

# **HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY**

## **SERIES 3: 37 - POSTHUMOUS PARENTHOOD - PART 1** **OU ISRAEL/BEIT KNESSET HANASI - FALL 2025**

- Over the next two shiurim we will be'H look at an issue which has tragically become very relevant over the last two years during the war - the posthumous removal of sperm from soldiers who have been killed and the ethical and halachic issues arising as to who can then use that sperm to create children from the fallen soldier.
- Although the urgency of the issue of posthumous sperm retrieval (PSR) is relatively recent in Israel due to the many fallen soldiers, the question of posthumous use of sperm donated while alive is much older. This has been relevant for many years in the case of men who were terminally ill (or were undergoing cancer treatment but did not survive) and donated sperm which could be preserved and then used after their death. There were also a number of cases of requests for sperm retrieval from men who were brain dead and on life-support or in a Permanent Vegetative State.
- Israeli Health Ministry data shows<sup>1</sup> that between October 7, 2023, and August 26, 2025, doctors performed 240 sperm retrieval procedures on fallen soldiers. Of these, 53 (22%) were requested by the soldiers' partners, while 187 (78%) were initiated by parents. The imbalance reflects the reality that most soldiers are young and unmarried.
- This issue raises many halachic, meta-halachic, hashkafic, social and ethical questions and has been addressed by a number of poskim<sup>2</sup>. In this shiur and the next we will give an overview of many of these issues including:
  - the retrieval of the sperm posthumously and the questions of *kavod hamet* and *nivul hamet*
  - the ownership of the sperm after the death of the donor and who should be given the right to use it, specifically the (sometimes conflicting<sup>3</sup>) interests of the widow or long-term partner and the parents.
  - the extent to which the wishes of the deceased donor are relevant to what happens to his sperm after death and how to proceed when those wishes were not made clear.
  - whether there is a halachic or hashkafic problem in producing children who will be 'planned orphans' who will never know their father, especially if the mother is an unconnected single woman. Will this place a 'social label' on the child?
  - should the grandparents have a right to perpetuate the memory of their son through creating a posthumous grandchild, or is this a denial on their part of the permanent reality of their tragic loss. Do we as a society have an obligation to provide a *nechama* to these special parents?<sup>4</sup>
  - whether the deceased sperm donor is halachically the father and fulfills through them the mitzva of *peru u'revu*.
  - whether children born in this manner will inherit from their father together with other progeny, even though this may only be ascertained years after his death.
  - whether posthumous insemination can in some sense fulfil the spirit of the mitzva of *yibum*.
  - whether such children, conceived and born after the death of the father, exempt the mother in the mitzva of *yibum/chalitzah*.
  - whether the IDF should be encouraging soldiers to consider this issue and make their wishes known. Will this undermine their confidence to fight or strengthen it?

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1. See <https://themedialine.org/life-lines/life-after-death-nearly-half-of-israeli-men-oppose-parent-led-posthumous-sperm-use-study-finds/#:~:text=The%20Media%20Line%20obtained%20the,sperm%20retrieval%20is%20an%20option.&text=%E2%80%9CThey%20should%20proactively%20suggest%20the,%20sperm%2C%20according%20to%20Savitsky.>
  2. R. Aschi Dick recently presented an overview of the issues in his Torah Yerushalayim 2025 shiur which can be found at [https://www.youtube.com/watch?v=n\\_uKlvi\\_\\_\\_4](https://www.youtube.com/watch?v=n_uKlvi___4). Rav Dick has researched the issue in great depth and was kind enough to send me some of his written material on this, for which I am very grateful. He has also discussed the matter with senior poskim. Other important resources are 3 articles which appeared in *Tehumin* Vol 44 (2024) pp. 361-395 by Rabbis Lior Shagav, Roi Zaga and Zvi Reisman. Rav Zev Weitman, Rav of Alon Shevut gave a psak on this issue following the first birth of a child (to a family in Alon Shevut) resulting from the removal of sperm from their son who was killed in action. The child was carried by the son's long-term partner and intended future wife, although they were not yet married. Rav Yuval Cherlow and Tzohar published a Position Paper on this in December 2023 which can be found at <https://ad120.tzohar.org.il/en/articles/position-paper-insemination-with-sperm-of-the-deceased/>. *Halacha Headlines* (episode 460, March 2024) covered this issue and interviewed (among others) Rabbi Shlomo Brody (Director of Eimatai) and Rabbi Gidon Weitzman (Director of Machon Puah), both of whom are experts (respectively) in halachic issues concerning death and fertility - see <http://podcast.headlinesbook.com/e/31624-%E2%80%93-shiur-460-%E2%80%93-extracting-from-the-soldiers-after-they-died-to-have-children-to-commemorate-them/>. See also Rabbi Brody's 2022 article at <https://www.ematai.org/blog/posthumous-sperm-donation/>
  3. In one case (Family Appeal 7141/15 – Doe v. Doe (published in *Nevo*, 22.12.2016) the Israeli Supreme Court ruled that the sperm of a deceased man was the property of the widow. She refused to have any children using the sperm and remarried. She also refused to allow the sperm to be released to impregnate another woman on the basis that she felt her deceased husband would not want this. The parents of the deceased (who was an only child) very much wanted the sperm to be used to generate a child from their son, but they were unable to do so.
  4. In one case a single father of an only son was devastated by his death and spoke publicly of his utter desolation. He received many offers from single women who were willing to bear a child from his dead son.

