

## Survey of Recent Halakhic Literature

# Above-Ground Burial (Part I)

*Your dead shall live, my corpses shall arise—Awake and sing you that dwell in the dust (Isaiah 26:19).*

*Said Rabbi Eleazar: “How much ink has been spilled, how many quills have been broken, in order to write the children of Heth. Ten times it is written ‘the children of Heth, the children of Heth.’ Ten paralleling the Ten Commandments” (Bereshit Rabbah 58:8).*

### I. Background and History

R. Me’ir Leibush Malbim, in his commentary *Torah Or*, Genesis 23:15, explains that, for the children of Heth, the purpose of underground burial was to avoid ignominy and the unpleasant odor associated with the putrefaction of a corpse. As such, the need for a grave was transient, temporally limited to decomposition of the body. Accordingly, they offered our father Abraham “in the choicest of our graves bury your dead” (Genesis 23:6). But Abraham did not seek only the right of burial; he insisted upon an “*inheritance* of a grave” (Genesis 23:4), a burial site that was to remain in his possession for eternity. Malbim asserts that Abraham sought to impress upon the children of Heth that man must live with anticipation of life after death and that the dead will arise on the Day of Judgment. Consequently, burial is for an enduring, unspecified period of time. *Bereshit Rabbah* 58:8 depicts confirmation of the sale of the sepulcher purchased by Abraham as paralleling fulfillment of the Ten Commandments. That comparison may reflect the notion that Abraham sought to impress upon the children of Heth that burial is tantamount to acknowledgement that during the period between burial and resurrection man is rewarded for observance of the commandments of the Torah or punished for failure to do so.

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“Do not allow his corpse to remain on the gallows” (Deuteronomy 21:22) constitutes a negative commandment. The verse “for bury shall you bury him on that day” (Deuteronomy 21:23) is a corresponding positive commandment.<sup>1</sup> Both commandments apply not only to a transgressor executed by the *bet din* but to all Jews.<sup>2</sup> *Halakhot Gedolot, aseh*, no. 34, enumerates the obligation of burial as one of the 613 *mizvot* mandated by the admonition “and you shall walk in His ways” (Deuteronomy 28:9).<sup>3</sup> Ramban, in his glosses to Rambam’s *Sefer ha-Mizvot, shoresh rishon*, s.v. *ve-ha-teshuvah ha-revi’it*, regards burial as included, *inter alia*, within the ambit of the commandment “and you shall walk in His ways” in addition to being commanded by “but bury shall you bury him on that day.”

In the land of Israel there is an additional prohibition against leaving a corpse unburied. Ramban, in his *Commentary on the Bible*, Deuteronomy 21:22, and in a gloss to *Sefer ha-Mizvot, shoresh rishon*, s.v., *ve-ha-teshuvah ha-revi’it*, asserts that in the land of Israel failure to bury a corpse the same day or night that death occurs constitutes a violation of “you shall not defile the land the Lord your God gives you as an inheritance” (Deuteronomy 21:23). That negative commandment applies to a non-Jewish corpse as well.<sup>4</sup>

