered to be both private and a fundamental right of individuals, posthumous reproduction introduces ethical questions that blur the boundaries of that fundamental right. 19 For example, it is not clear prima facie that a man has a cognizable interest in reproducing when he will not be able to raise the child. 20 Furthermore, even if such an interest does exist, it is not obvious whether it should be protected under the law. 21

Many of the ethical concerns surrounding the welfare of children conceived as a result of ART involve the widely debated impact of single parent childrearing. 22 Other ethical questions are raised concerning children who feel “wronged or stigmatized” after finding out that they were conceived subsequent to one of their genetic parent’s death. 23

If posthumous reproduction is considered a right that should be protected under the law, the next ethical hurdle that must be addressed is that of consent. 24 In cases where a married man has his gametes stored in order to impregnate his wife in the future, there does not seem to be any question as to whether the requisite consent from the man exists. However, in cases where explicit consent from the gamete provider was not obtained, like in many instances of PMSR, it is unclear whether and under what circumstances consent should be implied. 25

Although such questions about parental autonomy and child welfare are important aspects of the posthumous conception debate, they are beyond the scope of this Note. However, establishing what constitutes consent plays a significant role in determining appropriations of

20 Id.
21 Id.
22 Id.
23 See generally Orr & Siegler, supra note 11.
24 See generally Hilary Young, Presuming Consent to Posthumous Reproduction, 27 J. L & HEALTH 68 (2014) (discussing consent as it pertains to posthumous conception).
25 See Devon D. Williams, Over My Dead Body The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval, 34 CAMPBELL REV. 181 (2011) (discussing PMSR and the issue of consent).
survivor's benefits, and accordingly, this Note will address that issue in greater detail.

C. Legal and Medical Frameworks

Within the international community, there is a broad spectrum of positions on the rights of individuals to posthumous conception. While countries like Germany, Sweden, Canada, and the state of Victoria, Australia have passed legislation prohibiting posthumous conception altogether, other countries have embraced the idea. In many respects, Israel is at the forefront of this latter category. Israeli courts have permitted the spouses of deceased men to have sperm posthumously extracted from their husbands without having obtained explicit consent. In addition, there is Israeli case law allowing the parents of a deceased man to select a female recipient of their son's gametes without ever receiving formal consent from their son. The details and possible implications of this line of Israeli precedent will be presented in greater depth later in this Note.

Most western countries have situated themselves somewhere in between the two extremes described above. In England, pursuant to the Human Fertilization and Embryology Act, posthumous sperm extraction is legal if written consent was obtained from the deceased and the woman seeking to conceive with the deceased's sperm was given permission in writing. Argentina, Belgium, Latvia, the Netherlands, New Zealand, and Spain also require written consent for posthumous sperm extraction. In Greece, posthumous artificial insemination is permitted when there is written consent from the deceased and the de-

27 See Fischbach & Loike, supra note 1.
28 See Danya, supra note 3.
29 See infra Part III (LOOKING TO THE FUTURE).
ceased suffered from a disease that affected fertility or endangered his/her life.\textsuperscript{32}

In the United States, there are no laws prohibiting posthumous reproduction.\textsuperscript{33} As a result, posthumous sperm retrieval and reproduction is regulated locally, oftentimes based on guidelines implemented by individual hospitals.\textsuperscript{34} For example, Cornell University was tasked with developing postmortem sperm retrieval procedures and guidelines for several New York hospitals.\textsuperscript{35} The guidelines present four areas of consideration in determining whether posthumous sperm extraction is permissible: "(a) issues of consent, (b) medical contraindications, (c) resource availability, and (d) a waiting period prior to conception."\textsuperscript{36} Consent from the deceased must be presumed and the deceased's wife must consent in order to perform postmortem sperm retrieval.\textsuperscript{37} Furthermore, the death must have been "sudden and for reasons not due to a communicable disease or one known to affect sperm viability," with retrieval taking place within 24 hours of death.\textsuperscript{38} Finally, cryopreservation must be available locally, with the sperm being screened for communicable diseases and a mandatory wait period of one year prior to using the sperm.\textsuperscript{39}

Doctors and hospitals are not completely without guidance when making determinations about posthumous reproduction procedures. The American Society for Reproductive Medicine (ASRM) and the European Society of Human Reproduction and Embryology (ESHRE) have published committee opinions on posthumous reproduction which help physicians determine when requests for posthumous reproduction should be honored.\textsuperscript{40}

