



# Solidarity as a Theoretical Framework for Posthumous Assisted Reproduction and the Case of Bereaved Parents

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## Abstract

Bioethicists, medical professionals and lawyers who support Posthumous Assisted Reproduction (PAR) as an ethical procedure in the case of the deceased's spouse often oppose it in the case of the deceased's parents. In addition, supporters of PAR usually rely on an individualistic version of liberalism, thus focusing on a personal rather than relational approach to autonomy. This article proposes an alternative and comprehensive theoretical framework for the practice of PAR, based on the concepts of solidarity and relational autonomy. By analyzing empirical data on people's attitudes towards PAR, we reveal an important distinction between the deceased's wish and the deceased's consent. In addition, we show that in the majority of cases individuals report that the well-being of their relatives is paramount once they are dead. This finding, as will be demonstrated in the article, is not fully in line with Tremellen and Savulescu's position who allow PAR in the case of the deceased's spouse but not in the case of his parents. We also suggest that a relational autonomy perspective can be used to evaluate the choices and actions of the deceased, and to justify the requests for PAR by his spouse or parents. Furthermore, the discussion leads us to analyze both Sandel's account of solidarity and the more recent account of Prainsack and Buyx. We conclude that PAR can be considered as a solidarity-based practice, both at the familial and societal level, an aspect that should be given more emphasis in the discourse surrounding PAR.

**Keywords** Posthumous assisted reproduction · Solidarity · Relational autonomy · Bereavement · Postmortem sperm retrieval · Presumed consent

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## 1 Introduction

Retrieval of sperm from a deceased and its future use for posthumous conception (PAR) raise a variety of ethical, legal and social issues.<sup>1</sup> The ethical discussion usually focuses on the following points: the deceased's right to determine – while still alive – what will be done with his gametes, the obligation to respect the spouse's autonomy and her right to procreation, and the future child's welfare. One of the mainstream outcomes of this discussion is that the parents of the deceased should have no legal or moral rights regarding the use of their son's gametes. Furthermore, the ethical discussion tends to rely heavily on respect for autonomy or respecting an individual's reproductive rights. However, we wish to suggest that the language of rights tends to isolate an individual's rights or interests from the broader context in which they are exercised and from the broader motivation he might have in advancing them. In short, individuals should not be perceived as isolated atoms. According to the relational approach to autonomy, individual's choices and actions should be evaluated in reference to their relations with a significant other. Based on, *inter alia*, empirical data on peoples' attitudes towards posthumous use of sperm, we will show that the majority of individuals are more concerned with the well-being of their relatives than with their own preferences regarding their biological continuity. For this reason, they are willing to accede to their spouse's or parents' wishes regarding the use of their sperm for the conception of a child.

Moreover, we argue that right-oriented discussions regarding posthumous use of sperm are too narrow since they overlook important considerations, such as the process of grieving and feelings of obligation among members of a family, a community or a society. Following the accounts provided by Prainsack and Buyx (2011, 2012) and Sandel (2009), we suggest that obligations that arise from solidarity among members of a familial or societal unit should play a major role in the formulation of PAR policy.

### 1.1 Ethical, Professional and Legal Positions on PAR

The debate over PAR usually elicits a strong emotional response. The main issues in this debate are the type of consent required to ethically permit the posthumous use of the sperm, who should be allowed to use the sperm and whether the welfare of the future child should be considered. For example, Ruth Landau (2004) objects to the practice, viewing it as “planned orphanhood”. She claims that it harms the welfare of the future child and violates his basic right to two living parents.<sup>2</sup> In addition, it is argued that unless the deceased left written instructions regarding the posthumous use of his sperm, it is difficult to determine with certainty what his wishes would have been. Such a situation may lead to violation of the deceased's autonomous wishes. Others who share similar concerns are willing to approve PAR only in the presence of conclusive evidence that the deceased wished that his spouse would use his sperm and raise his child, provided that the welfare of the future child is protected (Orr and

<sup>1</sup> Although posthumous reproduction is possible through fertilization of sperm and egg, this paper will focus solely on the use of a deceased sperm. This is because the use of a deceased's egg raises additional ethical concerns such as the need for surrogacy. These issues are beyond the scope of this article.

<sup>2</sup> Although traditionally a child is conceived by a man and a woman, assisted reproduction techniques have created the possibility of a variety of family types – from single-parenthood to scenarios of (at least in theory) six parents (egg donor, sperm donor, mitochondrial donor, surrogate mother, social mother, and social father). Although Landau believes that it is in the best interests of the child to have two living parents, she does not provide any argument that this is a *right*.

Siegler 2002; Bahadur 2004). Contrary to Landau, Strong et al. (2000) reject the position that a child born from posthumous conception is worse off than if he had not been born at all. In their view, it is more reasonable to claim that children have a right to a decent minimum opportunity for development and that the threshold is violated only in cases where severe impediments limit the child's opportunity for development (Strong 1997), which is not the case with PAR. In addition, they claim that although the deceased's explicit consent is desirable, there is room for "reasonably inferred consent" (i.e. implied consent) where family members, or the deceased's spouse, ascertained from conversations with the deceased prior to his death that he wished to conceive posthumously. Tremellen and Savulescu (2015, 2016) present a more permissive stance which permits PAR on the grounds of presumed consent with an opt-out clause for those who object to the post-mortem use of their sperm.

