

Affective Reproductive Legality: Navigating the Borderland of Life and Death

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Abstract

Birth and death are traditionally viewed as antithetical moments. They divide our relations in the world: from their instantaneous creation at the point of birth to their dissolution at the point of death. From partner to widow, from expectant to grieving parent, in confronting the life–death threshold, we become someone other. This conventional view presupposes a clear demarcation between life and death, suggesting that beyond this threshold, our relationships experience a definitive change. Yet, while our relationship with the deceased is physically taken from us, could our affective bond with them not only hold firm—but also be helped to flourish? If so, what might be the tradeoff of blurring the borderland between life and death?

This Article considers these questions as a matter of law, particularly in the context of reproductive rights. It assesses and juxtaposes the jurisprudence surrounding two reproductive experiences where birth and death meet: stillbirth and posthumous assisted reproduction. Both delivering a stillborn child and conceiving a child posthumously using artificial reproductive technologies challenge—accidentally or intentionally—the life–death borderland, posing a dilemma for policymakers regarding how to regulate such scenarios. Examining the question centered in this Article, I argue, could inform policymakers contemplating the regulation of these experiences.

To pursue this inquiry, the Article sets forth a framework of affective legality synthesized and developed from affect theories. This framework considers how sensations and states-of-being—corporal

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and mental, ephemeral or lasting, ineffable or definable—are generated and circulated by and between bodies, be they individual or collective, to embody meanings, perceptions, and values. It evaluates how this affective dynamic becomes a medium under which the law—as a meaning-making process and institutionalized power-structure—is activated and essentialized. Applying this framework to the life–death borderland in the context of reproduction, the work facilitates a nuanced understanding of the jurisprudential possibilities and the legal perils embedded in the life–death threshold. In so doing, this analysis also explicates how the intersection of law and affect—which remains underdeveloped in the scholarship—can constitute a powerful methodological tool in critical analysis of the law.

INTRODUCTION

Stillbirth and posthumous human reproduction are situated in the borderland between life and death. Both delivering a dead child and creating a new life from a deceased person's gametes challenge the idea that death ends (or precludes) states of being in the world. Parents who deliver a stillborn child do not simply cease to experience parenthood in that moment.¹ Similarly, assisted reproductive technologies introduce a startling possibility: a person can become a parent even after their death.² These reproductive experiences do not just straddle the line between life and death; they question the very validity of this divide, sparking a conversation about the continuity of relational states beyond death. In both cases, the law plays a critical role in signaling how this life-death borderland is ostensibly to be treated—and even *affectively experienced* by those involved. This Article approaches this understanding from the perspective of two forms of jurisprudence. The first is the issuance of a birth certificate following a stillbirth—an option that, at the time of writing, is available to parents in most U.S. states.³ The second relates to judicial decisions concerning requests to retrieve and use the sperm of a deceased man, a practice that is available in the U.S. but, thus far, has yet to be directly regulated either at

1. See *infra* Part II.B.1.

2. See *infra* Part III.A. Indeed, the concept of “parent” is contested when applied in this context to refer to the deceased as a parent. While some scholars do use it, others argue that this term, where there is no live parent, reduces the understanding of parenthood to purely genetic. See Vardit Ravitsky & Ya'arit Bokek-Cohen, “Life after Death”: The Israeli Approach to Posthumous Reproduction, in *BIOETHICS AND BIOPOLITICS IN ISRAEL* (Boas Hagai et al., eds., 2018). Regardless of this contestation, posthumous human reproduction challenges the idea that death ends personal becoming also with regard to a widow and the grieving parents of her deceased husband. This form of reproduction enables them all to maintain their relationship with the deceased and to live out the future they always envisioned through a relationship with his future child (see *infra* Part II. B.1. & Part III. C).

3. See *infra* Part II.A.

the federal or state level.⁴ By placing these two forms of jurisprudence side-by-side, within the analytical framework of affective legality, the Article illuminates how this life-death borderland becomes a terrain in which structures of governmentality are constructed, sustained and obscured.⁵

The inquiry proceeds in three parts. Part I sets out the theoretical framework, informed by affect studies, that will accompany us throughout. Affect studies are concerned with human encounters and the resulting altered levels of intensity they bring about,⁶ be they experienced as emotions, feelings, bodily sensations, visceral responses, states of being, or more diffuse sentiments,⁷ which circulate and are transmitted on a daily basis but which become more noticeable in highly-charged, impactful events. While the “affective turn” has taken hold within various disciplines,⁸ and despite the fact that the legal realm is a potent wellspring of affect, writings dealing with affect in the field of law are still underdeveloped.⁹ Part I, then, distills two propositions from the most relevant affect theories. It contends that (i) affect is a medium under which the law—in its capacity as a meaning-making process and institutionalized power-structure—is activated and essentialized.¹⁰ Analyzing the affective nature of the law,

4. Shelly Simana, *Creating Life after Death: Should Posthumous Reproduction Be Legally Permissible without the Deceased's Prior Consent?* 5 J. L. AND THE BIOSCIENCES 329, 333 (2018).

5. Governmentality, a concept developed by Michel Foucault, describes a range of methods and strategies employed, sometimes subtly and indirectly, by the state to exert control over its citizens. This involves governing and influencing people's actions, behaviors, and desires, extending beyond direct policy and law enforcement. See Michel Foucault, *The Foucault Effect: Studies*, 102-03 in GOVERNMENTALITY WITH TWO LECTURES BY AND AN INTERVIEW WITH MICHEL FOUCAULT (eds. Graham Burchell, Colin Gordon, & Peter Miller 1991).

6. See BRIAN MASSUMI, PARABLES FOR THE VIRTUAL: MOVEMENT, AFFECT, SENSATION 35 (2002).

7. The interdisciplinarity of this terrain, however, has resulted in diverse articulations of what affect is. Two main waves can be recognized. One wave, articulated by Gilles Deleuze, Felix Guattari, and Brian Massumi, focuses on affect as a sub-conscious experience of intensity. A second wave defines affect as a relational drive interwoven with cognitive processes linked to cultural meanings. This understanding rejects the idea that affect is a subconscious bodily experience, detached from the cultural context. Among the theories that signify this wave are those developed by Eve Kosofsky Sedgwick, Sara Ahmed, and Kamari Maxine Clarke. This Article adopts the framing developed by the latter authors.

8. Patricia Ticineto Clough, *Introduction*, in THE AFFECTIVE TURN: THEORIZING THE SOCIAL 1-25 (Patricia Ticineto Clough & Jean Halley, eds., 2007).

9. Kamari Maxine Clarke, *Emotion, Affect, and Law*, in THE OXFORD HANDBOOK OF LAW AND ANTHROPOLOGY (Marie-Claire Foblets et al., eds., 2020) (“The scholarship dealing with the role of affect in the field of law is thus lacking”). Franz Reimer, *Law as Culture: Culturalist Perspectives in Legal Theory and Theory of Methods*, 18 GERMAN L.J. 255, 266 (2017) (“affect is certainly not a key category in legal theory and jurisprudence”). Some exceptions exist. None of these literatures, however, offers a typology or analytical framework explaining how affect may be moderated by the law. In criminal law, see, e.g., Clare Gumby & Anna Carline, *The Emotional Particulars of Working on Rape Cases: Doing Dirty Work. Managing Emotional Dirt and Conceptualizing ‘Tempered Indifference’*, 60 BRIT. J. CRIMINOLOGY 343 (2020). In the context of LGBTQ rights, see SENTHORUN SUNIL RAJ: FEELING QUEER JURISPRUDENCE: INJURY, INTIMACY, IDENTITY (2020). In legal esthetics scholarship, see, e.g., Greta Olson, *The Turn to Passion: Has Law and Literature Become Law and Affect?* 28 LAW & LITERATURE 335 (2016). On the differences between affect theories and emotions in law, see *infra* notes 69-65 and accompanying text.

10. While this part reviews various affective dynamics to exemplify this proposition, two are central

therefore, has the potential to offer a more nuanced understanding of its constitutive role; and (ii) contemplating the affective nature of moral dilemmas and disagreements between parties has the potential to illuminate new states of being that may not be anticipated in advance, ushering the conflicts in a more reparative direction. These two analytical propositions are explored through—and used to better understand and critique—two contested forms of jurisprudence in reproductive rights, both of which center on experiences where birth and death meet.

Part II focuses on the first of these expressions of jurisprudence: issuing a birth certificate for a stillborn child in the United States (U.S.).¹¹ After briefly surveying the legal development of this regulatory avenue,¹² this Part investigates the motivations for this contested documentation.¹³ Conceptualizing this jurisprudence through the affective legality lens reveals how the borderland between life and death—particularly when it is blurred in ways that once were inconceivable—challenges not only our understanding of the individual who experiences stillbirth¹⁴ but also the bodies of knowledge that recount and moderate their experience.¹⁵ This Part further discusses the potential pitfalls of issuing the stillbirth birth certificate, demonstrating how individuals who experience stillbirth *affect and are affected by* the experience of other groups of individuals—those who spontaneously miscarry¹⁶ and those who actively seek to terminate their pregnancy.¹⁷ Analyzing this reciprocal intersubjective dynamic of affect and its broader implications elucidates the legal challenges of regulating the life–death borderline but also, I argue, invites a different approach—one of reparative sensibility—to navigate the double-edge in this affect-laden terrain.¹⁸

Part III focuses on the second form of jurisprudence mentioned earlier: judicial cases concerning the request to conceive a child posthumously without the deceased’s explicit written consent. To understand what is at stake in this experience surrounding a death whose boundaries are rendered

and incorporated into the subsequent analysis of this Article: *affective dissonance*, which refers to dynamics in which the individual’s sense of self does not coincide with the socially constructed version of the self available to them; and *compulsory affective state*, which refers to an affective state that an individual is expected and pressured to express or experience in a specific situation.

11. Legal commentators have paid only limited attention to stillbirth birth certificates, with the exception of Carol Sanger and Jill Wieber Lens. Carol Sanger, “*The Birth of Death*”: *Stillborn Birth Certificates and the Problem for Law*, 100 CALIF. L. REV. 269 (2012); Jill Wieber Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, 98 WASH. U. L. REV. 1059, 1108 (2021). The present Article draws on this writing and extends it by deploying the lens of affect.

12. See *infra* Part II. A.

13. See *infra* Part II. B.

14. See *infra* Part II. B.1. Mindful that trans men can also bear children, this article uses neutral terms such as “pregnant person” or “the individual”.

15. See *infra* Part II. B.2.

16. See *infra* Part II. B.1.

17. See *infra* Part II. C.2.

18. See *infra* Part II. C.3

indistinct, I use the example of the most lenient jurisdiction regarding this practice: Israel.¹⁹ In Israel, widows have relatively straightforward access to posthumous conception even if the deceased man's parents are in contra;²⁰ and bereaved parents can readily seek legal recourse to permit the conception of their deceased son's sperm despite his widow's objection.²¹ The Israeli jurisprudence is a valuable platform from which to consider the broad questions posed in this Article, as it brings into the courtroom deeply emotional conflicts between various stakeholders, thereby pushing us to contemplate not only the motivation behind seeking to blur the line between life and death²² but also its collateral consequences.²³ Recognizing the affective nature of the contestation will enable us to expand our understanding of the conflict between the stakeholders and its broader discursive meanings.

The Conclusion summarizes the main contributions made by the juxtaposition of the two forms of jurisprudence through the lens of affect. This inquiry illuminates the intricate nexus between affect and governmentality in the life-death borderland. Both stillbirth and posthumous human reproduction not only bring to the fore intense affective responses, which may not necessarily be articulated linguistically, but also expectations around these responses, both from the person experiencing them and others observing this experience. Applying the "affect" lens to each reproductive experience, this Article opens up a new way of understanding the *affective nature* of the law, as it recognizes or legitimizes affective responses to certain scenarios but, in certain instances and in accordance with certain norms and values, selectively overlooks and devalues other affective responses. This analysis, then, sheds light on the constitutive nature of the law with regard to our affects: how its legitimization or overlooking "trains" us into what we can and should outwardly display.

I. AFFECTIVE LEGALITY

"Justice is not simply a feeling. And feelings are not always just. But justice involves feelings, which move us across the surfaces of the world, creating ripples in the intimate contours of our lives. Where we go, with

19. See *infra* Part III. A.

20. For the motivations of a deceased man's parents in seeking to use his gametes, see *infra* Part III.B.2.

21. See *infra* Part III.B.2.

22. See *infra* Parts III.B.1, III.B.2 & III.B.3.

23. See *infra* Parts III.C & III.B.3. While this Part focuses on Israeli law, its insights may be of value to policymakers in jurisdictions in which this topic is not directly regulated, such as in the U.S., where many requests are decided on a case-by-case basis by private fertility clinics and individual physicians. See Simana, *supra* note 4, at 333.

these feelings, remains an open question.”²⁴

This Part sets out the analytical framework that will accompany us throughout. As this framework is synthesized and developed from affect theories, I first outline the main principles of these theories for those who are less familiar with them. I then distill two analytical propositions on the intersection between affect and the law that underlie my approach here. I discuss how each proposition can be translated into an analytical principle that could be made accessible to the legal discipline and, specifically, to those dealing professionally with the issues addressed in this Article.

As the analysis of the stillbirth birth certificate and posthumous human reproduction progresses in this Article, this framework will be applied to the lived experience of individuals as described in each area of jurisprudence. This methodology provides an understanding of affect from the perspective of the legal subject, not merely that of theorists, encompassing community-wide outcomes and scenarios.²⁵

Affect refers to the human *encounter*, the moment of intensity or contact between but also *within* bodies. This encounter could be manifested through expressible sensations, such as emotions and feelings but also by other bodily-felt sensations (such as attachment, confusion, temperament, or intuition), visceral responses, states of being (such as belonging as opposed to alienation) or more diffuse sentiments which we may not be able to articulate in language.²⁶ The field of affect studies is concerned with the *contagion*²⁷ and *transmission*²⁸ of the affective states prompted by the encounter and how the bodies involved in this interaction *affect and are affected*, such that “[they] are constituted and constantly reshaped.”²⁹

Courtroom dynamics, by virtue of being characterized by moments of intensity, illuminate the normative implications of this reciprocal dynamic. The study by Clare Gunby and Anna Carline on the work of advocates in rape cases, for example, demonstrates how advocates make visible the “dirty” physical elements of their cases, such as blood, semen, and vomit,³⁰ to evoke visceral and bodily responses from jurors and leverage the “gut-wrenching authenticity of a complainant’s account,”³¹ in pursuit of a

24. SARA AHMED, *THE CULTURAL POLITICS OF EMOTION*, 202 (2004).

25. For the need to develop this methodology in the scholarship on affect, see Antje Kahl, *Introduction*, in *ANALYZING AFFECTIVE SOCIETIES: METHODS AND METHODOLOGIES*, 8 (Antje Kahl, ed., 2019).

26. See generally MASSUMI, *supra* note 6, at 28.

27. See e.g., Sara Ahmed, *Happy Objects*, in *THE AFFECT THEORY READER*, 36 (Melissa Gregg et al., eds., 2010).

28. THERESA BRENNAN, *THE TRANSMISSION OF AFFECT*, 1-9 (2004).

29. Christian von Scheve, *A Social Relational Account of Affect*, 21 *EUR. J. SOC. THEORY* 39, 55 (2018).

30. Gumby & Carline, *Dirty Work*, *supra* note 9, at 347.

31. *Id.* at 351.

successful prosecution.³² Though advocates use the “dirty” elements of their cases to *affect* the jury, there is always a risk that advocates themselves will *be affected* by this strategy, thereby being jarred into a state of emotional strain that prevents them from performing professionally.³³

Yet, although affect materializes within and through bodies, it is never bound to them and it holds the potential to inform other bodies.³⁴ That is, it circulates as collective moods and public sentiments.³⁵ What matters in this dynamic is that its capability, Ann Pellegrini and Jasbir Puar contend, “allows the body to be an open system, always in concert with its virtuality, the potential of becoming.”³⁶ This becoming, as Birgit Sauer and Otto Penz explain, is “not only of the body and of interaction but also of society,” vacillating between the subjective, *inner* sphere and the collective, *outer* sphere.³⁷

To understand such affective transmission between the inner and outer spheres, consider, for example, the struggle to legalize same-sex marriage in the United States. Tucker Culbertson and Jack Jackson discuss how the campaign and litigation around the first same-sex marriages in Massachusetts and San Francisco came close to “sentimentaliz[ing]” and “romanticiz[ing]” the institution of marriage itself.³⁸ In a similar vein, Katherine Franke has cautioned that this struggle could easily backfire, such that gays and lesbians, including those who wish *not* to marry, could fall under the scrutinizing eye of the state, where their sexual behavior—their freedom and curiosity—would be affected.³⁹

The writings of Sara Ahmed explicate this reciprocal dynamic. Ahmed argues that emotions and affect do not reside in—do not belong to—a subject or object. They come into being as an effect of their circulation and repetition.⁴⁰ Through this circulation, ideas *involve* and “stick” to the object and are repeated, thereby attracting new encounters as their “affective value” multiplies,⁴¹ and informing the “materialization of collective bodies.”⁴² Ahmed’s arguments about attachments between bodies thus

32. *See id.* at 352.

33. Gumby & Carline, *Dirty Work*, *supra* note 9, at 347.

34. Melissa Gregg & Greg Seigworth, *An Inventory of Shimmers*, in *THE AFFECT THEORY READER*, 3 (Melissa Gregg et al., eds., 2010).

35. Rua Wall, *The Law of Crowds*, 36 *LEGAL STUD.*, 395, 408-09 (2016).

36. Ann Pellegrini & Jasbir Puar, *Affect*, 27 *SOC. TEXT* 35, 37 (2009).

37. BIRGIT SAUER & OTTO PENZ, *GOVERNING AFFECTS: NEOLIBERALISM, NEO-BUREAUCRACIES, AND SERVICE WORK*, 27 (2019).

38. Tucker Culbertson & Jack Jackson, *Proper Objects, Different Subjects and Juridical Horizons in Radical Legal Critique*, in *METHODOLOGICAL DESCRIPTIONS: “FEMINIST” AND “QUEER” LEGAL THEORIES* 143 (Adam P. Romero, ed., 2009). NOTE: Quote appears on page 143; title of book is incorrect. On that page, no mention of San Francisco.