According to the ASRM, "posthumous gamete (sperm or oocyte) procurement and reproduction are ethically justifiable if written docu-
mentation from the deceased authorizing the procedure is available.\footnote{Ethics Comm. of the Am. Soc'y for Reprod. Med., supra note 19, at 1844.} The ASRM recommends that “[i]n the absence of written documentation from the deceased, programs open to considering requests for posthumous gamete procurement or reproduction should only do so when such requests are initiated by the surviving spouse or life partner.”\footnote{Id. at 1842.}

The ESHRE takes the position that “posthumous reproduction by a partner is acceptable if the following conditions are met: written consent has been given by the deceased person, the partner received extensive counseling, and a minimum waiting period of 1 year is imposed before a treatment can be started.”\footnote{See G. Pennings et al., supra note 18, at 3050.}

The issue of posthumous conception, already replete with ethical and legal considerations and lacking in international consensus, reveals further complexity and discord when discussed in its military applications. The following sections will discuss posthumous conception as it relates to the military, building upon many of the considerations already presented.

II. POSTHUMOUS REPRODUCTION AND THE MILITARY

A. Introduction

The relative timing of technological advances in ART and the beginning of the war in Iraq and Afghanistan made the military ripe for the issue of posthumous reproduction.\footnote{See Doucet & Perry, supra note 4, at 1.} With high rates of death and injury, some soldiers heading off to battle elected to have their sperm cryopreserved “as an insurance policy against infertility or death.”\footnote{Hans & Yelland, supra note 30, at 3.} Army National Guardsman Sgt. Patrick Atwell made a deposit at a sperm bank prior to his deployment after a Gulf War veteran told Patrick that he had returned from overseas to learn that he was sterile.\footnote{See Frank Buckley, Insurance Policy Troops Freezing Sperm, CNN (Jan. 30, 2003, 1:04PM), http://www.cnn.com/2003/HEALTH/01/30/military.fertility/index.html?iref=newssearch.} As Patrick’s wife explained, having the sperm frozen made her “feel more hopeful with our future . . . and if God forbid, he doesn’t come back,
then I’ll be able to have a piece of him here still.”

In the United States, pre-deployment preservation of sperm remains privately funded and administered despite its growing popularity amongst soldiers. Like many sperm banks in America, California Cryobank (CCB), “the world’s leading full-service tissue bank,” provides soldiers and their families with discounted services, whether it be for semen storage or post-mortem retrieval.

In England, soldiers are informed by their officers about sperm preservation before heading off to battle. The British Ministry of Defense does not fund pre-deployment fertility preservation; however, they do provide funding for sperm harvesting and storage for soldiers injured in battle.

While Israel is at the forefront of ART, the Israel Defense Forces (IDF) has yet to engage on the issue. According to Irit Rosenblum, founder of the New Family Organization and inventor of the “Biological Will,” the IDF doesn’t object to signing Biological Wills, but it’s unwilling to take an active role and inform the soldiers. This stance is significant considering the growing interest in cryopreservation of sperm and posthumous reproduction amongst Israeli soldiers.

B. Survivor Benefits for the Children of Fallen Soldiers in the U.S. and Israel

In the United States, survivor benefits are afforded to the family

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47 Id.
49 See Buckley, supra note 46.
51 Id.
53 See Irit Rosenblum, The Biological Will, BIOLOGICAL WILL, http://biologicalwill.com/ (last visited Oct. 22, 2015) (A biological will is “a last will and testament that describes any individual’s wishes for posthumous use or disposal of gametes or ova. Biological wills™ ensure that a person’s wishes for a biological legacy are legally binding.” To date, 600 biological wills have been composed.).
54 Linder-Ganz & Evan, supra note 52.
55 Id. (New Family receives an average of two to five inquiries per week about biological wills and received close to thirty inquiries during the first week of the 2013 Israeli Military Operation Pillar of Defense).
members of soldiers whose deaths occur "in the line of duty while on active duty." These benefits include: Dependency Indemnity Compensation (DIC), Servicemember's Group Life Insurance (SGLI), Survivor Benefit Plan (SBP), Survivors' and Dependents' Educational Assistance (DEA), Social Security, death gratuity, and other benefits.

Whether or not a posthumously conceived child is included within each of these respective government plans may have a significant effect on that child's economic livelihood.