On the policy level, some countries ban the use of PAR completely (France, Germany, Hungary, Slovenia and Sweden), while others adopt a policy of conditional acceptance requiring written consent (Czech Republic, Estonia, Greece, the Netherlands and Britain). In the US, there is no specific legislation regulating PAR and the decision whether or not to grant a request for post-mortem retrieval and use of sperm is left to the discretion of medical professionals and private fertility clinics. In Australia, the situation is more complex, with policies differing across states (Roy and Ram-Tiktin).<sup>3</sup> South Australia, for example, has adopted two conditions: that the deceased provided consent and that the sperm was retrieved and stored before his death. In Queensland, there is no relevant legislation and hence the courts have relied on the ethical guidelines published by the Australian government. These guidelines require the deceased's consent in order for the spouse to use his sperm or that the spouse can show that the deceased would have supported such a request.<sup>4</sup> Of the fourteen requests ruled on by the Australian courts, in three cases the courts refused to allow either the retrieval or use of sperm,<sup>5</sup> while in the remaining cases the courts granted the request, whether it was to retrieve or use the sperm. All the requests were submitted by the deceased's partner.

Israel has the most permissive policy, allowing the deceased's spouse to benefit from PAR on the grounds of the deceased's presumed wish (Attorney General 2003, Ram-Tiktin et al 2019) and in several cases lower courts have approved the requests of the deceased's parents to implement PAR as part of an agreement with a prospective single mother who will raise their grandchild.<sup>6</sup>

Professional societies such as the European Society of Human Reproduction and Embryology (ESHRE 2006) and the American Society for Reproductive Medicine (ASRM 2013) allow the use of PAR under the following limitations: First, the use of a deceased's sperm requires an explicit wish by the deceased (ESHRE) or an implicit wish if a parental project was begun (ASRM). Second, the permission to use the sperm is given exclusively to the surviving spouse, although the ESHRE published a minority view which allows the use of the sperm by a third party (including the deceased's parents) if the deceased gave explicit consent. Recently, the Israeli Fertility Association (IFA) Ethics Committee presented its

<sup>3</sup> Western Australia, Queensland and South Australia permit PAR. See Simana (2018), above n. 33, p. 3.

<sup>4</sup> Australian Government, National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017), <https://nhmrc.gov.au/about-us/publications/ethical-guidelines-use-assisted-reproductive-technology> (last accessed Jan. 2019). However, these guidelines lack a formal legal status.

<sup>5</sup> See: *Baker v State of Queensland* (6th of January, 2003); *MAW v Western Sydney Area Health Service* [2000] NSWSC 358; *In the matter of Gray* [2000] QSC 390.

<sup>6</sup> For an extended discussion on the legal and juridical ruling in Israel, see Roy and Ram-Tiktin, forthcoming.

recommendations (Ram-Tiktin et al 2019; IFA 2017), which allow the use of PAR when there is evidence of the deceased's implied wish or consent (a distinction that will be explained below) not only by the deceased's spouse but also by the deceased's parents who wish to raise the future child as their grandchild.

The diversity of opinion and policy on PAR derives, at least partly, from differences across cultures with respect to a number of issues (Hasiloni-Dolev and Schickntanz 2017; Katz and Hashiloni-Dolev 2019; Ueda et al. 2008), including the status of the deceased and society's duty to treat his body with respect; the legal status of gametes and their preservation or destruction; gender issues related to procreation; the status, role and function of the family and its duties towards the deceased; and the significance and meaning of life, death and the value of procreation. In our view, there is another relevant aspect of the issue that has not been previously discussed, namely the solidarity of a society, and that it should play a major role in the formulation of policy on PAR. Therefore, the analysis will focus on whether solidarity can justify the use of PAR by the deceased's spouse or parents.

The article has three objectives. First, to discuss why PAR can be permitted based on the deceased's presumed consent.<sup>7</sup> Second, we present an argument for extending PAR to include the deceased's parents who have come to an arrangement with a prospective single mother to raise their grandchild. In this context, our discussion will focus on the position of Tremellen and Savulescu (2015, 2016). We will highlight an inconsistency in their argument and explain why, if they hold to their position, they should allow the use of the deceased's sperm also by his parents.

Third, we present a theoretical framework which is complementary to the one presented by Tremellen and Savulescu but can also stand on its own, and it can be used to argue in favor of extending PAR also to the deceased's parents. We will argue that the concept of solidarity and the practices derived from it justify granting the request for PAR by the deceased's spouse or parents and that this can assist in their grieving process and their efforts to find new meaning in their lives and in the death of their partner/son by producing an offspring for motives other than just biological continuity.

## 2 Allowing PAR on the Grounds of Presumed Consent

As indicated above, there are major ethical concerns surrounding the use of PAR. In this section, we will present our position on some of those concerns, although our focus will be on the type of consent that is required for the ethical justification of PAR and its implications in deciding who should be allowed to use the deceased's sperm. To accomplish this, three assumptions on the moral status of the prospective child and the deceased are presented, as well as clarifications regarding the deceased's wish or consent (whether explicit, implied or presumed).

The first assumption relates to the welfare of the prospective child. Since the potential offspring is only a hypothetical entity at the time a decision is made whether or not to use the sperm posthumously, it has no rights. We agree with Strong et al. (2000) who argue against the position that a child born from posthumous conception is worse off than if he had not been

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<sup>7</sup> We have so far mentioned four types of consent: inferred, implied, presumed and explicit. In the first section, we will clarify the differences between them, as well as the difference between the deceased's wish and his consent.

conceived in the first place, claiming that it is incoherent or false.<sup>8</sup> We propose that it would be more sensible to discuss a prospective child's *fundamental interests* based on an impersonal intuition (Ram-Tiktin et al 2019). Society should recognize the fundamental interests of prospective children and has a duty to respect and protect them while at the same time taking into consideration the rights and interests of living individuals affected by the decision (such as the deceased's spouse or parents).