- 1 The Gemara, *Sanhedrin* 46b, queries, “Where is there a *remez* (allusion) to burial in the Torah?” Ramban, in his commentary on Rambam’s *Sefer Hamizvot, ha-shoresh ha-shelishi*, demonstrates that in talmudic usage the term “*remez*” is, at times, used in describing an actual biblical commandment.
- 2 Rambam, *Hilkhot Sanhedrin* 15:7–8 and *Hilkhot Evel* 4:8; as well as *Sefer ha-Mizvot, aseh*, no. 231 and *lo ta’aseh*, no. 66. *Sefer Mizvot Gadol, lo ta’aseh*, no. 194 and *aseh*, no. 104; Ramban, *Sefer ha-Mizvot, shoresh rishon*, s.v. *ve-ha-teshuvah ha-gimmel*; *Sefer ha-Hinnukh*, nos. 536–537; *Tosafot Yeshanim, Yoma* 60b, s.v. *ve-eglah*; Rabbenu Gershon, *Bekhorot* 9b. See also *Halakhot Gedolot, lo ta’aseh*, no. 224 and *Lev Sameah*, commentary on *Sefer ha-Mizvot, shoresh rishon*, s.v. *ve-ha-nir’eh li*, who maintains that the biblical commandment is limited to close relatives but others are bound by rabbinic decree. Cf., however, *Sefer Yere’im*, no. 252, and R. Sa’adia Ga’on, *Sefer ha-Mizvot*, III, *Minyan Shishim ve-Hamesh ha-Parashiyot, Parashah* 34. Cf., R. David ibn Zimra, *Teshuvot Radvaz*, I, no. 311 and *idem, Hilkhot Evel* 4:8, who maintains that the positive biblical commandment applies only to persons executed by the *bet din* but was extended by rabbinic enactment to include all deceased. Cf., however, Rambam, *Sefer ha-Mizvot, lo ta’aseh*, no. 66; R. Ya’ir Chaim Bacharach, *Teshuvot Havvot Ya’ir*, no. 139; and R. Zevi Hirsch Chajes, *Darkei Hora’ah*, no. 3, who maintain that the biblical prohibition against allowing a corpse to remain unburied applies only to transgressors executed by the *bet din*. Cf., however, *Teshuvot Sha’agat Aryeh Hadashot*, no. 6, sec. 1. Cf. also, *Radvaz, Hilkhot Evel* 4:8 as well as *Minhat Hinnukh*, no. 537, *addenda*. See also R. Chaim Hizkiyahu Medini, *Sedei Hemed, Kelalim, Ma’arakhet Aveilut*, no. 100, sec. 39.
- 3 Cf., R. Yechiel Michel Tucatzinsky, *Gesher ha-Hayyim*, I, chap. 7, sec. 3. *Gesher ha-Hayyim* infers that Rashi, *Bava Kamma* 82b, maintains that in Jerusalem burial must be immediate without any delay whatsoever.
- 4 See also Abarbanel, *Joshua* 8:29; Redak, *Joshua* 10:27; and Maharsha, *Hiddushei Aggadot, Sanhedrin* 47a. Cf., *Zohar, Parashat Terumah*, p. 141a and *Parashat Va-Yikra*,

The Gemara, *Bava Kamma* 82b, states explicitly that in Jerusalem a corpse may not be allowed to remain unburied overnight. *Shitah Mekubbezet*, *ad loc.*, and R. Shlomoh Luria, *Yam shel Shlomoh*, *Bava Kamma* 7:24, understand that admonition as rendering the prohibition applicable even to situations in which the delay in burial is for the purpose of according enhanced honor to the deceased. R. Ishturi ha-Parchi, *Kaftor va-Ferah*, chap. 7, and R. Israel of Shklov, *Pe'at ha-Shulhan* 3:23, rule that this restriction applies in our day as well. However, R. David ibn Zimra, *Teshuvot Radvaz*, II, no. 633, asserts that such a prohibition does not apply in an age in which, due to the lack of ashes of the red heifer, all persons remain defiled through contact with the dead.

Ramban, *Commentary on the Bible*, Deuteronomy 21:23, explains that allowing a person to remain unburied evokes comment regarding that person's transgressions which may have led to the death penalty. That is certainly true of a person executed as punishment for committing a capital transgression but may also occur in any case of death. All transgressions constitute profanation of the Divine Name.<sup>5</sup> Accordingly, delayed burial might have the effect of provoking reflection upon the person's transgressions and magnifying the resultant profanation of the Divine Name.<sup>6</sup> Rashi, Deuteronomy 21:23, cites a parable recorded by the Gemara, *Sanhedrin* 46b, concerning two brothers. One became a king; the second became a robber. The second was eventually apprehended, executed and his body hung from a tree. People gazed at the body displayed on the tree and mistakenly assumed that it was the corpse of the king. Thereupon, the king ordered that the body of the criminal be cut down and buried in order to prevent further dishonor to the monarchy.<sup>7</sup>

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p. 25b; Ibn Ezra, Deuteronomy 21:23; and R. Naphtali Zevi Judah Berlin, *Ha'amek Davar*, Deuteronomy 21:23. Cf., also Abarbanel, Genesis 23:1 and R. Isaac Arama, *Akeidat Yizhak*, *Parashat Hayyei Sarah*, *sha'ar* 22. Abarbanel and *Akeidat Yizhak* maintain that the defilement to which that verse refers is not physical or spiritual defilement but physical harm that may result to the living as a result of putrefaction of the corpse.

