

Post-Mortem Sperm Retrieval

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I am occasionally asked if Jewish law permits the removal of semen from a deceased man in order for his widow to bear his child. It is a delicate and sensitive issue and the answer is not simple. There are arguments both for and against the procedure, involving halakhic, legal and ethical considerations.

1. Arguments Against Post-Mortem Sperm Retrieval A. *Issur Nivvul ha-Met*

The 613 Torah commandments can be divided into two categories: those between man and G-d (*ben adam la-maqom*) and those between man and his fellow man (*ben adam la-havero*). The prohibition against *nivvul ha-met*, insulting the dignity of the dead, is a type of damage and, like all types of damages, falls in the category of commandments between man and his fellow man.¹

We learn in the Torah that we are required to pay for damages we cause to others.² As long as the one who incurred the damage does not forgive the one who caused it, the latter is obligated to pay for the damages, even if he is not being sued. However, nowhere in the Torah does it explicitly say that causing damage to your fellow man is forbidden. It is written that if one causes damage he must pay for it, but it does not say that causing damage in the first place is forbidden.

We learn from the oral Torah (*Tora she-be-'al peh*) that the source of the prohibition against causing damage to another person is *lo tiggzol*, "thou shall not steal."³ Inflicting any sort of damage is considered stealing, as Rabbeinu Yona teaches us: Moshe received both the written Torah (*Tora she-bi-khtav*) and the oral Torah, its explanation, at Sinai. "They were given together because otherwise we would not be able to understand

the written Torah. For example, we are told *lo tiggzol*, and the oral Torah explains that *kol neziqin bi-khlal oto ha-lav* — all damages are included in this prohibition."⁴ The prohibition is not against having that which you stole, it is against causing damage to the person you stole it from. All kinds of damages to persons living or dead — *nezeq* (damage), *tsa'ar* (suffering), *rippui* (medical expenses), *shevet* (unemployment), *boshet* (shame), *nivvul ha-met* — are included in the prohibition against stealing. Post-mortem sperm retrieval, if it involves *nivvul ha-met*, should therefore be forbidden.

It can be argued conversely, however, that the procedure does not involve insult to the deceased's dignity. Rabbi Moshe Feinstein writes that taking a biopsy from a corpse is not *nivvul ha-met*. It is performed on the living, so if performed in the correct, dignified manner it can also be performed on a corpse.⁵

B. *Issur Hana'a min ha-Met*

Post-mortem sperm retrieval seems to fall under the prohibition of *hana'a min ha-met*, deriving benefit from a corpse. We learn in the Talmud that this prohibition, unlike *issur nivvul ha-met*, belongs in the category of commandments between man and G-d.⁶

However, procreation is a mitsva ("be fruitful and multiply")⁷ and therefore the prohibition of *hana'a min ha-met* should not apply. The operating principle here is that mitsvot were not given for us to benefit from (*mitsvot lav lehanot nitnu*). The benefit of performing a mitsva and fulfilling G-d's command is not considered a forbidden *hana'a*.⁸ If a widow wants post-mortem sperm retrieval performed on her deceased

1. R. Yaakov Etlinger, Responsa *Binyan Tsiyyon* 170, 171. The Gemara in *Bava Batra* 154b affirms that the prohibition against *nivvul ha-met* does not exist if it can prevent the heirs from holding property that belongs to others. R. Yom Tov Ashbili (Ritva) on *Makkot* 7a writes that the source of the prohibition against *nivvul ha-met* is *ve-ahavta le-re'akha kamokha* (Leviticus 19:18); see also *Sheqalim* 2:5, *Sanhedrin* 48a, and the discussion on the third argument in section I:C below.
2. Leviticus 24:21.
3. *Ibid.*, 19:13.

4. Rabbeinu Yona of Gerona, *Avot* 1:1.

5. *Iggerot Moshe*, vol. 5 (*Yoreh De'ah* 2), 151.

6. *Avoda Zara* 29b.