## A] THE LAW

### A1] ISRAEL

- The legal position in Israel is actually out-of-step with that in most other countries in that Israel has the most permissive legal framework for posthumous sperm retrieval and use. This is certainly due to the tragic reality of so many fallen soldiers in the IDF, most of whom are young single men who have not started families. But it is also likely to stem from the strong Jewish focus on family in Israeli society, and the general positivity about having and raising children<sup>5</sup>. It may also be related to the biblical concept of *hakamat shem hamet* - establishing a continuation for the deceased, and the rabbinic concept of leaving a child to say kaddish for the deceased.
- The current law in Israel is based on the 2003 Guidelines on Posthumous Sperm Retrieval given by the Attorney General<sup>6</sup>. These introduced a legal policy that a deceased man's widow or long-term partner (even if not legally married under Jewish law) could request sperm retrieval without a court order. Parents, however, were required to obtain court approval and the assumption was that that parents had no legal status to direct use of the sperm unless the court found this to be the wishes of the deceased and with the consent of the widow.
- This was updated on October 11 2023, soon after the outbreak of the war, when a special order allowed parents, too, to request PSR without court intervention. Around the same time, it also became standard procedure for the officers who deliver the news of a soldier's death to inform the family that sperm retrieval is an option.
- Hospitals in Israel have been directed during the course of the war to approve requests from parents of the deceased for PSR without referring them to a family court, unless the deceased's spouse or any other family member objects to the posthumous sperm retrieval or if the parents disagree.
- USE of the store sperm to produce a child still requires the approval of a family court<sup>7</sup>. The court will review the deceased's wishes for progeny and, in so doing, will assume (unless there is a contraindication) that the production of children from his partner, even posthumously, is consistent with the deceased's will. In the case of a request submitted by the deceased's parents, the court will only approve use of the sperm if it can be proven that this was the deceased's will. Only a woman who is not related to the deceased may use the sperm, conceive, give birth and be the child's mother for all intents and purposes.
- New legislation is currently being debated in the Knesset which, if passed, may change these guidelines<sup>8</sup>.

### A2] OTHER COUNTRIES

- Many countries ban entirely the use of posthumous sperm retrieval (PSR). These include France<sup>9</sup>, Germany, Sweden, Norway, Italy and some states in Australia.
- Some countries permit PSR with the explicit written consent of the donor. These include the UK, Spain (which allows use only for 12 months after death), Brazil and Canada.
- A few countries permit PSR with court approval. These include many States in Australia. The law in the US varies from State to State; some have accepted arguments of implied consent but outcomes are unpredictable.

## B] THE MEDICAL PROCEDURE FOR PSR

- The sooner the retrieval procedure is conducted after death, the greater the chances of success. The chances of finding moving spermatozoa are significantly greater if the retrieval takes place up to 24 hours from the time of death. It is also possible to cryopreserve non-moving spermatozoa if a significant percent of them are still living (according to a diagnostic test).
- There are no documented cases in which living sperm cells have been successfully produced from a deceased person more than 72 hours after death<sup>10</sup>.

5. Israel has by far the highest overall birth rate in the OECD countries - 2.9 per woman in 2023. The next is Mexico at 1.9. Compare: World Average (2.24), US (1.6), UK (1.6), Australia (1.5), Austria (1.3), Italy (1.2), Spain (1.1) and North Korea (0.7). The Israeli Attorney General's 2003 Guidelines conclude: "The issue of using sperm after death is examined according to the values of society and its view of the issue of procreation in general, and the social interest in enabling the realization of the right of individuals in society to parenthood. And specifically, the right to parenthood is what is being discussed, and not the right to bring assets into the world."

6. 'Posthumous Sperm Retrieval and Its Use', Government Protocols of the Attorney General 1.22.02. These can be found at <https://www.gov.il/blobFolder/service/sperm-preserving-after-death/he/legal-advisor.pdf>

7. It should be noted that the sperm banks in Israel are government-run and not privately owned.

8. The current Israel government guidelines can be found at <https://www.gov.il/en/service/sperm-preserving-after-death#:~:text=In%20accordance%20with%20the%20guidance%20by%20the%20Attorney%20General%20of,sperm%20will%20not%20be%20approved.>

9. France instituted a complete ban after a 1984 court case granted a widow access to her deceased husband's sperm.

10. In a tragic case which came to R. Dr Jason Weiner in LA, a woman called when on her honeymoon to say that her new husband had tragically and suddenly died. She wanted to retrieve sperm and bear a child through him but, sadly, the window of opportunity was missed.

- The success rates mostly depend on the time that has passed since death and the circumstances of death. In about 75% of all posthumous sperm retrievals performed up to 24 hours from the moment of death, it is possible to find living sperm cells suitable for cryopreservation<sup>11</sup>.
- Future use of posthumously retrieved sperm requires IVF but it should be noted that the rates of fertilization, pregnancies and births are significantly lower compared to the use of the sperm produced during the man's lifetime.
- Sperm may be retrieved posthumously in various ways. In the 12-24 hours immediately following death it may be possible to retrieve them without invasive surgery through the application of a controlled electric current to stimulate nerves in the pelvic region (electroejaculation)<sup>12</sup>. If this is not possible, other options are an epididymal aspiration (extraction of sperm with a needle through the skin), a testicular biopsy, dissection of the testes or a complete removal of the testicles. Clearly, the later options are highly invasive and raise more halachic questions of *nivul hamet* (see below).

## C] IS THE BURDEN OF PROOF ON THOSE WHO PERMIT OR PROHIBIT?

1. א"ר ישמעאל - אלעזר בן עזריה עליך ראייה ללמד שאתה מחמיר, שכל המחמיר עליו ראייה ללמד (תפארת ישראל - שכל דבר שלא נדע טעם לאסרו מותר הוא עלי טעם. דלא הזכיר הכורה דברים המותרים כולן, רק דברים האסורים).

משנה ידים פרק ד משנה ג ותפארת ישראל שם ס"ק כז

*The Torah specifies what is NOT permitted. In the absence of such a prohibition, the assumption is that the act in question is permitted!*

2. נציין שעל פי ההלכה צריך סיבה כדי לאסור, וללא סיבה כזו המצב הטבעי הוא היתר.

ספר אסיא יג – תשובת הרב זלמן נחמיה גולדברג לחברי הועדה לאישור הסכמי פונדקאות (תשנ"ט)

*R. Zalman Nechemia Goldberg accepts this as axiomatic!*

- If the fundamental issue is simply halachic permissibility then the issues discussed below - burial, desecration of the a corpse and benefiting from it - become central as these are some of the core halachic questions.
- However, we will see in next week's shiur be'H that many poskim have profound concerns with the broader hashkafic, moral and social implications of producing children without a live father, especially where this involved single women who were never married to the deceased. This bleeds into the debate concerning the impregnation of older single women through donor and the creation of non-conventional family structures.
- We also saw in last week's shiur many poskim adopt a 'precautionary' approach when faced with new and innovative medial and technological developments. Notwithstanding the intense feeling of loss at the fallen soldiers and the urgent wish to honor and support their grieving families, many poskim will certainly urge caution in moving forward on issues such as this which could have long-term implications for the perception of the family unit in the orthodox world

## D] THE MITZVA TO BURY THE DEAD

3. כב וכייהיה באיש חטא משפט-מוֹת וְהוֹמַת וְתִלִּית אֹתוֹ עַל-עֵץ: כג לֹא-תִלִּין נִבְלָתוֹ עַל-הָעֵץ כִּי-קִבְרוֹ תִקְבְּרֶנּוּ בַּיּוֹם הַהוּא כִּי-קָלֶלֶת אֲלֵקִים תִּלְוִי וְלֹא תִטְמֵא אֶת-אֲדָמַתְךָ אֲשֶׁר ה' אֱלֹקֶיךָ נָתַן לָךְ נִחְלָה.

