

EXHUMING THE DEAD

Rabbi Myron S. Geller

This paper was approved by the CJLS on March 13, 1996, by a vote of eighteen in favor and one opposed (18-1-0). Voting in favor: Rabbis Kassel Abelson, Ben Zion Bergman, Stephanie Dickstein, Elliot N. Dorff, Jerome M. Epstein, Baruch Frydman-Kohl, Shoshana Gelfand, Myron S. Geller, Arnold M. Goodman, Susan Grossman, Judah Kogen, Vernon H. Kurtz, Aaron L. Mackler, Lionel E. Moses, Paul Plotkin, Mayer Rabinowitz, Gerald Skolnik, and Elie Kaplan Spitz. Voting against: Rabbi Gordon Tucker.

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

שאלה

As the result of an error by a burial society, an individual was interred, not in the grave site owned by him and his wife, but in a plot owned by an abutter. The abutter claims the occupied site and wants the remains removed from it so that the plot will be available for members of his own family, as he intended when the property was purchased. The family of the deceased refuses to allow the removal of the remains and requests that an additional plot owned by the abutter, adjacent to the deceased, be made available for eventual use by his spouse.

(1) May the remains be disinterred for relocation? Under what circumstances?

(2) If the remains are relocated, may the plot be reused for the burial of the original owner?

תשובה

A General Prohibition

The removal of remains from their place of burial is generally forbidden. The Yerushalmi rules:

אין מפנין את המת ואת העצמות מקבר מכובד למכובד, ולא מבזוי לבזוי,
ולא מבזוי למכובד, ואין צריך לאמר מן המכובד לבזוי.

Corpses or skeletons may not be removed from an honorable grave to an honorable grave, from one unworthy grave to another, from an unworthy grave to one that is honorable and no need to state, from an honorable grave to one that is unworthy.¹

¹ J. Moed Katan 2:4.

The Bavli makes a similar ruling:

אין מפנין לא את המת ולא את העצמות ממקום ביזוי למקום ביזוי, ולא ממקום מכוער למקום מכוער, ואין צריך לאמר ממקום מכובד למקום ביזוי.

Neither corpses nor skeletons may be removed from an honorable place to an unworthy place, from an ugly place to another ugly place and no need to state, from an honorable place to an unworthy place.²

The Tur³ follows these Talmudic precedents as does the Shulhan Arukh.⁴

Several Reasons for the General Prohibition

(A) The most important reason is cited in the Talmud, in the case of a young man who sold family property shortly before his death. After his burial, the sale was contested by his family, on the grounds that he was a minor. They sought permission to exhume his remains, hoping to show that acceptable marks of puberty could not be found on the body. Rabbi Akiva refused to allow the disinterment because **אי אתם רשאים לנוולו**, “you are not permitted to humiliate him.”⁵ In subsequent halakhah, concern about **ניווול המת**, humiliation of the dead, remains the strongest bar to exhumation.

(B) Another explanation cited is the confusion the dead would suffer if their remains were disturbed while they were experiencing **הרדת הדין**, trembling at God’s judgment.⁶ The Scriptural proof text that disturbing the dead causes them confusion is found in the response of Samuel to Saul, when he was brought up from the dead by the woman of En Dor.⁷

(C) Rabbenu Asher makes the additional point that it is a source of **בזיון**, embarrassment to the dead, to be moved from their burial site before their flesh is consumed from the bones, because in that state, their remains are sickening to the living.⁸ However, once the flesh is gone or if the remains are contained in a sealed casket, this reservation does not apply.

Exceptions to the General Prohibition

Despite the general prohibition, under certain circumstances the Rabbis permitted or even required exhumation. The Talmud Yerushalmi permits the removal of remains, even from a worthy to an unworthy place, that they may be buried with **אבותיו**, the ancestors of the deceased.⁹ The Taz understands **אבותיו** to include not only ancestors but **בני משפחתו**, one’s family in general.¹⁰

In his code, Rabbi Joseph Karo adds other circumstances when exhumation may be permitted or is required:

- A. It is a mitzvah for children to rebury a parent’s body in Eretz Yisrael, even if the parent expressed objection during his lifetime to having his remains moved there.
- B. When a burial site is unprotected from robbers or natural forces, it is

² B. Semakhot 13.

³ Tur Yoreh De’ah 363.

⁴ S.A. Yoreh De’ah 363:1.

⁵ B. Baba Batra 154a.

⁶ Beit Yosef, Tur Yoreh De’ah loc. cit.

⁷ 1 Sam. 28:15.