39. KATHERINE FRANKE, *WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY*, Ch 6 (2015).

40. Sara Ahmed, *Affective Economies*, 22 *SOC. TEXT* 117, 120 (2004).

41. *Id.*

42. *Id.* at 121.

include abstract concepts and discursive figures.⁴³ The interesting question, though, is not so much who or what is circulated but what this affective dynamic does.⁴⁴

Certain legal works explicitly reflect the intersubjective dynamic of affect and its normative implications. Consider, for example, the writings of Carol Sanger. Sanger discusses regulatory schemes that trigger affective responses that inform certain norms regarding reproductive choices. Such schemes include laws that require a pregnant person who has chosen to seek an abortion to first view an ultrasound image of the fetus potentially to cultivate feelings of care and attachment (and awaken an impulse toward becoming a parent, for those who are yet to have children).⁴⁵ The work of June Carbone and Naomi Cahn provides another example of this dynamic. Carbone and Cahn consider how family law fosters common understandings that shape behavior and synchronize emotions linked to intimate relationships.⁴⁶ They argue that, while family law has been developed in tandem with the emotions that correspond to modern marital relationships, the law has failed to do so for *non*-marital relationships when it has imposed legal obligations of marriage on non-marital relationships.⁴⁷ Such an “all-or-nothing approach,” as they explain, maintains the marital/non-marital dichotomy and fails to account for the varied emotions that underlie modern intimate relationships.⁴⁸ Both the work of Sanger and that of Carbone and Cahn illuminate the affective nature of the law as becoming a “biopolitical mode of governance that takes hold of people’s lives through affect.”⁴⁹ Yet, while Sanger’s work considers affect to be a *force* binding the subject to certain norms (to see a pregnancy through to term, for instance), the work of Carbone and Cahn sheds light on how affect becomes a *resource* distributed in accordance with certain dichotomies (marital/non-marital units). And, where Sanger’s work highlights how the affective dynamic becomes the means through which the individual’s agency (for example, that of the pregnant person) is informed, the work of Carbone and Cahn elucidates how this dynamic is an essential part of creating equality among various forms of modern intimate relationships.

Against this backdrop, I articulate the first analytical principle of this

43. Discursive analysis is a central aspect of the inquiry presented in this Article, both with regard to stillbirth (*see infra* Part II.B.2) and especially also posthumous assisted reproduction (*see infra* Part III.B.2 & Part III.C).

44. *Cf.* AHMED, POLITICS OF EMOTION, *supra* note 24, at 4 (Ahmed, rather than asking “What are emotions?”, asks “What do emotions do?”).

45. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 362, 381 (2008).

46. June Carbone & Naomi Cahn, *Family Law and Emotion*, in RESEARCH HANDBOOK ON LAW AND EMOTION, 197 (Susan Bandes et al., eds., 2021).

47. *Id.* at 198.

48. *Id.*

49. SAUER & PENZ, *supra* note 37, at 60.

Article: that affect is a medium under which meanings and perceptions are created and sustained but also clash. Affect, in that sense, does not function in the background of our lives. Rather, it forms the medium through which the constitutive role of the law—as it pertains to meaning-making processes and institutionalized power-structures—is operated.⁵⁰

Applying this proposition as an analytical tool, I seek to examine how the affective nature of the law comes into effect and what its normative implications might be—not only when it actively intervenes in our lived experience (as evidenced in relation to posthumous assisted reproduction jurisprudence)⁵¹ but also when it remains *silent* on that experience, intentionally or otherwise (as evidenced with regard to stillbirth jurisprudence).⁵² By taking this approach, I seek to discern how various constellations of governmentality are affectively experienced by different stakeholders and to critique their ramifications for the threshold between life and death.

While the analysis appraises various affective dynamics to pursue this aim, there are two that are central. The first, *affective dissonance*, refers to dynamics in which the individual's sense of self does not coincide with the socially constructed version of the self available to them (for example, made available by the public perception of their identity).⁵³ The second, *compulsory affective state*, refers to an affective state that an individual is expected and pressured to express or experience in a specific situation.⁵⁴ These concepts shed light on the constitutive nature of the law vis-à-vis our affective states—that is, how its legitimization (or, conversely, its disregard) “trains” us on what we can and should outwardly display.

The second analytical principle of the theoretical framework used in this inquiry pertains to its *reparative* aspect. It considers the *potential* of the encounter, in terms of knowing, understanding, and feeling it more freely and authentically. How can we express different affective states than those we might be expected to express in response to a given interaction?

This approach is manifested in queer literature on affect. For example, José Esteban Muñoz's notion of “a horizon of possibility” prompts us to think about ways to cultivate attachments to moments in time that spark

50. For further reading on the constitutive role of the law, see Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in *LAW IN THE DOMAINS OF CULTURE* 1, 5 (Austin Sarat & Thomas R. Kearns, eds., 1998).

51. See *infra* Part III.B.

52. See *infra* Part II.B.

53. Clare Hemmings, *Affective Solidarity: Feminist Reflexivity and Political Transformation*, 13 *FEMINIST THEORY* 147 (2012).

54. Cf. Amia Srinivasan, *The Aptness of Anger*, 26 *JOURNAL OF POLITICAL PHILOSOPHY* 123, 129 (2018) (focusing on how racial minorities who, in response to a structural experience of racism, are compelled to suppress their anger, even when those feelings are justified, to prevent a hardening of the oppressor's attitudes of discrimination). Certainly, affective dissonance could lead to a compulsory affective state. But there may be instances where compulsory affective states arise without prior affective dissonance—for instance, when an individual simply internalizes societal expectations.

curiosity and unleash us from oppressive structures.⁵⁵ In a similar vein, Eve Sedgwick calls us to shift from “paranoid reading” to “reparative reading.” The latter approach, even while recognizing structures of oppression, does not spread the paranoid idea that these structures are inevitable. Instead, this reading seeks to repair these structures’ relations with nourishment and productivity,⁵⁶ in the hope of revealing other affective potentials such as surprise⁵⁷ or pleasure.⁵⁸ And other scholars—among them, David Halperin⁵⁹ and Ann Cvetkovich⁶⁰—insist that we should not attempt to overcome negative affective states, such as shame or depression, by working to switch them to their polar opposites, such as pride or happiness. This is because, among other important reasons relating to our wellbeing, these negative states have the capacity unexpectedly to invoke shared experiences that can build community.⁶¹ The contribution of this approach lies in prompting us to *feel differently* about our worlds or to *know them differently* by not prejudging what affective states we might be capable of experiencing.

This approach is also manifested, to a degree, in certain legal works. Solangel Maldonado, for example, invites us to consider how the law could encourage forgiveness, rather than guilt, between divorcing parents.⁶² Clare Huntington problematizes the oppressive love–hate binary embodied in family law, calling on us to imagine other possibilities.⁶³ And Brenda Cossman suggests that the clash among feminists around the #MeToo debate could be better approached, through a reparative sensibility, with “affection, gratitude, solidarity and love.”⁶⁴ Viewing these works together, we can observe how affirming the affective nature of contestation could carve a space for reflection and reflexivity. Doing so may help us to be alert to the possibility of unexpected, yet valuable, outcomes or even creating new ones.

In each form of jurisprudence, I discuss what a reparative sensibility might look like to appraise the main dispute among the relevant stakeholders. Far from providing a clear answer regarding what the best

55. José Esteban Muñoz, *CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY*, 97 (2009).

56. EVE SEDGWICK, *TOUCHING FEELING AFFECT, PEDAGOGY, PERFORMATIVITY* 128 (2003).

57. *Id.* at 146.

58. *Id.* at 137.

59. David Halperin, *Homosexuality's Closet*, 41 MICH. Q. REV. 21 (2002).

60. Ann Cvetkovich, *AN ARCHIVE OF FEELINGS: TRAUMA, SEXUALITY, AND LESBIAN PUBLIC CULTURES* 7 (2003).

61. Clare Hemmings, *Invoking Affect: Cultural Theory and the Ontological Turn*, 19 CULTURAL STUDIES 548, 549–50 (2005).

62. Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 441 (2008).

63. Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1246 (2008) (“family law is predicated on a binary model of love and hate, with no accounting for guilt and the drive to reparation. This Love–Hate Model actively thwarts the cycle of intimacy, greatly diminishing the opportunity for repair in familial relationships”).

64. BRENDA COSSMAN, *THE NEW SEX WARS: SEXUAL HARM IN THE #MeToo ERA*, 204 (2021).

regulatory path for each jurisprudence might be, the goal of this work is to illuminate the multiplicity of vulnerabilities at stake, placing them alongside one another. Indeed, this analysis constitutes an invitation to elevate the conversation above the traditional readings of wins and losses, steering such conflicts in a more subjunctive, constructive direction. This approach, I believe, would help expand our understanding of the law, its discursive and material meanings, and open up new avenues for envisioning alternative ways of being, against and despite the hostile relations operated in each jurisprudence.

Before moving to apply this theoretical framework to the subject matter of this Article, I should clarify how this affect-studies approach differs from the emotion-and-law perspective.⁶⁵ The field of affect studies focuses on a broader range of sensations that extend beyond what we usually culturally categorize as emotions—some of which have bodily aspects, are visceral or ephemeral, or simply cannot be articulated in language.⁶⁶ Notably, affect studies honors the messiness and ever-changing nature of our lives, encouraging us to embrace broader ways of experiencing the world. This aspect holds invaluable analytical implications if we take the position that the categorization of our lived experiences sustains constellations of governmentality and modes of marginalization.⁶⁷ Further, as opposed to the emotional perspective, which focuses on the individualized assigned feeling, affect theories emphasize the *intersubjective* transmission of sensations and states of being, as reciprocal fluctuations through and against the dichotomies of inner/outer, self/body, and individual/collective.⁶⁸ Studying this intersubjective aspect, researchers assess how the affective state of the subject becomes a terrain in which human possibilities are managed,⁶⁹ but also, more abstractly, how

65. For recent work recounting the evolution of the field of emotions and law and some of its leading scholars, see BANDES ET AL., RESEARCH HANDBOOK ON LAW AND EMOTION (2021). Note that, although some legal scholars use “affect” and “emotion” interchangeably, I conceptualize emotions as a subset of affect along with other sensations that may not be possible to articulate. By doing so, I avoid collapsing affect theories into emotions-and-law study.

66. MASSUMI, *supra* note 6, at 28.

67. Janet Halley, *Paranoia, Feminism, Law*, in NEW DIRECTIONS IN LAW AND LITERATURE 124 (Elizabeth S. Anker & Bernadette Meyler, eds., 2017). This aspect is especially evident in works that adopt affect theories belonging to the *queer* strand that focuses on the less “admissible” affective responses and examines the hegemonic discourses of normalization that render them less visible or legitimate than others. See, e.g., JASBIR PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES 204 (2007); Ann Cvetkovich, *Depression is Ordinary: Public Feelings and Saidiya Hartman’s ‘Lose Your Mother,’* 13 FEMINIST THEORY 131-146 (2012).

68. See, e.g., Clare Hemmings, *Invoking Affect: Cultural Theory and the Ontological Turn*, 19 CULTURAL STUD. 548, 552 (2005). Cf. Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 HARV. C.R.-C.L. L. REV. 551 (2011) (highlighting how individual emotions invoke a more collective sense that shapes the mobilization of rights).

69. KAMARI MAXINE CLARKE, AFFECTIVE JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE PAN-AFRICANIST PUSHBACK 5 (2019).

perceptions and meanings are created, negotiated, and may clash.

Taking these two distinctions together, affect theories draw on emotion study and enhance it on both the descriptive and normative levels. By cultivating more awareness of the processual nature of affective embodiments in our worlds, legal scholars would be better placed to acquire a more acute sense of how our relations are organized and oriented relative to each other. This thicker understanding is vital if we are to discern how the law shapes our lives and our choices in ways that may escape our attention. To formulate adequate regulatory avenues, I argue, we should account not only for the sustained, explicit dimension of being but also the ephemeral, the fleeting, the temporal, and the subtle—a realm that is bound to go unnoticed unless we attend to it.

This is no straightforward task. Affects are less susceptible to analysis than other, more visible, phenomena; they are elusive, often disordered, and diffuse; and sometimes their expression is more muted. To bring affects into our awareness requires us, at least initially, to embrace their messiness, their shifting dynamic, the non-categorical nature of states of being in the world, and the powerful non-rational forces at play in human lives. This presents a challenge to all researchers but especially to conventional legal thought, which is grounded in clarity, definition, and precision,⁷⁰ and prioritizes objectivist epistemologies and rationality.⁷¹

To approach this challenge, as a starting point, this Article focuses on two terrains that are, arguably, more obviously affect-laden: stillbirth and posthumous human reproduction. Death, as a threshold moment, brings to the fore intense sensations that may not be linguistically articulated, and whose rationales or dynamics are not necessarily expected by the person experiencing them or others observing this experience. Death also invites us to think about the nexus between affect and governmentality, specifically how death becomes a terrain in which structures of governmentality are reinforced but also essentialized, constructed as “natural,” through certain affective responses. It is my hope that this analysis will lay the groundwork for future research in other contexts where affects are less explicit.

II. THE STILLBIRTH BIRTH CERTIFICATE

Stillbirth is the act of delivering a child who has died *in utero* or during

70. This has been discussed in the literature as a reason for marginalizing the place of emotions in traditional legal thought. See, e.g., Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1979 (2001); Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?* 94 MINN. L. REV. 1997, 2003-08 (2010). The discussion there is especially applicable to the study of affect, which encompass also less structured forms of sensations.

71. Ravit Reichman, *Law's Affective Thickets*, in NEW DIRECTIONS IN LAW AND LITERATURE, 112-13 (Elizabeth Anker & Bernadette Meyler, eds., 2017). CLARKE, AFFECTIVE JUSTICE, *supra* note 69, at 4.

the birthing process.⁷² In the U.S., 20 weeks is the minimum gestational period for legally defining the spontaneous, premature ending of a pregnancy as stillbirth, as opposed to a miscarriage.⁷³ This event is often associated with a mix of intense affective states—that is, states that extend beyond the felt emotions they contain: shock, anger, depression, and self-blame,⁷⁴ humiliation and inferiority,⁷⁵ loss of hope⁷⁶—but also sometimes a loss of the would-be parent’s *self* itself.⁷⁷

How are these affective states moderated by the law surrounding stillbirth?⁷⁸ I consider this question through the context of birth certificates.⁷⁹ To pursue this inquiry, I first set forth the normative landscape

72. Centers for Disease Control and Prevention, Stillbirth, <https://www.cdc.gov/ncbddd/stillbirth/facts.html> (last visited Aug 24, 2022). The term *stillbirth* replaced the term *intrauterine fetal demise*. Mark M. Maslovich & Lori M. Burke, Intrauterine Fetal Demise, StatPearls, <https://www.ncbi.nlm.nih.gov/books/NBK557533/> (last visited September 7, 2022).

73. Countries adopt different timelines distinguishing between miscarriage and stillbirth. In the U.S., stillbirth is defined as occurring after the 20th week of pregnancy. Symptoms & Signs of Miscarriage, American Pregnancy Association, <https://americanpregnancy.org/getting-pregnant/pregnancy-loss/signs-of-miscarriage/> (last visited Jan 10, 2023). In Israel, it is defined as occurring after the 22nd week. National Insurance, Maternity Allowance, <https://www.btl.gov.il/English%20Homepage/Benefits/Maternity%20Insurance/Maternity%20Allowance/Pages/Conditionsofentitlement.aspx> (last visited Jan. 10, 2023). In the U.K., it is defined as occurring after the 24th. Maternity Action, Miscarriage, Stillbirth and Neonatal Death, <https://maternityaction.org.uk/advice/miscarriage-stillbirth-and-neonatal-death-rights-to-time-off-and-pay-for-parents/> (last visited Aug 24, 2022). In Canada, it is defined as occurring after the 28th week. K.S. Joseph et al., *Stillbirth in Canada: Anachronistic Definition and Registration Processes Impede Public Health Surveillance and Clinical Care*, 112 CAN J PUBLIC HEALTH, 766 (2021). Similarly to Canada, the World Health Organization defines it as occurring after the 28th week of pregnancy. World Health Organization, Stillbirths, https://www.who.int/health-topics/stillbirth#tab=tab_1 (last visited Jan. 10, 2023).

I use the term ‘ending’ here instead of referring to the more commonly used ‘pregnancy loss,’ acknowledging that the latter can carry a negative tone. There are individuals who might experience predominantly relief when their pregnancy ends unexpectedly before term. Moreover, for those who feel sadness over this experience, the term ‘pregnancy loss’ could amplify the emotional burden associated with the loss they are already grappling with. Employing this term could also politicize the decision to terminate a pregnancy, inadvertently lending support to anti-abortion arguments.

74. Marianne H. Hutti, *Social and Professional Support Needs of Families After Perinatal Loss*, 34 JOURNAL OF OBSTETRIC, GYNAECOLOGIC, AND NEONATAL NURSING, 630, 630-38 (2005). Joanne Cacciatore et al., *A Parent’s Tears: Primary Results from the Traumatic Experiences and Resiliency Study*, 68 OMEGA 183, 184 (2014). Masha Sukovic & Margie Serrato, *Communicating Miscarriage*, in INTERROGATING PREGNANCY LOSS: FEMINIST WRITINGS ON ABORTION, MISCARRIAGE, AND STILLBIRTH, 22-38 (Emily R. M. Lind & Angie Deveau, eds., 2017).

75. Nancy Gerber, *Grief, Shame, and Miscarriage*, in INTERROGATING PREGNANCY LOSS, *supra* note 74, at 52.

76. Kate Parsons, *Feminist Reflections on Miscarriage, in Light of Abortion*, 3 INT’L J. FEMINIST APPROACHES TO BIOETHICS, 1, 14 (2010). Sarah Clark Miller, *The Moral Meanings of Miscarriage*, 46 J. SOC. PHILOS. 141, 147 (2015).