According to the second assumption, it is not reasonable to attribute interests or rights to a deceased individual since he has ceased to exist. Nonetheless, a deceased's explicit wishes—expressed while he was alive—should not be ignored. Following Kant (1996), we claim that the obligation to respect the wishes of the deceased is not an obligation towards the deceased but rather to the individual while he was alive. From the perspective of those who are living—even though an individual has no way of knowing whether and in what manner his wishes will be fulfilled after his death—there is clear benefit in him knowing that after death his wishes will be respected. It is possible that an individual's interests might—after his death—conflict with the interests or rights of the living. In such a case a more careful deliberation is needed in order to weigh the interests (and rights) of each party (Ram-Tiktin 2019; IFA 2017).

The third assumption states that any discussion of PAR must address the type of consent required for an ethical decision. To this end, clear definitions of the types of consent must be provided, which will be considered against the background of empirical data on individuals' wishes or consent regarding PAR.

In our view, the term “wish” represents the individual's personal desire that his sperm be used posthumously, regardless of his relatives' desires.<sup>9</sup> We define “consent”, on the other hand, as the individual's approval in the case of his spouse's or parents' wish to use his sperm posthumously. This approval or lack of it may reflect his personal wishes regarding the posthumous use of his sperm and/or his willingness to grant the wishes of others posthumously. The individual's consent may be explicit (stated orally or in writing during his lifetime) or it may be implied or presumed, two terms that also need to be clarified.

In the case of implied consent, relevant evidence (usually provided by the individual's relatives and/or close friends regarding the individual's wishes, values, previous behavior, etc.) is brought to support the assumption that the deceased would have consented to a particular action. Presumed consent, on the other hand, involves a provisional appraisal of the facts which is “based on some accepted fundamental state or pattern of behavior” (Pierscionek 2008). From these two definitions, it follows that presumed consent is not necessarily grounded on the wishes, values and previous actions of a specific individual, but rather on general information about an individual's choices, actions, preferences, beliefs and so on. According to Pierscionek, presumed consent is “an inference that is

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<sup>8</sup> This statement is incoherent if one believes that it is impossible to compare nonexistence to existence. On the other hand, if one believes that such a comparison is possible and sensible, then the statement is false since it assumes that the life of a child in a single mother's household is so awful that the child would have preferred not to exist in the first place. This debate also leads to the non-identity problem, which will not be discussed in this paper.

<sup>9</sup> Although an individual's wishes may be influenced by the concern for the benefit or desires of others, we feel that in circumstances that invite others to report on the individual's wishes it is important to isolate what he viewed as his own wishes from what he might have consented to in order to benefit others. This distinction will be demonstrated below while reviewing the studies on PAR.

made on available fact or evidence with the understanding that vital information that can render the inference invalid may be missing” (ibid).

In order to examine the meaning of consent in the case of PAR, it is helpful to examine the findings of research that has empirically investigated people’s views on consent for PAR. Some of the studies (Pastuszak et al. 2013; Nakhuda et al. 2011; Styer et al. 2003) were conducted among men and women who were undergoing fertility consultation, preservation or treatment and had strong motives to become parents,<sup>10</sup> perhaps stronger than those of the general population of reproductive age. Other studies examined public attitudes towards PAR (Hans 2008; Hans and Yelland 2013; Hans and Frey 2013; Hans and Dooley 2014) and found that public opinion is more favorable when the surviving spouse is a woman who had a relatively long relationship with the deceased and when the cause of death was sudden and “justifiable” (during military service rather than bungee-jumping, see Hans and Yelland 2013) as opposed to suicide (Hans and Frey 2013). Although these studies give us some notion of public attitudes towards PAR, they contribute little to our ability to determine an individual’s wishes regarding the future use of his *own* gametes. Hans (2014) attempted to fill this gap. He found that 64% of male participants and 55% of female participants (aged 18–97) would allow their surviving spouse to use their gametes after their death, if the spouse wished to do so. Among individuals of reproductive age (18–44), the numbers were higher (70% of male participants and 58% of female participants).

It is important to mention that in the majority of these studies the subjects were asked if they would allow their surviving spouse to use their gametes for post-mortem use. The relatively high willingness in Hans (2014) as well as other studies [86% (Pastuszak et al. 2013), 85% of men and 72% of women (Nakhuda et al. 2011)] does not shed light on their *personal wishes* or *preferences* regarding the future use of their gametes in case of death regardless of the desires of the surviving spouse.<sup>11</sup> When the respondents were asked to explain their positive/negative response, only 16.5% of male participants and 18.4% of female participants “provided a rationale that alluded to their own personal desire to leave a legacy in the form of offspring” (p. 12). Almost twice those numbers stated that they would comply with the desires of the surviving spouse.