In Israel, the government provides extensive benefits to the families of fallen soldiers. Widows acknowledged under the "Families of Casualties Law" are eligible for permanent compensation. This compensation is distributed in the form of monthly payments with the rate being determined by the "age of the widow, the number of children, their age and whether or not her children are IDF servicemen." A widow with one dependent child is entitled to monthly stipends equiva-

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58 See Servicemember's Group Life Insurance, 38 U.S.C. § 1970 (2015). Where no beneficiary is named under a SGLI plan, proceeds are distributed to the spouse if one exists, and if not, in equal shares to the surviving children. As a result, defining "child" under the SGLI program has significant ramifications for SGLI payout where there is no surviving spouse and a child has been born posthumously to a non-relative. See DOUCETTPERRY, supra note 4, at 15.

59 See Survivor Benefit Plan, 10 U.S.C § 1450 (2015). SBP pays out to the surviving spouses of fallen soldiers on a monthly basis, unless before the age of fifty-five, the spouse remarries. If the fallen soldier had a child with his/her spouse, that spouse could petition to have the SBP benefit paid to the child to prevent termination of payments upon remarriage. Here, SBP recognition of posthumously conceived children could have significant impact on whether payments would continue upon remarriage. See DOUCETTPERRY, supra note 4, at 18.


61 See DOUCETTPERRY, supra note 4, at 14.


63 DEPT' OF FAMILIES AND COMMEMORATION & STATE OF ISR. MINISTRY OF DEF., supra note 62, at 47.
lent to 257.7% of the monthly salary of a government worker with a level nineteen administrative ranking.\textsuperscript{64} Another 11% is added to a widow’s monthly stipend for each of her additional dependent children.\textsuperscript{65}

The Israeli Department of Families and Commemoration refers to the children of fallen soldiers as “orphans” regardless of whether they have a surviving parent.\textsuperscript{66} Orphans are entitled to subsidized dental care along with grants for extracurricular activities, school-related expenses, bar/bat mitzvah expenses, driving lessons, and marriage expenses.\textsuperscript{67} Determination of whether a posthumously conceived child is considered an orphan under the “Families of Casualties Law” has a significant influence on the amount of funding the Israeli government is responsible to provide.

C. Survivor Benefits and Posthumous Conception in the U.S.

In the United States, there is no federal legislation regarding posthumous reproduction.\textsuperscript{68} The right of posthumously conceived children to receive survivor benefits as the offspring of fallen soldiers mirrors their right to social security benefits.\textsuperscript{69} In other words, if the posthumously conceived child of a fallen soldier is considered under the law to be a legitimate recipient of social security benefits (i.e., meets the criteria for “child” under the Social Security Act (SSA)),\textsuperscript{70} that child will also be considered a legitimate recipient of dependency and indemnity compensation.\textsuperscript{71} Complicating matters further, the SSA’s definition of “child” lacks the nuance necessary to address the issue of posthumous conception.\textsuperscript{72} As a result, the Social Security Administration looks to  

\textsuperscript{64} Families of Casualties Law, supra note 62.
\textsuperscript{65} Id.
\textsuperscript{66} Families of Casualties Law, 5710-1950, § 1 (as amended) (Isr.).
\textsuperscript{67} DEPT OF FAMILIES AND COMMEMORATION & STATE OF ISR. MINISTRY OF DEF., supra note 62; see also Families of Casualties Law, 5710-1950, §§ 8, 15, 28 (as amended) (Isr.).
\textsuperscript{68} See DOUCETT-PERRY, supra note 4, at 8.
\textsuperscript{69} Id. at 13.
\textsuperscript{71} See Compensation, DEPT VETERANS AFFAIRS, http://benefits.va.gov/COMPENSATION/types-dependency_and_indemnity.asp (last visited Feb. 7, 2016) (“Dependency and Indemnity Compensation (DIC) is a tax free monetary benefit paid to eligible survivors of military service members who died in the line of duty or eligible survivors of Veterans whose death resulted from a service-related injury or disease.”).
\textsuperscript{72} See Ruth Zafran, Dying to Be a Father, Legal Paternity in Cases of Posthumous Conception, 8 HOUS. J. HEALTH L. & POL’Y 47, 62 (2008).
the intestacy laws of the state in which the deceased was domiciled at the time of death in order to determine the status of his posthumously conceived child’s inheritance and benefits. Unfortunately, there is a severe lack of uniformity between the states with regard to intestacy law and, by extension, the rights of posthumously conceived children.

In the hopes of creating some consistency across the country on this issue, the National Conference of Commissioners on Uniform State Laws (NCCUSL) passed the Uniform Parentage Act (UPA) in 2000 (amended in 2002), establishing parentage for the purposes of determining a child’s right to social security benefits, veteran’s benefits, and inheritance rights. According to section 707 of the UPA, “[i]f a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.” To date, nineteen states have adopted the UPA.