77. LINDA L. LAYNE, *MOTHERHOOD LOST: A FEMINIST ACCOUNT OF PREGNANCY LOSS IN AMERICA*, 199-200 (2013) (citing bereaved parents who describe how “[p]art of [them] is missing . . .” and that stillbirth “made [them] less than whole”). Miller Sarah Clark, *The Moral Meanings of Miscarriage*, 46 J. SOC. PHILOS. 141, 153 (2015) (“her moral identity shifts significantly—from potential mother to not—against her desires and in a way that runs counter to her self-determined ends”).

78. Indeed, the starting point of this inquiry is not *whether* these affective states are (or might be) moderated by the law: the proposition underlying and analyzed by this Article is that the affective nature of the law comes into effect not only when the law actively intervenes in our experience but also when it remains silent regarding it.

79. While I focus here on the birth certificate, it is important to acknowledge that the affective

of this jurisprudence.

A. *The Normative Landscape*

In the U.S., the stillbirth birth certificate is gradually replacing the fetal death certificate that was previously issued to grieving parents following a stillbirth. This shift is attributed to the grassroots campaign work of Joanne Cacciatore. When Cacciatore delivered a stillborn daughter in 1994, she asked Arizona, her home state, to issue a birth certificate for her might-have-been-child.⁸⁰ For Cacciatore, like many other parents who have experienced stillbirth,⁸¹ receiving a fetal death certificate was a jarring bureaucratic response to her tragic loss.⁸² Cacciatore's request was denied.⁸³

Her experience eventually led her to establish the Mothers in Sympathy and Support (MISS) Foundation to support family members grieving the death of a child, and she began lobbying state legislature to create a birth certificate specifically for stillbirths.⁸⁴ Her efforts led Arizona to enact the first such legislation in the U.S., known as the Missing Angels Act, which authorizes a state to issue, upon the request of the grieving parents, a birth certificate recognizing the birth of a stillborn child.⁸⁵ Following this move, to date, most U.S. states have now implemented this Act and issue birth certificates to bereaved parents upon stillbirth.⁸⁶

Given the highly-charged emotional nature of the circumstances surrounding this legislation, it attracted (and continues to attract) much debate, often quite visceral. As one commentator observed, for example, issuing a birth certificate for a child that was born dead “sounds at once macabre and incongruent.”⁸⁷ Indeed, it disrupts the correlation between the traditional meanings attributed to this legal documentation—the creation of a new life—and its subject, a live baby. From this perspective, the passing of this legislation clouds the division between life and death by constructing it as a legal embodiment. The next subsection, however, elucidates the cracks in this critical perspective. It discusses the importance of modulating

nature of the law is manifested also in other contexts regulating pregnancy loss, such as employment (compassionate leave from the workplace) or tort (compensation for pregnancy loss resulting from medical negligence). Notwithstanding, these contexts are beyond the scope of this Article.

80. Sanger, *Stillborn*, *supra* note 11, at 280.

81. Danielle Fuller et al., *Death Before Birth: Understanding, Informing and Supporting Choices Made by People Who Have Experienced Miscarriage, Termination and Still Birth* (project report), 15 (2018), http://pure-oai.bham.ac.uk/ws/files/91775753/summary_of_project_findings_report_for_dhsc.pdf (last visited Jan. 10, 2023).

82. Lens, *Justice*, *supra* note 11, at 1108.

83. *Id.*

84. Sanger, *Stillborn*, *supra* note 11, at 280-81.

85. *Id.*

86. This is according to the MISS Foundation's website. See <https://www.missfoundation.org/advocacy/miss-state-and-federal-legislative-initiatives/> (last visited Jan. 10, 2023).

87. Melissa Murray, *A Hug from the State: Recognizing Stillbirths*, 1 JOTWELL (2012).

this ambiguity through the law.

B. Modulating the Ambiguity

To understand the potential of the birth certificate in modulating the ambiguity surrounding stillbirth, I consider various affective dynamics operating in this terrain and some of their normative implications.⁸⁸ In recognizing the reciprocal affective dynamic between individual and collective senses,⁸⁹ this analysis encompasses both the *inner* sphere (which focuses on the selfhood of the stillbirth parent) and the *outer* sphere (which focuses on how the understanding of this stillbirth is constructed through various bodies of knowledge).⁹⁰

1. The inner sphere

One way to understand the stillbirth experience is through the concept of *liminality*. Pregnancy is generally understood as a linear trajectory from conception toward birth and, thus, a gradual shift from the “non-parent” to the “parent” category.⁹¹ When this transitional process is abruptly and spontaneously interrupted, the *self* of the gestational part is embedded in a journey that has yet to culminate in its destination.⁹² As the philosopher Alison Reiheld contends, the person who loses their pregnancy non-voluntarily, including through stillbirth, is caught between two affective states registering simultaneously in their body: the “not being a parent” and “being a parent,” the no-longer and the not-yet.⁹³ This is a liminal space.

The challenge for the person who experiences pregnancy loss lies not with the liminality itself but with how it impedes them. The notion of *cruel optimism* could be helpful here in understanding the bind in which they find

88. Though my analysis draws on various studies conducted on stillbirth parents’ experiences, it acknowledges that not all stillbirth parents mourned or even missed their stillborn children. In that sense, this account does not represent all possible affective states resulting from stillbirth.

89. See *supra* notes 35-37 and accompanying text.

90. I am mindful that it is difficult to draw a strict boundary between the *inner* and the *outer* spheres. These spheres are entangled: stillbirth parents’ selfhood is informed by epistemological processes, and there is always the potential for this relationship to operate inversely. The distinction drawn here, though, has an analytical purpose: to underscore the normative implications at stake in the life–death threshold in this context. While, in the first sphere, it is the stillbirth parents’ *agency* that is at stake, the second sphere orients our attention to aspects of *subordination*. The term “agency” here refers to the capacity for self-definition and acknowledges that is not divorced from social influences. See Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 825-7 (1999).

91. Alice Lovell, *Some Questions of Identity: Late Miscarriage, Stillbirth and Perinatal Loss*, 17 SOC. SCI. MED. 755, 760 (1983). For a more recent account of this liminality, see Sarah Jane Brubaker & Christy Wright, *Identity Transformation and Family Caregiving: Narratives of African American Teen Mothers*, 68 J. MARRIAGE FAM. 68, 1214, 1215 (2006).

92. Lovell, *Identity*, *supra* note 91, at 760 (“from the moment it was discovered that the baby was lost, there was an abrupt cut-off in the identity construction process . . . and rapid de-construction of her motherhood”).

93. Alison Reiheld, *The Event That Was Nothing: Miscarriage as a Liminal Event*, 46 J. SOC. PHILOS. 9, 11 (2019).

themselves. Lauren Berlant refers to cruel optimism as an affective state that exists “when something you desire is actually an obstacle to your flourishing.”⁹⁴ Indeed, argues Berlant, “all attachments are optimistic,”⁹⁵ but what makes them cruel is the “relation of attachment to compromised conditions of possibility.”⁹⁶ The problem is that the bodily experience of stillbirth can trap the subject in an attachment whose function is to help them cope with the in-betweenness but which can never be realized in a complete and fulfilling way.⁹⁷ That is, the stillbirth parent experiences a profound, bodily sense of attachment but it is one that finds expression in absence and longing. The father, too, can be understood as sharing this bodily longing.⁹⁸ As Linda Layne discusses in her study of support groups for the parents of stillborn babies, stillbirth entails “challenges for would-be parents’ sense of themselves,”⁹⁹ situating them in a state of “limbo.”¹⁰⁰ Similarly, Maya Bhavé explains, the absence of a co-created tangible object—a live child—propels the stillbirth parent into the “amorphous space” of the loss.¹⁰¹ With these research findings in mind, we can observe how the experience of stillbirth could be understood as a “state of becoming that never becomes.”¹⁰²

That reading, however, may be misleading. It assumes that the “cruel” liminality is an inevitable result of an objective truth: the birth of a dead child. In that sense, it nullifies the agency of the person who delivers a stillborn child, rendering them a subject trapped in a state of liminality that they cannot control. However, the way in which we, as a society, recognize and acknowledge our *affective* experiences—the meaning-making process—is an essential part of how we know ourselves, and our identity in particular. And a major dimension of this meaning-making process is formalization, the process by which our identity is formed by the law.¹⁰³

To grasp the affective nature of *formalization*, consider the following dissonance. Just like any person who delivers a live child, a person who gives birth to a stillborn child is likely to identify themselves psychologically as a parent.¹⁰⁴ The similarity is further expressed in the bodily reactions they experience after the labor. Both individuals “hold their

94. LAUREN BERLANT, CRUEL OPTIMISM, 1 (2011).

95. *Id.*

96. *Id.* at 24.

97. *Id.* at 21.

98. Anna R. Brandon et al., *A History of the Theory of Prenatal Attachment*, J. PERINATAL & PERINATAL PSYCH. & HEALTH 201, 213 (2009) (arguing that a prenatal attachment can develop regardless of the anticipated parent’s sex).

99. *Id.* 200.

100. LAYNE, MOTHERHOOD, *supra* note 77, at 60.

101. Maya Bhavé, *The Ambiguous Space of Motherhood*, in INTERROGATING PREGNANCY LOSS, *supra* note 74, at 63.

102. Reiheld, *Liminal Event*, *supra* note 92, at 11.

103. Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 748 (2015).

104. Lens, *Justice*, *supra* note 11, at 1100-1101, n. 336-342.

infants after birth. Days after birth, both [individuals'] bodies start to produce milk to nourish their babies."¹⁰⁵ But, unlike the first individual, who is considered a *legal parent* (even if their child dies soon after birth), the second individual may be left without any formal recognition of their "parental" status.¹⁰⁶ This is a striking *affective* dissonance as it oscillates between *body* and *mind*, between what their body tells them and what their mind cognitively knows about the loss.

This dissonance, I argue, may be moderated by a stillbirth birth certificate, issued upon the parents' request. As a public record, this formalizes and documents the existence of the child for all to see.¹⁰⁷ Thus, the formalization becomes a legal embodiment, according to which a *real* child was born—"real enough to have its birth recorded"¹⁰⁸—to a *real* parent. From this perspective, this legal embodiment not only *attests* to their parental identity but also *constructs* it.¹⁰⁹ Specifically, it allows them to "function as [an] intentional agent" in the process of forming their own self-narrative,¹¹⁰ where "the dead baby [is incorporated] into the family biography."¹¹¹ The birth certificate, in the eyes of the stillbirth parent, is that legal embodiment that informs and affirms a sense of *being*, allowing them to retain agency for experiencing the relations they could have had in this world.¹¹²

2. The outer sphere

Affects are not merely personal. They are situated in social, historical, cultural, and political processes, including epistemological ones. Epistemological processes concern the production and circulation of hermeneutical resources that enable the subject to make sense of the situation in which they find themselves, thereby rendering their affective

105. *Id.* at 1103.

106. *Id.*

107. Anna Marie D'Ginto, *The Birth Certificate Solution: Ensuring the Interstate Recognition of Same-Sex Parentage*, 167 U. PA. L. REV. 975, 1001-02 (2019).

108. Sanger, *Stillborn*, *supra* note 11, at 288.

109. *Id.* While Sanger highlights the *evidential* element accompanying this legal documentation and its relation to parental identification, I stress the constitutive role of this documentation. In that sense, issuing the birth certificate becomes a *medium*—a moment characterized by an affective encounter—by which parental identification is constructed.

110. Russell Spears, *Commenting on Continuity: A View from Social Psychology*, in SELF CONTINUITY INDIVIDUAL AND COLLECTIVE PERSPECTIVES 251, 254 (Fabio Sani ed., 2008)

111. Lyn Brierley-Jones et al., *Stillbirth and Stigma: the Spoiling and Repair of Multiple Social Identities*, 70 OMEGA 143, 144 (2015) (discussing how the stillbirth certificate operates as a form of memorialization in the experiences of mothers undergoing stillbirth in the U.K.).

112. I should clarify that I do not assert here that stillbirth birth certificates are the paramount issue for people experiencing stillbirth. Indeed, not all parents mourn or even miss their stillborn children, and those who do, do not live through the experience in the same manner. I also acknowledge that, for some, the way their religious community addresses the boundary between life and death might carry greater significance than whatever the state offers through administrative means. My aim is to emphasize the importance of issuing stillbirth birth certificates as a one valuable tool that can assist in navigating the ambiguous nature of this liminal space.

experience intelligible. When these resources are withheld by the law, this may result in epistemic subordination of the subject.¹¹³

In light of this dynamic, I demonstrate how the stillbirth experience—its affective dimension, in particular—is epistemically subordinated. This subordination operates in multidimensional ways, through day-to-day interactions between health service providers, friends and family, but also on the macro level where regulation, politics, and theory reside. Certain scenarios discussed in this section, such as friends hiding baby-shower artifacts or doctors shifting toward less-affective vocabulary, may not necessarily reflect epistemic subordination rather than care and sensitivity. However, the *accumulated* weight of such practices results in obscuring the stillbirth experience from collective understanding. It is crucial therefore to examine these scenarios in conjunction with one another and how they contribute, borrowing Miranda Fricker’s words, to “persistent and wide-ranging hermeneutical marginalization.”¹¹⁴

Stillbirth subjects are subordinated by the medical community, for example. Until the 1970s, individuals giving birth were not allowed to hold their baby if it died during delivery.¹¹⁵ Today, the true scale of the problem of stillbirth remains underestimated, due to inaccurate (or a lack of) public health recording and data.¹¹⁶ Individuals are also subordinated in their daily interactions with the medical community, as “any eagerly pregnant [individual] who has had an ultrasound knows that the doctor points out the baby’s hands, not the ‘fetus’s’ hands. ‘[B]ut when something goes wrong, the medical terminology is quickly redeployed’ And thus, after stillbirth, the technical medical characterization of ‘fetus’ appears.”¹¹⁷ This could be understood as form of subordination: the clinical response accommodates the pregnant person’s attachment to their would-be baby only when their experience corresponds with the hegemonic script of happiness.

Stillbirth subjects are further subordinated by friends and acquaintances who dismiss or deny the impact of this experience as if “nothing

113. Miranda Fricker conceptualizes this as “hermeneutical injustice.” MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 153–58 (2007). The section here draws on this concept and clarifies its application with regard to affect—an intersection that is currently at a nascent stage. See, e.g., Alicia García Álvarez, *Redefining the Wrong of Epistemic Injustice: The Knower as a Concrete Other and the Affective Dimension of Cognition*, 29 *INTERNATIONAL JOURNAL OF PHILOSOPHICAL STUDIES* 497 (2021); Francisco Gallegos, *Affective Injustice and Fundamental Affective Goods*, 53 *JOURNAL OF SOCIAL PHILOSOPHY* 185 (2022).

114. See Miranda Fricker, *Powerlessness and Social Interpretation*, 3 *EPISTEME* 96, 99 (2006).

115. Samantha Murphy & Joanne Cacciatore, *The Psychological, Social, and Economic Impact of Stillbirth on Families*, 22 *SEMINARS IN FETAL AND NEONATAL MED.* 129, 130 (2017).

116. Jill Wieber Lens, *Counting Stillbirths* 56 *U.C. DAVIS L. REV.* 525, 543 (2022).

117. Joanne Cacciatore & Jill Wieber Lens, *The Ultimate in Women’s Labor: Rethinking Feminism Around Pregnancy, Birthing, and Grieving a Dead Baby*, in *ROUTLEDGE INTERNATIONAL HANDBOOK OF WOMEN’S SEXUAL AND REPRODUCTIVE HEALTH*, 312 (Jane M. Ussher et al., eds., 2019). Cacciatore & Wieber are citing Victoria Browne, *Feminist Philosophy and Prenatal Death: Relationality and the Ethics of Intimacy*, 41 *SIGNS*, 387, 402 (2016).

happened.”¹¹⁸ As Layne discusses in her aforementioned study of stillborn parents, “[o]ne of the most frequent complaints voiced at pregnancy-loss support meetings is that . . . [a]ll evidence that a baby was expected (shower gifts, nursery furnishings) may be hidden away before the [individual] returns home from the hospital and all topics relating to pregnancy studiously avoided.”¹¹⁹ Another manifestation of this denial may be expressed even by those who do recognize the experience, when they attempt to minimize its consequences, saying, “You can always have another.”¹²⁰

Stillbirth is also epistemically subordinated by our language. Our vocabulary and the concepts and propositions it enables us to use are the means we deploy to understand ourselves and the world around us.¹²¹ Unlike words and labels that signal the changed status of the individual affected by the death of a loved one—a person who loses their spouse becomes acknowledged as a widow or widower, for instance, and a child who loses both parents is denoted an orphan—there is no single word in English to capture the status of a parent to a stillborn baby.¹²²

Stillbirth is also subordinated by some streams of feminist thought. Pregnancy loss has long been silenced out of a fear that “the ‘loss’ in this experience provides ammunition for the anti-abortion idea of fetal personhood.”¹²³ Here, the concern is that the stillbirth experience would be weaponized by the anti-abortion camp to interfere with individuals’ right to terminate their pregnancies. To protect abortion rights, the reproductive rights movement in the U.S. has simply avoided the issue of stillbirth. And many feminist and queer discourses have long sidelined the topic too,¹²⁴ questioning the idealization of childbearing and lamenting how it is imbued with hegemonic presumptions of kinship.¹²⁵ In Ahmed’s terms, children are “the cause of happiness, which mean[s] they already circulate as social goods before we happen upon them.” To clarify, it is neither the child nor the longing to bear a child that Ahmed is problematizing but how the *figure*

118. LAYNE, *MOTHERHOOD*, *supra* note 77, at 69.

119. *Id.*

120. *Id.*

121. Kristie Dotson, *A Cautionary Tale: On Epistemic Oppression*, 33 *FRONTIERS* 24, 29 (2012).

122. *Cf.* Sanger, *Stillborn*, *supra* note 11, at 288. It should be noted that terms like “grieving parent” are not typically associated with parents of stillborn babies. One counterargument is that creating a vocabulary to differentiate the situation from the death of a living child inherently falls into the trap of subordination.