⁸ Rosh, Moed Katan 1:13.

⁹ Loc. cit.

¹⁰ Yoreh De’ah 363:2.

- permissible to remove bodies to locations that are not so compromised.
- c. When a stipulation is made at the time of burial about the removal of the body at a later date.
- d. When a body is buried in קבר הנמצא, an available site, but without authorization from its owner, the body may be moved.¹¹

This last ruling follows the Tosefta which permits the removal of a body from a grave which endangers public safety or which was used without the permission of its owner but bans removal when the owner has granted permission and later changes his mind.¹² When the grave is used without the owner's permission, לא קנה המת מקומו, the deceased has not gained title to the site, and disinterring the remains is proper, in order to return the plot to its rightful owner. Only a מת מצוה, a corpse whose family is unknown and responsibility for whose burial devolves on everyone, acquires title without the owners permission and cannot be disinterred. When the grave is cleared, the place is permitted for use.

The Mitzvah of קבר שלו

Among the traditional requirements for Jewish burial is that which obligates each person to acquire and be interred in קבר שלו, his own burial plot, one which is the property of the deceased. The Talmud quotes Josh. 24:33 about the death of Elazar ben Aharon and his interment at a site owned by his son Pinhas. The Gemara is concerned about the basis of Pinhas' title to the property. Abaye rejects R. Papa's suggestion that Pinhas might have purchased it. Such title, terminating at the יובל, the Jubilee Year, would leave צדיק קבור בקבר שאינו שלו, a saint buried in a grave to which he had not acquired title.¹³

The Talmud understood that a קבר שלו required צדיק, a grave to which he had acquired title; later authorities extended this mandate to all Jews:

ואם כי בבבא בתרא דף קי"א מצינו "נמצא צדיק קבור בקבר שאינו שלו"
לא דוקא צדיק אלא כל אחד צריך להיות נקבר בקבר שלו.

Although Baba Batra 111b speaks of, "a saint buried in a grave to which he has not acquired title," this refers not specifically to a saint but rather to every individual who must be buried in a grave to which he has acquired title.¹⁴

Rabbi Isaac Elkhanan Spector supplies the rationale for the extension in that each Jew enjoys a חזקה, a presumption, as צדיק, to whom the קבר שלו, personal ownership requirement applies. Thus every Jew must be buried in a plot owned in perpetuity by the deceased.¹⁵

If one is buried in a plot that does not meet this standard but he owns a plot which he has designated for his burial elsewhere, he should be disinterred in order to satisfy the requirement of burial in קבר שלו, a grave to which he has acquired title and in accordance with the wishes of the deceased.¹⁶

¹¹ S.A. Yoreh De'ah 364:2.

¹² B. Sanhedrin 47b. A distinction is made between קבר הנמצא, a grave in which the deceased has been buried without the owners consent which may be cleared, and קבר הידוע, a grave in which a body was interred with the consent of the owner, which may not be cleared.

¹³ B. Baba Batra 111b.

¹⁴ Yekutiel Greenwald, *Kol Bo Al Aveylut*, p. 174.

¹⁵ Ein Yitzhak no. 34.

¹⁶ Maharam Schick, Yoreh De'ah 354.

Justifying Exhumation

When permitting the removal of remains, the Rabbis set aside their concerns about **ניוול המת**, humiliation of the dead, **חרדת הדין**, trembling at God's judgment, and **בוזיון**, embarrassment of the dead or found that they did not apply. Maharshal rules that **ניוול המת**, humiliation of the dead, does not apply when a body is exhumed and reburied in the same cemetery or even in the same city. After the passage of twelve months from the time of death, there is no concern for **חרדת הדין**, trembling at God's judgment. If the body was buried in a sealed casket, **בוזיון המת**, embarrassment of the dead, is not considered a deterrent to disinterment of the remains. In any case, this category does not apply once the flesh is gone from the bones.¹⁷ Even when these circumstances do not apply, the Rabbis find that the removal of remains to satisfy a halakhic imperative or for the honor of the deceased, overrides reservations about exhumation and reburial.