5 See Rambam, *Hilkhot Yesodei ha-Torah* 5:10.

6 *Zohar*, *Parashat Naso*, p. 143b, understands Psalms 49:13, "Ve-adam bikar bal yalin nimshal ka-behemot nidmu," as meaning "And man is cherished, therefore his corpse should not remain overnight lest he be deemed comparable to an animal."

7 R. Meir Shapiro, *Teshuvot Or ha-Me'ir*, no. 74, finds that the alternative explanations have a halakhic ramification. *Hllul Ha-Shem*, or profanation of the Divine Name, attends only upon transgressions committed by a Jew. Hence, according to Ramban, desecration of a corpse, a prohibition derived from the commandment concerning burial, is limited to the corpse of a Jew. However, non-Jews are also created in the image of God. If so, according to Rashi, who finds the commandment against violating a corpse to be rooted in the notion that man is created in the image of God, violation of the corpse of a non-Jew is also forbidden.

The Gemara, *Sanhedrin* 46b, records two possible goals accomplished by interment: 1) prevention of ignominy, i.e., visible putrefaction is a desecration of the Deity in whose image man is created and/or of all humans who will suffer that end; and 2) expiation of sin, i.e., burial and subsequent decomposition of the body is a form of atonement. The difference, explains the Gemara, is manifest in the instance of a person who expresses a desire not to be buried. If the reason for burial is that non-burial is ignominious to the Deity and/or to a person's fellow man, he has no authority to bind others by disclaiming burial. If, however, the purpose is atonement for sin, that end will not be accomplished by unwanted burial. Nevertheless, many early-day commentators indicate that there is no contradiction between those explanations and that both are correct, with the result that undesired burial remains mandatory by virtue of the first rationale. Other commentators explain that the second rationale advanced by the Gemara is simply a factual statement to the effect that burial will not result in expiation of sin against the will of the deceased but is not grounds for obviating a biblical commandment.

Abraham was the first to plead for permission to purchase a sepulcher and to submit to price gouging<sup>8</sup> in order to acquire a burial ground

- 8 The Palestinian Talmud, *Terumot* 1:2, records a controversy with regard to whether the sum of the *ketubah* (marriage contract) is denominated in *kesef zuri* or in *kesef medinah*. A *zuz* and a *dinar* are equal in value. See Rambam, *Hilkhot Ishut* 10:8. Four *dinari* are equal to one *shekel ha-kodesh*, i.e., the *shekel* of Scripture which is *kesef zuri*. Rav Huna maintains that the 200 *zuzim* of the *ketubah* are to be paid in the value of *kesef zuri* and hence equal 50 biblical *shekalim*. Accordingly, the sum of 200 *zuzim*, which constitutes the amount necessary for one year's support, is equal to 200 *dinari* or fifty *shekalim*, described as the "dowry of virgins" (Exodus 22:16). *Tiferet Yisra'el*, *Pe'ah* 8:8. Thus, 400 biblical *shekalim* are equal to eight times 200 *zuzim*. That is equal to the sum that was necessary to defray a person's living expenses for a period of eight years in ancient times. Other *Amora'im* maintain that the 200 *zuzim* of the *ketubah* are denominated in *kesef medinah*, the monetary system in use during the talmudic era. See *Tosafot*, *Ketubot* 10a, s.v. *noten*; *Shulḥan Arukh*, *Even ha-Ezer* 66:6; and Rambam, *Hilkhot Ishut* 10:8. For a comprehensive discussion of opinions regarding whether the *ketubah* is denominated in *kesef zuri* or *kesef medinah*, see *Encyclopedia Talmudit*, XXXI (Jerusalem, 5773), 23–33. The silver content of *kesef medinah* was one-eighth the content of *kesef zuri*. The result is that it requires thirty-two *zuzim* (8 x 4 *zuzim*) of *kesef medinah* to equal one biblical *shekel*. For the relative value of *kesef zuri* and *kesef medinah* see *Bava Kamma* 36b and *Encyclopedia Talmudit*, XXXI, 824. If so, 400 biblical *shekalim* are the equivalent of 400 x 32 *zuzim* or 12,800 *zuzim* of *kesef medinah*. If the *ketubah* is denominated in *kesef medinah*, it is 200 *zuzim* of those coins, i.e., of *kesef medinah*, that is necessary for one year's living expenses. In effect, payment of the *ketubah* in *kesef zuri* or *kesef medinah* reflects widely disparate assessments of the cost of living during the talmudic period as expressed in silver. Consequently, if 200 *zuzim* of *kesef medinah* is the sum necessary for one year's support during the talmudic period, 50 biblical *shekalim* would have represented the cost of defraying support