Similar findings were found in a qualitative study of 13 couples (Hasiloni-Dolev 2015). In this study, the participants were asked explicitly about their own personal wishes, regardless of their surviving spouse’s desires. Only 3 out of 13 men stated that they would like to have a child after their death due to their desire for continuity. The majority were concerned about the wellbeing of their spouse and thought that she should be able to start a new life. However, they stated that if she would wish to make use of their sperm, they are willing to defer to her wishes. In a recent study among Israeli soldiers and parents of soldiers, Bokek-Cohen and Ravitsky (2017) provided further reinforcement for the distinction between personal desire (i.e. the deceased’s wishes) and deferring to the relatives’ desire (i.e. the deceased’s consent). The findings showed that the majority of soldiers did not express a personal wish to have children

<sup>10</sup> In some cases, they were facing the possibility of premature death due to terminal illness.

<sup>11</sup> Hans (2014) presented the respondents with the following question: “Suppose you were to experience an early death and your spouse wanted to have a biological child with you. Would you or would you not want your spouse to be able to use your sperm/eggs following your death to have a child with you?” (p. 12). Note that the phrasing of the question does not ask the respondent what his/her personal wishes are, regardless of those of the surviving spouse.

after death; nonetheless, they were willing to allow their parents to make use of their sperm if that was their wish.<sup>12</sup>

The data gathered so far can only suggest that there is presumed consent of the deceased to allow PAR if his surviving relatives (mainly spouse and parents) wish to use his sperm. This conclusion supports the position presented by Tremellen and Savulescu that PAR be allowed on the grounds of presumed consent and that those who object to this practice should have the choice to opt-out. However, in our view their argument suffers from several flaws, as will be discussed below.

### 3 Tremellen and Savulescu's Argument

Tremellen and Savulescu (2015, 2016) present three claims in favor of PAR. First, the post-mortem retrieval of sperm does not violate the deceased's dignity. Many countries allow retrieval of organs for donation on the grounds of presumed consent even though it disfigures the body to a far greater extent than sperm retrieval. Second, people have an interest in what happens after their death and benefit from knowing that their wishes for what will happen after their death will be respected. For this reason, people have wills drawn up or take out life insurance with the goal of protecting the welfare of their loved ones after they are dead. Tremellen and Savulescu claim that there is benefit from knowing that after one's death his spouse will be allowed to produce their offspring. Third, they argue that the deceased is under the duty of "easy rescue", according to which:

...when there is a tension between an individual's self-interests and morality (e.g. consideration for others), then that individual has a moral duty to take the action that fosters benefit to the other person (widow) if that benefit is considerable (birth of a new human being) and the cost to the individual is minimal. (2015, p. 8).

Since the cost to the deceased is zero (since he is dead) or minimal (a negligible non-disfiguring surgical procedure), then he is under a *moral duty* to assist his spouse to become a mother using his sperm, if she so wishes.

Kroon (2016) points to an unspoken assumption made by Tremellen and Savulescu regarding the nature of gametes, which in his opinion underlies their argument. According to this assumption, gametes are viewed as a *pure genetic resource* that can benefit the man and his spouse if a child is born while the man is still alive, or benefit only his spouse if the child is born after the man's death. According to their argument and the aforementioned assumption, the sperm can be viewed as a genetic resource, in which case the man has no posthumous interest in his sperm since he cannot benefit from its use after death. The man might have certain wishes regarding the use of the sperm by others after his death, but the granting of these wishes will not benefit him when he is dead, and therefore they are other-centered (i.e. they concern the welfare of others). As a result, if the man has any moral duty prior to his death it is

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<sup>12</sup> This study was conducted on Israeli active-duty soldiers ( $n = 212$ , half of whom were serving in combat units) and parents of active-duty soldiers in combat units not participating in the study ( $n = 308$ , 58% were mothers and 42% were fathers, none of whom were married to each other). The soldiers were presented with six scenarios of familial circumstances and asked to indicate in which of them they would consider explicitly asking their family to carry out PAR if they were killed. 88.6% marked I would request that PAR be carried out in case I am killed only if my parents would wish to have a grandchild from me after I die. Only 43.3% marked the option that represented a desire for biological continuity.

to allow the use of his sperm by his spouse, since she is the one who can benefit most directly from it (i.e. the duty of “easy rescue”). Therefore, all things being equal, it is morally incumbent on the man to allow the posthumous use of his sperm.

Before presenting our critique of Tremellen and Savulescu’s position, it is important to introduce an alternative model—known as the *relational model*—presented by Kroon. Contrary to the pure resource model, gametes, including sperm, have relationship-centered potential. According to this view, gametes, unlike other body parts, are more than a mere biological resource. We have a vested interest in our offspring, since they are *our* offspring, even after our death. This is a relationship that is centered on us and for this reason it may be that we refuse to give our consent that our gametes be used posthumously.

Tremellen and Savulescu (2016) accept Kroon’s position and explicitly claim that according to their position the sperm should be considered as a pure genetic resource. In our view, although this assumption regarding the nature of gametes supports their argument in favor of a policy of presumed consent, it also leads to several difficulties in their general argument. These include the scope of application of easy rescue; the lack of consistency in how gametes are viewed (genetic resource versus a relationship-centered potential resource); and the way in which these two elements interact in the development of their argument.

The first difficulty with the duty of easy rescue is that it can be applied only in favor of the deceased’s spouse. If the sperm is viewed as a pure genetic resource, and if individuals are under the duty of easy rescue towards their spouse, then the duty would also apply in the case of the deceased’s parents, especially if there is no spouse at the time of death or if the spouse is uninterested. It is evident from the findings of Bokek-Cohen and Ravitsky (2017, see also Ravitsky and Bokek-Cohen 2018) that soldiers are willing to allow their parents to use their sperm by means of a prospective single mother in order to produce a grandchild.