Another potential source of guidance on this issue is the Uniform Probate Code (UPC), which was amended in 2008 to address posthumous conception. Similar to the UPA, the UPC requires a signed record consenting to parenthood or clear and convincing evidence that the deceased intended to be considered the parent of the posthumously conceived child. The UPC also contains a time limit securing inheritance rights and limiting survivor benefits to only those posthumously conceived children who were either conceived or born within thirty-six months or forty-five months, respectively, of the decedent’s death. To date, Massachusetts is the only state that has adopted the UPC’s approach to posthumously conceived children.

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73 Id. at 63 (citing 42 U.S.C.S. § 416(h)(2)(A) (2015)).
74 Id.
75 UNIF. PARENTAGE ACT §§ 101-905 (UNIF. LAW COMM’N 2002).
76 Id. § 707.
78 UNIF. PROBATE CODE § 2-120 (UNIF. LAW COMM’N 2010).
79 Id.
80 Id.
In New York, the previously ambiguous legal status of posthumously conceived children with regard to inheritance rights was recently elucidated with the passage of Bill 7461-A. The enacted law requires the following in order for posthumously conceived children to be considered distributees of their deceased genetic parent:

1. the genetic parent in a written instrument executed pursuant to the provisions of this section not more than seven years before the death of the genetic parent:
   (A) expressly consented to the use of his or her genetic material to posthumously conceive his or her genetic child, and
   (B) authorized a person to make decisions about the use of the genetic parent’s genetic material after the death of the genetic parent;
2. the person authorized in the written instrument to make decisions about the use of the genetic parent’s genetic material gave written notice, by certified mail, return receipt requested, or by personal delivery, that the genetic parent’s genetic material was available for the purpose of conceiving a genetic child of the genetic parent, and such written notice was given;
   (A) within seven months from the date of the issuance of letters testamentary or of administration on the estate of the genetic parent, as the case may be, to the person to whom such letters have issued, or, if no letters have been issued within four months of the death of the genetic parent, and
   (B) within seven months of the death of the genetic parent to a distributee of the genetic parent;
3. the person authorized in the written instrument to make decisions about the use of the genetic parent’s genetic material recorded the written instrument within seven months of the genetic parent’s death in the office of the surrogate granting letters on the genetic parent’s estate, or, if no such letters have been granted, in the office of the surrogate having jurisdiction to grant them; and
4. the genetic child was in utero no later than twenty-four months after the genetic parent’s death or born no later than thirty-three months after the genetic parent’s death.82

Similarly, in California, the following criteria must be met in order for a posthumously conceived child to be considered a distributee of their deceased parent:

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82 N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2014).
(a) The decedent, in writing, specifies that his or her genetic material shall be used for the posthumous conception of a child of the decedent, subject to the following:

(1) The specification shall be signed by the decedent and dated.

(2) The specification may be revoked or amended only by a writing, signed by the decedent and dated.

(3) A person is designated by the decedent to control the use of the genetic material.

(b) The person designated by the decedent to control the use of the genetic material has given written notice by certified mail, return receipt requested, that the decedent’s genetic material was available for the purpose of posthumous conception. The notice shall have been given to a person who has the power to control the distribution of either the decedent’s property or death benefits payable by reason of the decedent’s death, within four months of the date of issuance of a certificate of the decedent’s death or entry of a judgment determining the fact of the decedent’s death, whichever event occurs first.

(c) The child was in utero using the decedent’s genetic material and was in utero within two years of the date of issuance of a certificate of the decedent’s death or entry of a judgment determining the fact of the decedent’s death, whichever event occurs first. . . . 83

As previously mentioned, in the United States, survivor benefits track state intestacy law. 84 Therefore, if the requirements of the New York and California codes are met, a posthumously conceived child in those states is both the distributee of their deceased parent for the purposes of inheritance rights as well as a legitimate recipient of survivor benefits if their parent was a soldier on active duty at the time of their death. 85 The UPA, UPC, and state codes mentioned in this section inform some of the considerations underlying the proposed legislation introduced in Part III.D of this Note.

III. LOOKING TO THE FUTURE

This section will analyze the issue of survivor benefits as it applies to non-hypothetical posthumous conception scenarios from the last

83 CAL. PROB. CODE § 249.5 (West 2006).
84 See Zafran, supra note 72, at 72, 73.
85 See id.
survivor benefits for posthumously conceived

decade and a half of Israeli law. These scenarios will be addressed from a public policy perspective, taking into account both ethical and legal considerations.