123. Lens, *Counting*, *supra* note 116, at 538, n. 94.

124. I do not argue that this scholarly sidelining amounts to epistemic injustice, as there could be various reasons for this epistemic gap that have nothing to do with the experience of stillbirth. Yet, this gap is still worthy of attention as it may contribute to the overall subordination discussed above.

125. *See e.g.*, Judith Butler, *Is Kinship Always Already Heterosexual?* 13 *FEM. CULT. STUD.* 14 (2002) (rejecting the conflation of kinship and biology and asserting that biology creates no special enduring tie that is superior to other forms of kinship).

of the child subordinates those who “fail” to bear it.¹²⁶ What is even less spoken about, though, is how those who choose to realize this script of happiness, but fail to do so, are also subordinate under the same logic of this script.¹²⁷ Stillbirth parents are counted among these individuals, the “killjoy” subjects of this idealizing script, ushered away “behind closed doors.”

Finally, the law—in particular, its documentation for acknowledging a stillborn child, the fetal death certificate—is another means in which the stillbirth is epistemically subordinated. Our affective states, to borrow Kamari Maxine Clarke’s words, become the *bridge* that connects us to certain “biopolitical strategies”¹²⁸ and “competing interpretations of justice.”¹²⁹ Indeed, the affective nature of the law comes into effect not only when it actively intervenes in our lived experience but also when it remains silent regarding that experience. While, for many parents, a birth certificate is an innocuous, taken-for-granted piece of paper, for stillbirth parents, it is the means by which the world formally acknowledges a devastating experience with “dignity and validation.”¹³⁰ By issuing a birth certificate, the law not only provides “acknowledgement of their child’s birth and existence beyond his death”¹³¹ but also *mitigates* the subordinated silence accompanying their experience that materializes them,¹³² the stillborn parents, as the “killjoy” subjects.

Yet, as much as this legal documentation embraces the stillbirth parents’ affective embodiment—their emotional experience and states of being—it may also inform the affective embodiments of others. The potential to *affect and be affected* may not be anticipated in advance, especially when the traditional lines of death and life are removed. This requires us to consider the potential drawbacks of this legal response, beyond the narrow context of the U.S.

126. LEE EDELMAN, *NO FUTURE: QUEER THEORY AND THE DEATH DRIVE*, 1-11 (2004).

127. Sheri McClure, *Grieving in Silence: Repercussions of the Family Ideal on Women with Pregnancy Loss Mother*, in *MOTHERS WITHOUT THEIR CHILDREN*, 203 (Charlotte Beyer et al., eds., 2019).

128. CLARKE, *AFFECTIVE JUSTICE*, *supra* note 69, at 5.

129. *Id.* at 33.

130. Consider the statement of Cacciatore, who initiated the struggle to establish the stillbirth birth certificate: “[I]t’s dignity and validation . . . It’s the same reason why [a person] want[s] things like marriage licenses and baptismal certificates.” Tamar Lewin, *Out of Grief Grows Desire for Birth Certificates for Stillborn Babies*, N.Y. TIMES (May 22, 2007) <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9E07E0DC1F31F931A15756C0A9619C8B63.html> (last visited Jan. 10, 2023).

131. Lens, *Justice*, *supra* note 11, at 1110.

132. I acknowledge that issuing a stillbirth birth certificate, in and of itself, may not diminish the hermeneutical injustice discussed above. Nonetheless, it is a significant step toward recognizing and validating the loss of stillbirth children. This legal initiative could be complemented by mindful clinical and funeral practices.

C. Potential Pitfalls

1. A compulsory affective state

The first pitfall of issuing birth certificates for stillbirths on a widespread scale is that it would potentially generate expectations of specific affective states or reactions under similar circumstances. The concern here, as Carol Sanger observes, is that this possibility not only *informs* of the option to receive that document but can also “*suggest* what suffering parents of stillborn children need (or are supposed to need).”¹³³ What troubles Sanger is not so much the expectation of engaging in a certain pattern of bereavement, which could include the stillbirth birth certificate as one among other “artifacts of mourning,”¹³⁴ but the fact that this expectation becomes *institutionalized*, set by the state.¹³⁵ Understood this way, mourning would become compulsory.

Grief is only one way to experience the premature ending of a pregnancy: it is not always spontaneous or undesired. And, even where the pregnancy *does* spontaneously end before term, it could still invoke sensations that have nothing to do with grief, such as peace of mind that stems from a sense of relief. These sensations could be linked to myriad considerations, *inter alia*, a lack of desire to have a child, a self-perceived or financial inability to raise one, feeling overwhelmed or anxious about the prospect of becoming a parent, medical factors that prevent pregnant people from making their own decisions, religious or cultural concerns (for example, if the pregnancy was a result of infidelity), changes in the relationship with the other anticipated parent, or worries over the health of the child.¹³⁶ The normalization and even reification of grief can devalue the diverse ways in which we experience the world. The very process of normalization (re)creates an *affective dissonance*, a gap between what the subject “should” be expressing (grief) and what they actually *are* expressing.¹³⁷

This concern is not exclusive to the question of the stillbirth birth certificate. Consider the debate around whether the state should provide paid bereavement leave for employees who suffer a miscarriage. The potential unintended consequence, as Gillian Calder articulates, is that this regulation might not only mediate or script a narrative of grief but even compel it.¹³⁸ The outcome, though, may be divorced from the reality of the legal subject who wishes to take advantage of the sought-after recognition

133. Sanger, *Stillborn*, *supra* note 11, at 300.

134. *Id.*

135. *Id.* at 286-87.

136. Cf. Maggie Kirkman, *Reasons Women Give for Abortion: A Review of the Literature*, 12 ARCHIVES OF WOMEN'S MENTAL HEALTH 365 (2009).

137. Cf. *supra* notes 105-106 and accompanying text, specifically the dissonance described there.

138. Gillian Calder, *Legislating Emotion, Reading Grief: Bereavement Leave for Miscarriage and Stillbirth in New Zealand Law* 45 DALHOUS. L.J. 335, 347 (2022).

(paid bereavement leave), especially in circumstances where they *choose* to terminate the pregnancy.¹³⁹

It may be that this “compulsory” affective state becomes noticeable in each emotionally-laden context, where, as Clare Huntington reminds us, “the state is privileging and emphasizing one set of emotions over another.”¹⁴⁰ This brings to mind the calls from certain legal scholars against the recognition of same-sex marriage, out of a fear it would generate a normative preference that renders the marital bond all but compulsory for all who are eligible to it.¹⁴¹ Indeed, affect is a force that exists everywhere: “it only becomes noticeable when its modalities shift.”¹⁴²

Against this backdrop, I consider these concerns—about the potential for creating compulsory affective states—to be a particular derivation of the traditional double edge of legal recognition. The essence of this dilemma is that asking the state for recognition could unwittingly fortify certain expectations of how the rights-based subject should behave. The double edge is that the sought-after recognition may turn into obligation. The most problematic feature here, in my view, is less about whether the recognition creates a template for certain expressions and more about the extent to which the recognition would restrict or devalue *other* modalities of life, expression, and being in the world.¹⁴³ This concern is bound up in the two potential pitfalls discussed next.

2. Moral exclusion

The second pitfall relates to another group of individuals, those who experience miscarriage. Opening the door to the stillbirth birth certificate leaves this other form of spontaneous pregnancy loss outside the scope of official recognition. Yet, are we to assume that the pain of a person who undergoes a spontaneous miscarriage is any less (or less deserving of acknowledgment) than that of the stillbirth parent?

Some research even demonstrates that the emotional experience of loss may be intensified in the case of early miscarriage because “there is no visible *thing* to mourn.”¹⁴⁴ As numerous studies demonstrate, “the

139. *Id.* at 352. This is not to say that people who choose to abort may *not* experience grief. Rather, this example aims to demonstrate the limitations of the expected narrative of grief that the law evokes.

140. Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1136 (2010).

141. Elizabeth Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 29, 277 (2004).

142. JONAS BENS ET AL., THE POLITICS OF AFFECTIVE SOCIETIES: AN INTERDISCIPLINARY ESSAY, 108 (2020).

143. This restriction may be manifested *covertly*. Returning to the example of same-sex marriage, the concern echoed by legal scholars is that the right to marry becomes a surveillance device through which intimate practices fall under the scrutinizing eye of the state. This surveillance operates through a set of roles and responsibilities—all of which manage the sexual practices of rights-based subjects. Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685 (2008).

144. ALLEN MARIE & SHELLY MARKS, MISCARRIAGE: WOMEN SHARING STORIES FROM THE HEART, 15-16 (1993).

[individual] needs to mourn their baby, even if it never moved inside [them] and was only a tiny embryo or a cluster of cells.”¹⁴⁵ If we take the position that the potential birth certificate would seek to moderate beneficially the affective state of the stillbirth parent, why would it exclude miscarriage from its scope? The concern here is that, by excluding this other form of spontaneous early pregnancy loss from the scope of this entitlement, the law would be rendering other individuals’ losses unintelligible and ungrievable.

There are several possible responses to this concern. To begin with, there is the argument that the experiences of miscarriage and stillbirth are *physically* distinct. On the whole, miscarriage does not involve childbirth and its physical aftermath.¹⁴⁶ A birth certificate—by virtue of its linguistic definition—pertains to the act of delivering a child. Further, stillbirth, as opposed to miscarriage, requires parents to endure the further distress of a cremation or burial, meaning that issuing a birth certificate in the case of a miscarriage could devalue this particularly traumatic feature of a stillbirth.¹⁴⁷

Yet, such responses, in and of themselves, sustain the same constellation of oppression that the stillbirth birth certificate sought to challenge in the first place. They differentiate between specific scenarios of loss based on whether the pregnancy loss involves a *physical* aspect (i.e., delivery) or an external *tangible* action (i.e., burial). By focusing on these components, such responses devalue and marginalize the ineffable and visceral aspects of our embodiments. And doing so incurs the risk of hierarchizing the precariousness that is embedded in pregnancy loss, thereby imposing an order that determines whose vulnerability should receive greater acknowledgment by the state.¹⁴⁸

Irrespective of whether we find any of these responses persuasive, we need to recognize that any legal intervention with regard to formalizing the identification of a parent of a stillborn child needs to draw some line vis-à-vis the stage of gestation.¹⁴⁹ Indeed, there may be little discernable difference between an individual who miscarries at 19 weeks and an individual who delivers a stillborn child at 21 weeks—both may perceive themselves as parents, and, in both cases, a failure to issue a birth certificate may result in an affective dissonance for them.¹⁵⁰ Yet, the subjective timeline is not the legal timeline. The lines and thresholds that an individual sets for themselves—how *they* recognize and experience their pregnancy

145. Paula Gerber-Epstein et al., *The Experience of Miscarriage in First Pregnancy: The Women’s Voices*, 33 DEATH STUD. 1, 4 (citing several studies indicating these findings).

146. Lens, *Justice*, *supra* note 11, at 1108, n. 386.

147. Cacciatore & Wieber, *Women’s Labor*, *supra* note 117, at 311.

148. JUDITH BUTLER, NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY 118-19 (2015).

149. Jurisdictions draw different dividing lines between miscarriage and stillbirth. *See supra* note 73.

150. *See supra* notes 104-106 and accompanying text.

journey—may not be those imposed by the law. This discrepancy is not exclusive to the context of pregnancy: the law is grounded in certain time logics that, being designed to secure uniformity and certainty, may leave subjective accounts outside its scope.¹⁵¹

3. *Personhood and the fetus*

The third pitfall touches on “the elephant in the room” regarding the jurisprudence surrounding stillbirth: abortion rights. Abortion-rights advocates have resisted legislative attempts at the U.S. state level to issue the stillbirth birth certificate,¹⁵² out of a concern that doing so for a child who has never lived outside the body of its parent “may serve as yet another legal marker equating fetal life with that of born persons.”¹⁵³

The concept of *affective transmission* can help us appreciate the tangibility of this concern. Affects, as Ahmed contends, have a “life” of their own. And, given that affects, such as pain, sorrow, and grief, circulate and exchange between objects, they gain a cultural value that exceeds any one discrete affective expression.¹⁵⁴ When this affective transmission is intensified by the law governing birth, in particular, it becomes risky because, Carol Sanger warns, “abortion politics have an uncanny habit of shimmying into law in unexpected places.”¹⁵⁵ The concern, in that sense, is that the jurisprudence of stillborn birth certificates may become another *affective medium* through which anti-abortion politics is operated and intensified, eventually reverberating throughout regulatory avenues.¹⁵⁶ Indeed, the political strategy followed by the anti-abortion lobby has long been recorded as grounded on the circulation of the fetal personhood narrative, as evidenced through multiple regulatory attempts to assign fetuses rights in different contexts¹⁵⁷ that *ostensibly* have nothing directly to do with the right to abort.¹⁵⁸ The concern, in that sense, is that the needs, rights, and claims of stillbirth parents become weaponized in a larger

151. Noy Naaman, *Timing Legal Parenthood*, 75 ARK. L. REV. 59, 60-64 (2022).

152. Joanne Cacciatore & Suzanne Bushfield, *Stillbirth: A Sociopolitical Issue*, 23 AFFILIA 378, 382-84 (2008).

153. Sanger, *Stillborn*, *supra* note 11, at 305.

154. Ahmed, *Affective Economies*, *supra* note 40, at 119.

155. Carol Sanger, *The Lopsided Harms of Reproductive Negligence*, 118 COLUM. L. REV. ONLINE 29, 46 (2017).

156. “Affective medium”, as a concept, refers to a site through which the *affective nature*-specific narrative (or politics) takes place. This concept is used in communication studies. *See, e.g.*, WEIHONG BAO, FIERY CINEMA: THE EMERGENCE OF AN AFFECTIVE MEDIUM IN CHINA 1915–1945, 5-6 (2015).

157. The major examples are drug policies or statutes criminalizing maternal conduct. For further reading on this form of regulation, *see* Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781 (2014).

158. Kenneth De Ville & Loretta Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 334-35 (1999) (“the redefinition by the legislature of ‘fetus’ into ‘child’ is consistent with the grand strategy of pro-life advocates . . . [t]he selection and use of terms such as ‘unborn child’ and ‘expectant mother,’ then, have more than symbolic importance. They have practical, rhetorical, and political power as well”).

political game.

This concern is not remote. Recent years have witnessed a growth trend in the U.S. states issuing “memorial certificates” to honor pregnancies lost even soon after conception. In 2017, Florida was the first state to issue a “Certificate of Nonviable Birth” for individuals who suffer miscarriage between weeks 10 and 20 of their pregnancy.¹⁵⁹ Next was Nebraska, which issued a commemorative birth certificate for “non-viable births” without requiring a minimum gestation period.¹⁶⁰ Oregon permitted the issuance of a “Commemorative Certificate of Stillbirth,” without even defining how it classifies a stillbirth.¹⁶¹ These legislations were supported by anti-abortion rights groups for “recognizing the dignity and humanity of the unborn at the earliest stages of development.”¹⁶² The circulation of the fetal personhood narrative went a step further in the State of Georgia, where the Department of Revenue recently declared that people who undergo *miscarriage* will be entitled, by law, to a tax deduction.¹⁶³ Such gestures toward extending the recognition of fetuses as having full personhood should be taken seriously, not least because of their potential to inform judicial decision-making regarding abortion rights. One recent example, in this regard, is that of Justice Alito’s opinion in *Dobbs v. Jackson Women’s Health Organization*,¹⁶⁴ which took away the constitutional right to abort: crucially, while not adopting a position recognizing fetal personhood,¹⁶⁵ the opinion did include hints that the ruling was persuaded by this position.¹⁶⁶

Given this normative status quo, can we accede to fetal value without simultaneously eroding abortion rights? Does legally acknowledging the stillbirth parents’ affective embodiment inevitably come at the price of

159. FLA. STAT. ANN. § 382.0086 (2022) (“For any nonviable birth in this state, the department shall issue a certificate of nonviable birth within 60 days upon the request of a parent named on the registration of nonviable birth.”). Christine Sexton, *Florida Becomes First State to Offer Certificates of ‘Nonviable Birth’ in Cases of Miscarriage*, POLITICO (May. 31, 2017), <https://tinyurl.com/5n77tjet> (last visited Jan. 10, 2023).

160. NEB. REV. STAT. ANN. § 71-607 (1)(a) (2018) (“A health care practitioner . . . shall advise a patient who experiences a nonviable birth that the patient may request a commemorative certificate as provided in this section”).

161. OR. REV. STAT. § 432.148 (1)(a) (2013) (“The State Registrar of the Center for Health Statistics shall establish a Commemorative Certificate of Stillbirth. The certificate shall be signed by the state registrar”).

162. Nate Grasz, *Press Release: LB1040 Takes Effect, State-Issued Commemorative Birth Certificates for Miscarriages Now Available in Nebraska*, NEBRASKA FAMILY ALLIANCE (Jul. 12, 2018) <https://nebraskafamilyalliance.org/press-release-miscarriage-birth-certificate/> (last visited Jan. 10, 2023).

163. Ava Sasani, *Georgia Abortion Law Says a Fetus Is Tax Deductible*, N.Y. TIMES (Aug. 4, 2022), <https://www.nytimes.com/2022/08/04/us/georgia-abortion-law-fetus-tax-dependent.html> (last visited Jan. 10, 2023).

164. 19-1392597 U.S. 1-108, 142 S. Ct. 2228 (2022).

165. *Id.* at 38 (“Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth”).

