Postmortem Sperm Insemination: A Halachic Survey

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A young Israeli soldier dies Al Kiddush Hashem in battle. His widow asks to procure some of his sperm so that she can have his child. A young man is killed in a sudden accident. He and his wife have been trying to have children for a few months before he is killed. His widow asks if she can continue their endeavors even after his death.

These are only a sampling of the various situations for which postmortem sperm insemination would be the only means of having a child. What does the halacha say about such situations? What issues would result from the fact that the entire procedure takes place after death? Does the child post-facto fulfill the obligation of pru u’revu that his father was not able to fulfill? Moreover, what is the resulting halachic status of the child?

The procedure of sperm procurement for insemination is not a complicated one, nor a recent advancement [1]. The first case of successful artificial insemination in humans was performed in 1770 by a surgeon named John Hunter. The procedure did not work well until 1949, when it was discovered that adding a small amount of glycerol to the sperm before freezing would drastically increase chances of sperm vitality. Artificial insemination is now ubiquitous, and modern technology has made it readily accessible [2]. This accessibility has given rise to numerous requests for postmortem sperm procurement, in the hopes that a baby will be born using this procedure. According to Dr. Richard V. Grazie, director of Genesis Fertility and Reproductive Medicine, and Dr. Joel B. Wolowelsky, Chairman of Advanced Placement Studies at the Yeshivah of Flatbush, “[b]etween 1980 and 1995, eighty-two requests for postmortem sperm procurement were reported at 40 facilities in 22 different states.” More than half of the reported requests were made in the last two years of the data, indicating that this is a growing issue that should be immediately addressed [1].

This article will focus on one type of artificial insemination, artificial insemination by husband (AHF). In this procedure, semen is procured from the husband, and is inseminated by means of a syringe into the wife at her time of ovulation [2]. The procedure is not all too different when being performed postmortem. Before one can attempt to approach tough halachic questions on this topic, the premise must be established: is the man halachically dead? The legal criterion for death is brain death, but there is debate between halachic authorities whether this constitutes halachic death. If the man is indeed halachically dead, there are concerns that result from dealing with a dead body, such as delaying burial, nivvul ha’met, and hana’ah min ha’met, as will be addressed below: Rabbi Yigal Shafran, Director of the Jerusalem Rabbinate’s Department of Medicine and Halacha, prohibits posthumous sperm retrieval due to these concerns [1]. Many modern day poskim, including Rabbi Yosef Shalom Elyashiv, Rabbi Shmuel Wosner, and Rabbi Eliezer Waldenberg concur that the heartbeat must stop; cessation of breathing (i.e. brain death) is not enough to constitute halachic death [3]. If a brain-dead individual is not considered halachically dead, the sperm procurement procedure may be considered assault on a living person. Moreover, this decision has implications on the parental halachic standing of the child. Some poskim assert that a child conceived utilizing postmortem insemination does not have a halachic father, and therefore the vitality status of the father has an impact on the halachic lineage of the child [1]. The discussions within this article will assume that the father is indeed halachically dead, in accordance with the definition of death of the Chief Rabbinate of Israel under the auspices of Rabbi Avraham Kahana-Shapira and Rabbi Mordechai Eliyahu, who define halachic death as brain death, or more specifically, that all autonomous breathing has permanently irreversibly stopped, which can be proved by lack of function of the brain [3].