דברים כא:כב-כג

*The Torah includes a mitzva to bury before night a capital criminal who was executed and subsequently hung<sup>13</sup> on a tree. Chazal learn from here prohibitions both of delayed burial and also of *nivul hamet* - treating the body disrespectfully.*

4. שלא ילין הצלוב על העץ וכן המת בביתו אלא לכבודו. שלא נעזוב התלוי שילין על העץ, שנאמר (דברים כא: כג) לֹא-תִלִּין נִבְלָתוֹ עַל-הָעֵץ. ולשון ספרי כאן, לא תלין נבלתו על העץ - זו מצות לא תעשה. כל ענין המצוה כתוב במצות עשה ג' שבסדר זה [תקל"ז] .....

ספר החינוך פרשת כי תצא מצוה תקלו

*There is a negative Torah prohibition not to leave a body unburied overnight, unless for their honor.*

11. Since the timing can be critical the question arises as to whether the sperm retrieval can be done on Shabbat. Inevitably this will involve some Torah prohibition and it is not specifically for pikuach nefesh. As such, poskim recommend that it should be done by a non-Jew. See Tehumin 44 p.371.

12. This is only possible with a patient who has been declared brain dead and cardiopulmonary function has been artificially maintained.

13. For English grammar aficionados, 'hanged' is the correct participle only where death is caused by hanging, which is not the case in halacha.

5. אם צוה שלא יקבר אין שומעין לו - שהקבורה מצוה שנאמר כִּי-קָבֹר תִּקְבְּרֶנּוּ.

רמב"ם הלכות אבל פרק יב הלכה א

*We do NOT take account of the wishes of the deceased if they instruct that parts of them should not be buried.*

6. תִּקְבְּרֶנּוּ - כולו ולא מקצתו. תִּקְבְּרֶנּוּ - מיכן שאם שייר ממנו לא עשה כלום שנאמר כִּי-קָבֹר תִּקְבְּרֶנּוּ.

תלמוד ירושלמי (וילנא) מסכת נזיר פרק ז הלכה א

*Chazal learn in the Yerushalmi that the mitzva to bury includes ALL parts of the deceased at the time of death<sup>14</sup>. Failure to bury even a part of the deceased will be a breach of the mitzva of kevura.*

7. מיכן שאם שייר ממנו לא עשה כלום, שהוא הלמוד דחייב לקבור גם אברים ובשר המת שנשאר אף שכבר נקבר רובא דרובא של המת ....

אגרות משה יורה דעה חלק ב סימן קנ

*The mitzva to bury every part of the met applies even if the vast majority was buried. This includes liquids from the body.*

8. מצות קבורה לנהרג על פי בית דין וכן לכל מת

(א) לקבור מי שנתלה ביום ההוא, שנאמר (דברים כא:כג) כִּי-קָבֹר תִּקְבְּרֶנּוּ בַּיּוֹם הַהוּא וגו'. ולשון ספרי כאן - כִּי קָבֹר תִּקְבְּרֶנּוּ בַּיּוֹם הַהוּא, מצות עשה. .... גם בכלל המצוה לקבור כל מת מישראל ביום מותו .... ועובר על זה והלך את המת שלא לכבדו ביטל עשה זה, מלבד שעבר על לאו כמו שנכתוב בסדר זה בעזרת השם [מצוה תקל"ו].

ספר החינוך פרשת כי תצא מצוה תקלו

*There is also a positive mitzva to bury a Jewish body as soon as possible, preferably before the night is over.<sup>15</sup> However, delaying burial to honor of the dead is permitted and burials are often delayed so that important relatives can be present.*

- On that basis many poskim argue that failing to bury the sperm of the deceased in order to produce future children (who may be able to say kaddish to elevate the neshama of the dead) would certainly be no less in their honor than relatives being present at the funeral. On the other hand, that is a temporary delay but the retrieval of sperm could delay their burial for years, perhaps permanently.
- There is also a halachic debate as to whether the main focus of honor should be for the dead or his living family<sup>16</sup>.
- However, R. Issur Yehuda Unterman (Ashkenazi Chief Rabbi 1964-72) ruled<sup>17</sup> concerning corneal transplants from deceased donors that, because the cornea continues to live in the body of the recipient, it is not halachically considered to be dead tissue. This argument was accepted by R. Shlomo Zalman Auerbach<sup>18</sup> and could be applied to the posthumous use of sperm.
- Also, there is a debate as to whether the obligation to bury the dead applies to a piece less than a kezayit<sup>19</sup>, although many poskim understand that this position only relates to a body-part that has already been removed. Ideally, all parts of the body at death require burial, no matter how small.<sup>20</sup>

## E] NIVUL HAMET - DISGRACING AND DESECRATING THE DEAD

9. תא שמע: הלינו לכבודו, להביא לו ארון ותכריכין - אינו עובר עליו. .... כי אמר רחמנא לֹא-תִלֵּין נִבְלָתוֹ עַל-הָעֵץ - דומיא דתלוי דאית ביה בזיון. אבל הכא, כיון דלית ביה בזיון, לא.

סנהדרין מז.

*The Gemara learns from the mitzva of burying the body that there is a prohibition of desecrating or disgracing the dead. According to many poskim this is a Torah prohibition<sup>21</sup>.*

14. The halachic obligation is to bury all parts of the body which were present at the time of death. (As many will know, the Israeli organization Zaka - *Zihui Korbanot Ason* - is dedicated to finding all traces of the bodies of those who die in tragic circumstances.) There is however no requirement to keep parts of the body for later burial if they were removed during life - such as teeth, hair or nails. As to the halachic issues concerning burial of amputated limbs, see <https://www.torahmusings.com/2018/12/amputated-limbs/>. Although there is no halachic obligation according to most poskim to bury limbs or organs which were removed from a living person there are many minhagim relating to such matters, even the burial of the placenta after a birth. It is said that R. Yechezkel Landau appeared to his son in a dream after his death and asked him to bury his tooth which he told his son could be found on a certain shelf. And so it was. There is a similar story about the Rambam who appeared to someone in a dream after his death and asked him to bury his toe that had been amputated some time earlier, and told him where it could be found. His wish was apparently fulfilled and the toe was placed in his grave in Tiberias (see Yabia Omer 9:35).