but he was hardly the last Jew to find himself in such a position. Throughout most of the medieval period and beyond, Jews were restricted to dwelling within designated areas. The right of domicile was attained at a high price and the right to purchase property was severely curtailed.<sup>9</sup> Cities became overpopulated and cemeteries even more so. Land for consecration as a burial site was not readily available.<sup>10</sup>

When a cemetery became filled to capacity and local civil authorities refused to allow expansion or purchase of an additional tract of land, the only solution was to expand vertically. This was accomplished by pouring copious quantities of earth over existing graves and digging fresh graves in the newly fashioned surface. At times, the gravestones affixed to the lower plots were removed and placed on top of the new layer of earth together with monuments marking the new graves. Other times, the gravestones marking the lower-level graves were covered over by the newly poured soil.

The earliest published reference to layered burial as a response to overcrowded cemeteries is probably that of R. Menachem Azariah Meir Kastelnovo, *Misgeret ha-Shulḥan, Yoreh De'ah* 362:4. An unnamed community wished to raise the level of its cemetery by placing a layer of soil of the requisite height over the existing graves and digging additional graves in that layer of earth. *Misgeret ha-Shulḥan* reports that the rabbi and officers of the community agreed to the plan but all died within the year. *Misgeret ha-Shulḥan* writes that he forbade the community that had consulted him to proceed with their plan despite the great need and refused to allow the practice even if the soil between the layers of graves would be “more than

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for a period of eight years and 400 x 32 would equal 12,800 *zuzim* representing the sum necessary for maintenance for a period of 64 years. [Cf., *Torah ve-Hora'ah*, (published by Makhon Yerushalayim le-Dayyanut) *Parashat Hayyei Sarah* 5781, p. 1. Strangely, that source posits 400 biblical *shekalim* as sufficient for living expenses for only a period of 48 years.] For a discussion of various opinions regarding the quantity of silver represented by 200 *zuzim* and hence the contemporary value of the *ketubah* see R. Yehudah Kelemer, *Tosefet Ketubah* (Jerusalem, 5750), pp. 15–16.

- 9 The right to acquire tracts of land for burial purposes was restricted even in modern times, particularly in Arab countries. R. Ovadiah Yosef, *Teshuvot Yabi'a Omer*, IX, *Yoreh De'ah*, no. 34, and *idem*, *Ḥazon Ovadiah, Hilkhot Avelut*, I, 1:22, sec. 70, reports that sometime in the 1950s the cemetery in Alexandria became full to capacity but the authorities refused to allow purchase of an additional tract of land for use as a cemetery.
- 10 See Ramban, *Commentary on the Bible*, Genesis 23:4, who interprets the exchange between Abraham and the children of Heth as conducted in a milieu in which burial rights of strangers were severely curtailed.

six *tefaḥim*.”<sup>11</sup> Layered burial was employed in Prague,<sup>12</sup> Krakow,<sup>13</sup> Kalish,<sup>14</sup> Pressburg,<sup>15</sup> Paris,<sup>16</sup> Frankfurt am Main<sup>17</sup> and Fez<sup>18</sup> to name but a few cities in which this expedient became necessary.<sup>19</sup> Visitors to Prague, in particular, cannot help but notice the very tall restraining wall surrounding the cemetery but are generally oblivious of the reason why ground level of the cemetery is several meters higher than the level of the road below. The cemetery in Prague contains multiple layers of graves in rows stacked