There are three major halachic concerns when it comes to the physical extraction of sperm postmortem: delaying burial, the issur of nivvul ha’met (prohibition against desecrating the dead) and the issur of hana’ah min ha’met (prohibition against benefitting from the dead). Rabbi Chaim David Halevi, Sefardic Chief Rabbi of Tel Aviv-Yaffo from 1972-1998, writes that the mitzvah of burial does not apply to an organ that is going to be transplanted because it will shortly be used within a living body. Similarly, Rabbi Issar Yehuda Unterman, Chief Rabbi of Israel from 1964-1965, opines that a harvested organ returns to life once implanted and therefore is exempted ab initio from the requirement of burial [3]. The issur of nivvul ha’met is derived from the prohibition against causing damage to another person, and therefore posthumous sperm procurement should be forbidden if it involves any degradation. According to Rabbi Moshe Feinstein, disrespect would occur only if the procedure were to be done any differently on a dead person than on a live patient. If retrieval of the sperm is done in “the correct, dignified manner,” it does not make a difference if the patient is alive or dead, because there is no inherent desecration [4]. A further consideration in the matter is whether consent given beforehand can play any role in permissibility. Rabbi Moshe Schreiber, better known as the Chatam Sofer, a leading Orthodox rabbi of European Jewry in the first half of the nineteenth century, holds that consent does not authorize desecration, because it is not only a personal matter, but also includes the honor of God. Maharam Schick, a leading Orthodox rabbi in nineteenth century Hungary, held similarly, but explained that desecration of the dead is in fact insulting to the living. However, in his Responsa Binyan Tzion, Rabbi Yaakov Ettinger asserts that an autopsy may exclusively be performed if the person specifically waived his own dignity by giving consent while he was still alive [3]. Assumedly, this would not apply exclusively to autopsies, but to any procedure performed postmortem that would involve potential desecration. In the same vein, Rabbi Zalman Nechemia Goldberg, a modern Israeli posek and Chief Justice of Beit Din HaGadol of Jerusalem,
asserts that if there is no consent, the entire procedure is forbidden. However, if explicit consent is given for the procedure, or if it is obvious that the man would have wanted the procedure done, there is no prohibition. As Rabbi Mordechai Halperin, director of the Dr. Falk Schlesinger Institute for Medical-Halachic Research and the Chief Officer of Medical Ethics at Israel’s Ministry of Health, stipulates, “As long as the deceased gave his consent, there is strict supervision ensuring that there will be no mixing of sperm, and there is documentation of the child’s paternity so that later, when the child is ready to get married, his legal, halachic father will be known,” the procedure is halachically acceptable [4].

The isur of hana’ah min ha’met applies to any benefit one could have from a dead body. Therefore, if procuring the sperm is a benefit, it should be forbidden. Rabbi Issar Yehuda Unterman holds that hana’ah min ha’met does not apply “in corneal transplants because the cornea continues to live in the body of the recipient and therefore is not considered dead tissue, and Rabbi Shlomo Zalman Auerbach accepted this argument” [4]. Rabbi Levi Yitzchak Halperin, director of the Institute for Science and Halacha in Jerusalem, posits that based on this notion, insemination should all the more be allowed because the purpose of the entire process is to create life from the zera [5]. Furthermore, the purpose of the procurement is procreation, which is a mitzvah via the commandment “pru u’revu,” to be fruitful and multiply. If indeed the insemination is a means of fulfilling the mitzvah of pru u’revu, then the principle of mitzvot lav lehanot nitnu, that mitzvot were not given to us to benefit from, must be taken into consideration. Rabbi Mordechai Halperin proposes that the procurement can perforce not be considered a hana’ah, because it is for a mitzvah [4]. However, one must also consider that having a child may be a secondary hana’ah that results, and therefore this argument may be invalidated [6]. This requires further investigation that is beyond the scope of this article.

Within halacha, there are two different commandments that ostensibly have identical fulfillments: “Pru u’revu u’mil-eu kol ha’aretz,” “be fruitful and multiply and fill the entire land” (Bereshit 1:28), and “Lo tohu ber’ah lashevet yitzrah,” “God did not create the world to be desolate, but rather, inhabited” (Yishayahu 45:18). The obvious difference between these two commandments is their sources; pru u’revu is deoraita, directly from the Torah, while lashevet is derive sofrim, from the prophets. The Gemara in Masechet Megilla 27a, in regard to women’s obligation to have children, quotes lashevet. Tosafot (medieval commentary on the Talmud) in Masechet Gittin 41b says that lashevet, in fact, is not the same commandment as pru u’revu, and elucidates two new considerations. The first possibility is that lashevet is not an entirely separate mitzvah, but rather amplifies the mitzvah of pru u’revu, emphasizing its importance. In Tosafot’s theory, without lashevet, pru u’revu is a mitzvah reglah (regular mitzvah) like any other deoraita, but lashevet intensifies it and makes it into a mitzvah rabah, a magnified and important mitzvah. The other option is that lashevet is in fact a separate mitzvah and is intended to encompass individuals who are not required to fulfill pru u’revu. Since pru u’revu applies strictly to men, because women cannot be obligated in a mitzvah that can be potentially dangerous, as concluded in Yevamot 65b, lashevet would come to include women. Based on this, we can conclude that women are definitely not obligated in pru u’revu. But are women obligated in lashevet? If the halacha is like the first option in the Tosafot, women would not be obligated because lashevet is simply amplifying pru u’revu, in which they are not obligated at all, as seen in the Beit Shmuel, a seventeenth century commentary by Rabbi Shmuel ben Uri Shraga Frysh, on Shulchan Aruch Even HaEzer Hilchot Piryah V’Rivyah 1:2. However, if the halacha is like the second possibility, women would be obligated, albeit not to the same degree, because lashevet adds in. This second approach is held li’ima-aseh by the Mishnah Berurah 153:24, which is a commentary on the Shulchan Aruch published by Rabbi Yisrael Meir Kagan (author of the Chofetz Chaim) in the late nineteenth century [7].