In the event that an individual is buried in the wrong place because of error or oversight, the remains may be moved at a later time to a family plot and halakhic restrictions on exhumation and the reasons for those restrictions are not applicable.¹⁸

Reuse of the Empty Grave

A structure built above ground for the burial of the deceased as well as any stones, monuments, markers, articles of clothing or other objects specifically designated for burial with the dead, may not be reused by others. However, the soil of the grave, or the grave, in the event that the site was used without the permission of the owner so that the deceased did not, except in the case of a **מת מצוה**, a corpse whose family is unknown and responsibility for whose burial devolves on everyone, acquire his place, is permitted to be reused.¹⁹ Rambam takes a stricter view because of his concern for the dignity of the dead but is not followed by most rulings. Greenwald cites the generally accepted view that **מותר לקבור מת אחר בקבר שמשם נפנו עצמות מת** which remains have been disinterred.²⁰ However, if the grave was prepared for a family member, even if it is permitted to others, it is barred to relatives.²¹

Summary

From the perspective of halakhah, the removal of remains from a grave is generally barred because of concern for the dignity of the dead. Under certain circumstances, remains may be transferred:

- A. to move the remains to a family burial plot;
- B. to move the remains to Eretz Yisrael;
- C. for the security of the remains against vandalism or natural catastrophe;
- D. for public need;²² or,
- E. if the remains were buried in a plot belonging to someone else.

¹⁷ Greenwald, op. cit., p. 234.

¹⁸ Ibid., p. 238.

¹⁹ B. Sanhedrin 47b; S.A. Yoreh De'ah 364.

²⁰ Ibid., p. 242.

²¹ B. Sanhedrin 48a. The burial of another family member in place of the relative for whom the grave was intended is considered a dishonor to the latter.

²² Public need may include public safety, construction of railroads or highways and other projects involving land taken by governmental authorities. Greenwald argues that property taken by eminent domain is no longer

The grave site from which the body is removed may be used for burial by another person but not by a relative of the person originally interred at the plot.

This *תשובה* considers only the implications of Jewish law and does not reflect in any way on civil statutes which may override the conclusions stated here. Rabbis should consult with appropriate legal counsel when questions related to exhumation of graves and reburial so require.

Conclusion

The deceased, in our case, had expected to be buried in his own plot, amongst the members of his family. As the result of an error, he was buried in a grave belonging to another person, to which he had no claim and over which he can acquire no title because he is not a *מת מצוה*, a corpse whose family is unknown and responsibility for whose burial devolves on everyone. Removing his remains to his own plot, would comply with the intention of the deceased when he observed the mitzvah of *קבר שלו*, acquiring title to his own grave and would bring him to the final resting place he had expected *בקברי אבותיו*, in his families' burial plot. The continued occupation of the grave by the deceased raises an embarrassing question of unlawful acquisition, from which his family should want to spare him.

There is no question of *ניוול המת*, humiliation of the dead, *חרדת הדין*, trembling at God's judgment, or *בזיון*, embarrassment of the dead. The body would be moved only within the confines of the cemetery, a very short distance, in a casket, more than twelve months after the death occurred.

The reuse or the sale of the plot by the original owners is permitted as long as it is not used by a family member of the individual who was buried there in error.

The leniency of the halakhah to exhume a body under these circumstances in no way compromises the obligation to maintain *כבוד המת*, the dignity of the deceased, which should be punctiliously respected during disinterment and reburial.²³ There is no need for a ceremony when disinterment and reburial take place, although some words in memory of the deceased may be spoken.²⁴ The family of the deceased should perform *קריעה*, the rending of a garment, and observe *אבלות*, a period of mourning, until evening.²⁵

קבר שלו, owned by the deceased. This demands the relocation of remains to a site acceptable to Jewish law. Greenwald cites a ruling of Maharam Schick requiring large-scale disinterment of remains over a sizable area from land taken by the government for the construction of a railroad line. He makes no distinction between the disinterment of individual remains and the relocation of an entire cemetery. Greenwald, *op. cit.* p. 240.

²³ After this paper was completed, I learned from Rabbi Mayer Rabinowitz that a *תשובה* on disinterment by Rabbi Jack Segal had been approved unanimously by the CJLS. Rabbi Segal "suggests that every problem of disinterment be presented before a board of three rabbis, and that each case should be judged on its own merits," *PRA* 31 (1967): 208. In my view, the *מרא דאתרא* should determine if this is called for and may prefer ruling on the matter without recourse to a bet din.

²⁴ J. Moed Katan, 1.5, states, *ולא תנחומי, אבלים ולא ברכת אבלים עליהן לא אומרים עליהן ונהי אין אומרים עליהן ונהי אין אומרים עליהן דברים מהו דברים רבנן אמרו קילסין. אבל אבליים... אבל אומרים עליהן דברים מהו דברים רבנן אמרו קילסין.* See also Division of Religious Activities, National Jewish Welfare Board, *Responsa in War Time*, pp. 61-62.

²⁵ Greenwald, *op. cit.*, p. 241.