- 11 A comprehensive survey of sources permitting layered burial with interposition of soil between layers is presented by R. Moshe Kutkes, *Moriah*, vol. 35, no. 4–6 (Shevat 5777), pp. 262–263. Rabbi Kutkes presumes that the authorities who permit such burial do so only when no alternative is available. Rabbi Kutkes marshals sources to that effect in his contribution to *Moriah*, vol. 35, no. 7–9 (Nisan 5777), 327–331. As will be shown, that presumption is subject to question and requires further discussion. See *infra*, notes 31–39, and accompanying text. Rabbi Kutkes, *Moriah*, Nisan 5777, p. 333, further cites the ethical will of R. Judah ha-Ḥasid, sec. 3 and *Sefer Rokeaḥ*, *Avelut*, no. 316, who admonished against placing “a coffin upon a coffin.” *Sefer Rokeaḥ* adds that if such is done “it is certain that someone will perish within nine days.” Rabbi Kutkes cites later early-day authorities who disagree with regard to whether “a coffin upon a coffin” refers only to placement of the coffins one upon the other without the requisite interpositioning soil or whether *Rokeaḥ* posits a danger even in situations in which that halakhic requirement has not been observed. See also *infra*, note 23 and accompanying text.
- 12 R. Israel Meir Levinger, *Hama’yan*, vol. 54, no. 3 (Nisan 5774), pp. 19 and 22.
- 13 See *Baḥ*, *Yoreh De’ah* 362. *Baḥ* comments that it was impossible to carry a corpse beyond the Jewish quarter because of danger. See also R. Eliyahu Klatzkin, *Hibbat ha-Kodesh*, no. 23 and *Sedei Ḥemed*, *Kellalim*, *Avelut*, sec. 142.
- 14 See R. Isaac Schmelkes, *Teshuvot Bet Yizḥak*, *Yoreh De’ah*, II, no. 153.
- 15 See R. Isaac Elchanan Spektor, *Teshuvot Ein Yizḥak*, *Yoreh De’ah*, no. 34, sec. 7. See also R. Moshe Kutkes, *Moriah*, Nisan 5777, p. 330.
- 16 See R. Mordecai Winkler, *Teshuvot Levushei Mordekhai*, *Yoreh De’ah*, I, no. 216.
- 17 See R. Israel Meir Levinger, *Hama’yan*, p. 23.
- 18 See R. Joseph Ben-Haim, *Teshuvot She’erit ha-Zon*, IV, no. 354.
- 19 Proposals for such arrangements were advanced in later years as well. During the course of a visit to Alexandria, R. Ovadiah Yosef, who at the time was serving as a member of the *bet din* of Cairo, advised making use of this expedient. See *supra*, note 9. In 5752, responding to a query sent to him by a Brazilian community, R. Mordecai Eliyahu, *Teshuvot ha-Rav ha-Rashi*: 5750–5753, no. 143, approved a proposal for layered burial when no other option was available. Later such an arrangement was accepted and implemented by R. Jacob Rosenthal in Haifa. See *Moriah*, vol. 22, no. 10–12 (Elul 5759), p. 86 as well as R. Shlomoh Moshe Amar, *Teshuvot Shema Shlomoh*, VI, *Yoreh De’ah*, no. 21 and *Teḥumin*, XXVII (5777), pp. 429–435. Rabbi Amar responded affirmatively to a request from the Jewish community of Istanbul regarding permissibility of layered burial. Turkish law provided that if there was no burial for a period of three years the cemetery became subject to seizure by the civil authorities. R. Sha’ul Yisraeli expressed a similar opinion when consulted by the community in Montevideo. See *Be-Mareh ha-Bazak*, 2<sup>nd</sup> revised ed., no. 4 (Jerusalem, 5765), pp. 176–184, and *Teḥumin*, XXVII, 429.

one upon the other. The result is stacks of graves varying between seven and ten levels of burial.<sup>20</sup>