7. Genesis 1:28. There is a dispute among the Tannaim (*Yevamot* 6:6) and Amoraim (*Yevamot* 65b) over whether women are obligated in this mitsva. R. Yohanan ben Beruqa rules that a woman is equally obligated in the commandment *peru u-revu*, according to the literal meaning of the verse in the Torah. The halakha is not according to his opinion, however; a woman is not obligated to endanger herself in order to have children, but if she has done so then a mitsva has been fulfilled. See *Iggerot Moshe*, vol. 7 (*Even ha-Ezer* 4), 29:4 (pp. 59-60).

8. *Eirvin* 31a.

husband so she can fulfill the mitsva of procreation, it is not considered a forbidden *hana'a* from the corpse and this argument fails.

Rabbi Issar Yehuda Unterman argues that there is no prohibition of *hana'a min ha-met* in corneal transplants because the cornea continues to live in the body of the recipient and is therefore not considered dead tissue,⁹ and Rabbi Shlomo Zalman Auerbach accepted this argument.¹⁰ Perhaps this argument can also be applied to sperm. If so, there is no *hana'a min ha-met* in the case of postmortem sperm retrieval.

C. The Father's Consent

There is an ethical question in creating a child without the father's consent. It is related to the argument of *nivvul ha-met* because the corpse is being touched and its sperm is being taken against its will. This is a serious type of damage, and it is prohibited.

However, before he dies a man can consent to post-mortem sperm retrieval, and his consent does not necessarily have to be explicit. If it is known that he would have wanted the procedure had he been asked, it is as if he gave his consent.

Halakha takes into consideration what the deceased would have thought about certain damages caused after his death. There is a dispute in the Mishna over what should be done with any remaining money that was donated for a burial.¹¹ Should it be distributed among the deceased's heirs or should a finer headstone be purchased? *Hazal* explain that the difference of opinion hinges on perception of what a normal person would prefer be done after the humiliation of having his burial paid for by charity.¹² From this we learn that consent can be determined retroactively, post mortem.

D. Uncertain Paternity

Another argument against post-mortem sperm retrieval is that the child's paternity is uncertain. In the case of artificial insemination performed after the father's death, there is legal and halakhic disagreement over whether the child is considered the deceased's son.¹³ The same disagreement exists with post-mortem

sperm retrieval. In halakha, it is very important to know who the father is. A divorced or widowed woman, for example, must wait three months before she can remarry because, should she be pregnant with her first husband's child or become pregnant with the second husband's child soon after her remarriage, paternity would be uncertain,¹⁴ and this could lead to the forbidden marriage of a brother to his sister.¹⁵

However, there is a clear halakhic difference between unknown and uncertain paternity. An illegitimate child whose father is unknown — the child of a prostitute, for example — is called a *shetuqi*,¹⁶ but with post-mortem insemination using frozen sperm or with post-mortem sperm retrieval, the biological father is known and the controversy over paternity is strictly legal. Paternity is uncertain, which from the halakhic perspective is totally different from unknown as it cannot accidentally lead to the forbidden marriage of a brother to his sister.

E. Considering the Other Heirs

An often-heard ethical argument against post-mortem sperm retrieval is that a new heir is being created against the will of the other heirs. If the inheritance is one million dollars and there are four heirs, each will get two hundred and fifty thousand dollars. If you then create a fifth heir, each will get only two hundred thousand dollars. Is this fair?

I did not find a halakhic source for this argument, as heirs have no say in the creation of other heirs. The money does not belong to them until they acquire it through their father's death, and until then the father can do what he likes: he can bequeath the money to someone else — to none of his children — or he can produce more children. The existing heirs, therefore, cannot object to the creation of other heirs.

It can be argued that if the heirs receive the inheritance before their father's death, post-mortem sperm retrieval could indeed lead to another heir who will lay claim to a share of the inheritance. Nevertheless, even if the new heir claims and receives a share, the new apportionment is retroactive, meaning that what the others had already received was never really theirs.¹⁷

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9. *Shevet mi-Yehuda*, vol. 1, p. 314.

10. *Ibid.*, vol. 3, pp. 403-6; *Assia* 65-66, p. 162.