166. *Id.* at 22 (citing with approval “to many purposes, in reference to civil rights, an infant *en ventre sa mere* is regarded as a person in being”). See Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1694 (2022).

sustaining the far-reaching fetal *personhood* narrative? In other words, how can we reconcile the disagreement between the regulation of *unplanned* pregnancy loss (advocated by stillbirth parents) and *planned* pregnancy-interruption (advocated by the pro-choice camp)? Can we hold both tensions? Both sides are representing the voices, experiences, and needs of pregnant people. Neither is more valid. Neither is more right. So, is there a way to *read alongside* the divisive feminist split around the stillbirth birth certificate from a place of reparative sensibility?¹⁶⁷

Framing the conversation around, and in the language of, individuals' authority over their reproductive autonomy could be a starting point for that purpose. Consider the suggestion offered by Greer Donley and Jill Lens. They distinguish between fetal personhood (underlying pro-life politics) and attachment to the fetus (underlying stillbirth parents' politics).¹⁶⁸ While the former is "innate, biological, and fixed at conception in every pregnancy" (and is thus universal), the latter is "subjective and relational." That is, attachment varies from person to person, depending on their unique circumstances.¹⁶⁹ Focusing on the subjective experiences of different people is a form of *reading alongside* the disagreement. It shifts the conversation from a "hermeneutics of suspicion,"¹⁷⁰ the fear of how individuals' emotional experiences can be weaponized by the anti-abortion lobby, to how the recognition of individuals' attachment to the fetus they have carried could strengthen, rather than undermine, the meaning of reproductive autonomy. Donley and Lens's suggestion cultivates a new way of thinking about reproductive autonomy, expanding it from a concept reduced to the *choice* in the experience of pregnancy to a concept that also embraces other affective states, such as emotional attachment, ineffable feelings, and bodily sensations involved in this experience of pregnancy and its spontaneous premature ending. Adopting this perspective enables us to envision a reproductive-rights politics that expands its focus from strictly *bodily* authority to include *affective* authority as well. Cultivating our awareness of this distinction could advance a more inclusive and holistic approach toward reproductive autonomy—reproductive *affective* justice—that is more attentive to the rich affective nature of the moral dilemma under consideration.¹⁷¹

The quest for new ways to approach the contestation around pregnancy-

167. See *supra* notes 55-58 and accompanying text.

168. Donley & Lens, *Personhood*, *supra* note 166, at 22. Indeed, the narrative of attachment to the *fetus* (rather than the "unborn" advanced by stillbirth advocates) could be understood as another form of epistemological subordination.

169. *Id.* at 33.

170. SEDGWICK, *TOUCHING*, *supra* note 56, at 139-40. Sedgwick's reparative reading draws on Paul Ricoeur's notion of the "hermeneutics of suspicion," presented in *FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION* (1965), which became a dominant mode of literary and cultural criticism.

171. This holistic approach to reproductive autonomy is further advanced throughout the analysis of posthumous assisted reproduction. See *infra* note 324 and accompanying text.

termination is acute, now more than ever. In the post-Dobbs era, where pregnant individuals' reproductive autonomy is increasingly threatened,¹⁷² it is not only those individuals who elect to terminate their pregnancies who are more vulnerable to criminalization but also those who non-voluntarily *lose* their pregnancies.¹⁷³ In the latter case, they are now more likely to face (unwarranted) suspicion of having performed a self-managed abortion.

Indeed, note how blurring the borderland between life and death impacts not only the legal subject in question but also the collective—its politics, in particular. This frontier space was once unequivocal and non-negotiable (because the law rendered it so), and, in that sense, straightforward; but now, its ambiguity renders it complex and fraught. The following Part extends this inquiry by shifting the focus from stillbirth to considering what is at stake in the context of conceiving a child posthumously.

III. POSTHUMOUS ASSISTED REPRODUCTION

A. Socio-Legal Background

Posthumous assisted reproduction (PAR), the use of the gametes of a deceased person to conceive a child, is morally contested.¹⁷⁴ Creating life from the dead disrupts one of the most essential conventions of human

172. Several states passed so-called “trigger” laws to ban abortion automatically once *Roe* was overruled. Other states indicated an intention to prohibit abortion, while others amended their constitutions to make clear that no state provision protects abortion. David S. Cohen, Greer Donley, & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV 6 (forthcoming, 2023).

173. Individuals experiencing a spontaneous and premature termination of pregnancy may find themselves entangled in the enforcement of abortion laws. See Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 321 (2013) (documenting that in sixty-eight cases, women who experienced miscarriage, stillbirth, or infant death faced homicide charges).

174. This practice may take place in cases where the gametes of the deceased were frozen, with their permission, while they were still alive—for instance, a cancer patient who undergoes a treatment that will affect their future fertility. In other cases, the gametes, usually sperm, are retrieved postmortem from the body of the deceased shortly after their death (usually on the basis that they gave their consent, be it explicit or implicit, in life) and stored for posthumous reproductive purposes. For further information on this practice, see Mima Mahmoud et al., *Request for Posthumous Fatherhood with Perimortem Surgical Sperm Retrieval*, in ASSISTED REPRODUCTION TECHNIQUES: CHALLENGES AND MANAGEMENT OPTIONS, 565, 565-67 (Khalidoun Sharif & Arri Coomarasamy, eds., 2021). The difference between sperm- and egg-retrieval can be explained in both medical and cultural terms. From a medical perspective, posthumous sperm retrieval, compared to the posthumous retrieval of ova, is a relatively simple and speedy procedure. See Lisa Campo-Engelstein, *Ethics of Posthumous Reproduction*, in TEXTBOOK OF ONCOFERTILITY RESEARCH AND PRACTICE: A MULTIDISCIPLINARY APPROACH, 376 (Teresa K. Woodruff et al., eds., 2019). Studies have shown that men are more inclined to approve of their partner using their gametes posthumously to conceive a child. Stéphanie Côté et al., *Posthumous Reproduction With Surplus in Vitro Fertilization Embryos: A Study Exploring Users’ Choices*, 102 FERTIL STERIL, 1410 (2014). Further, the difference between sperm- and egg-retrieval can also be explained by the predominant cultural expectation that women are the primary caregivers of children and that men’s interests are narrower and reduced to procreation. Yael Hashiloni-Dolev & Silke Schicktanz, *A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins-of-Life Perspectives*, 4 REPROD. BIOMED. SOC. ONLINE 21, 27 (2017).

being. This practice restores the “natural” course of family continuity,¹⁷⁵ enabling the deceased to become a “parent” but thereby creating what Ruth Landau refers to as a “planned orphan,” with all its negative connotations.¹⁷⁶ Another tension is the lack of clarity around the deceased’s consent to retrieve and use their gametes, as people typically do not give prior explicit consent or even talk about this possibility before they die.¹⁷⁷

Given these moral tensions, certain countries have banned PAR.¹⁷⁸ Some countries, such as New Zealand,¹⁷⁹ the U.K.,¹⁸⁰ and British Columbia,¹⁸¹ permit this practice only if the deceased gave their *written* consent prior to death, known as a biological will. In others, including the U.S.,¹⁸² Australia,¹⁸³ and Israel,¹⁸⁴ verbal consent or consent inferred from conduct can fulfill this criterion.

When it comes to evaluating intent posthumously, Israel goes one step further. The Israeli directive stipulates that, in the absence of written instructions left by the deceased, a man who lives with a woman in an intimate relationship is *presumed* to wish to have his widow carry his child after his death.¹⁸⁵ On this *presumed wish* premise, widows in Israel find it relatively easy to obtain permission for PAR.¹⁸⁶ Furthermore, although the

175. Yael Hashiloni-Dolev & Zvi Triger, *The Invention of the Extended Family of Choice: The Rise and Fall (to date) of Posthumous Grandparenthood in Israel*, 39 NEW GENET. SOC., 250, 251-2 (2020).

176. Ruth Landau, *Planned Orphanhood*, 49 SOC. SCI. MED. 185, 188 (1999).

177. Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 905 (1997). Gulam Bahadur, *Ethical Challenges in Reproductive Medicine: Posthumous Reproduction*, 1226 INT. CONGR. SER. 295, 296 (2004).

178. Simana, *Life*, *supra* note 4, at 331.

179. Nicola Peart, *Life beyond Death: Regulating Posthumous Reproduction in New Zealand*, 46 VIC. UNIV. WELLINGT. L. REV. 725, 729 (2015).

180. Emily Jackson, *The Right to Procreate and Assisted Reproductive Technologies in Europe*, in THE OXFORD HANDBOOK OF COMPARATIVE HEALTH LAW, 999-1000 (David Orentlicher & Tamara K. Hervey, eds., 2020) (“In the absence of written consent, it would be unlawful to use the gametes in the U.K. and impossible to export them without the consent of the HFEA [The Human Fertilisation and Embryology Authority]”). Yet, it seems there is ambiguity in this regard. HEATHER CONWAY, THE LAW AND THE DEAD 173 n. 83 (2016) (arguing that “[t]here appears to be no legal precedent for this in the UK”).

181. Assisted Human Reproduction Act, SC 2004, c 2, s. 8(2); Assisted Human Reproduction (Section 8 Consent) Regulations, SOR/2007-137. *L.T. v. D.T. Estate*, 2020 BCCA 328 (CanLII) (ruling against the widow who requested permission to use the sperm of her deceased husband in the absence of his informed, written consent to such use).

182. Simana, *supra* note 4, at 333.

183. Amy Thomasson & Marco Rizzi, *Consent in Posthumous Reproduction: Giving the Deceased a Voice Without Drowning out the Living in Cases of Unexpected Death*, 48 U.W. AUSTL. L. REV. 557, 557-8 (2021).

184. Guideline N° 1.2202: Retrieving Sperm Postmortem and Its Use, MINISTRY OF JUSTICE GUIDELINES OF THE ATTORNEY GENERAL OF THE GOV'T (2003).

185. *Id.* § 11. For the sake of simplicity, in this Article, the term *widow* is used to refer to the surviving female partner (married or not) of a deceased man. Similarly, the term *husband* or *widower* is applied to a women’s male partner, regardless of their marital status.

186. Hashiloni-Dolev & Triger, *Extended Family*, *supra* note 175, at 252. Compared to widows, widowers may encounter greater difficulty obtaining permission for PAR. Under Israeli law, the use of eggs derived from a deceased woman is only permitted with her prior written consent and in the presence of a physician. See People’s Health Regulations (In Vitro Fertilization), 5739–1979, KT 3996, 10(d) & 14 (c)(a)(Isr.). This restriction also applies to married women: a widower cannot use the eggs

directive excludes the deceased's parents from pursuing this option,¹⁸⁷ in practice, their requests to conceive their late son's sperm *have* been approved by courts.¹⁸⁸ This approval has sometimes been granted against the widow's wish not to have her dead husband's sperm used for this purpose.¹⁸⁹

Unsurprisingly, this lenient approach to evaluating intent posthumously incites intense clashes between the primary stakeholders—the deceased parent, the widow, and the state. Here, I examine what is at stake when the traditional line between life and death is partially erased in the judicial process of determining the deceased's intent. To this end, I will now identify and appraise two narratives embodied in this jurisprudence: *intersubjective mourning* and *repronormative widowhood*.¹⁹⁰ Analysis of the affective nature of this jurisprudence aims to provide a more nuanced understanding of the competing positions in this contested terrain, its discursive and material implications in particular. The relationship between these narratives—how they intersect and inform each other—is clarified throughout the analysis.¹⁹¹

B. Intersubjective Mourning

1. Posthumous human reproduction and mourning

Death evokes intense emotional responses, to which the bereaved needs to adjust gradually. Adjustment to this threshold-moment in the cycle of life and death includes an array of ritual practices—among them, burial or cremation, funeral ceremonies,¹⁹² and practices designed to commemorate

of his deceased wife posthumously without her explicit written consent in life. *Id.* § 10(c)(2). This disparity is yet another way by which the law constructs mothers as the primary caregivers of children, in contrast to fathers, who are constructed as instrumental providers. See Karin Carmit Yefet, *Feminism and Hyper-Masculinity in Israel: A Case Study in Deconstructing Legal Fatherhood*, 27 YALE J.L. & FEMINISM 47, 50 (2015).

187. AG Guidelines, *supra* note 184, §§ 20-21. Note that, in 2012, a government committee published a report making several recommendations regarding the use of PAR, among other reproductive practices. This report approved most of the AG Guidelines, including that which excludes parents from using their deceased son's sperm. Ministry of Justice, RECOMMENDATIONS OF THE PUBLIC COMMITTEE FOR THE REGULATION OF FERTILITY AND REPRODUCTION IN ISRAEL, 43-51 (May 2012), <https://www.health.gov.il/PublicationsFiles/BAP2012.pdf> (last visited September 7, 2022) [Hebrew].

188. The court is not obligated by these directions.

189. See *infra* notes 305-321 and accompanying text.

190. I analyzed all court decisions regarding PAR, through the two most widely-used legal databases: Nevo and Takin. In total, I collected 16 cases, representing various court opinions from Family (14 cases), District (6 cases), and Supreme (5 cases) Courts. Since PAR cases fall under the jurisdiction of the Family Courts, not all existing cases can be accessed, as, by law, Family Court cases are not made public. Therefore, only cases that judges chose to publish, after redacting the personal information of the parties, are available in databases. To the best of my knowledge, as of 2020, there were approximately 30 cases in Israel (*cf.* Dolev & Triger, *Extended Family*, *supra* note 175, at 267, n. 5). As Israel is a common-law jurisdiction, the published law reflects the law in action, and therefore these data provide us with a relatively reliable picture regarding PAR.

191. See *infra* notes 285-289 and accompanying text.

192. Huijbertha Mitima-Verloop et al., *Facilitating Grief: An Exploration of The Function of*

the legacy of the dead,¹⁹³ such as circulating the names and photos of the loved one or sharing affectionate stories about them.¹⁹⁴ While these practices help the mourner to manage their own emotional responses, they also transcend the individual psyche as they bridge the gap between the living and the dead.¹⁹⁵

Understood within this context, PAR could be considered, as Shai Levi suggests, “a modern practice of mourning”¹⁹⁶ in Israel, whereby the living family seeks to perpetuate “the intergenerational cycle of life followed by death followed by new life.”¹⁹⁷ According to Levi, when a *childless* person dies, this cycle is interrupted, and it is “the duty of the living toward the dead to complete the cycle,”¹⁹⁸ allowing the continuation of their genetic lineage. From this perspective, PAR is less about modulating the affected state of the mourner and more about articulating a reciprocal relationship between the living and the dead by enabling the former to fulfill their duty toward the latter.¹⁹⁹

To understand the *scope* of the duty to heal the broken intergenerational cycle of life in Israel, we should foreground its cultural setting. While genetic continuation is a universal motivation,²⁰⁰ its place within Israeli-Jewish society, as one of the most pro-natalist societies in the world,²⁰¹ entails unique meanings. The genetic-centric characteristic of this society is grounded in the history of the Jewish people (chiefly the Holocaust),²⁰² religious principles (the Jewish order (*halakha*) to “be fruitful and multiply”),²⁰³ and the demographic race between Jews and Arabs.²⁰⁴ Israeli-Jewish society views reproduction as a “civil duty,” to the extent that having

Funerals and Rituals in Relation to Grief Reactions, 45 DEATH STUD. 735-36 (2021).

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

194. Cybele Blood & Joanne Cacciatore, *Parental Grief and Memento Mori Photography: Narrative, Meaning, Culture, and Context*, 38 DEATH STUDIES 224 (2014).

195. Kathryn J. Norlock, *Real (and) Imaginal Relationships with the Dead*, 51 J. VALUE INQUIRY 341, 343 (2017); Becky Millar & Pilar Lopez-Cantero, *Grief, Continuing Bonds, and Unreciprocated Love*, SOUTH. J. PHILOS. 1, 2-3 (2022).

196. Shai Lavi, *The Mourning After: Posthumous Sperm Retrieval and the New Laws of Mourning*, in LAW AND MOURNING 36, 49 (Austin Sarat, Lawrence Douglas, & Martha M. Umphrey, eds., 2017).

197. *Id.* at 48.

198. *Id.* at 52.

199. Yet, of course, the two elements are inseparable. Fulfilling the duty toward the deceased has a rehabilitative dimension, from the perspective of the mourner.

200. Asa Kasher, *Life in the Heart*, 8 J. LOSS TRAUMA 247, 248 (2003).

201. Israel has the highest fertility rate among the states associated with the Organization for Economic Co-operation and Development (OECD). See *Society at a Glance 2019*, OECD, (Mar. 27, 2019), <https://www.oecd.org/social/society-at-a-glance-19991290.htm> (last visited Jan. 10, 2023).

202. Yoram Carmeli & Daphna Birenbaum-Carmeli, *Ritualizing the Natural Family: Secrecy in Israeli Donor Insemination*, 9(3) SCI. AS CULTURE, 301, 305 (2002). The ethos is viewed as a collective effort to “recover” from the near-extinction of the European Jewish population.

203. JACQUELINE PORTUGESE, FERTILITY POLICY IN ISRAEL: THE POLITICS OF RELIGION, GENDER, AND NATION (1988).

204. Nira Yuval-Davis, *Women and the Biological Reproduction of “The Nation,”* 7 WOMEN’S STUD. INT’L F. 17, 19 (1996).

children is key to social belonging.²⁰⁵

It is in the context of reproduction as a civic duty, then, that I have come to consider PAR a form of *intersubjective mourning*—that is, an expression of an affective state experienced not only individually, by bereaved family members, but also by the wider collective. Seeking PAR is a way of mourning the loss of potential that the deceased—in particular, their genetic continuity—represents for the historical, religious, and political aspects of the collective. That is, this potential extends beyond the immediate family unit. I advance the principle of *affective transmission*—where the subjective affective state becomes the object of others’ affective responses by circulating beyond and between subjects.²⁰⁶ To this end, in the next section, I deploy textual analysis of judicial cases dealing with PAR where no written consent was left by the deceased.²⁰⁷

The judicial cases presented here are used not merely as a *research platform* to consider the appearance of affect and its normative implications. They are also a *discursive medium* through which affects are transmitted.²⁰⁸ Indeed, as Greta Olson reminds us, individual and collective senses of legal identities (but, also, I will add, values and perceptions) are negotiated “through interactions with medially imparted narratives”²⁰⁹ This is especially true for judicial cases, their factual aspects, and rights-based rhetorics, which are a form of cultural production that exerts a powerful influence on the public imagination.²¹⁰

2. *The affective transmission of mourning*

Consider *Shahar*, one of the precedent decisions in the Israeli jurisprudence surrounding PAR. This case concerns Omri Shahar, a 25-year-old man killed in a car accident while on military duty.²¹¹ A few hours after his death, Omri’s parents petitioned the Family Court to retrieve their deceased son’s sperm from his body. Following Family Court approval, Omri’s sperm was duly extracted, frozen, and stored in the hospital.²¹² A year later, his parents appealed to a Family Court requesting permission to

205. Daphna Yeshua-Katz, *Childless in an IVF-Nation: Online Stigma-Coping Strategies in Support Groups for Childless Israeli Women*, 21 (10) INF. COMMUN. SOC. 143, 145 (2017).