The second difficulty with easy rescue is that if it is a moral *duty*, as they claim, then it would be immoral for a man to opt out and thus deny the spouse’s wish to conceive from his sperm after his death. Tremellen and Savulescu might counter that individuals are under a duty of easy rescue only when the cost to themselves is minimal. Thus, they might argue that for some men the cost is considerable if they do not wish that their sperm be used posthumously for the conception of children, they would not be able to nurture and love. Allowing these men to opt out is an act of respecting their autonomy. However, this possible defense of their position would be inconsistent with the underlying assumption that the sperm is to be viewed as a pure genetic resource. Recognizing that at least for some individuals post-mortem conception is undesirable better accords with the alternative model presented by Kroon—the relational model—according to which the sperm is viewed as invested with relationship-centered potential.

We propose that the duty of easy rescue should be replaced with a less demanding rule, according to which *if a specific action can benefit one person and not harm another, then the action is morally permissible*. According to Tremellen and Savulescu, the use of the sperm does not harm the deceased but can benefit his spouse and therefore he has a *duty* to allow her to use his sperm. The only meaningful way to claim that post-mortem conception harms the sperm donor is by referring to his wishes and opinions while alive and his fear that these wishes will not be respected after his death. Although Tremellen and Savulescu explicitly claim that “the welfare of the living is far more important consideration...over degrees of consent and infringement of alleged autonomous rights of a deceased person” (p. 9) they are willing to allow for an opt-out option. For this reason, we claim that Tremellen and Savulescu’s position would be less problematic under the aforementioned alternative rule than



with the more demanding rule of easy rescue which creates a duty for men to allow the posthumous use of their sperm by their spouse.

If sperm is viewed as a pure genetic resource, then Tremellen and Savulescu's position suffers from an additional inconsistency. Although they present one of the most permissive accounts for PAR, they limit its use only to the deceased's spouse (either a wife or a partner in a relationship of significant duration), and do not permit its use by the deceased's parents. They assume that the mother's motivations are more sensible or understandable from the future child's perspective if the conception is a realization of a wish she shared with the deceased. On the other hand, it would be less understandable to the child if his mother chose to conceive from a deceased donor rather than a living donor. However, this line of reasoning leads to an inconsistency since although Tremellen and Savulescu view the sperm as a pure genetic resource, it is being acknowledged that from the perspective of the future child and mother the sperm is being viewed as invested with a relationship-centered potential.

Tremellen's and Savulescu's position, which limits the use of the sperm only to the deceased's spouse, is based on the assumption that the motives of the child's mother are more acceptable if she had a meaningful relationship with the deceased. There are two difficulties here: First, this is an empirical question and to the best of our knowledge this kind of data is not currently available, since the numbers of children born through PAR techniques is relatively small and most of them are still very young.

Second, there are good grounds for rejecting their assumption. When making the choice between using sperm from an anonymous live donor or an identified deceased donor, a single woman might prefer that her child know who the father is.<sup>13</sup> Furthermore, her arrangement with the deceased's parents allows the child to have a relationship with his paternal grandparents and with the father's siblings and other relatives. For the prospective single mother, their presence may provide emotional, social and economic support for her and the child. Furthermore, she may be sympathetic towards the parents who prematurely lost their son. Thus, she might gain satisfaction from the fact that her decision to conceive from the sperm of a known deceased donor will help the deceased's parents overcome their grief and find hope, meaning and continuity in their grandchild. Thus, an agreement between a prospective single mother and the deceased's parents has the advantage of benefiting all three parties involved in the process, namely the child, the prospective mother and the deceased's parents.<sup>14</sup>

## 4 Benefiting the Living

Recall that according to Tremellen and Savulescu the welfare of the living is more important than the wishes of the deceased, especially when they are unclear. We also advocate this position and in what follows we present empirical data to show that individuals view the welfare of their relatives as paramount to their own once they are dead. We will also examine the possible implications of PAR on the welfare of grieving relatives. This discussion will pave the way to offering an alternative theoretical framework for PAR based on solidarity at the familial and societal levels.

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<sup>13</sup> It should be noted that even in the case of an identified sperm donation, the child would not know who the father is until he reaches adulthood. In addition, even then the sperm donor might not want to have any relationship with his child.

<sup>14</sup> Another benefit is the respect for the man's autonomous wish prior to his death.

As mentioned above, studies that examined the views of individuals of reproductive age regarding the posthumous use of their *own* gametes found that the wish for genetic continuity was not the prime factor they considered (Hans 2014; Hasiloni-Dolev 2015; Bokek-Cohen and Ravitsky 2017; Ravitsky and Bokek-Cohen 2018). For the majority of participants, their personal views on PAR were less important than their wish to ease the grief of their close relatives after their death.

Bokek-Cohen and Ravitsky (2017, 2018) showed that the wish to benefit the living even after one's death by means of PAR is not limited to the individual's spouse but also includes his parents. Only 30.6% of the soldiers approved of allowing their partner to use their sperm, while three times that proportion were willing to allow their parents to use their sperm. Bokek-Cohen and Ravitsky conclude that the high willingness to allow PAR in response to the parents' wishes and the relatively low willingness in response to a life partner's wishes is related to the young age of the soldiers (average age of 19.72) so that a life partner was for many of them a more hypothetical proposition. Thus, "they feel a greater obligation towards their current nuclear family" (2017, p. 15).