15. This is an example of where the Torah learns a mitzva as a *kal vechomer* from an *in extremis* situation. Even the lowest criminal deserves burial, all the more so a regular person. Other examples are the mitzva to treat a Jewish wife properly - learnt from a situation where a man marries an *ama ivria*, even the lowest status marriage requires full attention and appreciation. A third example is the mitzva of *tzniut* which is learnt from the Torah mitzva to maintain dignity in the battlefield bathroom; it applies all the more so in regular life.

16. See Ramban, Torat Ha'Adam, Sha'ar Hakevura, who rules that it is honor of the living.

17. Shevet mi-Yehuda, vol. 1, p. 314 (Mosad HaRav Edition p. 55).

18. Ibid., vol. 3, pp. 403-6; *Assia* 65-66, p. 162; ; Shu't Minchat Shlomo Tinyana 97. In his words: ה"נ גם כאן חיבורן לחי בטלן מתורת מת

19. See Tosafot Yom Tov to Mishna Shabbat 10:5.

20. See Shu't Yabia Omer 3 YD 22.

21. This may depend on the origins of the prohibition of *nivul hamet*. According to some poskim it is learnt as a *kal vechomer* from the mitzva of burial. As such, where there is a Torah

## E1] DESECRATING THE DEAD FOR THEIR OWN HONOR

10. **שאלת -** ראובן צוה בשעת פטירתו שישארו אותו לקבור אותו אל מקום קברות אבותיו. וביום שמת נאנסו ולא יכלו לישא אותו מיד והכניסוהו לשעה בקבר מקום פטירתו. ועכשו רצו בניו להוליכו אצל קברות אבותיו. ומפני שאי אפשר לישא אותו מחמת הפסד הבשר וריחו נודף עד שיתעכל הבשר אם מותר ליתן על כל גופו סיד למהר העכול. אי איכא בזיון [המת] בכך או לא? ....
- תשובה -** כל כי האי שעושים לעכל בשרו מהרה כדי לישא אותו למקום שצוה - מותר. שאין כאן משום בזיון .... והחנותין קורעין אותו ומוציאין מעיהן ואין כאן לא משום צער ולא משום בזיון. ולפנותו ממקומו כדי לקברו במקום שצוה ומקום קברות אבותיו - מותר. שלא אמרו שאין מפנין מקבר לקבר ואפילו מבזוי למכובד אלא שלא לצורך לכבוד בעלמא, ואף על פי שמפנין אותו מקבר בזוי לקברו במכובד. אבל כענין זה לקברו אצל אבותיו - מותר. שערב לו לאדם להיות נקבר אצל אבותיו וכתוב (בראשית מט:כט) *קָבְרוּ אֹתִי אֶל-אֲבֹתַי*. ... וכש"כ בנדון שלפנינו שצוה לפני מותו ושנקבר על דעת לפנותו שהוא מותר ומצוה על בניו לקיים דבריו.

שו"ת הרשב"א חלק א סימן שסט

*The Rashba (13th century, Spain) was asked concerning a man who died and instructed his relatives to bury his body in the family plot. Since this was too far away, they buried him in a temporary grave and asked whether they could pour lye onto the body in order to accelerate its decomposition so that the bones could then be moved in accordance with the deceased's instructions. The Rashba ruled that this was permitted and did not constitute a desecration of the dead since it was a major honor for the dead which he has explicitly requested in advance. Even embalming, which involves opening the body and the removal of major organs, would not be considered a desecration where required.*

- The Rashba's ruling<sup>22</sup> is based on the fact that this action was (a) for the honor of the dead; (b) a wish explicitly expressed by the deceased; and (c) a wish that is objectively cited in the Tanach as positive - to be buried with one's family.
- Some of these factors as less clear in our case:

(a) It could be argued that producing children from the deceased who can continued their name and maybe say kaddish for them WOULD be considered a great honor for them. But this is far from clear. If the deceased had no other children and the intended mother is his widow whom he loved and wished to raise a family with, then this is likely<sup>23</sup>. This might also be said for a long-term partner. But what if there was no partner and the woman who bore the child was completely unconnected with the deceased. Would he want this? What if the parents wished to produce a child and raise it, but the deceased was estranged from his parents or would otherwise have been opposed to his parents raising the child? What if the child will be raised in a non-observant environment, lead a lifestyle against halacha and not be interested in saying kaddish - is that an honor for the deceased?

11. לא נוכל להשתמש בזרעו של בחור זה אלא כדי להפרות פנויה. והפרית זו אינה מציאותית כלל בפנויה יראת שמים שומרת תורה ומצוות אלא בפנויה חילונית כמוכן לכל בר דעת. ואף אצל הנשים החילוניות אין זה מצוי שפנויה תרצה להרות אלא בחוגים מופקרים פורקי עול החפצות להרות וללדת ולגדל ילדים ללא עול וקהיר של חיי נישואין ואבהות. ואם כן קרוב הדבר שאם אכן יקימו זרע לא יהיה בן זה שומר תורה ומצוותיה, ואיזה זכות יש לאדם כשזרעו מרשיע ופורק עול והלא כשם שברא מזכה אבא כשהבן צדיק כמבואר בסנהדרין (קד.), כשהבן רשע מבייש הוא את אביו ...

רב אשר וייס, קובץ בית הלל כרך י דף עג

*Rav Asher Weiss rules that, where there child will be carried by a single woman (as opposed to the widow) the strong likelihood is that any woman wanting to do this will be from a non-religious background and the child will be raised in such a way that will not be an merit for the soul of father.*

- This may be very case specific. In today's world there could be single women of good standing and religious observance who would want to carry the child of a dead soldier and raise the child in coordination with his parents. But, even in this case, is this likely to succeed and should we be creating potentially dysfunctional or disadvantaged situations of this kind<sup>24</sup>.
- Also, the mutilation of the body in the case of the Rashba was to specifically assist in the burial of that body, not for some external reason. This may be answered by the ruling of the Node Beyehuda (see below) concerning autopsy, where he rules that is considered an honor for the dead that other lives will be saved ie exacting justice, which is an external form of honor.

(b) The wish for children is also cited in Tanach as objectively positive.

mitzva to bury there will be a parallel Torah prohibition of *nivul hamet*. See Tehumin 44 p. 363 fn 5. Other candidates for the source of *nivul hamet* are the mitzva not to allow the body to remain unburied overnight and the mitzva of *VeAhavta Lere'each Kemocha*.

22. The Rashba's heter in this situation was followed by the Radvaz in his Shu't 1:484.

23. Aside from his wish to raise a family with this woman, he would likely want her to have children to look after her in her old age.

24. We will address in Part 2 the hashkafic question of 'planned orphanhood'.

12. (א) וַתָּרָא רָחֵל כִּי לֹא יָלְדָהּ לְעֵשָׂקֵב וַתִּקְנֶה רָחֵל בְּאֶחָתָהּ וַתֹּאמֶר אֶל-עֵשָׂקֵב הִבָּה לִי בָנִים וְאִם-אֵין מִתָּה אֲנִי׃

בראשית לא:

*Rachel expresses to Ya'akov that, without children, she feels dead. Is this also true of a man?*

13. ועוד אף כי ניוול אסור מחמת בזיון המת כמו להלינו מכל מקום לכבודו מותר. הכי נמי מותר לחתוך כרסה בשביל הצלת הולד, דניחא לה להחיות זרעה.

שו"ת נחל אשכול סימן לח

*The Nachal Eshkol<sup>25</sup> explains that there is no greater kavod for a met than to give it progeny.*

- However, this assumes that the child from PSR WILL indeed be the halachic child of the deceased. If not, the halachic case to allow *nivul hamet* significantly weakens, especially if the deceased did not give explicit permission. We will deal next week be'H with the crucial question of yichus.

(c) Clearly, in the Rashba's case, the wishes of the deceased WERE relevant to the question of *nivul hamet*. So, if he has left clear instructions as to his wishes for PSR this may be halachically relevant<sup>26</sup>. (See below as to the general question of following the wishes of the deceased). Where the deceased did not give explicit permission some poskim prohibit the procedure on the basis of *nivul hamet*.<sup>27</sup>

- Another important and relevant case dealing with *nivul hamet* can be seen in the following discussion of gathering the bones:

14. אין מפרקין את העצמות ואין מפסיקין את הגידין אלא אם כן נתפרקו העצמות מעצמן, ונתפסקו הגידין מעצמן.

מסכת שמחות פרק יב הלכה ו

15. אין מפרקין את העצמות ולא מפסיקין את הגידים.

שולחן ערוך יורה דעה סימן תג סעיף ו

*One may not purposely break the bones of or dismember a corpse.*

16. כל הכלים הנמצאין בירושלם .... רבי יוסי אומר כולן טהורין חוץ מן הסל והמגרפה והמריצה המיוחדין לקברות.

משנה בשקלים פרק ח משנה ב

*R. Yosei in the Mishna rules that all items found in Yerushalayim can be assumed to be ritually pure other than those specifically used for the gathering of bones of the dead. These include the 'meritza'.*

17. מריצה - כלי שרוללים ומשצרים זו עצמות המת כשרוללים להכניסם צסל להוליכן ממקום למקום.

פירוש ר' עובדיה מברטנורא שם

*Rav Ovadia of Bartenura explains (following the Rambam) that the meritza was a tool used to smash up the bones so that that could be inserted in a basket to be moved from place to place.*

18. הרי אתה רואה שהיו מתירין לרצץ העצמות להוליכם ממקום למקום וסתמא דמילתא לא היו עושין כן אלא לכבודו של מת לקוברו אצל בני משפחתו. וכל שכן שיהיה מותר לעשות כן כדי לקוברו בארץ ישראל.

שו"ת רדב"ז חלק ב סימן תריא

*The Radvaz explains that this was permitted since it was for the kavod of the met<sup>28</sup>.*

- On that basis many poskim permit even invasive dissection on a *met* if needed for *kavod hamet*.

25. Rabbi Benjamin Hirsch Auerbach (1808-1872). This comment pertains to the Gemara which permits opening the body of a woman who has died in childbirth in order to save the fetus. One might have thought that the reason for this heter was to save life of the fetus, on which the Nachal Eshkol clarifies that it is in fact so that the mother will have progeny.

26. Some authorities permit *nivul hamet* where the person consents (Shu't Binyan Tzion 171). The Maharam Shick (YD 347) disagrees, citing Shu't Chatam Sofer that *mechila* by the deceased makes no difference. This is based on the source for the prohibition of *nivul hamet* - leaving a body hanging overnight - which the Torah calls a desecration of the *zelem Elokim*. As such, the person may perhaps forgo his own honor, but cannot forgo that of God. It may also depend on whether the origin of the prohibition of *nivul* is the obligation of burial. If so, since a person may not forgo their burial, they may also not forgo their *nivul*. Others permit slight mutilation even in cases of assumed consent (Rabbi Yitzchak Isaac Halevi Herzog, Rulings and Writings 5, YD 157). Some permit mutilation in cases of great need (see the sources brought in Shu't Yabia Omer, 3, Yoreh Deah, 23).

27. In this situation the consent of close family - the widow and parents - will not help. In fact, it may make it worse, since these close relatives may have higher level of obligation than others not to cause *nivul hamet*. See Tosafot Bava Batra 154b s.v. *zuzei hahavinan* who makes this distinction. See also Tehumin 44 pp. 370 and 372.

28. Note the question of the Tiferet Yisrael on the Bartenura (ibid) which is answered by the Radvaz. It is unlikely that the Tiferet Yisrael would have seen Shu't HaRadvaz.

## E2] DESECRATING THE DEAD TO SAVE LIVES

19. ... וליחוש דלמא טרפה הוה! אלא לאו משום דאמרין זיל בתר רובא. וכי תימא דבדקין ליה, הא קא מינוול. וכי תימא משום איבוד נשמה דהאי נינווליה, וניחוש שמא במקום סייף נקב הוה.

חולין יא:

*This Gemara is discussing a murder trial. The suggestion is to perform an autopsy on the victim to establish if the victim had a prior fatal disease (independent of the murder wound) which would prevent the execution of the murderer<sup>29</sup>. In the end the Gemara concludes that such an autopsy may be pointless and therefore cannot be done, but it is clear that nivul hamet would have been set aside for a actual pikuach nefesh.*

20. עוד הביא כבוד מעלתו רביה מסוגיא דחולין (יא:) ..... הרי דלכיל הרוח היה מותר לנוול הברוג. וכ"ת דשם ודאי הלל הוא וכאן ספק הוא שירפאו הרופאים פעם אחרת ע"י כך, שם ג"כ ספק הוא שמא ימלא טריפה. ועוד דגם ספק פיקוח נפש דוחה כל איסורין שבתורה חוץ מתלת. .... ועוד דאי אמרין שלעולם לא יהרג הרוח שלי דיקת הכהג איך ניוול זה הוא לכבודו של הניחא וכל מה שהוא לכבודו אין זו משום ניוול. את כל אלה כתבתי לפי דבריכם שאתם קורים זה פיקוח והלל נפש. אבל אני תמה הלא אם זה יקרא אפילו ספק הלל נפשות איך למה לכם כל הפלפול ... שאפילו ספק דוחה שבת החמורה .... ואמנם כ"ז צ"ע ספק סכנת נפשות לפנינו, כגון חולת או נפילת גל ...

שו"ת נודע ביהודה מהדורה תניא - יו"ד סימן רי

*The Node Beyehuda (R. Yechezkel Landau 1713 - 1793) makes it clear that we would set aside the prohibition of nivul hamet for pikuach nefesh - indeed such a purpose would not be a desecration of the body, but an honor for it! However, it must be for a real case of pikuach nefesh lefaneinu - before us. That would exclude using a body for medical research (even though that may save lives in the future).*

- It is clear that the prohibition of *nivul hamet* (according to some poskim a Torah prohibition) would be set aside in order to possibly save a life which is in present danger<sup>30</sup>. But this does not prove that it would be set aside in order to keep other mitzvot, such as *peru u'revu*<sup>31</sup> by creating a future child through PSR. It seems clear that the prohibition of *nivul hamet* will NOT be set aside simply because of the wishes of the deceased's family<sup>32</sup>.
- As noted above, the actual procedure for PSR may NOT be *nivul hamet* if can be done in a non invasive manner. This will depend on the amount of time that has passed since the death and the condition of the body.

21. נראה לע"ד דאם לא יחתכו האברים ולא יפתחו צוארו ובטנו, רק רוצים לתחוב נידעל להוציא ממנו איזה לחלוות להיוודע דברים הנוגעים למחלה, שזה אין להחשיב לניוול שהרי דבר כזה מצוי טובא בזמננו שעושים כן גם לחיים, ויש להתיר בפשיטות. וכן להוציא מעט דם לבדוק וכדומה ע"י נידעל אינו ניוול ויש להתיר. ואף שלא מצאתי זה בפירוש נראה זה לע"ד ברור.

שו"ת אגרות משה יורה דעה חלק ב סימן קנא:

*R. Moshe Feinstein rules that any procedure (in this case drawing blood for a toxicology report) which would be accepted by a living person will be permitted post-mortem and will not constitute nivul hamet. This includes inserting a needle or taking blood. But it is unlikely to include more invasive surgeries such as the cutting or removal of a testicle.*

- However, this assessment is not clear. Would a man agree to the dissection or removal of his testicle if this would enable him to have a child? Many would not, but some may. This question will be impacted by the extent that the wishes of the deceased on this matter were made clear before his death<sup>33</sup>.

29. Murder of a victim with a pre-existing fatal condition - a treifa - is still considered to be halachic murder, but the murderer is not liable for capital punishment.

30. Another proof is brought from the Gemara in Arachin 7a that we are required to cut open a woman who died in childbirth in order to try and save the fetus. Shu't Binyan Tzion (171) quotes the Maharam Shick (YD 347) who brings this proof, although disagrees on the basis that caesarian operations were also performed on living women so no proof could be brought concerning nivul hamet. However, it should be noted that, at the time of the Gemara, successful C-sections on living women were impossible as the mother would always die as a result of the process.

31. We will address in Part 2 the question of whether this does indeed satisfy the mitzva of *peru u'revu*, which is disputed.

32. As to whether the deceased himself has the ability to consent to his own *nivul*/see above fn 26.

33. Note that some poskim only accept this parallel (with actions which a live patient would accept) for procedures undertaken to clarify or diagnose, as this is the type of activity that the traditional sources permit on a corpse. However, actions which are carried out on live patients to HEAL are irrelevant to a corpse and would be prohibited. This would include dissections undertaken for the purposes of refua. This is the position of R. Avraham Steinberg - see Tehumin 44 p368.

## E3] BURIAL AS A SOURCE OF KAPPARA

22. איבעיא לה: קבורה משום בזיונה הוא, או משום כפרה הוא? למאי נפקא מינה? דאמר: לא בעינא דליקברוה לההוא גברא. אי אמרת משום בזיונה הוא, לא כל כמיניה (רש"י – דזיון כו' לקרוביו). ואי אמרת משום כפרה הוא, הא אמר לא בעינא כפרה.

סנהדרין מו:

*Chazal are clear that an important element of burial is not only the honor for the deceased (and their family) but also atonement for the soul of the deceased. If the later, the wishes of the deceased as to how he or she achieves a kappara are relevant.*

- The presence of a son to say kaddish for the parent is considered an enormous kappara for the parent<sup>34</sup>.
- On the other hand, there is an idea<sup>35</sup> that those who were killed *al kiddush Hashem*<sup>36</sup> already have the highest kappara possible. The Maharil quotes the Maharam of Rottenberg as ruling that those people need no kaddish, although he disagrees since the neshama can always rise higher.

23. .... על מה ששמעתי משם מהר"ם מרוטנבורק ז"ל הי"ד, שהוראה והנהיג שאין לומר קדיש לאביו שנהרג על קידוש השם ... ועל דבר הקדיש ליתמי הקדושים. אנא לא שמיע לי מה שכתב מר בשם רבינו הקדוש. אבל שמעתי אחרים אומרים כן ולא השגחתי בהם כי נראה לי דבר פשוט דיש לאומרו ... והיא גופא נראה לי אף על גב שהם קדושי עליון ובמדרגה העליונה ואין בריה יכולה לעמוד במחיצתם ...

שו"ת מהר"ל סימן צט

*The Maharil explains that those killed al kiddush Hashem are on the highest possible spiritual level in Shamayim<sup>37</sup>, which explains why there are those that suggests they need no kaddish. However, he disagrees.*

## F] BENEFITING FROM THE DEAD

24. מה מת אסור בהנאה, אף זבח [של עיז] נמי אסור בהנאה. ומת גופיה מנלן? אתיא 'שם' 'שם' מעגלה ערופה. כתיב הכא: (במדבר כ"א) וַתָּמָת שָׁם מְרִיָּם [וַתִּקְבֹּר שָׁם], וכתוב התם: (דברים כ"ד) וְעָרְפוּ אֶת-הָעֵגְלָה בְּנָחַל. מה להלן אסור בהנאה, אף כאן נמי אסור בהנאה. והתם מנלן? אמרי דבי רבי ינאי: כפרה כתיב בה כקדשים.

עבודה זרה כט:

*Chazal learn that it is prohibited to derive benefit from the dead. This is derived<sup>38</sup> from a gezeira shava analogy between the death of Miriam and the Egla Arufa - the heifer whose neck is broken.*

25. מת, בין עובד כוכבים בין ישראל, תכריכו אסורים בהנאה. (ש"ך – דכתיב ותקצר שם מרים וילפינו 'שם' 'שם' מעגלה ערופה – מה עגלה ערופה אסורה כהנאה אף מת וכל תכריכו אסורים כהנאה).

שולחן ערוך יורה דעה סימן שמט סעיף א ושך שם

*There is a prohibition of deriving benefit from a dead body, whether Jewish or non-Jewish.*

- Again, the definition of 'benefit' will be complex. Some poskim prohibit PSR on that basis<sup>39</sup>. Others argue that use of a sperm in this situation may NOT constitute halachic 'benefit' for a number of possible reasons:

(i) There is a general principle that the performance of a mitzva is NOT considered a benefit where benefit would be prohibited - *mitzvot lav lihenot nitnu*<sup>40</sup>. IF the subsequent creation of a child fulfills the mitzva of *peru u'revu* this could be relevant. But it is not clear that it will fulfill this mitzva for the deceased and, even if it does, is this relevant to the mother or parents who are 'using' the sperm? As a woman, the mother is not obligated in the same way in *peru u'revu*, although it could still be the fulfillment of a Torah mitzva. She is obligated in a more general rabbinic obligation to populate the world - *lashevet*<sup>41</sup>.

34. The source of this is the famous midrashic story quoted by the Machzor Vitry (223) and also in Sefer ha-Rokeach and the Or Zarua. In this story, Rabbi Akiva was once passing through a cemetery and he saw naked man who was black as coal and carrying a great burden of thorns on his head. The man told him that he was being punished in Gehinom without relief but would be released if he had a son who would stand in front of the congregation and say *barchu* and have the them answer *yehei Shmei rabba*. However, the man had no son to do so since he had left his wife pregnant and did not know if she had a boy or if he ever learned Torah. R. Akiva found the son, taught him to daven and released the man from Gehinom. Older versions of the story appear in Kalla Rabbati (2:9), Seder Eliyahu Zuta (17) and Midrash Aseret haDibrot, but without specific reference to the kaddish. Rather, in these versions, the son is trained to do other mitzvot to assist the soul of the father.

35. See Sanhedrin 47a and Pesachim 50a.

36. This is more so for those who were burned alive *al kiddush Hashem* - see Magid Meisharim Vayikra 84b. Some selichot contain the line עשה למען הרגים ושרופים על יחוד שמך. See Sefer Zechut Yitzchak 1:2 who learns from this that the *serufim* are on an even higher level.

37. Rabbi Aschi Dick suggests, on this basis, that rather than our learning being for the aliya for the neshamot of the fallen soldiers and those killed by terrorists, we should be davening that our own neshamot should have an aliya through their great stature.

38. There is a discussion in the poskim as to whether this prohibition is min haTorah or miderabbanan.

39. This is the position of R. Yigal Shafran in 'Fatherhood After Death', *Tehumin* 20 (5760), pages 347-352.

40. Eruvin 31a and other places.

41. See Magen Avraham 153:9.



- (ii) As noted above in connection with the psak on corneal transplants, some poskim rule that a body part which is reconnected to a living body is not considered dead, although it is not clear that this would apply in the same way to sperm used for fertilization.
- (iii) Some poskim rule that use of the sperm in this way for medical purposes is not considered *derech hana'a* - the normal manner of gaining benefit<sup>42</sup>. But what is the 'normal' manner of benefiting from sperm if not to use it for fertilization<sup>43</sup>?
- (iv) There is a halachic debate as to whether the hair of a corpse is subject to the prohibition on benefiting<sup>44</sup>. Rashi<sup>45</sup> explains that the debate concerning hair is based on the reality that it does not degrade after death. So too, if the sperm is removed and preserved, it will not degrade. But this is true of most other body parts which can be preserved without human intervention.
- (v) Some poskim rules that the sperm is a 'mere discharge' of the body which is not subject to a prohibition on benefit<sup>46</sup>.
- (iv) According to one view, the minimal amount which is subject to the prohibition of benefiting from the dead is learnt from the minimal amount for imparting ritual impurity which is a kezayit. However, this is not generally accepted<sup>47</sup>.

## G] OWNERSHIPS OF BODY PARTS

26. שימוש באברים של מת אף על פי צוואתו להשגת ידיעה בענייני רפואה ..... הנני משיב בקצרה כי על פי דין התורה שקבלו חז"ל איש מפי איש עד משה רבינו ע"ה שקיבלנו מסיני, אין שום אדם בעלים על גופו לצוות שיעשו בגופו, ואפילו רק באבר אחד מאבריו, שום דבר. אף לא לצורכי השגת ידיעה לענייני רפואה. וכל שכן שבני וקרוביו אינם בעלים על זה.

שר"ת אגרות-משה יו"ד ח"ג סי' קמ

*R. Moshe Feinstein is very clear that, no one has full ownership over the individual parts of their body would entitle them to dictate what should be done which those parts when removed. This is even more so for others, including family members, who do NOT have halachic ownership of their relative's body in a way which would entitle them to dictate what should be done with it.*

- Of course, people can, and should, do mitzvot with their body and this can include live organ donations (such as kidneys) to save others' lives. But we do not have permission to use our bodies in ways which contradict halacha.