206. See *supra* note 40-44 and accompanying text.

207. For the value of engaging with affect theory through discursive analysis, see Cate Poynton & Alison Lee, *Affect-ing Discourse: Towards an Embodied Discourse Analytics*, 21 SOCIAL SEMIOTICS 633, 633 (2011).

208. Cf. James Ash, *Technology and Affect: Towards a Theory of Inorganically Organised Objects*, 84 EMOTION, SPACE AND SOCIETY 84, 88 (2015). This proposition offers another nexus—a methodological one—at which affect and the law may intersect.

209. Greta Olson, *Introduction* in THE TURN TO PASSION IN LAW AND LITERATURE 21 (2022).

210. See e.g., Yofi Tirosh, *Just Another Rape: On the Politics of Textual Representation in Cr.A. 3031/98 The State of Israel v. Shabtai*, 31(3) HEBREW UNIVERSITY LAW REVIEW, 579 (2001) [Hebrew].

211. FamC (Family Court Petah Tikva) 16699-06-13 *Shahar v. Attorney General* § 1, Nevo (Sep. 27, 2016) (Isr.).

212. *Id.* § 1.

conceive a child using that frozen sperm and a donated egg, with the assistance of a surrogate,²¹³ and to become “de facto parents” of the resulting child.²¹⁴ Omri’s widow actively supported the parents’ claim.²¹⁵ But the Attorney General objected to their request, arguing, *inter alia*, that this method of conception violates the Israeli Surrogacy Law, according to which a child must be brought up by at least one living genetic parent.²¹⁶

In support of the parents’ position, the Family Court highlighted the role of posthumous reproduction in helping bereaved parents deal with their grief. It held that their request should be approved, particularly as “Israel is a pro-natalist country that encourages birth, particularly for grieving mothers, for whom becoming pregnant is considered rehabilitative.”²¹⁷ The affective nature of conceiving a child posthumously was manifested by the bereaved mother, who testified that bringing the dead son’s child into the world would be “a rehabilitative act”²¹⁸ and “would bring life into the home.”²¹⁹ Further, the judge underscored that the sorrow of the deceased’s mother touched “on the most exposed nerves of Israeli society, known for wars and disasters, which, unfortunately, are no strangers to bereavement and grief.”²²⁰ Ahmed’s understanding of affective transmission between the inner and outer aspects of our social lives may help us understand what is going on here. Consider, for example, her reflections on how hatred toward certain “others,” such as racial or national minorities, is justified through a narrative of victimhood and injury to the *body of the nation*, and, as such “does not reside in a given subject or object.”²²¹ Rather, according to Ahmed, it *circulates*. Emotions, then, “mediate the relationship between the psychic and the social, and between the individual and the collective.”²²² This “slide between figures” is echoed in our case, too.²²³ Here, subjective mourning is justified and elevated to the collective realm through a narrative of necessary repair and timely restoration of *the nation’s* bloodline.

Indeed, the affective transmission of mourning in the *Shahar* ruling does not lie in the background but is echoed by the court itself. However, this intersubjective dynamic can also be manifested more subtly or could be used as a lens through which to understand court opinion. Consider the *Anonymous* case,²²⁴ in which, like *Shahar*, bereaved parents requested

213. *Id.*

214. *Id.*

215. *Id.* § 2.

216. *Id.* § 8.

217. *Id.* § 28.

218. *Id.*

219. *Id.*

220. *Id.* § 23.

221. Ahmed, *Affective Economies*, *supra* note 40, at 119.

222. *Id.*

223. *Id.*

224. FamC (Family Court Jerusalem) 27169-11-13 *Anonymous v. Deceased* (Jan. 20, 2016), Nevo

permission to conceive the sperm of their only child, who had died in a car accident, with the assistance of a surrogate. In justifying the request, the court emphasized that “[t]hese are parents, to whom the deceased was the only child and, beyond him, they do not have any piece of themselves . . . It is not enough to express empathy and we need to consider practical ways to alleviate their suffering.”²²⁵ In the court’s eyes, the request, regardless of whether its factual evidence attested to the posthumous intent, called for active action to be taken to alleviate the parents’ pain.²²⁶ This approval, framed as nothing less than empathy for that pain, attests to what their mourning represented (and perhaps evoked) for the *collective*.²²⁷

What is the motivation underlying this rhetoric? It could be read as a means to *universalize* the subject’s injury, to justify the legal intervention in the status quo, despite the contestation this intervention may entail.²²⁸ To justify the petition of the family member of the deceased seeking to use his sperm, the legal rhetoric stresses how their pain evokes an affective response among observers, who empathize with such predicaments

(Isr.).

225. *Id.* § 13.

226. Indeed, judicial compassion toward the stakeholders’ tragic circumstances can be expressed without taking any concrete legal steps. *See, e.g., L.T v. D.T Estate*, 2020 BCCA 328 (the British Columbian case of a wife attempting to use her husband’s sperm after his unexpected death without any written consent to do so, in which the judge maintained that, despite its sympathy for the position of the wife, it was only responsible for interpreting the regulation, which clearly prohibited her requested action (*see* paragraphs 35 & 52 of the case)).

227. The dynamic of affective transmission is not exclusive to PAR. It was also manifested in the struggle to amend the Israeli Surrogacy Law, which, until recently, excluded single men and same-sex couples. The exclusion evoked one of the largest movements in the history of the Israeli LGBTQ community and attracted extraordinary public attention throughout society (*see* Noy Naaman, *Bordering Legal Parenthood*, 33 (3) *YALE J.L. & HUMAN.* 333, 346 (2023)). The Israeli Supreme Court, in one of its precedent decisions regarding the petition to amend the law, highlighted that “one must not deny that suspending the decision on the petition is significant for the petitioners as well as for many others in the Israeli public; these will be members of the community itself or other citizens who identify with *their pain*” (my emphasis) (*see* HCJ 781-15 *Itay Arad-Pinkas, Yoav Arad-Pinkas et al. v. The Committee for Approval of Agreements for Carrying of Embryos* § 16 Vice Chief Justice Joubbran’s opinion (Aug. 3, 2017), Nevo Legal Database (Isr.).) This affective dynamic was also subsequently echoed in the Israeli Parliament (the Knesset). Prior to voting on the amended Surrogacy Law in 2018, one former Member of the Knesset from the Labor Party asserted that barring gay men from equal access to surrogacy was not only an “individual infringement” but also an “intergenerational infringement” because preventing one person from becoming a parent affects not only that person but whole generations reaching back into history (*see* the Knesset, Protocol 359, 20 (Jul. 17, 2018), <https://main.knesset.gov.il/Activity/plenum/Pages/Sessions.aspx>, On file with author). Reading the judicial and legislative rhetorics around the struggle of surrogacy together, two forms of affective transmission emerge here. The first form, echoed by the court, concerns the relationship between the injured subject vis-à-vis other subjects in society. This form elucidates how the subject of childlessness constitutes a space for Jewish-Israeli national attachment to its reification of parenthood. The second form, echoed by the legislature, concerns the relationship between the injured subject and their intergenerational family. This form illuminates how the Jewish-Israeli national attachment to childlessness is informed by the ethics of intergenerational continuation. *Cf.* Yael Hashiloni-Dolev, *The Effect of Jewish-Israeli Family Ideology on Policy Regarding Reproductive Technologies*, in *BIOETHICS AND BIOPOLITICS IN ISRAEL* 121 (Hagai Boas et al., eds., 2017) (discussing the “close-knit” feature of Zionist society, according to which family members within Jewish-Israeli society are inseparable).

228. EVE SEDGWICK, *EPISTEMOLOGY OF THE CLOSET*, 40 (1990).

indirectly, through what that pain represents for the collective.²²⁹ This explanation is oriented by how *subjects* capitalize on the affective state of the collective to leverage their individual positions when making their case before the court. Here, though, I want to shift the focus to the *collective* by considering how the subject's affective state—the yearning of the mourning of the family member of the deceased—becomes a site where the collective and its structures and norms are moderated. To advance this proposition in the context of posthumous conception, I will consider several theories of governmentality.²³⁰

The intersubjective dynamic of mourning lends itself, perhaps too readily, to a Foucauldian framework of *biopolitics*. Biopolitics is defined as “diverse techniques for achieving the subjugation of bodies and the control of populations.”²³¹ Under this framing, the bereaved parents who wish to bring a child into the world posthumously would be contributing a new life not solely to their family but also for the “good of the community.” The image of the child conceived posthumously calls into mind Leo Edelman’s critique of the figure of the child. According to Edelman, the figure of the child embedded in the image of the American nation is designed to govern and discipline the freedom of its citizens.²³² Yet, I argue, in the context of posthumous human reproduction, the figure of the (posthumous) child—and especially its Foucauldian biopower logic—comes into force through the *affective* transmission of mourning.²³³

Intersubjective mourning should also, I argue, be understood through the notion of *necropolitics*. Necropolitics is concerned with how the state exercises its authority in matters of *death*.²³⁴ Specifically, as Achille

229. The “minoritizing” and “universalizing” paradigms are discussed in greater detail by scholars of sexuality law as a political-rights dilemma of whether to frame issues of LGBTQ people as discrete (emphasizing their *difference*) or broader and more generalized (emphasizing their *sameness*). See, e.g., LIBBY ADLER, GAY PRIOR: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM, 99 (2018).

230. While the example of surrogacy illuminates the broad-scale application of the intersubjective dynamic of pain, which is embedded in the discourse of reproductive rights, I leave this example behind.

231. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, 138-144 (1978).

232. EDELMAN, *supra* note 126, at 11 (“The figural Child alone embodies the citizen as ideal, entitled to claim full rights to its future share in the nation’s good, though always at the cost of limiting the rights ‘real’ citizens are allowed”).

233. Such an affective dynamic is not new. Judith Butler contends that the process of becoming subordinated involves the production of the subject in melancholia. That is, the state’s very power stems from the subject’s melancholic state. According to Butler, the melancholia is what “designates a sphere of attachment” that regulates and normalizes objects. With Butler’s genealogical understanding in mind, we can observe how the affective nature of institutionalized practices, whether they relate to PAR or the issuing of the stillbirth birth certificate, displaces the explicit modes of social governance, which promote certain norms and assumptions, into the inexplicit. JUDITH BUTLER, THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION, 143 (1997).

234. The theory of necropolitics was developed by Achille Mbembe. See Achille Mbembe, *Necropolitics*, 15 PUBLIC CULTURE, 11, 11-12, 16-17 (2003). Where biopolitics is oriented toward understanding the operation of state authority through the human experience of producing life, necropolitics focuses on that sovereign power that is aimed at creating death. Yet, biopower and necropolitics are interrelated. See PUAR, *supra* note 67, at 35.

Mbembe explains, necropolitics refers to “the instrumentalization of human existence and the material destruction of human bodies and populations.”²³⁵ In a militarized society like Israel, where there is compulsory military service, the lenient judicial attitude toward posthumous human reproduction brings to mind the theory of necropolitics. While the circumstances of death have not been officially accepted as a justification for accepting the parents’ request for PAR,²³⁶ death during military service has nevertheless been discussed at length in these judicial cases.²³⁷

Consider, for example, the rhetoric of the Family Court in *Shahar*, which, in favoring the parents, emphasized that their longing for continuity was “[a]ll the more [. . .] applicable when the parents lost their child Omri during his military service, and struggle every day to sustain the relationship with the deceased and commemorate him.”²³⁸ In other cases, the military contextualization is tied to the bereavement of the deceased’s parents in a way that attests to the idea that the parents’ bereavement, and the fight to rehabilitate themselves following their tragic loss, is actually, in the court’s words, “*our* fight” (my emphasis).²³⁹

Another way in which military service is used to contextualize intersubjective mourning is through moral reasoning, according to which the loss of families grieving fallen soldiers is inseparable from the obligation of the state to offer a means to heal the void they left behind. Consider the *Meiri* case, involving the request of bereaved parents to use the sperm of their son, who died during military training at the age of 22.²⁴⁰ In response to the objection of the Attorney General to approve their request, the deceased’s mother lamented that “[p]arents are good enough when their son is alive, but become meaningless upon his death. We raise children, love them, nurture them, care for them . . . and when they turn 18 we give them to the state, for military service, and if something happens to them [and] our parenthood is taken away . . . we become nothing.”²⁴¹ Though the mother’s position was rejected by the majority of judges in the Supreme Court, the minority opinion held that these parents’ circumstances

235. *Id.* at 14.

236. FAR (Supreme Court Jerusalem) 7141-15 *Jane Doe v. Jane Doe*, Nevo (Dec. 22, 2016) (Isr.).

237. See, e.g., FamC (Family Court Be’er Sheva) 28012-10-16 *Jane Doe v. State Attorney’s Office* § 15, Nevo (Aug. 24, 2017) (Isr.). FamC (Family Court Petah Tikva) 16699-06-13 *Shahar v. Attorney General* § 33, 100, 163 Nevo (Sep. 27, 2016) (Isr.). FamC (Family Court Petah Tikva) 31344-09-13 *Jane Doe v. State Attorney’s Office*, Nevo (Mar. 18, 2015) (Isr.).

238. FamC (Family Court Petah Tikva) 16699-06-13 *Shahar v. Attorney General* § 27, Nevo (Sep. 27, 2016) (Isr.).

239. FamC (Family Court Kriyat Shamona) 12977-014 *Jane Doe v. Ministry of Health* § 30, Nevo (Jan. 06, 2015) (Isr.) (“Before us is the bereaved mother of a dead soldier who was forced to go through a terrible experience of pain and bereavement. Despite the overwhelming experience . . . , she has gone on with her life over the years . . . , while finding meaning in life with the assistance of partners who will help her in her fight, which is actually *our* fight”).

240. FAR 7141-15 (Supreme Court Jerusalem) *Jane Doe v. Jane Doe* §§ 6-7, Nevo (Dec. 22, 2016) (Isr.).

241. *Id.* §§ 22-23.

should be weighted in favor of approving their request, “as they are the ones who bear the ultimate cost” of having their son enter military service.²⁴²

That same moral reasoning has also been echoed outside the courtroom. Following the *Meiri* case, the Knesset proposed a bill authorizing parents to use the sperm of their deceased (military) sons, based on the position that Israel “owes a moral obligation to the bereaved families who have lost what is most precious to them.”²⁴³ Note here that the right to conceive children posthumously is conceptualized as a benefit provided to the families of fallen soldiers to help them to rehabilitate following their loss, in the manner of a “military death compensation.”

Indeed, this moral reasoning could arguably be celebrated as a form of solidarity.²⁴⁴ However, I contend, this moral reasoning could also attest to the necropolitical structure of a society in which citizens are obligated to sacrifice their life for the nation. Where “daily life is militarized”²⁴⁵ and the collective state is invested in bereavement and rehabilitation following wars and the death of soldiers,²⁴⁶ healing the broken intergenerational cycle of life is not only an inevitable outcome; it is also a condition under which the necropolitics can be constructed, sustained, and *sanitized*. Indeed, this constellation is reminiscent of what Jasbir Puar calls the *bio-necro collaboration*, which “acknowledges biopower’s direct activity in death, while remaining bound to the optimization of life.”²⁴⁷ Yet, note how this bio-necro collaboration is *affected*: mourning and sorrow do not circulate in the background of this structure. Instead, these emotions drive its very logic, “work[ing] to bind subjects together”²⁴⁸ and promoting modalities of life that seemingly have nothing to do with bio-necro collaboration. Situating this affective dynamic alongside these theories is crucial if we are “to recognize the deadly workings of power,”²⁴⁹ thereby revealing another way by which the borderland between death and life is rendered ambiguous. The moral reasoning grounded in intersubjective mourning prompts three main concerns around the potential for affective states: to be made

242. *Id.* § 66.

243. Draft Bill for Fallen Soldiers’ Families Law (Pensions and Rehabilitation) (Amendment – Use of Fallen Soldiers’ Sperm), 5710–1950, HH (Gov.) No. P4312/20, http://fs.knesset.gov.il/20/law/20_1st_386535.docx (last accessed September 7, 2022). In September 2022, a similar bill was approved by the Plenum in a first reading, with no objections: <https://main.knesset.gov.il/News/PressReleases/pages/press19.09.2a.aspx> (last accessed Jan. 10, 2023).

244. Cf. Roy Gilbar & Efrat Ram-Tiktin, *It Takes a Village to Raise a Child: Solidarity in the Courts—Judicial Justification for Posthumous Use of Sperm by Bereaved Parents*, 28 MED. L. REV. 317, 340 (2020) (advocating for a solidarity-based account as justification for PAR).

245. Mbembe, *Necropolitics*, *supra* note 234, at 30.

246. See generally, Meira Weiss, *Bereavement, Commemoration, and Collective Identity in Contemporary Israeli Society*, 70 ANTHROPOL Q. 91 (1997); Yoram Bilu & Eliezer Witztum, *War-Related Loss and Suffering in Israeli Society: An Historical Perspective*, 5 ISR. STUD. 1 (2000).

247. PUAR, *supra* note 67, at 35.

248. Ahmed, *Affective Economies*, *supra* note 40, at 119.

249. JINTHANA HARITAWORN ET AL., *QUEER NECROPOLITICS*, xviii (2014).

compulsory; to objectivize the deceased; or to dehumanize other lives. Each of these concerns amounts to a different constellation of governmentality and is discussed, in turn, in the next section. Here, I consider affect to be not merely an intangible aspect contingent on constellations of governmentality, as demonstrated above, but also a *force* propelling them.²⁵⁰ The overarching proposition of this Article, then—that affect is used as medium through which the law asserts its institutionalized power and meanings-making process²⁵¹—is further demonstrated through the life–death threshold in the context of reproduction.

3. *Collateral pitfalls*

A compulsory affective state

One concern is that the circulatory dynamic of mourning becomes a prescription for how would-be parents of a child born posthumously *should* present in court. A similar concern has been raised by scholars calling attention to cases where certain legal actors are forced to moderate their emotions so as to appear credible. Commentators argued that the figure of the victim of oppression is compelling for the emotions it elicits.²⁵² Others similarly argue that the recognition of controversial rights—such as access to abortion,²⁵³ or bereavement leave in the case of miscarriage²⁵⁴—mandates a *particular* emotional state upon those who wish to claim them.