While the motives of a life partner to conceive using PAR might be altruistic (namely, to satisfy the deceased's wish to have offspring), studies have found clear (and legitimate) egocentric motives, such as to become a mother, having something to hold onto after the death of a spouse, and to benefit from a loving relationship. In the case of the parents' motives, there was less of a tendency to request PAR if they knew that their son explicitly opposed PAR. The crucial factor in considering PAR was the continuity of the deceased, rather their own "interest in their genetic continuity or their wish to have grandchildren who may [take] care of them in their old age" (2018, p. 210).

An interesting familial phenomenon was revealed by Bokek and Ravitsky. They found that the inclination of soldiers to ask for PAR was largely determined by what they knew about their parents' wishes in the matter and their willingness to grant those wishes. The parents surveyed voiced analogous views. They conclude that this "also leads to the interesting challenge of a cyclic approach, in which cultural values push both parties to pursue PAR and then each party's desire feeds into that of the other." (p. 210).

Beyond the empirical findings that support the normative claim that the welfare of the living should dictate PAR policy, we will argue that it is important to understand the deceased's relatives' request for PAR within the context of the grieving process. The death of a loved one may validate or refute an individual's values or beliefs. When the death is anticipated, it is easier for the individual to explain the loss within the framework of his values and beliefs. However, when the death is sudden, the existing framework of beliefs may not be able to provide an explanation of the new reality and the individual may experience a loss of meaning with respect to the self, the world and the absence of the deceased (Neimeyer 1998).

In contrast to the "classical" literature on bereavement (heavily influenced by Freud), which views disengagement from the dead as a healthy process, modern theories of bereavement hold that it is a continuous process that does not end the relationship with the dead person, but rather modifies it (Klass et al. 1996). Within this process, the survivor must rearrange his identity and ask himself the question: "Who am I after losing someone dear to me?" The individual is required to build a new narrative for himself on both the personal and interpersonal levels. The challenge of the bereavement process is to seek meaningful ways to continue the relationship with the deceased. A continuous and modified relationship with the deceased leads to emotional transformations and helps to give new meaning to the individual's self-perception and his relations with others.

The transformation of meaning is a dynamic, active and continuous process of adaptation and reorganization of self-perception and other-perception. Therefore, the grieving process is not a psychological process that ends after a period of time during which the person is “healed”. Grieving is a continuous state of the survivor’s life that ends only with his own death. When the process of grieving leads to “healthy” and constructive transformation of the self and the individual’s relations with the world, it may lead to a sense of serenity, peace of mind and closure (Silverman and Klass 1996).

We propose that, under certain circumstances, the creation of a child is a way of finding new meaning in the world and of the self. It is a way of remoulding a previous relationship with the deceased and may also reshape relations among the surviving family members by filling the void with hope, love and continuity. This understanding of the grieving process suggests that the decision to use PAR by the deceased’s spouse or parents is not necessarily a futile desire to hold on to the memory of the dead nor the exploitation of a prospective child as a memorial. It may instead be the survivors’ way of finding new meaning in life by fulfilling what they perceive to be the deceased’s wishes or expectations of them. As studies show, the decision to bring a child into the world signifies more than just the desire for genetic continuity, in that it allows the parents, despite the grief they are experiencing, to evolve their personality and capacities and to fulfill their role as grandparents to their prospective grandchild, thus meeting their perceived commitment to their son. It can be viewed as an empowering act of hope for the deceased’s parents that will also be to the benefit the prospective offspring.<sup>15</sup>

The empirical findings and the current theories of bereavement support a different outlook on PAR. While previous discussions in the literature focused on how to reconcile the autonomous wish of the deceased with the rights and interests of the living relatives, we suggest shifting the focus to relations between the deceased and his relatives. This position stems from the communitarian view that individuals are not isolated atoms, but rather are embedded within familial and social relations. As shown above, the welfare of our loved ones shapes our attitudes and choices and we are willing to adhere to what we view as their best interests even after death. We view these bonds as an expression of familial solidarity. In the following section, we argue that there are similar bonds of solidarity at the societal level and that these also need to be considered and nurtured.

## 5 Solidarity as a Theoretical Framework

As stated above, supporters of PAR usually justify their view by claiming that we have a duty to respect individual autonomy and reproductive rights. We wish to suggest that this line of argument reflects an atomistic view of individuals, according to which an individual’s rights and interests are treated as being isolated from his relations with others. In this section, we will provide an alternative theoretical framework based on solidarity, in which the use of PAR is permitted for the deceased’s spouse or his parents. This theoretical framework can stand on its own or can be viewed as complementary to Tremellen and Savulescu’s account.<sup>16</sup>

<sup>15</sup> An interesting qualitative study on the process of grieving of family members who submitted requests for PAR is presented in Katz and Hashiloni-Dolev 2019.

<sup>16</sup> The discussion in this section is based on the accounts of solidarity presented by Prainsack & Buyx, and Sandel. For a more extensive review of the concept of solidarity and the view of solidarity as a relational concept, see Roy and Ram-Tiklin, forthcoming.

Prainsack and Buyx (2011, 2012) state that solidarity is an elusive concept and provide an extensive discussion of the concept of solidarity and differentiate it from other related concepts, such as empathy, charity and altruism. They claim not to be using the term in a prescriptive manner, namely calling for mutual support or greater social cohesion, but rather in its descriptive sense, namely as an empirical fact of social and political human life. In this sense, solidarity means that groups of people are de facto “tied together by bonds of mutual assistance, common goals, and/or other aspects of a situation that they share” (2012, p. 344).

