Post-Mortem Sperm Retrieval

Mordechai Halperin, M.D.

Director, Dr. Falk Schlesinger Institute for Medical-Halakhic Research
Director, Jerusalem Medical Center for Impotence and Fertility

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 Nivul 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 nivul 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.

We learn in the Torah that we are required to pay for damages we cause to others. 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 tigzol, "thou shall not steal." 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 tigzol, and the oral Torah explains that kol neziqin bi-khal oto ha-lav — all damages are included in this prohibition." 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), ts'ar (suffering), rippui (medical expenses), shevet (unemployment), boshet (shame), nivul ha-met — are included in the prohibition against stealing. Post-mortem sperm retrieval, if it involves nivul 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 nivul ha-met. It is performed on the living, so if performed in the correct, dignified manner it can also be performed on a corpse.

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 nivul ha-met, belongs in the category of commandments between man and G-d.

However, procreation is a mitsva ("be fruitful and multiply") 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 nittnu). The benefit of performing a mitsva and fulfilling G-d's command is not considered a forbidden hana'a. If a widow wants post-mortem sperm retrieval performed on her deceased husband, she is permitted to do so.

1. R. Yaakov Ettlinger, Responsa Biryan Ta'yyon 170, 171. The Gemara in Bava Batra 154b affirms that the prohibition against nivul ha-met does not exist if it can prevent the heirs from holding property that belongs to others. R. Yom Tov Ashibili (Ritva) on Makkot 7a writes that the source of the prohibition against nivul ha-met is ve-ahava le-re'u'ka kamokha (Leviticus 19:18); see also Sheqalim 2:5, Sanhedrin 48a, and the discussion on the third argument in section I:C below.
5. Igerot 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 Igerot Moshe, vol. 7 (Even ha-Ezer 4), 29:4 (pp. 59-60).
8. Einavin 31a.
husband so she can fulfill the mitzvah 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, and Rabbi Shlomo Zalman Auerbach accepted this argument. 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 postmortem 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. 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. 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. 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, and this could lead to the forbidden marriage of a brother to his sister.

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, 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.

11. Sheqalim 2:5.
15. Yevamot 42a.
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-lishkah, which was raised by the mahatset ha-sheqel (half sheqel) that everyone is required to give each year. There is a general law in the Mishnah that a person can be forced to pay his mahatset 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 mahatset ha-sheqel? Won’t the sacrifice be invalid because the donation was forced?

Tosefta20 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 mahatset 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.

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 halakhic 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 Mishnah 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.

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-Bechora on Ketubbot 27b.
24. Yadahim 4:3.
25. Tiferet Israel, Yadahim, 4:3; R. Elhanan Bunem Wassermann, Qovets Ha’aretz, 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?”

C. “Be Fruitful and Multiply”

Does the deceased fulfill the mitsva 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 mitsvot.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 mitsva 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 mitsva 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 mitsva. Thus we see that a ma’aseh is not required to fulfill the mitsva of peru u-revu.

Taz disagrees. According to him, a ma’aseh is probably required in order to fulfill the mitsva 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 mitsva of peru u-revu since the halakhic relationship between a convert and his children is broken by the conversion (ger she-nigayer 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 mitsva, 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 mitsva.

Minhat Hinnukh goes even further in proving this point.33 The mitsva of peru u-revu is different from many others in that while most mitsvot 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, Beisaa 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, B. 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 intimate 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.
33. Mitsva 1, sect 8.
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.

Medical Ethics & Jewish Law
Summer Program
July 3rd – August 1st 2001

Come to Machon Schlesinger in Shaare Zedek Medical Center, Jerusalem and attend lectures given by top physicians and rabbis.

Lecture topics include Infertility, Euthanasia & DNR, Organ Transplantation and Laws of Shabbat.

Lectures are in English

For further information:
Visit our web site:
<www.szmc.org.il/machon/index.htm>
or contact the Education Coordinator at:
Tel: +972-2-6555267
Edu@szmc.org.il

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.