And the scope of this affective imposition is irreducible to the spatial boundaries of the court. One is reminded of Carol Sanger’s warning with regard to the regulation of the stillbirth birth certificate and the concern about normalizing grief (and the official endorsement of specific ways to moderate it).²⁵⁵ In a similar vein, the troubling issue here is that the dynamic of intersubjective mourning would script a template of how other bereaved parents²⁵⁶ or widows should respond, act, or simply *feel* under these circumstances. Indeed, emotions are not only informed by the law but are also produced by it.²⁵⁷ So what happens when one of the deceased’s family

250. SAUER & PENZ, *supra* note 37, at 36.

251. *See supra* note 50 and accompanying text.

252. *See* Srinivasan, *supra* note 54 at 129. *See also* Daniel Del Gobbo, *Lighting a Spark, Playing with Fire: Feminism, Emotions, and the Legal Imagination of Campus Sexual Violence* 45 DAL. L.J. 1, 19 (2022).

253. Calder, *Reading Grief*, *supra* note 138, at 350.

254. CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN 21ST CENTURY AMERICA 214-238 (2017).

255. *See supra* notes 133-135 and accompanying text.

256. *Cf.* Nofar Yakovi Gan-Or, *Securing Posterity: The Right to Postmortem Grandparenthood and the Problem for Law*, 37 COLUM. J. GENDER & L. 109, 157-60 (2019) (offering a compelling analysis of this concern more generally with regard to using the practice of PAR as a method for healing the pain of the deceased’s *parents*).

257. Robin West, *Law’s Emotions*, 19 RICH. J. L. & PUB. INT. 339, 361 (2016).

members adopts a different template of emotional experience? I return to this question later, in sub-section C.

Objectification

Another concern is that the circulatory dynamic of mourning could lead to the objectification of the deceased, thereby harming that person's agency.²⁵⁸ Two interrelated forms of objectification are applicable to posthumous human reproduction. One, objectification can take place through a disavowal of subjectivity²⁵⁹—for example, if we refer to another subject's autonomy as irrelevant, treating them as an instrumentality or a thing, such as a means of modulating the affective experience or continuation of family lineage. Two, it can occur when the subjectivity of the person is reduced to their (dead) body.²⁶⁰

Where none of the factual findings attests to *posthumous* intent, there is a risk of blurring the boundaries between the deceased's wishes and those of his family members who seek to use his gametes.²⁶¹ The potential for this outcome increases when heightened affected states are circulated and intensified to such an extent that they disguise and erase the wish of the deceased.

The factual scenario of *Shahar*, presented before the District Court in Lod (the Court of Appeal), demonstrates how this concern comes into effect.²⁶² There, although the District Court acknowledged that the bereaved parents were mourning their son, it reversed the Family Court's opinion. In its ruling, the District Court highlighted that “the bereaved parents seek

258. Lina Papadaki, *What Is Objectification?* 7 J. MORAL PHIL. 16, 17, 32 (2010) (referring to objectification as “seeing and/or treating a person as an object . . . in such a way that denies this person's humanity”). I chose to use the term “objectification” instead of “instrumentalization” for two reasons. The first is that the framework of objectification focuses on the distinction between subject and object, while the framework of instrumentalization focuses on the distinction between means and ends. The subject-object distinction aligns with the paradigms of affect theories (specifically those with which this Article engages) that deal with how affects are circulated and exchanged between subjects, sometimes running the risk of objectifying them. The second reason is that instrumentalization can be employed without denying someone's humanity or agency. For instance, hiring a contractor to build a house is “using” them as a means to an end but this does not necessarily mean that the contractor is being treated as an object. The normative nature of this type of outcome is not my focus here.

259. Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFFS. 249, 257 (1995).

260. RAE LANGTON, *SEXUAL SOLIPSISM: PHILOSOPHICAL ESSAYS ON PORNOGRAPHY AND OBJECTIFICATION*, 228-29 (2009).

261. One counterargument might be this: where there is a factual finding attesting to the deceased's intent to become a father one day (albeit not a posthumous one), or unless the deceased clearly indicated that they did not want children when alive, the use of their gametes does not seriously harm their humanity and, therefore, does not amount to objectification (if we hold a Kantian understanding of objectification). This argument could be supported by the presumption that posthumous conception *benefits* the deceased (e.g., it enables the continuation of their “bloodline”), and thus it does not treat that person as merely a means to an end. The response to this argument might be that (a) it is not always clear how to decide whether the deceased is treated as a mere means; and (b) ignoring the deceased's wishes, i.e., whether he wanted his gametes to be used after his death, could result in harming his bodily integrity. This outcome, at least in the eyes of certain philosophers (among them, Martha Nussbaum), is considered a form of negative objectification. See Papadaki, *supra* note 258, at 27.

262. FA (District Court Lod) 45930-11-16 *State of Israel v. Shahar*, Nevo (Jan. 29, 2017) (Isr.).

actually to put their own longing, pain and loss above the wish of the deceased, a wish that remains unknown in the absence of clear and unequivocal evidence.”²⁶³ While the District Court does not nullify the use of PAR as a way to alleviate the bereavement process, it nonetheless makes it clear that this rehabilitative effect of the law cannot come at the expense of overstepping the deceased’s wishes, which the law of PAR is supposed to embody in the first place.²⁶⁴ Importantly, even the fact that the deceased may have once expressed a wish to become a father during his lifetime does not equate to his permission to conceive a child by him *after* his death. Leaving the difference between the former and the latter indistinct runs the risk of discounting the deceased’s subjectivity.²⁶⁵

Dehumanization

Another concern is that the circulatory dynamic of mourning may dehumanize other lives by falling into unequal distribution of precariousness. This ethics is defined by Judith Butler as one that “depends on dominant norms regarding whose life is grievable and worth protecting and whose life is ungrievable.”²⁶⁶

Consider again the contextualization of military service death as a circumstance that justifies the requests of bereaved parents to use the sperm of their fallen son. Such contextualization draws a line between those families whose losses are more acknowledged and respected and those whose are less so. This line conversely creates a postmortem division between the deceased whose lives are deserving of being commemorated (through the radical possibilities of PAR) and those whose lives are “less worthy of [. . .] sustenance,”²⁶⁷ leaving their intergenerational cycle of life irretrievably broken.

Indeed, the contextualization of military service death seems attributed to

263. *Id.* § 53.

264. *Id.* §§ 35, 36. It should be noted that this affective ambiguity is also manifested in other judicial cases approving parents’ requests for PAR. Take, for example, FamC (Family Court Jerusalem) 27169-11-13 *Anonymous v. Deceased*, Nevo Legal Database (Jan. 20, 2016) (Isr.) (*see supra* note 224 and accompanying text). A careful reading of the case reveals that no factual findings were shown to prove that the deceased would have agreed to have his sperm used to conceive a child with another woman (as requested by the parents). *See also* FAR 7141/15 *Jane Doe v. Jane Doe* §§ 109-110, Nevo Legal Database (Dec. 22, 2016) (Isr.). The court overturned the rulings of the Family Court and the District Court, stating that “none of the witnesses testified about any statement of the deceased, or any other indication on his part, regarding the possibility of having children after his death [. . .] and certainly there is no indication of the deceased’s wish or consent to bring forth descendants from another woman whom he neither chose nor knew.”

265. One counterargument might be as follows: when the deceased’s wishes cannot be proven posthumously (which is often the case—*see* Bahadur, *Ethical, supra* note 177, at 296) does denying the request of his family—who may arguably be best placed to represent what he would have wanted—not, itself, *jeopardize* his autonomy? And which of these possibilities incurs a higher risk of objectification in a society where the longing to extend one’s genetic lineage is taken for granted?

266. BUTLER, PERFORMATIVE, *supra* note 148, at 119.

267. *Id.*

the particular national context of Israel, where military service for the majority of young adults is a civil obligation. However, the nature of the moral reasoning underlying this context transcends Israeli adjudication. This moral reasoning could also be attached to other contexts, such as deaths that result from participation in civil duties, dangerous occupations, or circumstances that simply invoke empathy for what the special place of the subject engaged in a given activity represents for many of us.²⁶⁸ To the extent that the judicial reasoning in posthumous human reproduction is grounded in *feelings of sameness*—sameness to the precariousness of the subject whose sperm is under dispute—it entails the risk of hierarchizing different forms of “being” in our world.

To examine in greater depth how affective dynamics become a medium under which different biopolitical arrangements take effect, I turn to a specific stakeholder in this terrain: the widow.

C. Repronormative Widowhood

As explained in Part I, one dimension of affect analysis is concerned with identifying the figures to whom sensations are ascribed in discourse.²⁶⁹ Ahmed’s observation on hatred could help us comprehend the *affective* dynamic interwoven in this figurative configuration and the normative implication of this dynamic. As Ahmed explains, hate does not reside in a given figure but, rather, exchanges between signifiers, “work[ing] to create the very outline of different *figures* or objects of hate, a creation that crucially aligns the figures together and constitutes them as a ‘common’ threat.”²⁷⁰ In this section of the Article, I apply Ahmed’s understanding to consider how the figure of the widow is modulated through legislative and judicial discourses of PAR, imbuing it with specific cultural significances, and to appraise normative implications.²⁷¹

The figure of the widow is brought to the surface through the regulatory scheme by all three of the following constellations: (a) situating her as the best-placed testifier on the posthumous intent;²⁷² (b) situating her as the person who is qualified to initiate the PAR;²⁷³ (c) setting forth the presumed-

268. Consider, for example, FamC (Family Court Jerusalem) 27169-11-13 *Anonymous v. Deceased*, Nevo Legal Database (Jan. 20, 2016) (Isr.). There, in its decision to approve the parents’ request for PAR, the court highlighted the fact that the parents had no other children besides the deceased whose sperm was under consideration.

269. See *supra* note 43 and accompanying text.

270. Ahmed, *Affective Economies*, *supra* note 40, at 119.

271. Doing so explicates another process whereby affect becomes a condition under which norms and hegemonic discourses are operated but also negotiated.

272. AG Guidelines, *supra* note 184, §§ 11, 17.

273. *Id.* While the Israeli guidelines excluded the requests of bereaved parents to use their deceased son’s sperm (*id.* § 20), in practice, as I discuss, courts do approve parents’ requests of this kind. Indeed, in recent years, while this possibility has been restricted in cases where the deceased left a partner, it has not been nullified. FAR (Supreme Court Jerusalem) 7141-15 *Jane Doe v. Jane Doe* §§ 27-33, Nevo (Dec. 22, 2016) (Isr.).

wish assumption, according to which a deceased man who had a partner is assumed to have wished her to conceive using his sperm.²⁷⁴ This regulatory scheme, which is not exclusive to Israeli law (excluding its third component), reflects the understanding that bringing a child into the world is a project shared exclusively by the couple.²⁷⁵

In light of this regulatory scheme, I believe posthumous conception situates the widow as the legal subject who upholds the reciprocal interplay between life and death. It is a reciprocal relationship precisely because it is characterized by a dynamic of *affect* and *being affected*. This visceral encounter between the widow and her dead husband affects both parties: it shapes both her self-identity within the relationship and in society *and* his agency regarding what he bequeaths to the world.

One dimension of this reciprocal relationship is reflected by the understanding that conceiving the child posthumously somehow reanimates the spirit of the deceased. The widow becomes the body/means through which the absence of her late husband is recast “as a powerful and abiding presence.”²⁷⁶ Hence, the recasting of the agency of the deceased and his biographical narrative is continuously affirmed through the child, who becomes the repository for his memory.

The other dimension of this reciprocal relationship is reflected by the understanding that conceiving a child this way enables the widow to maintain her relationship with the deceased. Studies illustrate that widows wishing to conceive using the sperm of their dead husband are motivated by the longing to maintain a relationship with the latter through a relationship with the future child.²⁷⁷ This is because, from the widow’s point of view, the death of the husband not only supposes the loss of the relationship with him but also the future she imagined, so a child born posthumously could return that future to her.²⁷⁸

In both of these dimensions, notice how the *possibility* of conceiving a

274. See *supra* notes 185-186.

275. AG Guidelines, *supra* note 184, §§ 8, 9.

276. Bob Simpson, *Making ‘Bad’ Deaths ‘Good’: The Kinship Consequences of Posthumous Conception*, 7 J. ROY. ANTHROP. INST 1,3 (2001). See also ELIZABETH HALLAM ET AL., *BEYOND THE BODY: DEATH AND SOCIAL IDENTITY*, 125 (1999).

277. Yael Hashiloni-Dolev, *Posthumous Reproduction (PHR) in Israel: Policy Rationales Versus Lay People’s Concerns, A Preliminary Study*, 39 CULTURE, MED. & PSYCHIATRY 634, 647 (2015) (conducting a study on women’s motivations for pursuing PAR, finding that “[w]omen deliberated this possibility as a means of fulfilling their love or marriage relationship”). See also Gulam Bahadur, *Death and Conception*, 17 HUM. REPROD. 2769, 2772 (2002).

278. Indeed, under this account, the resulting child could be seen as being instrumentalized. But this is not unique to the context of PAR. Parents may conceive children for many reasons, including to “balance out” the family, provide a playmate for an existing child, or carry on the family name, or even in the hope of improving or cementing their own relationship. Indeed, the particular concern in the context of PAR is that the child will become a repository for the memory of the deceased. Yet, prohibiting this method of conception based on this argument is problematic, as it arguably amounts to saying that the child is worse off than if not conceived at all. Kelton Tremellen & Julian Savulescu, *A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception*, 30 REPRODUCTIVE BIOMEDICINE ONLINE 10 (2015).

child posthumously is operated as an affective embodiment weaving between the body and the mind. While the widow's body is an object activating the deceased's agency, the deceased's reproductive material, in turn, is the object by which their kinship can be sustained despite his absence, creating the future she had envisioned, had her husband not passed away.

This reciprocal dynamic is embraced by the Israeli jurisdictions, where widows readily obtain permission to undertake PAR. Yet, as much as this possibility embraces the reproductive agency of the widow, it can also be turned into an expectation, a presumed *responsibility*, according to which she feels under pressure to complete the intergenerational cycle of life that was interrupted by her husband's death. There is a tradeoff between the recognition of this reciprocal relation oscillating between life with death and the expectation of animating it in a specific manner, through PAR, which constructs what I identify as the *repronormative widowhood narrative*.

That presumption, that the deceased's parents expect—and press—the widow to conceive the sperm of their son, is acknowledged by policymakers in Israel and other jurisdictions, which set forth various measures to address it. These include a mandatory waiting period during which the use of the sperm is not permitted²⁷⁹ and a *suggestion* that the widow will undergo psychological assessments conducted by a social worker to verify that she is acting out of her free will in this regard.²⁸⁰ As laudable as these measures are, they may be insufficient to dismiss this potential concern. It is not inconceivable, for example, that the request for PAR submitted by the widow after this mandatory waiting period may be driven or coerced by the deceased's parents.

To understand the tangibility of this tradeoff in Israel, though, we need to understand its cultural context. In Jewish-Israeli society, parenthood, and especially, motherhood has long been constructed as a civic duty.²⁸¹ Yet, the potential expectation placed upon widows to conceive a child by their late husband is contingent on another fear: the fear of men dying childless, which is embedded in ancient Jewish culture. According to Jewish mysticism (specifically, Kabbalah, which is a part of Jewish tradition), having an heir is necessary to perform ritualistic duties in memoriam of the dead, which children carry out to honor their late fathers.²⁸² Furthermore, I suggest, by conceiving a child from the sperm of the deceased, the latter's

279. AG Guidelines, *supra* note 184, § 30.

280. *Id.* § 28.

281. See *supra* note 205 and accompanying text.

282. Lavi, *Mourning*, *supra* note 196, at 51. The obligation to carry the name of the deceased is also reflected in the biblical practice of levirate marriage, mentioned in the Attorney General's directives (see AG Guidelines, *supra* note 184, § 2), according to which, when a man dies childless, his brother is obliged to marry his widow, and their first child is to carry the name of the deceased and be his heir.

status is elevated from childless man to deceased *parent*. While the deceased may not be the *actual* legal parent of the child,²⁸³ he is the father of this child who was born from his genetic material, just as if he were still alive. Posthumously, the new status allows the deceased to ratify his membership in the Jewish-Israeli collective, which, as discussed, is framed in repronormative terms.²⁸⁴ The pressure exerted on the widow by the deceased's parents to conceive with their son's sperm becomes greater once we consider the observation that PAR serves to fulfill the duty of the living person toward the childless deceased. This duty is none other than to heal the broken intergenerational cycle of life,²⁸⁵ on which the continuity of the entire family lineage depends²⁸⁶ and on which the affective state of the collective is contingent.²⁸⁷

We can see the potential drawback here: the widow who opposes the bereaved parents' request to use their son's sperm may be understood as having made a selfish, unconventional, and even irresponsible, choice.²⁸⁸ Such a scenario is far from fantastical if we bear in mind the Family Court statement in *Shahar*, that the mourning of the deceased's parents "touches on the most exposed nerves of Israeli society."²⁸⁹

Consider again the aforementioned *Anonymous* case.²⁹⁰ Here, the widow challenged the parents' narrative that their son would agree to their request to use his sperm with the assistance of a surrogate. Reading the factual parts of this case carefully, one cannot stay apathetic toward the ambivalent states of being that come across in this case—hesitation, confusion, emotional vacillation, and silence—that attest to the complicated position of the widow.

The factual parts of this case are as follows. A couple, one year after the death of their son, approached his widow to "check the option of using the deceased's sperm,"²⁹¹ that is, for her to consider agreeing to become

283. For further reading on this aspect, see Ruth Zafran, *Dying to Be a Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL'Y 47 (2008).