They view solidarity as signifying “shared practices reflecting a collective commitment to carry ‘costs’ (financial, social, emotional, or otherwise) to assist others” (2012, p. 346). In contrast to empathy, solidarity requires something more than mere inner sentiments towards the fortune of others. It requires performing certain actions and a willingness to bear the associated costs of those actions. In contrast to charity, which involves an asymmetrical relationship between giver and receiver, in the case of solidarity the willingness to assist is based on recognizing elements of sameness between the giver and receiver.

According to Prainsack and Buyx the recognition of similarity to others manifests first and foremost in the willingness to assist and bear the costs of that assistance at the interpersonal level, which is the first tier of solidarity. Feelings of sameness to other individuals mean that in relevant respects we feel we share a common fate, whether as a result of our intended choices or due to an external force. When a certain practice of solidarity becomes common and is viewed as “good conduct”, it becomes institutionalized into a collective commitment to assist others and bear the costs. This constitutes the second tier of solidarity, which exists at the group level. Such practices can be observed among bereaved parents and widows who, based on a feeling of a shared fate, provide each other with various forms of assistance. These practices sometimes take on a further level of institutionalization when manifested in contractual or legal form, such as legislation benefitting army veterans.<sup>17</sup>

While Prainsack and Buyx emphasize the feeling of sameness based on actual shared circumstances experienced by individuals, Sandel’s (2009) account suggests that solidarity can be grounded on an individual’s understanding that her circumstances *could* have been the same. He states that once we realize that our fate is determined by the arbitrariness of luck, and that if things were different we could have been in the other person’s shoes, then a sense of solidarity between groups of people who are different from each other will arise.

In contrast to Prainsack and Boyx who use solidarity in its descriptive sense, Sandel uses it in its prescriptive sense. According to Prainsack and Boyx solidarity *may* arise among individuals *if* they identify a feeling of sameness. Sandel on the other hand views solidarity as a necessary social obligation. He states that obligations of solidarity derive from being a member of a specific group, community or society and they involve moral responsibilities to those with whom we share a certain history. Contrary to “natural duties” which are universal (such as respecting every individual’s moral status), obligations of solidarity are specifically directed towards the members of our family, our community or our society. Furthermore, obligations of solidarity do not require consent and they differ from “voluntary obligations” which are specific, require consent, and can be explained in contractarian terms. Obligations of solidarity arise from the recognition that an individual’s life story is interwoven within those of

<sup>17</sup> Veteran’s Benefit Act 2010 PUBLIC LAW 111–275—OCT. 13, 2010 is one example.

others. The individual is not an isolated atom; rather he is part of something greater and has responsibilities towards other individuals who share and shape his life story.<sup>18</sup>

Contrary to the individualistic version of liberalism, from which stems part of the discussion on PAR that focuses on individuals' rights and interests, Sandel's communitarian perspective is in line with the notion of relational autonomy that views the individual as intimately related to other people and groups.<sup>19</sup> According to these views, individuals' identity, wishes and goals are interwoven in a net of narratives embroidered over histories. Understanding their values, motivations and actions is possible through reference to other people and to the traditions they embrace and practice. Thus, the essence of relational autonomy is that the individual makes decisions in a social context, such that her close and intimate relationships with significant others have an influence on her decisions. Intimacy creates a sense of mutual responsibility in the individual towards her family member and this affects the decision-making process the individual undergoes (Lindemann-Nelson and Lindemann-Nelson 1995).

As already mentioned, we wish to propose solidarity as a theoretical framework for the practice of PAR. In its descriptive sense, solidarity is manifested in the actual bonds of commitment between individuals and between groups of people. Arguably, solidarity-based practices are most frequently found in the context of intimate family relationships. The feeling of sameness is natural in a familial context and it is usually recognized that family members have obligations towards each other, whether or not they were explicitly consented to. This accords with the notion of relational autonomy discussed above. The findings of Hans (2014), as well as Hasiloni-Dolev (2015) and Bokek-Cohen and Ravitsky (2017, Ravitsky and Bokek-Cohen 2018) can be explained using this notion. These findings demonstrate the existence of solidarity within the family, in that each family member is willing to defer to what he views as the best interests of another family member.<sup>20</sup>

The extent of solidarity-based practices varies from one society to another. It has been argued that solidarity is a distinctly European value and is characteristic of European social welfare states, and that its manifestation in North America, where the values of autonomy and individualism take precedence, is more limited (Häyry 2003). However, even if the manifestation of solidarity is more limited in North America, it is far from totally absent and can be seen in self-help groups in the United States such as Alcoholic Anonymous and Narcotic Anonymous (second tier) and in Medicare and Medicaid programs (third tier).<sup>21</sup>

An example of an institutionalized practice of solidarity is the Pentagon's pilot program of fertility preservation. Defense Secretary Ash Carter has stated that the goal of the program is to

<sup>18</sup> It should be noted that according to other schools of thought the notion of solidarity has negative connotations since it is perceived as a collectivistic value that jeopardizes individual autonomy. Those who endorse an individualistic perspective of autonomy might view Sandel's notion of solidarity as threatening the individual's ability to be free from social and cultural directives. However, as will be specified below, we take the relational perspective of autonomy and view solidarity as a moral act which acknowledges one's relationships with significant others and her willingness to carry the relevant costs for the benefit of others. A more extensive discussion on the moral aspect of solidarity as a form of recognition see Roy and Ram-Tiktin, forthcoming.