11. *Sheqalim* 2:5.

12. *Sanhedrin* 48a.

13. See R. Shaul Israeli, "Paternity in Artificial Insemination," *Tora she-be'al Peh* 33 (1992): 41-46.

14. *Yevamot* 4:10.

15. *Yevamot* 42a.

16. *Qiddushin* 4:1.

17. In fact, R. Israeli ruled that new heir will not receive any part of the

F. The Mother's State of Mind

This argument is very interesting: a widow who wishes to have post-mortem sperm retrieval performed on her deceased husband is in a state of emotional distress and her decision might be against her "real" interest. In the future she will certainly regret her decision.

Does the widow really not know what she wants? What should be considered, her current or her future state of mind?

Retrospective consent has halakhic validity. The daily Temple sacrifices were bought with the money from *terumat ha-lishka*, which was raised by the *mahatsit ha-sheqel* (half sheqel) that everyone is required to give each year. There is a general law in the Mishna that a person can be forced to pay his *mahatsit ha-sheqel*,¹⁸ but on the other hand, a person who brings a sacrifice to the Temple must do so of his own free will — *li-retsonkhem tizbahu*.¹⁹ The question in *Tosefta* is how, then, can he be forced to pay his *mahatsit ha-sheqel*? Won't the sacrifice be invalid because the donation was forced?

*Tosefta*²⁰ cites *Hazal's* example of a person who has gangrene in his leg and the only way to save his life is to cut off his leg, but he refuses. The physician ties him up, cuts off part of his leg, and cures him. Retrospectively, he consents to the amputation.

The same is true with forcing a person to pay his *mahatsit ha-sheqel*. When a person brings a sacrifice it brings him closer to G-d and his sins may be forgiven; retrospectively, therefore, he will be pleased that he brought the sacrifice. Thus, retrospective consent is halakhically valid and there are times when we should consider that in the future, consent will be retrospectively given.

Of course, to circumvent this argument altogether, a one-year minimum can be set before which insemination of the widow cannot be performed.

G. Procreation by a Widow: *Mar'it Ayin*

Another argument against post-mortem sperm retrieval is that it appears to be immoral — the widow becomes pregnant and gives birth to a child, but she has no husband — and *Hazal* were very particular about moral issues of *mar'it 'ayin*.

inheritance if the insemination was performed after the father's death (op. cit.).

18. *Sheqalim* 1:3.

19. Leviticus 22:29.

20. *Tosefta, Sheqalim* 1, 2.

Beit Hillel rules that a husband is forbidden to be with his wife after he has written her a *get* (bill of divorce). The Gemara explains that Beit Hillel is concerned that the husband and wife will have relations and she will become pregnant, and there may be considerable delay between the writing and the delivery of the *get*. People might forget about the delay and think that the date on the *get* is correct, and therefore assume that the child is illegitimate,²¹ which, as Rashi adds, is a stigma.²² However, it seems that although this argument was behind Beit Hillel's ruling, there is no general halakhic ban that prohibits similar situations involving stigma.²³

H. Adding Complications to an Already Complicated World

The natural desire to have children is strong, and the argument that the world is complicated enough without our adding complications to it may not carry enough weight to stand up to the legitimacy halakha grants to the desire for children, as will be seen below.

2. Arguments for Post-Mortem Sperm Retrieval A. Strict Rulings Require Substantiation, Lenient Rulings Do Not

The Mishna emphasizes that only prohibitive, strict rulings require juridical substantiation while permissive or lenient rulings need no supportive precedent.²⁴ The absence of a prohibiting substantiation is equated with halakhic permissibility.²⁵ Therefore, if no reason is found in the halakhic sources for prohibiting a new medical technology or procedure, it is permitted.

Invalidating eight arguments against post-mortem sperm retrieval, however, is not enough to prove that there is no halakhic prohibition against it. An accepted halakhic authority must be consulted.

When faced with uncertainty or insufficient information, one should indeed be strict, as no special authority is needed to say that something is prohibited.

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21. *Gittin* 79b.

