

FATHERHOOD AFTER DEATH: A BIOLOGICAL AND HALACHIC ANALYSIS

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The importance of carrying on a Jewish legacy and a paternal namesake is of utmost significance in Jewish law. The most prominent example of this idea is the *halacha* of levirate marriage, or *yibbum*. The biblical command dictates that the brother of a childless deceased man has a legal obligation to marry his brother's widow. The son that they bear will have the same lineage and namesake as that of the deceased, thus serving to continue the dead man's heritage. The verse explicitly states that the purpose for the implementation of such a law is "that his name (of the deceased) be not blotted out of Israel" (Deuteronomy 25:5). Continual scientific breakthroughs of the 21st century have revolutionized a new method by which a man's legacy can be continued post-mortem. Harvesting sperm immediately after death allows for the possibility of later inseminating a woman. Thus, husband and wife can successfully conceive even after his death. The science behind the procedure is not very complex, but the ethical and *halachic* ramifications are startling. It is clear that continuing the Jewish name is essential to Jewish life but can it be done in this innovative manner? The procedure could revolutionize bringing children to infertile cancer patients, dead war heroes, and victims of unfortunate accidents. But questions remain: Is taking the sperm permissible from a *halachic* standpoint? Does the sperm donor gain full paternal rights?

A case study published in a 2005 scientific journal presents a true case studied at the Centre for Assisted Reproduction, Department of Obstetrics and Gynecology, in the Czech Republic. From the first post-mortem sperm fertilization in 1980 to 1995, there were over eighty two cases worldwide. Dostal *et al.* [1] reported that, "Post-mortem sperm retrieval and its utilization in assisted reproduction techniques is now performed worldwide albeit with differences in national culture, ethical values, and legislation creating *de facto* divergences." The majority of countries agreed that without written consent from the deceased, this procedure presents major ethical concerns. The case study presented was unique in that there was prior documented informed consent and

that it was relatively simple: in March 2002, a fatal accident at Prostějov airport in the Czech Republic caused the death of a 29 year old Hungarian parachutist. Three days after his death and on the second day after the autopsy, the parents of the deceased contacted the Institute of Forensic Medicine, through the Hungarian Consulate, and requested sperm retrieval from the deceased. A copy of his informed consent, sent through the Consulate, contained the request that in the event of his death, his sperm was to be retrieved and used for insemination of his partner. The procedure for sperm retrieval involved the removal of his testis by a forensic pathologist. The harvested sperm was mixed in a ratio of 1:1 with Medicult sperm freezing medium. The freezing medium/semens mixture was stored at room temperature for 10 min and then distributed into cryopreservation vials. The vials were suspended for a half hour over liquid nitrogen and then submerged into it for final storage at a temperature of -196°C [1].

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The first step, cryopreservation, or the freezing of sperm, is sometimes permitted for a (living) married man who uses it to fulfill his obligation to procreate. Former Chief Rabbi of Israel, Eliyahu Bakshi Doron, only permitted this option for a married man with the *halachic* obligation to have children, while other *poskim*, like Rav Zalman Nechemya Goldberg, did not see a distinction between the married and the unmarried man, stating that they both have the obligation to procreate, thereby leaving the possibility for a single chemo-

therapy patient to undergo this procedure [2].

Even so, both views must be analyzed in a post-mortem sperm retrieval case with the new *halachic* problem of *nivul hamet*, or defiling the dead. In Jewish law, the deceased have certain rights and the defilement of their body is prohibited. There are serious implications of this prohibition, as the Talmud categorizes anything that would be damaging to a person's body during life as a prohibited act in death. *Nivul hamet* in the context of sperm retrieval is included in the category of *gezel*, or stealing from the dead. Consequently, it should be prohibited. However, Torah authorities like Rav Moshe Feinstein, admitted that the procedure is not painful or insulting to dignity and it is compared to a simple biopsy that would be permissible to perform on a living person [3]. In addition, there is overwhelming evidence that this procedure would completely violate the prohibition of *nivul hamet* if there was no prior explicit or implicit consent from the deceased. There is an additional question regarding the issue of *ha-na'a min hamet*, deriving benefit from the dead. Two *halachic* principles are cited to explain why this prohibition is not problematic in the post-mortem case. First, the Talmud, *Eruvin* (31a), notes the principle of *mitsvot lav lehanot nittenu*, or "mitzvot are not meant to derive benefit from." In other words, since the retrieval of sperm in this case is done in the act of doing a mitzvah, it is not considered *h'anaa*, or receiving benefit. In addition, Rabbi Issar Yehuda Unterman's argument with regard to cornea transplants is that since the cornea continues to live in the other person, it is not even considered dead tissue and thus may be used [3]. This argument may also be applicable in this situation.

In terms of the status of fulfilling one's obligation to procreate, many *halachic* authorities claim that the command of *peru u'revu*, "be fruitful and multiply," only encompasses natural conception and does not include artificial intervention. It seems, therefore, that the father cannot fulfill the *halachic* obligation to have children post-mortem [2]. However, the *Beit Shmuel* in *Even Haezer* (1:10) states that even if a man was asleep and inseminated a woman who subsequently gave birth, he is considered the father. Even

according to the *Beit Shmuel*, one must ask if this obligation can be fulfilled after death. The *Minchat Chinuch* rules that in a case where the father dies, leaving a pregnant wife, the father has fulfilled his obligation for *peru urevu* through the birth of this child. This position stems from the *Minchat Chinuch's* position that the *kiyum*, or fulfillment, of *peru urevu* is the existence of children and not the maaseh, or act of the *mitzvah* itself [3].

The current law of the United Kingdom listed under the Human Fertilization and Embryology Act states that, "where the sperm of man, or any embryo, the creation of which was brought about with his sperm that was used after his death, he is not to be treated as the father of the child." Using a similar legal construct, the United States' Uniform Status of Children of Assisted Conception Act states the same conclusion. In the *halachic* realm, Rabbi Shaul Yisraeli notes that in this case, there is no *halachic* father. This position is preceded in both the case of a child born to a Jewish woman and a gentile man and the case of a convert who must sever ties with his family. Similar to post-mortem sperm donation, there is no *halachic* father in either of the situations [3]. However, it must be noted that there is a big difference between uncertainty in the realm of paternity and that of an unknown father. In this case, the biological father is known but the paternity is unknown from a legal *halachic* perspective. This is a crucial distinction as unknown paternity presents the major problem of accidental forbidden marriage to one's relative [2].

In conclusion, the topic of post-mortem sperm retrieval is extremely complex. Though this essay does not provide an answer to the question, the exploration of its details is fascinating. From all standpoints, implicit or explicit consent from the deceased is essential. In addition, the issue of gaining benefit from the deceased must be considered. Finally, it must be understood that it is unclear whether a man can use this method to fulfill an obligation to procreate or whether he has any *halachic* paternal rights to the child born. These questions are matters of larger continuing *halachic* debates and Rabbis must be consulted.

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