While it is by no means certain, it is at least foreseeable that as reproductive technology advances, the opportunities it offers will become more widely understood and desirable to people around the world. This in turn may motivate governments to consider similar policies for regulating posthumous conception to those adopted by the State of Israel. For this reason, the following discussion will address Israeli public policy considerations while taking into account nations with dissimilar public policy concerns, anticipating a time when the issues presented become relevant across the globe.

A. Israeli Global Precedents

In 2003, the Israeli Attorney General published a set of guidelines for posthumous reproduction. These guidelines were generally permissive of the practice, showing particular leniency with regard to the issue of consent. Under the guidelines, it is assumed that a "man who lived in a loving relationship with a woman would want her to have his genetic child after his death even if he never had the opportunity formally to express such a desire." Furthermore, having a legal marriage is not a necessary condition for the presumption to kick in. This treatment of consent represents a significant departure from the British and American systems, especially when considered in conjunction with precedent from the following Israeli family court decisions.

The seminal case in Israeli posthumous conception jurisprudence is that of Staff Sgt. Keivan Cohen, described in this Note's introduction. In 2002, Sgt. Cohen was killed in action in the Gaza Strip. Following his death, the parents of the nineteen-year-old had his sperm ex-

86 See Vardit Ravitsky, Posthumous Reproduction Guidelines in Israel, 34 HEALTH HASTINGS REP. 6-7 (2004), http://repository.upenn.edu/cgi/viewcontent.cgi?article=1012&context=bioethics_papers.
87 See id. at 6.
88 Id.
89 Id.
90 See Hans & Yelland, supra note 30, at 1.
tracted and cryogenically preserved. In 2005, the Cohen family successfully petitioned the Tel Aviv District Family Court to allow them to use their son’s sperm to inseminate a female recipient of their choosing.

The Cohen case was groundbreaking for a number of reasons. First, Keivan’s sperm was extracted postmortem without his prior consent. Second, the court found implicit consent to use the young man’s sperm to conceive a child from testimony given by Keivan’s relatives. This testimony consisted of statements describing the young man’s wishes to become a father. Finally, Keivan’s sperm was used to fertilize the egg of a woman he had never met, a woman who Keivan’s parents had chosen from a list of people who had responded to a newspaper appeal.

Following the Keivan Cohen case, there have been a series of Israeli family court cases that have further distinguished Israel from the rest of the world with regard to posthumous conception jurisprudence. In 2009, an Israeli family court recognized the verbal biological will of Idan Snir, giving his parents the authority to select a woman to be fertilized with their son’s gametes. Similarly, in 2011, an Israeli court allowed the parents of Baruch Posniansky to select a woman to conceive their son’s child, this time giving legal recognition to the young man’s written biological will. In 2013, there were an additional three babies conceived as a result of successful legal suits recognizing biological wills. As of June 2013, Israeli courts had reviewed more than ten cases in which parents sought permission to use the sperm of

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92 Id.
93 Id.
94 Id.
95 Id.
96 Id. The Cohen family stated in an interview that “[Keivan] would always talk about how he wanted to get married and have children.” Furthermore, “he loved children and was especially connected to little ones. He even wanted to marry during his army service, but we didn’t agree.” Id.
97 Id. Mrs. Cohen explained her family’s story in a newspaper, looking for a woman who was willing to be the recipient of her son’s sperm; 200 women responded. Id.
99 Id.
100 Id.
101 Id.
their deceased sons to produce grandchildren. These Israeli developments in posthumous conception jurisprudence, certainly controversial in their own right, become even more contentious when the issue of survivor benefits is introduced into the equation.

B. The Problem

When courts establish common law precedent by making historic rulings, those rulings often generate as many issues as they address. Recent Israeli precedents in the area of posthumous conception offer a prime example of this phenomenon. While Israeli courts have endorsed the biological wills of fallen soldiers, they have yet to determine under what circumstances the resulting children would be considered eligible recipients of survivor benefits. It is foreseeable that as the use of biological wills becomes increasingly popular, a growing number of soldiers will stipulate in such biological wills that they wish to conceive multiple children posthumously should they die during their military service. For the State of Israel, which champions the highest birthrate in the developed world (an average of three children born to every woman, versus an average of 1.7 children born to mothers from other developed nations), providing government benefits for many Israelis’ desired number of children could put a significant financial burden on the government and tax-paying citizens.