The reason all of this is important is because it is determining why exactly a wife would want, or if she would even be allowed, to be inseminated with her husband’s sperm. If her husband can in fact fulfill the mitzvah postmortem, then there is no issue of hana’ah min ha’met because she is extracting sperm to fulfill his mitzvah, whether or not she is obligated in the mitzvah herself. But if her husband cannot fulfill the mitzvah after he dies, the question of whether or not she is allowed to extract his sperm depends upon whether or not she is indeed obligated in the commandment of procreation.

Can the mitzvah of pru u’revu be fulfilled after death? The principle of bametim chafshi, the dead are free, is discussed in Masechet Shabbat 30a [4]. The Gemara indicates that once people are dead, they are “batel,” not required to do mitzvot anymore, seemingly because they physically have lost the capability to do so, and therefore are “free” from doing mitzvot. Therefore, the mitzvah of pru u’revu cannot be fulfilled posthumously, because the man is no longer commanded in it. One proposition to counter this is that actions in life have the capability to reap schar, reward, even after our death, as shown in the principle of “Bera Mezakei Abba,” merits acquired by a son affect the father, as seen in Sanhedrin 104a. Can this principle be extended to anything that someone does in this world, and if so, if a person writes a consent form, is this an action of his that can give him reward after death? This is a bit of a stretch, and one would have to assume that he can only continue collecting schar for something that he already initiated in his lifetime. Severely, consent is not enough initiation to collect schar later on in his life [6].

After death, a person can obviously not be involved in the ma’aseh of the mitzvah. The Minchat Chinuch, a discussion of the 613 mitzvot by Rabbeinu Yosef Babad based on the Sefer HaChinuch in the mid-late nineteenth century, says that pru u’revu is fulfilled through the existence of children. Therefore, the ma’aseh seems
inconsequential, and it should not matter when the insemination takes place, because the insemination is only the mechanism through which the mitzvah of having a child is achieved. However, as previously established, the father cannot fulfill mitzvot, so any argument that this procedure would somehow benefit him postmortem is moot, and the halachic relationship between the father and child is another separate discussion. Rabbi Shaul Yisraeli, a prominent twentieth century Israeli posek, holds that this child is not part of the yerushah, and therefore does not free his mother from yibbum, but Rabbi Mordechai Halperin opines there is no proof that the child does not have a halachic relationship [4]. Rabbi Yisraeli ruled that a child conceived through postmortem sperm insemination has no halachic father [1]. An in-depth analysis is beyond the scope of this article, predominantly because of its lack of practical implication on the permissibility of the procedure. Rabbi Mordechai Halperin concludes by stating that “the default position in Jewish law is permissibility, not prohibition,” as he proves from the Mishnah Yadayim 4:3 which “emphasizes that only prohibitive, strict rulings require juridical substantiation while permissive or lenient rulings need no supportive precedent” [4].

While there are many considerations, each complication has a factor of permissibility, and each individual should consult her own rabbi to discuss any pertinent matters. From a legal standpoint, all issues can be avoided if there is clear, written consent, but from a halachic perspective the issues are obviously much more extensive [9]. There are no easy conclusions about whether or not this procedure is halachically permissible. The motivations are generally not halachic, but rather they satisfy the widow’s emotional need to have a child “with” her late husband. Even if the husband is not fulfilling a mitzvah, per se, in practicality he is indeed a father [6].

Acknowledgements:

This article is Bzehut Refuah Shelaimat Yehonatan Shimon ben Chaya. I would like to thank Rabbi Yonatan Emmett for all of his assistance in formulating ideas, theories, and going above and beyond, as well as stellar editorial skills. I would like to also thank my parents for helping every step along the way with encouragements and late-night halachic theory sessions. And of course, I would like to thank Dr. Babich for aiding in the entire process, from start to finish.

References: