

HALOCHOSCOPE

This week's question:

A man was buried in the cemetery that he had paid for. His surviving wife was also enrolled in the same cemetery. However, she changed her registration to a different cemetery, where other members of her family are interred in a family section. She would like to move her late husband's grave to the new location.

The issues:

A) *Kevurah*, the mitzvah to bury the dead

B) *Nivul Hamais*, disrespect towards a dead body

C) *Pinuy Keverim* or *Pinuy Hamais*, exhuming a body for reburial

A) *Kevurah*

This *mitzvah* is Scriptural. The Torah obliges us to bury those executed by *bais din* on the same day. We apply this to all corpses. Cremation or any other form of disposal of a body violates this *mitzvah*. The Talmud gives two possible explanations for this *mitzvah*. It is a *kaparah*, atonement for the soul, to have the body laid to rest in the ground. It is also an issue of *bizayon*, human dignity. It is undignified to for a body to be left unburied. The difference between these reasons is when the deceased left instructions not to be buried. One may voluntarily claim he does not want a *kaparah*. *Bizayon* affects others, including his survivors. The poskim seem to conclude that the primary issue is *bizayon*.

There is a debate about those obligated in the *keverah*. The *mitzvah* to bury executed bodies would appear to apply to the community at large. However, references to burial throughout the Torah and Scriptures refer to children or other family members burying. This pertains to both the actual activity and the cost. While a survivor might not complete the full burial, he would be able to participate in the main parts, and delegate the rest to others, paid or volunteers. In actuality the *bais din* had two cemeteries. The four types of execution are graduated by severity. The first two had one cemetery, and the second two had another. This way the worse violators would be not be buried near the lesser violators. It appears that after the body decomposes, the remains are moved to a family plot.

As mentioned in the last issue, there is a *mitzvah* on the relatives of the deceased, who are those obligated to mourn, to occupy themselves with the burial. During the period before the burial, they are *onenim*, exempt from performance of other positive *mitzvos*, due to their preoccupation with this *mitzvah*. The poskim debate whether there is a hierarchy of those who mourn. If there are no relatives, the body is a *mais mitzvah*. All Jews are obligated, and the first available Jew must carry out the obligation. Ideally payment should come from the deceased's estate. If this has been given away or instructions were left not to use it for this, there is a debate whether it may be forcibly taken from the heir or the relatives? If the person died penniless, there could be an obligation on his survivors or the communal coffers to pay for a respectable but minimal burial.

There is a specific provision made in a *kesuba*, marriage contract, to obligate a husband to cover the costs of his wife's burial. This applies even if it was not written in to the document. It is a clause that was instituted Rabbinically, that can only be exempted in special circumstances. He must also spend whatever is needed to accord her the honor that befits her station. If he is not available, *bais din* may take funds from his property. If he is not living, sometimes, his heirs pay, and sometimes those who inherit her *kesuba* pay, depending on the stage of her receiving the *kesuba*. The wife would not be obligated to spend her *kesuba* money on the husband's burial needs, even if there is none left in his estate to pay for it. The bill would then go to his survivors or *tzedaka*. [See Kesubos 48a, Sanhedrin 46b, Yevamos 89b, Nazir 43b, Poskim. Tur Sh. Ar. YD 348:2-3, 362:1, CM 253:30-31, EH 89, 118:18, commentaries.]

B) Nivul Hamais

The Talmud assumes a prohibition on mutilating a corpse. This is cited in a number of situations. When the courts are in doubt they may use *rov*, the principle of majority chances, to rule. In guessing a presumed, non-statistical *rov*, the rule must be Scripturally considered sound. Otherwise, it is an unresolved doubt. This is treated stringently for lack of knowledge. One source cited for reliance on such a *rov* is the issuance of a death penalty for a murderer. At any given time a minority of people are considered *traifah*, terminally injured, possibly due to internal conditions. One who murders a *traifah* is exempt of liability in court. How can a death sentence be passed on a murderer? The victim might have been *traifah*! The Torah must rely on a probabilistic *rov*.

The Talmud analyzes this: Perhaps it is expected that the body is examined internally! This is impossible because of *nivul hamais*. Perhaps the body may be mutilated to save the life of an accused murderer! The examination would not be conclusive because of the remote possibility that the puncture or blow was in a place where there was a pre-existing injury. Proscribing the death penalty evidently relies on *rov*. Modern postmortem is presumably as mutilating as that in Talmudic times. It is inconclusive to prove innocence. [A minority rules that it is permitted to prove guilt.] Some derive the prohibition of *nivul hamais* from this passage.

Another situation is discussed by the Talmud: a young person died, having disposed of some property. His heirs claim he was a minor, unqualified to effect the transaction. They wish to exhume the body to check for external signs of adulthood – blatant *nivul hamais*. The buyer should be permitted to check the body. He paid the money. One view on this passage is that only those who stand to lose money may exhume. The other view is that relatives are treated more stringently than others, even if they stand to lose.

Based on these passages the poskim debate the issue. Some maintain that it is primarily an issue of desecration. If the deceased left instructions to mutilate, this would be permitted. Likewise, anything done to honor him is permitted. This disrespect does not involve actual mutilation, but exposure and withholding burial. Active mutilation remains a controversy. Most poskim maintain that one may not allow for it in his will. In addition, many sources teach that the soul remains in the body. It is especially painful when the body is moved or mutilated. Others maintain that there is a *mitzvah* incumbent on the living to prevent desecration to a human body, that is in the image of Hashem. The deceased's wishes cannot override this *mitzvah* on the living.

The origin of the prohibition is sometimes cited as the negative *mitzvah* not to leave the corpse of a one sentenced to death hanging overnight. Others cite the positive *mitzvah* to bury the dead as soon as possible. The ideas behind these *mitzvos* are to prevent desecration and to bring peace to the departed soul. [See Chulin 11b, Baba Basra 154a-b, Poskim. Tur, Sh. Ar. YD 363:3 7, CM 253:13, commentaries. Noda Biyehuda II:210. Chasam Sofer YD 336. Igros Moshe YD I:242 II:150 151 159 160. Tzitz Eliezer IV:14.]

C) Pinuy Hamais

As a general rule, it is forbidden to move a body from its grave. The body must stay put, and the ground where it lies is hallowed. A reason given by the poskim is that moving the body causes confusion to the soul. He becomes fearful of the day of judgment. Allusions may be found in Scriptures, such as when the witch raised the spirit of Shmuel. In addition, there is an issue of *nivul hamais*, or other forms of disrespect to the body. [In truth, even a live person will be slighted if he is moved around against his will, or even when he did not ask to be moved.] However, there are poskim who point out that these are given as reasons, but do not make or break the prohibition. Therefore, even if it can be guaranteed that the reasons do not apply, it is forbidden. Fear of judgment ends when the body has decomposed, yet it may not be moved. Likewise, the body will not be mutilated any more, but it may not be moved. In addition, there is the issue of the space of the grave being hallowed.

Some consider this prohibition Rabbinical in origin. Others maintain that it must be Scriptural, at least according to some poskim. This could depend on whether they consider the space of the grave hallowed or impure after the exhuming, regardless of whether remnants are absorbed on the spot. Some point out that the reasons given forbid transfer even to benefit the deceased, except in the instances mentioned below. The true basic reason seems to be as a sub-category of the *mitzvah* of *keverah*. The idea is to place the body in one location until the resurrection. In fact, it seems that opening the grave is also forbidden, even without exhuming the body.

Accordingly, the body may not be moved from a respectable grave to an equally respectable grave, to a less respectable grave or even to a more respectable grave. It is forbidden to move him to a different city for another reason. If there are Jewish graves in the first city, moving him slights the honor of those buried there.

There are exceptions to this prohibition. Basically, if it honors the deceased, one may move him. This includes a case where he left specific instructions to do so. It also includes moving him to his ancestral plot, because he would certainly be pleased about this. If there is a risk of the grave being desecrated by vandals or damaged by water, he may be moved. In some cases abandonment is also a reason to permit it. If he was buried among gentiles, or in a lone grave, or if a lone grave is found, they may be transferred. A body may be moved to Eretz Yisroel. This actually aids in the *kaparah*. If the deceased left instructions that he should be buried in a specific place, but this was not possible at the time, one may move him to fulfill his wishes. Similarly, if a condition was made at the time of burial, by the family or others responsible for the burial, the body may be moved later, in accordance with the condition. However, it must be a case of benefit to the deceased. If it is done for the convenience of the living, such as to make it easier to visit the site, it would be forbidden. The fact that the deceased will benefit from the visits

of the living does not permit it. They can always visit, albeit with some inconvenience.

There is an issue of proximity of graves. It is forbidden to bury two people in the same grave, unless they would have been permitted to lie together while living. The 'same grave' means a single grave or immediate proximity. There must be at least six hand-breadths space between them. In addition, we mentioned that violators punishable by death are buried according to the severity of their sins. One may not bury a *tzadik* next to a *rasha*. It is customary in many cemeteries not to bury a man next to a woman if they were not married, even with the required spacing. In some communities it is customary to set aside family plots. In these cases, if one is not buried in the customary way it leads to shame and, sometimes, suspicion. Accordingly, if it can be determined that this would indeed be an issue, the body may be transferred. In addition, if the wife decides that she must be buried in a location that befits her, the husband is responsible to arrange this. His estate must also arrange this. This might then mean that his body must be moved to be near her body, provided that it is not presently in a preferable location.

Our case involves the following issues. If one may indeed move a body to lie next to a spouse's body, may this be done before the spouse expires? Should the wife wait until she dies, leaving instructions to be buried in her own family plot, and only then request that her husband be moved there? First, this will mean that she is not being buried next to him, initially. This might be permissible anyhow. If it is against the custom, it might be permitted based on the future intention to move the husband close to her. Second, when the husband was initially interred there was no thought of moving his body to another cemetery. Maybe, the wife should be interred next to him right now, then both could be reburied in the other cemetery. Is this permissible for the sake of the wife? Would one move two graves, so that one could lie near a parent?

Traditionally, transferal of graves is treated with caution and trepidation. Ideally, the wife should be persuaded to give up her insistence that she be buried elsewhere. If this itself causes her shame, and having her husband buried in a different grave would cause her husband shame, the only solution might be to transfer him. This would appear preferable to transferring both. If this is done, a consensus of rabbis should be sought. [See Sanhedrin 46b-47b, Yerushalmi Moed Katan 2:4, 3:5, Smachos 13. Tur, Sh. Ar. YD 362:3-6, 363, 364 (Bais Yosef), commentaries. E.g., Igros Moshe YD I:236-243 II:154-162. Mishmeres Sholom Smachos 13-22.]

On the Parsha ... *Your corpses will be for food for all birds of the heavens and beasts of the earth and no-one will frighten ...* [28:25] This curse seems to apply even after death. Apparently, either the living are concerned about the state of their remains, or the dead are able to feel this curse. The *Targumin* seem to have two versions on the word to frighten. One meaning is that no-one will frighten the animals away. Another applies it to the people themselves, 'no-one will frighten you.' Perhaps this means that no-one will appreciate the importance of honoring the dead. The curse is how low people can sink in their misery and apathy.



In memory of Rochel Devorah bas R. Moshe a"h, whose Yahrzeit is on the 24th of Elul. 

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