Consider a scenario in which a particularly narcissistic soldier stipulates in his biological will that he wishes to have his parents select ninety-nine women to become the recipients of his sperm should he die in battle. Imagine further that the soldier, recognizing the infinite lifespan of his frozen sperm, expresses a wish to have future descendants choose additional recipients of his sperm in the next ten generations. Should survivor benefits be extended to all of this man’s post-

103 See Biological Will Precedents, supra note 98.
106 See Doucet-Perry, supra note 4, at 2.
humously conceived children? If not, how and where should the line be drawn?

C. Addressing the Problem

There are a number of parties whose interests must be considered when developing a policy for distribution of survivor benefits to posthumously conceived children of fallen soldiers. These parties include the soldier, the soldier’s spouse, the soldier’s child, the soldier’s parents, the government, and society at large. This section will address the interests of each of these parties in turn.

i. The Soldier

For the sake of this discussion, it is assumed that the fallen soldier provided the requisite consent in order to constitute approval for posthumous conception. Whether this approval was given explicitly via an instrument like a biological will,107 was implied via family testimony,108 or was assumed from the deceased’s engagement in a “loving relationship”109 is not immediately relevant to the question at hand. What is relevant, however, is the fallen soldier’s perspective regarding survivor benefits for his prospective posthumously conceived children. It seems fairly intuitive that a soldier who consents to having his gametes used to produce a child would be strongly supportive of that child receiving the same government benefits as any other child whose father died in the service of his country. In addition, and as previously discussed, military personnel benefit from the knowledge that their children will be supported financially should they die during their service. For these reasons, it will be assumed that there is a direct correlation between the best interest of military personnel and increased government survivor benefits for posthumously conceived children of fallen soldiers.

ii. The Soldier’s Spouse

Upon cursory review it appears that, as with fallen soldiers, there is a direct correlation between the best interest of surviving spouses and

107 See Rosenblum, supra note 53 (discussing written and oral biological wills).
108 See Greenberg, supra note 91.
109 See Ravitsky, supra note 86, at 6.
the level of government benefits available for their posthumously conceived children. In most instances this may be true; greater access to benefits means that widows have decreased financial burdens. However, enacting policies that make the receipt of survivor benefits for posthumously conceived children exceedingly simple could result in a number of unanticipated and undesirable effects.

Consider a scenario in which a soldier stipulates in his biological will that he wishes to have his gametes made available to his wife for the purposes of posthumous conception. If the husband were subsequently to die in battle, it seems likely that his wife would elect to undergo IVF. For this widow, aside from experiencing the many joys of becoming a parent, helping her late husband become a father after death could be a source of great pride and happiness, especially with the knowledge that much of the financial burden associated with childrearing would be dispelled by survivor benefits.

Adopting a survivor benefits policy that permits women like the one in this example to have multiple children who receive coverage could create a feeling amongst widows that society expects them to conceive multiple children with their deceased husband’s gametes. This could foster a sense of guilt in those women who choose not to give birth to more than one posthumously conceived child; even worse, some widows may be motivated to have more of their late husbands’ children than they truly wish to have. It is important that any survivor benefits policy take into account the personal and societal value in maintaining widows’ autonomy in making such decisions as how many children to have and when to move on with their lives.

iii. The Soldier’s Child

Analyzing the interests of posthumously conceived children of fallen soldiers with respect to survivor benefits involves two distinct perspectives. The first considers the best interest of posthumously conceived children once they are born. The second deals with prospective posthumously conceived children, focusing on the relationship between permissiveness of benefits and the best interest of potential life.

The assertion that any child who is brought into the world without a father is better off receiving government survivor benefits seems non-controversial; increased survivor benefits translates into less financial pressure on the child and her family. The deeper, more philosophical
question asks whether promoting posthumous conception by implementing inclusive survivor benefit regulations could result in the births of children who might have been better off not being born. While for some the idea that a child may have an interest in not being born is internally contradictory at best, this is a well-established position in a number of ethical debates concerning reproduction, most notably in cases where children bring suit for “wrongful life” and “dissatisfied life.” Recognizing that availability of survivor benefits may have an impact on the number of posthumously conceived children born, a deeper review of this topic may be more appropriately situated in an ethical discussion about posthumous conception generally than in the current analysis of survivor benefits.

iv. The Soldier’s Parents

Israeli common law decisions from the last decade have expanded the role of the parents of fallen soldiers with regard to posthumous conception. In these precedential cases, parents were motivated by a desire to fulfill their sons’ hopes of fatherhood as well as their personal aspirations to become grandparents. For some bereaved parents of fallen soldiers, posthumous conception offers the only possibility for continuing their family name. Survivor benefit policies that recognize posthumously conceived children are clearly in line with the interests of these eager grandparents. Such policies increase the likelihood of posthumous conception in these cases and improve the life of the children once they are born—both factors that generally track the interests of the parents of the deceased.

v. The Government

It is clear that with reference to survivor benefits for the posthumously conceived children of fallen soldiers, there are some public policy considerations that are universal to all governments. For example, irrespective of location, affording expansive survivor benefits programs
translates to increased government spending and potential tax increases. Additionally, all governments have an apparent interest in keeping military personnel and their families satisfied with their benefit programs. There are, however, a number of considerations that differ from one country to the next, resulting in divergent public policy analyses.