22. A similar argument is brought in the name of R. Shlomo Zalman Auerbach against artificial insemination by a donor (AID) for an unmarried woman. See *Nishmat Avraham*, vol. 4 (*Even ha-Ezer*), 1, note 3.

23. See Meiri in *Beit ha-Bechira* on *Ketubbot* 27b.

24. *Yadayyim* 4:3.

25. *Tiferet Israel, Yadayyim*, 4:3; R. Elhanan Bunem Wassermann, *Qovets He'arot, Yevamot* 87b, sect. 67 (550).

To establish permissibility, however, the facts must be unambiguous.²⁶ When there is no clear halakhic precedent calling for leniency, one must be thoroughly versed in all the halakhic sources before definitely stating that no halakhic reason for prohibition exists.

B. The Natural Desire for a Descendant

Rabbi Zalman Nehemia Goldberg, a member of the Supreme Rabbinical Court in Jerusalem, Rabbi Shlomo Zalman Auerbach's son-in-law, and a great *poseq* in his own right, adds a second argument in favor of permitting post-mortem sperm retrieval.

Rabbi Goldberg was asked by the Israeli Surrogacy Committee if halakha permits removing of semen from a deceased man in order for his widow bear his child. His answer, based on the two arguments in the section above, was clear: "Without the man's consent it is, of course, forbidden. However, if he gave explicit consent to post-mortem sperm retrieval or if it is clearly known that he would have wanted the procedure done, then there is no prohibition against performing post-mortem sperm retrieval."²⁷

Rabbi Goldberg ruled that the Torah accepts the natural desire for a descendant as meaningful; this is a partial understanding of the concept of *yibbum* (levirate marriage). Adding complications to an already complicated world, therefore, is an insufficient argument when by "complicating" things you can help another person.

When I asked Rabbi Goldberg if post-mortem sperm retrieval should be allowed, he responded, "Why not?" 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, halakhic father will be known, "under these circumstances, why should it be forbidden?"

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C. "Be Fruitful and Multiply"

Does the deceased fulfill the mitzva to "be fruitful and multiply" (*peru u-revu*) through post-mortem sperm retrieval? On one hand, *ba-meitim hofshi*: after a person has died, he has no halakhic obligations and can no longer fulfill mitzvot.²⁸ On the other hand, there can be post-mortem acts that are considered the results of actions performed while still alive — *bera mezakkeh abba*, for example.²⁹

We must clarify what the essence of the mitzva of *peru u-revu* is: the act itself (*ma'aseh*) or the existence of children. Is a *ma'aseh* required? Obviously, there cannot be a *ma'aseh* if the man is no longer alive.

If a physician removes sperm from a man while he is asleep and inseminates a woman who subsequently gives birth, is the man considered the child's father? If so, has he fulfilled the mitzva of *peru u-revu*? *Beit Shemuel* states that even though there was no *ma'aseh* whatsoever, something happened while the man was asleep,³⁰ the child is considered his, and he has fulfilled the mitzva. Thus we see that a *ma'aseh* is not required to fulfill the mitzva of *peru u-revu*.

Taz disagrees. According to him, a *ma'aseh* is probably required in order to fulfill the mitzva of *peru u-revu*.³¹

Rabbi Yehiel Ya'akov Weinberg states that a *ma'aseh* is not necessary.³² One might think, for example, that a convert to Judaism who fathered children before his conversion has not fulfilled the mitzva of *peru u-revu* since the halakhic relationship between a convert and his children is broken by the conversion (*ger she-nitgayyer ke-qatan she-nolad dami*) and because *peru u-revu* was not incumbent on him at the time. Nonetheless, *Hazal* say that he is considered as having fulfilled the mitzva, even though there was no halakhic *ma'aseh* and there is no halakhic relationship between him and his children. This proves that an halakhic *ma'aseh* or halakhic relationships are not required in order to fulfill this mitzva.