284. See *supra* notes 200-205 and accompanying text.

285. See *supra* notes 196-199 and accompanying text.

286. Hashiloni-Dolner & Triger, *Extended Family*, *supra* note 175.

287. See *supra* Parts II. B.1. & II. B.2.

288. Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. HUM. RTS. L. REV. 181, 185 (2001). Note that, while I focus here on cases where the widow is disciplined through her arguments *against* the posthumous use of sperm, the same outcome could occur through her argument *for* this practice. Take, for example, FamC (Family Court Tel Aviv) 1922-96 *Jane Doe v. International Medical Services* § 2, Nevo Legal Database (Sep. 21, 1997) (Isr.). In that case—documented as the earliest published case concerning PAR—the bereaved father objected to the widow's request to use his son's sperm via PAR, arguing that her request was motivated by the aspiration "to take over the deceased's property which he inherited from his father."

289. FamC (Family Court Petah Tikva) 16699-06-13 *Shahar v. Attorney General* § 23, Nevo (Sep. 27, 2016) (Isr.).

290. FamC (Family Court Jerusalem) 27169-11-13 *Anonymous v. Deceased* (Jan. 20, 2016), Nevo (Isr.).

291. *Id.* § 8.

pregnant by in-vitro fertilization. The widow asked for more time to think about it, but “two years passed after the death and still she did not make a decision.”²⁹² Under these circumstances, the court stated, “where the widow found difficulty in making this decision,”²⁹³ the parents asked the court for permission to have the sperm conceived with the assistance of another woman.²⁹⁴ During the legal back-and-forth, the widow then informed the court that she was willing, after all, to attempt to conceive with her husband’s sperm.²⁹⁵ Yet, ultimately, no sooner had she submitted a statement to the court formalizing her opinion regarding the parents’ request than she withdrew her consent.²⁹⁶ Her hesitation circulated and intensified in each procedural stage, and the widow remained indecisive,²⁹⁷ despite the attempts of the bereaved parents to change her mind.²⁹⁸ Even after “she decide[d] not to bear a child with the sperm of her deceased [husband],”²⁹⁹ she asked for half of her husband’s sperm, which was retrieved shortly after his death, to be reserved for possible future use, should she change her mind (again).³⁰⁰

The widow’s ambivalence was also evidenced through her legal strategy. While she did not object to the request of the deceased’s parents and asked the court to rule on this matter by itself,³⁰¹ she also expressed a robust conviction that her husband would object to having a child posthumously with another woman.³⁰² Such ambivalence attests to the tension the woman had to confront as the repronormative widow. This is the conflict between her loyalty to her husband, representing his voice, and her duty to society to heal the broken intergenerational cycle of life, on which the continuity of the whole family lineage depended. Consciously or otherwise, the widow knew that, should she refuse the parents’ request, she risked being blamed for breaking this cycle. It is not by chance that she requested to “be released from appearing for subsequent hearings after her initial testimony.”³⁰³ Avoiding standing in the way of the deceased’s parents in their efforts to heal the interrupted cycle in this most tangible of ways was the very least she was expected to do as the “good widow.”

But this was just one widow’s response, and others may make entirely

292. *Id.*

293. *Id.* § 9.

294. *Id.*

295. *Id.* § 10.

296. *Id.* § 11.

297. *Id.* §§ 7, 13.

298. *Id.* §§ 13, 14.

299. *Id.* § 15.

300. *Id.* § 17.

301. *Id.* § 15.

302. This declaration was essential in evaluating the intention of the deceased, as he left no biological will.

303. *Id.* § 17.

different choices under these complicated circumstances. Certain widows may choose to internalize what is expected of them according to the logic underlying the “repronormative widowhood” account. Others, by contrast, may prioritize loyalty to what they believe their late husbands would have wanted. The tradeoff, in this latter case, is that the widow could be constructed as a “killjoy subject,”³⁰⁴ whose problematic connotations should be excluded from the hegemonic script.³⁰⁵

This is not an unfounded concern. Consider again the *Meiri* case,³⁰⁶ where the bereaved parents wished to use the sperm of their deceased son. Just as in *Anonymous*, the deceased did not leave any biological will,³⁰⁷ and his widow stated that, in her opinion, he would have objected to having his sperm used to conceive a child with a woman other than herself.³⁰⁸ In *Meiri*, however, the widow went one step further and formally *objected* to the parents’ request. This clash between the wishes of the widow and those of the deceased’s parents pushed the Israeli court to rule in what appears to be the first such litigated case in the world.³⁰⁹

This case came before three different levels of courts. The first level, the Family Court, authorized the deceased’s parents to use their son’s sperm. This court ruled that, since there was no doubt that the deceased wished to have children—as evidenced by various testimonies and his own travel diary³¹⁰—it could be assumed that, on balance, it was “more likely” that he would concede to his parents’ wish to use his sperm, notwithstanding his widow had no interest in doing so.³¹¹ In taking the parents’ side, the court questioned whether the widow was “the right person to represent the deceased’s wish regarding using the sperm to conceive with the assistance of another woman.”³¹² This was in light of the fact that she had “found a [new] relationship and brought two children into the world, and [had] stopped coming to memorials and memorial days and [had] ‘disappeared from view’ . . .”³¹³ We can see here how the concern about the *compulsory affective state*, discussed above,³¹⁴ comes into effect: to secure her status as the person best placed to represent her late husband’s intent, the widow was

304. Ahmed, *Happy Objects*, *supra* note 27, at 20.

305. One is reminded here of the similar constellation of discursive subordination discussed with regard to the stillbirth parent. *See supra* Part II.B.2.

306. FamC (Family Court Petah Tikva) 31344-09-13 *Jane Doe v. State Attorney’s Office*, Nevo (Mar. 18, 2015) (Isr.).

307. *Id.* § 7.

308. *Id.* § 8.

309. FAR (Supreme Court Jerusalem) 7141-15 *Jane Doe v. Jane Doe* § 68, Nevo (Dec. 22, 2016) (Isr.).

310. FamC (Family Court Petah Tikva) 31344-09-13 *Jane Doe v. State Attorney’s Office* § 26-29, Nevo (Mar. 18, 2015) (Isr.).

311. *Id.* § 34.

312. *Id.* § 23.

313. *Id.*

314. *See supra* notes 252-54 and accompanying text.

required to follow a certain template of bereavement. Moving on with her life and building a new family is clearly not part of this template. Under these circumstances, the court considered, she may *not* be best placed to represent her dead husband's wishes.

The Family Court also positioned the widow's choice not to conceive from her husband's sperm as equivalent to "shattering the hopes and dreams of the deceased to see his lineage continued."³¹⁵ In the court's eyes, it was not the tragic death of the individual that broke the intergenerational cycle of life but the widow's decision to move on with her life and thwart the parents' request to realize the continuation of their lineage. Note how the widow who steps outside the accepted repronormative account is constructed as the "killjoy subject."

The District Court took this account one step further.³¹⁶ It blamed the widow not only for showing no interest in using her late husband's sperm but also for "oppos[ing] even the possibility . . . that the sperm would be moved to the sperm bank so that it could be donated to the parents or anonymous women."³¹⁷ In view of the court's position of blame toward the widow, we may understand its choice to determine a new principle: when a widow refuses to use the sperm of her late husband herself, she loses her legal standing vis-à-vis any use of the deceased's sperm for reproductive purposes.³¹⁸ Making this move enabled the court easily to overcome the clash between widows and the parents of the deceased and any clashes that could arise in the future.

Yet, this ruling did more than that. It sustained the discursive division echoed by the lower court underpinning the *repronormative widowhood* account. This is the division between the "good widow" who complies with the obligation to continue a lineage and the "bad widow" who chooses otherwise; the latter, as the court made clear, should be downgraded to a mere testifier.³¹⁹ Shifting a widow's legal status from the husband's (sole) *representative* to one *testifier* among several not only downgrades her legal sphere of influence. It also retroactively removes her embodiment from her late husband's biographical narrative—what he dreamed of doing and wished to have happen. The normative implication of this act, I argue, is far from being merely symbolic; it disavows the widow's agency—how she experiences her relationship with the deceased person and, more generally, her sense of being in this world. Along similar lines to the affective experiences of (some) stillbirth parents who receive a fetal death

315. FamC (Family Court Petah Tikva) 31344-09-13 *Jane Doe v. State Attorney's Office* § 23, Nevo (Mar. 18, 2015) (Isr.).

316. FA (District Court Lod) 7457-05-11 *M. A. v. H. M.*, Nevo (Oct. 17, 2015) (Isr.).

317. *Id.* §§ 13-14.

318. *Id.* § 20.

319. FA (District Court Lod) 7457-05-11 *M. A. v. H. M.* § 20, Nevo (Oct. 17, 2015) (Isr.).

certificate,³²⁰ this act results in affective dissonance, whereby the widow's embodied sense of self does not align with the socially constructed version of herself that is made available to her.³²¹

While this ruling enabled the court ostensibly to mend the broken intergenerational chain of life, it broke another relationship: the reciprocal relationship between the widow and her late husband. The widow maintains this reciprocal relationship not only by choosing to conceive with his sperm but also by attesting to what her husband would *not* have wished to do with his gametes. This distinction, however, receives no attention in a ruling that authorizes the widow as the deceased's representative only on the condition that she chooses to become pregnant, posthumously, by him. To the extent that the widow's degree of control to act on behalf of her husband is contingent on whether she is willing to activate her husband's procreative capacity or agrees to an arrangement that aligns with the family's interest to continue their genetic lineage, her figure as a widow is reduced to a means of fulfilling Israel's hegemonic natalism. Indeed, such a form of objectification echoes the concern that the affective states triggered by stillbirth are weaponized by the anti-abortion camp in a larger political game, as discussed above.³²² Recognizing this discursive implication in two different settings of reproductive rights (stillbirth and PAR), this work exhorts a more inclusive approach to autonomy, one that honors the individual's bodily control but also *affective* authority—both of which are necessary components of self-definition.³²³ This understanding could broaden our lens on the role of law in the context of reproduction beyond its physical aspect, to comprehend the multiplicity of harms bound up in this terrain.

320. See *supra* Part II.A.

321. Indeed, while both scenarios of affective dissonance are concerned with a sense of self, there are some differences. While, in the context of stillbirth, the dissonance relates to the marginalization of the subject's parental (or-parent-to-be) *identity*, among other aspects of selfness discussed above, in the context of posthumous assisted reproduction, the dissonance is a consequence of subordinating the social *attribution* of the subject (e.g., as a wife or widow). Both outcomes, however, illustrate how certain aspects of the live legal subject's agency (that of the stillbirth parent or the widow) are impinged-upon by decisions made by the law regarding the deceased—either their retroactive status or their choice.

322. See *supra* Part II.C.3

323. This inclusive approach to reproductive autonomy invites further discussion of its scope and tradeoffs, which extend beyond the scope of this Article. I should clarify, though, that this proposed understanding aligns, to some extent, with several legal developments across the world. One of them is the approach advanced by the Ontario Court in *S.H. v. D.H.*, 2019 ONCA 454, vis-à-vis disputes between two non-genetic progenitors and the use of their embryos. In this case, a dispute occurred between a divorced couple over the embryo created via IVF during the course of their marriage using anonymous egg and sperm donors. The woman wished to have the embryo implanted into her, against her former husband's wishes but without seeking child support from him, should the IVF prove successful. The court endorsed the man's position, despite the fact that he would have had no genetic relation or legal obligations to the future child conceived. This outcome expands the current understanding, codified in Assisted Human Reproduction (Section 8 Consent) Regulations, around the reproductive control of the non-genetic progenitor to withdraw his consent regarding the use of an embryo that was artificially created in agreement with his wife prior to his divorce. This understanding respects not only the man's bodily agency but also his affective authority.

The reactions to this groundbreaking ruling were not long in coming. The widow and the Attorney General appealed to the Supreme Court,³²⁴ which, in a majority opinion, accepted the widow's position. The Court held that (with the exception of unique cases), where the deceased did not explicitly express his will regarding the use of his sperm after his death, only the widow can legally make decisions on this matter.³²⁵ While this ruling impedes the circulation of the account developed by lower courts, it is not inconceivable that, unwittingly, it actually increases the pressure put on widows by the deceased's parents to conceive with the sperm of their son. Should the widow deny this request, it is now more likely, after this ruling, that the deceased's parents' wishes will not be realized.³²⁶ The tension this creates is tangible because, as one bereaved mother expressed, "[t]he Commemoration of a lost son is an almost obsessive act for parents,"³²⁷ and many "cannot imagine even one family of mourning parents . . . that will not use this option, if an opportunity to do so arises."³²⁸

Arguably, with emotions running high, this tension will simply come to bear outside the courtroom: the parties caught up in this affective entanglement with the widow (primarily, the parents of the deceased) may feel compelled to configure her as a "killjoy" and treat her rejection of their request with disdain. In their distress, they may see her position as combative, even cruel, and may feel unable to arrive at any empathy for her situation. Is she doomed, then, to be the "bad widow"? I believe a more fruitful affective relationship *is* possible.

To apply a reparative sensibility—in Sedgwick's sense—we should begin with an acknowledgment of the affective experiences of both sides, looking at them *alongside* each other, for a more subjunctive and constructive reading.³²⁹ Here, both parties seek to maintain the values centered on the relationship with the deceased. While, for the parents, this translates to a commitment to healing the rupture in the intergenerational cycle of life resulting from the death of their childless son, for the widow, it is expressed as loyalty toward her own biographical story formed with the deceased before he passed away. Neither is more right or more virtuous. Both are valid. But, the law, by definition, has to make a determination, has to polarize, hence it cannot help resolve these contentions. Therefore, in this hostile terrain, unearthing the hidden, less obvious, affective nature of this

324. FAR (District Court Lod) 7141-15 *Jane Doe v. Jane Doe* § 6, Nevo (Dec. 22, 2016) (Isr.).

325. *Id.* §§ 27-33, 110-11.

326. I am not arguing against the Supreme Court's decision but, rather, seeking to clarify the complexity that arose. While securing the widow's authority on the matter, as discussed above, the Court's ruling may not fully mitigate the pressure placed upon her.

327. Lavi, *Mourning*, *supra* note 196, at 47 (citing "Postmortem Sperm Retrieval," Knesset Science and Technology Committee 97, September 30, 2009, 9).

328. *Id.*

329. *Cf.* COSSMAN, *supra* note 64, at 121-49 (discussing different ways in which reparative sensibility might present in practice).

contestation and contemplating its discursive meanings as discussed here could perhaps help soften these competing positions. If each party could be helped by the legal system to cultivate this awareness of the affective experience of the other, and supported in envisioning it alongside their own pain and anger, this may open up the potential for easing the conflict in a different direction, mitigating, to some extent, its hostility and rendering the suffering a little more tolerable.

CONCLUSION

Issuing a birth certificate for a stillborn child and conceiving a child posthumously using assisted reproductive technology are both contested legal practices. Each is worthy of its own analytical scrutiny, but, by framing them jointly through a legal–affective lens, several insights—normative and methodological—emerge that transcend the specific scope of each.

This inquiry reveals the many structures of governmentality operated at the threshold between life and death. The point at which this threshold becomes hazy, however, highlights the different constellations of these structures. As discussed with regard to each experience, the regulation of this threshold could easily result in devaluing different modalities of being in the world and, specifically, discipline the person's agency through their body and their affective experience. The impact of this lack of clarity, though, is felt not only by the legal subject under consideration but also by the collective and its politics. Where the American story of parents who have suffered stillbirth evokes the contestation around individuals' right to abort, the Israeli story of bereaved parents' struggle to use their son's sperm to conceive a longed-for grandchild illuminates how the politics of reproductive rights is informed by the collective status of bereavement and rehabilitation. Both stories, in that sense, frame the borderland between life and death—specifically, the dilemma of how to moderate its ambiguity legally—through their respective political fabrics.

Yet, the stories are similar in what they say about the law. As a matter of law, they reveal that the meaning-making of reproductive rights is constructed not only by what is tangible, in this material world, but also through our relation to death on the collective level. The struggles of many stillbirth parents denaturalize conventional notions of *parental identification*, while the struggles of bereaved parents to use their adult child's sperm challenge traditional conceptions of *procreation*. The fact of death, then, exhorts us to consider the broader discursive meanings embedded in the legal discourse of reproductive rights.

The account I provide here of these two forms of jurisprudence can, of course, be told through the traditional narrative of rights and legal recognition. But the affective lens opens up a more nuanced understanding

of the law by directing our analytical attention toward structures of governmentality—how these structures take effect within the regulation of these experiences and how they are also displaced into *implicitness* through various affective dynamics. Deploying this lens further expands the possibility of approaching the hostile relations arising under these structures—whether between the stillbirth parents and the pro-choice camp *or* between the deceased's parents and his widow—from a reparative sensibility, which is especially necessary in such deeply affective terrains. Comprehending these aspects of affect, in that sense, is essential in understanding not only *what* the law is but also what role the law *should* play with regard to human reproduction—and more generally.

Finally, by juxtaposing these two forms of jurisprudence, this Article elucidates the methodological implications of affect theories and, particularly, how these could be applied to understand better the constitutive role of the law as it pertains to human reproduction. It offers two pathways of analysis: (a) by interrogating this role to identify how certain *regulatory avenues*—i.e., stillbirth birth certificates—shape, and are shaped by, affect-laden experiences, as demonstrated with regard to stillbirth; and (b) by exploring the affective dynamics embedded in a *rights-based rhetoric*—i.e., judicial and legislative discourse—to evaluate the constitutive role of the law, as demonstrated with regard to the regulation of posthumous assisted reproduction. Indeed, these analytical approaches differ somewhat in how they engage with affect. In the first analysis (stillbirth birth certificate), the departure point is the affective dynamics *experienced by the legal subject* (stillbirth parent), which are used to examine how constellations of governance are simultaneously contingent upon, and the consequences of, these dynamics. In the second analysis (posthumous assisted reproduction), it is the affective dynamics *evoked by the law* that are used as a departure point to reassess this role. Yet, grounded in the analytical principles of affective transmission and reparative sensibility, both approaches advance our normative understanding of how affect and law intersect. Notably, they urge us to consider how affects become a medium under which the law—as a meaning-making process that sustains constellations of governance—comes into force but also could be envisioned otherwise. With these methodological insights, this Article hopes to sensitize legal scholars to consider affect more broadly, as another valuable methodological tool in the arsenal of critical legal analysis.