<sup>19</sup> See for example: Nedlesky (1989) and Christman (2004).

<sup>20</sup> It is acknowledged that familial relations are not always supportive. Worse than that, sometimes they are coercive, manipulative and exploitative. For this reason health professionals who assist family members in the process of PAR should verify in advance that the decision of the spouse or the deceased's parent(s) reflect their personal wishes and is given freely after careful deliberation.

<sup>21</sup> Medicare and Medicaid are two health-related government-run programs founded in 1965 following the implementation of Lyndon Johnson's "Great Society" vision of social commitment in which more affluent and healthy sectors of society provide support to the less well-off sectors. These programs can be explained as the social manifestations of solidarity.

preserve soldiers' fertility by covering the costs of gamete cryopreservation for active-duty service personnel who desire it (Kime 2016). Although one rationale behind the program is to retain soldiers in the army, this does not contradict or minimize the element of solidarity. This accords with Prainsack and Boyx's view that expected benefits from assisting others "are not a precondition for solidarity, but nor do they undermine it" (Prainsack and Buyx 2012, p. 346). The Pentagon policy can be explained not only by our wish to express gratitude for a soldier's sacrifice (which is not an act of solidarity but rather an expression of responsibility or empathy), but also by the aspects of sameness between us and them. These include, *inter alia*, the desire to start a family, the desire to raise, nurture and educate a child for the sake of our personal growth, and the desire for a biological and even spiritual or moral legacy.

However, Prainsack and Boyx's emphasis on feelings of sameness is too thin to explain the willingness to dedicate public funding to fertility preservation of active-duty service personnel. In our view, Sandel's view of solidarity provides a better foundation, since it is derived from an understanding that members of a society have an obligation of solidarity towards each other. As he explains, these are particularistic obligations and do not require our consent. They are based on the realization that our lives are interwoven with those of others and the understanding that being part of a group (a community or a nation) imposes obligations of mutual assistance and reciprocity.

The justifications for the Pentagon's pilot program do not relate to the post-mortem use of the gametes and in our opinion that is a lacuna. If one of the motives of the program is to give soldiers and their relatives "peace of mind", as Secretary Carter stated, then that concern should extend to after death. In our opinion, if soldiers desire cryopreservation of their gametes for their own use in case they are injured, or for the use of their relatives if they are killed, then post-mortem use of the sperm by their spouse or parents is a desirable policy that manifests social solidarity. Furthermore, the case for allowing PAR is not limited to soldiers. The feeling of sameness with others would serve as justification of PAR in other circumstances of premature death (as a result of a terminal illness, accidents, and the like). As Sandel suggests, it is based on moral responsibilities towards others who share with us a similar history and a similar narrative.

## 6 Conclusion

We have presented four elements that support the practice of PAR for the benefit of a deceased's spouse and/or parents: sperm as a relational resource, relational autonomy, support for the process of grieving, and the value of solidarity. These elements can interact in the justification of PAR. Sperm should be viewed as invested with relationship-centered potential. This view is supported by the empirical data on individuals' attitudes toward post-mortem use of gametes and their willingness to allow PAR so that their relatives can benefit from a child/grandchild. Furthermore, such data is better explained using the notion of relational autonomy, which explicates individuals' choices and actions in reference to their relations with others. From the perspective of the grieving spouse and parents, the choice to use the deceased's sperm can be seen as an act of hope and empowerment which reformulates the imperishable relationship with the deceased. It can also be viewed as a solidarity-based practice within the family since family members (particularly the spouse and the parents) are willing to take on themselves the obligation to raise the deceased's child if according to their understanding the deceased would have expected it of them.

At the societal level, institutionalized solidarity-based practices are manifested in policies that provide services to community members in need of them, based on reciprocal obligations and sentiments of shared fate. Several countries already fund cryopreservation of gametes for terminally ill patients, and as mentioned above the US army provides this service to its soldiers. This is a beneficial policy that can be adopted by countries wishing to maintain and reinforce the moral bonds that transform a group of individuals into a community. Clearly, the value attributed to family, procreation, and obligations toward the dead vary from one society to another. Nonetheless, we claim that mutual obligations among community members (in the familial and societal contexts) exist at some level in any society. At the societal level, solidaristic practices will prevail when a community or nation is characterized by strong social cohesion—whether as a result of traditional norms or religious values or as a result of feelings of a shared fate due to some existential threat. Under these circumstances, it would be possible to justify a policy that would fund gamete cryopreservation and PAR techniques.

At the familial level, members of the family may feel that they are tightly bound to one another by mutual obligations. When these obligations are perceived by them as strongly binding they can explain the motivation of the deceased to allow his relatives (either the spouse or the parents when there is no spouse) to use his sperm posthumously, as well as his relatives' wish to raise the prospective offspring. Note that we are not claiming that family members are required to perceive their mutual obligations to one another as imposing a duty to use the deceased's sperm for post-mortem fertilization. Rather, we have attempted to show that some family members (particularly the deceased's spouse and/or parents) may feel that this is expected of them or that it will allow them to reconcile with the death of a loved one. The deceased, for his part, can acknowledge his relative's desires and comply with them. We conclude that a society can respect these wishes and allow PAR based on solidarity.

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