When men and women living in countries without policies of mandatory military service\textsuperscript{113} decide whether to enlist, they are incentivized by the knowledge that their loved ones will receive government support should they die in the line of duty. In countries like Israel that have a policy of conscription,\textsuperscript{114} although government benefits are not part of the impetus for service, those benefits do help promote a sense of trust and accountability between the citizenry and the government. While there are significant public policy motivations for governments to afford survivor benefits irrespective of conscription policy, it does seem that conscription policy affects the incentive levels that must be offered. As evidence for this, the benefits soldiers in the United States receive for voluntary enlistment dwarf the benefits received by Israeli soldiers for mandatory service. In 2013, a Private (E1) in the United States Army received $18,378 per year,\textsuperscript{115} 41% of the national average salary in the United States of $44,888.\textsuperscript{116} In 2013, a Private in the IDF received $3,384 per year,\textsuperscript{117} 11% of the national average salary in Israel of $31,200.\textsuperscript{118} It must be noted that enlistment incentivisation is just one of many country-specific variables that determine the amount of government finances allotted to survivor benefit programs.\textsuperscript{119}

Government interests may also vary as a result of dissimilar cultur-
al values and concerns. The State of Israel is uniquely supportive of ART, demonstrated by the fact that Israel is the only nation in the world in which in vitro fertilization is almost completely state subsidized. The pronatalist disposition that has characterized Israeli courts and Parliament can be traced back to the Biblical commandment to "be fruitful and multiply." Along with its religiously underpinned emphasis on procreation, Israeli law in this arena is also motivated by a "fear of being outnumbered by non-Jews on Israeli soil."

vi. Society

Considering the interests of society at large is as important to this public policy analysis as it is complicated by it. While society is made up of individual citizens who are often proponents of progressive survivor benefits programs because of their personal ties to enlisted soldiers and general patriotic sentiments, it must also be recognized that it is the general public’s tax dollars that subsidize government benefits programs. As ART becomes more mainstream, the number of people looking to utilize these technologies to reproduce posthumously will likely increase, putting financial pressure on society as a whole. Furthermore, in the unfortunate event that war should break out, many soldiers would likely perish, resulting in a proportionally large number of bereaved families. Any responsibly drafted survivor benefits program needs to anticipate this possibility. For this reason, implementing a highly inclusive survivor benefits program may prove untenable.

D. Proposed Regulation

The following is a proposed regulation that aims to elucidate Israel’s survivor benefits policy with respect to the posthumously conceived children of fallen soldiers. This standard balances the interests

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121 See id.

122 See id.

discussed in the preceding section while at the same time anticipating future public policy considerations.

**Survivor Benefits for Posthumously Conceived Children**

All benefits afforded to "orphan" children prior to the enactment of this regulation shall be extended to posthumously conceived children when the following conditions are met:

(a) The biological father of the child died during military service. For the purposes of this provision, "military service" includes:
   i. any period of non-reserve military service; or
   ii. any period of active reserve service.
(b) The in vitro fertilization resulting in the birth was conducted legally.
(c) The mother of the child is the widow of the fallen soldier. For the purposes of this provision, "widow" is defined as: whomever was the wife of the deceased on the day of his death, including a woman who was married to another but lived with the deceased before the day of his death and at that time was publicly known as his wife.  
(d) The child is the result of the widow’s first successful in vitro fertilization following her partner’s death.

Determinations of eligibility will be made by the Israeli Department of Families and Commemoration upon receipt of an application for survival benefits.  

**Comment**

**Subsection (a):** This provision is drafted with the reasonable expectations of soldiers in mind. The only military families excluded from coverage under this provision are those whose soldier relatives are officially members of the reserves but not technically acting in a military capacity at the time of their death. Assuming they continue to meet the applicable health requirements, Israeli men who completed their man-
mandatory three-year service are required to serve in the reserves until the age of forty-five.\textsuperscript{126} Most of these reserve soldiers spend somewhere between twenty to thirty days a year participating in reserve related activities.\textsuperscript{127} Considering the number of Israeli citizens who are members of the reserves, the number of years these citizens participate in reserves, and the limited amount of time per year that these reserve soldiers conduct military activities, it would be unreasonable for reserve soldiers to expect their families to receive survivor benefits should their deaths occur during the course of their non-military lives. As a result, survivor benefits are not granted under those circumstances.