Minhat Hinnukh goes even further in proving this point.³³ The mitzva of *peru u-revu* is different from many others in that while most mitzvot require a *ma'aseh*, the essence of *peru u-revu* is the existence of children. He brings a very interesting proof from the Palestinian

26. Rashi, *Beitsa* 2b.

27. His response (December 9, 1998) was published in *Assia* 65-66 (1999): 45-49. He added that there must be supervision ensuring that there will be no mixing of sperm and that there should be valid documentation of the child's paternity so that later, when he or she is ready to get married, the legal, halakhic father will be known. Nevertheless, R. Yehoshua Y. Neuwirth has a different opinion on this subject, which he mentioned to the author (without any additional discussion) in February 1999. Nine months later, R. Neuwirth elaborated on his opinion in a personal conversation with the author. He may be willing to accept post-mortem sperm retrieval only if it is done in order to inseminate the deceased's legal widow. See also note 22 above.

28. Psalms 88; *Shabbat* 31a.

29. *Sanhedrin* 104a.

30. *Even ha-Ezer* 1:10.

31. *Ibid.*, 1:8.

32. *Serdei Eish*, vol. 3, responsum 5, p. 15-17.

33. Mitzva 1, sect 8.

Talmud: a man who fathered a child through a prohibited act, for which he will be punished later, is still considered as having fulfilled the mitsva of *peru u-revu*.³⁴ There is a rule that *mitsva ha-ba'a be-'aveira*, a mitsva that is performed by doing something that is forbidden, is invalid and the mitsva has not been fulfilled. Why, then, can *peru u-revu* be fulfilled through a prohibited act? According to *Minhat Hinnukh*, the answer is that the essence of *peru u-revu* is not the *ma'aseh*, it is the existence of the children.

Another question is whether *peru u-revu* can be fulfilled after death. When the deceased has no children but leaves behind a pregnant widow, for example, at what moment is the mitsva fulfilled? According to *Minhat Hinnukh*, when the child is born. The answer, then, is that the deceased has probably fulfilled the mitsva of *peru u-revu*.

Without knowing the opinion in *Minhat Hinnukh*, one might assume that in the case of artificial insemination, the insemination at least would have to be performed during the father's lifetime for the father to have fulfilled the mitsva. Having learned the *Minhat Hinnukh*, however, we see that the *ma'aseh* is not essential; since the mitsva is to have a child, the insemination only enables the mitsva (*makhshir mitsva*). Therefore, if a widow who was not pregnant at the time of her husband's death was later inseminated with sperm he donated (while still alive), becomes pregnant, and gives birth, her deceased husband should be considered as having fulfilled the mitsva.

It follows, according to the above principles, that if a widow becomes pregnant through post-mortem sperm retrieval and gives birth, her deceased husband can be considered as having fulfilled the mitsva, even though there might not be any halakhic relationship between him and his offspring.³⁵ This is similar to the previous discussion about a convert having fulfilled the mitsva of *peru u-revu* even though the halakhic relationship between him and his children is broken by the conversion.

34. *Yevamot* 2:6.

35. R. Israeli, notes 13, 17 above. Nevertheless, a careful study of R. Israeli's Talmudic source may lead to a conclusion somewhat different than his. R. Israeli showed that a child created through post-mortem insemination does not receive any part of the inheritance and does not free his mother from the mitsva of *yibbum* (if the father died childless and left behind a brother). However, there is no proof that such a child has no halakhic relationship to his father. For example, if the father was a kohen, there is no proof that such a child is not a kohen. Similarly, such a child is not allowed to marry his father's first-degree relatives, in contrast to what might be concluded from R. Israeli's essay. A comprehensive discussion on this subject is beyond the scope of this article.

Conclusion

The default position in Jewish law is permissibility, not prohibition. Post-mortem sperm retrieval's permissibility depends on two factors. If before his death the man did not explicitly or implicitly agree to have his semen removed after his death for his wife to bear his children, then it is strictly forbidden to do so and there is no halakhic dispensation for performing the procedure. Second, if he did give explicit or implicit consent to the procedure, then the matter may depend on the different opinions among the *poseqim* and a qualified halakhic authority must be consulted.

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