## H] EXPLICIT/IMPLIED CONSENT AND FOLLOWING THE WISHES OF THE DECEASED

- Even if they may not own the sperm samples left, how binding are the explicit wishes of the deceased and their family?

27. רבי מאיר היא דאמר: מצוה לקיים דברי המת.

תענית כא.

*It is a mitzva to fulfil the wishes of the deceased. This certainly applies to financial issues but does it go beyond these? And what if the wishes of the deceased were unclear?*

- Chazal debate<sup>48</sup> what should be done with any remaining money that was donated for a burial and discuss whether it should be distributed among the deceased's heirs or used to buy a more expensive headstone. The difference of opinion hinges on the assessment of what a normal person would prefer be done after the humiliation of having his burial paid for by charity. As such, we see that consent can be determined retroactively after death. But this is for monetary property which the deceased DID own and which now CAN be owned by his heirs. Does it apply to sperm samples?

28. האם מותר לשאוב זרע ממת על מנת להפרות את אשתו ולהשאיר לו זכר בעולם? ללא הסכמה של הנפטר הדבר אסור. אך אם קיימת הסכמה או אפילו אומדן ברור שזה רצונו אז אין בכך איסור. ... לענין זה נוגעת גם העובדה שהתורה החשיבה מאד את הרצון האנושי להשארת שם וזכר בעולם, כפי שניתן ללמוד מפרשת ייבום.

ספר אסיא יג – תשובת הרב זלמן נחמיה גולדברג לחברי הועדה לאישור הסכמי פונדקאות (תשנ"ט):

*Rav Zalman Nechemia Goldberg ruled that PSR was permitted only with the prior consent of the deceased OR if we could reasonably ascertain that this would have been his wish. Again, this is very case dependant. However, R. Goldberg understands the wishes of the deceased to be very important.*

42. See Shu't Igrot Moshe YD 1:229:5 who rules that medical purposes are not considered *derech hana'a*, while acknowledging the view of the Tzitz Eliezer (13:91) who disagrees. In the words of R. Feinstein: אבל בעצם ודאי נחשב זה שלא כדרך הנאה שלחברו בבשר אדם חי הוא שלא כדרך הנאה של המת, ואף שבמת אין נהנים כלל אף לא העכו"ם. See also Shu't Radbaz 3:548, Shu't Har Tzvi 277, addendum of R. Akiva Eiger on Shulchan Aruch YD 349.

43. I.e. to what extent does *hana'a* have an objective or subjective halachic definition.

44. Rambam Hilchot Avel 14:21 rules that there is no prohibition and Tur and Shulchan Aruch (YD 349) rule that there is.

45. Arachin 7b

46. See Shulchan Aruch YD 91 and *Tehumin* 32, p354.

47. This position is cited in the Chidushei HaRan Chulin 122a s.v. *shema*. He rejects it on the basis that hair is not metamei and may still be subject to the prohibition of *hana'a*. It would seem that the relevant shiur for the prohibition of *hana'a* is a *shavei pruta* (see *Tehumin* 44 p. 374)

48. See Mishna Shekalim 2:5 and Sanhedrin 48a.

29. ליורשים אחרים של הנפטר אין שום מעמד בשאלה זו.

רב זלמן נחמיה גולדברג שם

*However, he rules that the other family members, whether widow or parents, have no halachic standing in the issue. Only the wishes of the deceased are relevant.*

• While some poskim stress the importance of following the instructions of the deceased after their death. However, others (including R. Asher Weiss) rule that this principle is relevant only to the deceased's monetary possessions and not to our case.

30. ראיתי בקובץ בית הלל גליון ט' מאמר פרי עטו של הרב מרדכי הלפרין שליט"א ובו כתב שיש לעשות רצון נפטר זה. והנני לדון בקיצור בתמצית דבריו. בשם גאון אחד כתב וזה לשונו: 'התורה החשיבה מאד את הרצון האנושי להשארת שם וזכר בעולם כפי שניתן ללמוד מפרשת יבום'. בער אני ולא אבין וכי משום 'רצון האנושי' ניתנה מצות יבום? וכי דרשינו טעמא דקרא? והלא שרשו בגובהי מרומים וגזירת הכתוב היא 'וטעמי המצוות לא נתגלו לשום אדם מעולם' (לשון נפש החיים סוף שער א).

רב אשר וייס, קובץ בית הלל כרך י דף עג

*Rav Asher Weiss entirely rejects the suggestion that this issue is in any way connected to the 'spirit' of the mitzva of yibum<sup>49</sup>. He also rejects the centrality of prioritizing the wishes of the deceased above other halachic considerations.*

31. 3.3.2 Insemination without consent – using the sperm of a person for the sole purpose of memorializing them, without the person consenting before their death, brings up additional problems. Usage like this portrays sperm as nothing but a technical resource and means to be used at the whim of people. This outlook on sperm is very problematic, for sperm cells are the essence of mankind's existence, and it is fitting to relate to them entirely differently. The unique status of sperm cells is expressed in the serious prohibition of spilling seed; in the restrictions the poskim have made to the conditions allowing for one to ejaculate for the purpose of medical examination or artificial insemination; and the halachic and legal concerns that arise regarding cloning. In light of this, it seems that the parents of the deceased themselves do not have the power to intervene in this decision.

Rabbi Yuval Cherlow, Position Paper – Insemination with Sperm of the Deceased, December 2023

*Rav Cherlow focuses on the unique and special status of a sperm sample which must not be treated like a mere asset to be used 'at the whim of people'. In his view, the view of the parents is irrelevant in determining its use.*

• In Part 2 we will be'H look at the other related questions, including:

- whether there is a halachic or hashkafic problem in producing children who will be 'planned orphans' who will never know their father. Is there an intrinsic benefit to the child in being alive, despite his challenges.
- whether the sperm donor is halachically the father of those children and fulfills through them the mitzva of peru u'revu.
- whether posthumous insemination can in some sense fulfil the spirit of the mitzva of yibum and the concept of *hakamat shem met*.
- whether such children, conceived and born after the death of the father, exempt the mother in the mitzva of yibum/chalitza.

49. We will look at this in detail in Part 2.