**Subsection (b):** This provision requires that the IVF resulting in the child’s birth be conducted in accordance with the posthumous conception guidelines published by the Israeli Attorney General in October 2003,\textsuperscript{128} as well as relevant Israeli case law concerning biological wills.\textsuperscript{129} Making observance of these texts an explicit requirement in the proposed regulation is crucial in order to avoid confusion in the future as the nebulous body of posthumous conception law continues to develop.

**Subsection (c):** Limiting survivor benefits to children conceived by the widows of fallen soldiers recognizes the legitimate interests and expectations of soldiers and their widows regarding survivor benefits\textsuperscript{130} while avoiding the threshold questions involved in affording survivor benefits to children conceived by non-widows.\textsuperscript{131} As a result of this provision, in cases where a non-widow chooses to undergo IVF with the gametes of a fallen soldier, that decision is informed in part by the knowledge that the resulting offspring will not receive government survivor benefits. This standard fairly addresses the reasonable expectation of the fallen soldier, prior to his death, that the government will assist his loved ones. A soldier’s expectation that the government will provide benefits to his unborn child is significantly more reasonable when the soldier leaves behind a widow upon his death. While it may be argued that this standard in effect punishes many children who are just as

\begin{thebibliography}{99}
\bibitem{127} See id.
\bibitem{128} See Ravitsky, supra note 86.
\bibitem{129} See Danya, supra note 3 (discussing biological wills).
\bibitem{130} See discussion supra Part III.C.ii–iii.
\bibitem{131} See discussion supra Part III.C.iii.
\end{thebibliography}
much the biological children of fallen soldiers as other children who receive survivor benefits, it must be recognized that this provision helps to protect the best interests of many prospective posthumously conceived children. There is a legitimate concern that making survivor benefits available to the children of non-widows could create an inappropriate financial incentive for procreation. Additionally, the government and society benefit from the structure of this regulation because the circumstances in which taxpayers are responsible for providing financial support to posthumously conceived children are limited.

**Subsection (d):** Notably, this provision refers to a “widow’s first successful in vitro fertilization” rather than her first posthumously conceived child. This distinction allows for receipt of benefits in the event of a multiple birth pregnancy. Granting survivor benefits for only those children born from a widow’s first successful IVF attempt following her partner’s death, this provision allows for the kind of genetic continuity sought by many soldiers and their loved ones while avoiding the slippery slope of affording survivor benefits to subsequent posthumously conceived children. In addition, limiting benefits in this way helps to reduce the social pressure a widow may feel to have multiple posthumously conceived children.

**CONCLUSION**

Posthumous conception is an issue deeply entrenched with ethical and legal implications. This Note explores posthumous conception within the military setting focusing on the receipt of government survivor benefits for posthumously conceived children whose fathers die in the line of duty. With its progressive statutory and common law precedents, the State of Israel has made itself a prime candidate for posthumous conception analysis. The purpose of this Note is to intro-

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132 Note that there were 200 responses to the newspaper advertisement seeking a woman to be fertilized with the gametes of Keivan Cohen. See Greenberg, supra note 91.

133 See Multiple Births and Single Embryo Transfer Review, FAMILIES HUMAN FERTILIZATION EMBRYOLOGY AUTHORITY, http://www.hfea.gov.uk/Multiple-births-after-IVF.html (last visited Oct. 22, 2015) (stating that “on average, one in five IVF pregnancies are a multiple pregnancy compared to one in 80 for women who conceive naturally.”).

134 See discussion supra Part III.B (The Problem).

135 See discussion supra Part III.C.ii.
duce a number of potential issues concerning survivor benefits for the posthumously conceived children of fallen soldiers and to propose a regulation that addresses these potential issues. It is the position of the author that any regulation of survivor benefits for the posthumously conceived children of fallen soldiers must fairly balance the overlapping interests of the soldier, soldier's wife, soldier's child, soldier's parents, the government, and society. While the proposed regulation introduced in this Note is drafted with Israeli legal precedents and public policy concerns in mind, many of these precedents and concerns may become pertinent internationally if the prevalence of posthumous conception in the military community continues to grow. Accordingly, it is in the best interest of countries like the United States that lack federal regulations of posthumous conception and associated survivor benefits to consider implementing national directives.