The practice of layered burial was adopted only because of extreme need and is believed to be fraught with potentially adverse consequences. Rabbi Kutkes reports that the old cemetery in Krakow reached capacity in the early 1930s. Necessary arrangements were undertaken for the consecration of a new cemetery but had not yet been completed. In the interim, layered burial was permitted consequent to placing six *tefaḥim* of soil on top of the existing graves.<sup>21</sup> However, as recorded in the source cited by Rabbi Kutkes, *Koveḥ Bet Aharon ve-Yisra'el*, vol. 33, no. 4 (Nisan-Iyar 5778), p. 143, in 1933, in a manner eerily reminiscent of the narrative earlier related by R. Menachem Azariah Meir Kastelnovo in *Misgeret ha-Shulḥan*, the Chief Rabbi of Krakow and two senior *dayyanim* of the city died suddenly. Thereupon, further burial in that manner was banned.<sup>22</sup>

The regulations governing layered burial are recorded in *Shulḥan Arukh, Yoreh De'ah* 362:3. *Shulḥan Arukh* rules that two bodies should not be buried adjacent to one another unless “the wall of the grave separates them from one another.” In the very next paragraph, *Shulḥan Arukh, Yoreh De'ah* 362:4, rules that one coffin may not be placed upon another and that, if burial is conducted in such manner, the second body must be exhumed, “but if there are six *tefaḥim* of earth between [the two coffins] it is permitted.”<sup>23</sup>

20 See Rabbi Levinger, *Hama'yan*, p. 19.

21 The measurement of six *tefaḥim* is a matter of controversy with the corresponding height varying between 48 and 60 cm. (A *tefaḥ* is equal to one-sixth of an *amah*). See R. Jacob Kaniewski, *Shi'urin shel Torah* (Bnei Brak, 5729), p. 64. For a fuller discussion of the length of an *amah* see J. David Bleich, *Contemporary Halakhic Problems*, VI (Jersey City, New Jersey, 2012), 211, note 22.

22 *Be-Netivei Ḥesed ve-Emet*, published by the *Chevra Kaddisha* of Tel Aviv in 5748. I have been unable to locate this source. The card catalog of the National Library of Israel has a notation stating that apparently it was not actually published.

23 The earliest source of this regulation is *Semaḥot*, chap. 13, which states only “two bodies should not be buried one adjacent to the other.” Tractate *Semaḥot*, often referred to as *Evel Rabbati*, is a collection of extra-mishnaic *beraitot* included in standard editions of the Talmud.

R. Jacob Reischer, *Teshuvot Shevut Ya'akov*, II, no. 95, reports that in all of “the dispersions of Israel” it is the practice to place graves “one next to the other” without statutory distancing, despite the fact that such practice is “not in accordance with the *din*.” *Shevut Ya'akov* attributes such laxity to difficulty in securing land for use as a burial ground. He cites as a parallel the statement of *Taz, Yoreh De'ah* 364:2, regarding the lapse of granting an unattended corpse the right to be buried *in situ* “because the land is not ours and we do not have authority for everything.” Nevertheless, responding to the residents of a newly established settlement, *Shevut Ya'akov* advises them to allow for the required space between graves and to delay worry about any future problem until such time as it arises.

The *shi'ur*, or measurement, of three *tefaḥim* is based upon a reference in the Gemara, *Nazir* 65a, to the “*tefisah*” of each corpse. The published texts read “three fingers.” However, Rashbam’s reading, *Bava Batra* 101b, s.v. *met*, is “three *tefaḥim*.”<sup>24</sup> The reason for a separation between bodies is that, as is evidenced from the Mishnah, *Nazir* 64b, with disintegration of the body, small particles of the corpse as well as body fluids become separated from the corpse and fall into the surrounding soil. Thus, parts of the body are, in effect, buried in those three *tefaḥim* which become part of the grave. Thus the term “*tefisah*” or “seizing” of the grave. Therefore, the Gemara provides that, when a corpse is exhumed, three *tefaḥim* of surrounding earth on all sides must be reinterred together with the corpse. Separation of graves is designed to assure that secretions as well as particles of flesh and bone of one corpse will not become mingled with those of another.<sup>25</sup> Since each corpse requires a surrounding space of three *tefaḥim*, the space between two graves should total six *tefaḥim*.<sup>26</sup> Some authorities rule that a total of only three *tefaḥim* is sufficient.<sup>27</sup>

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Later, R. Mordecai Winkler, *Teshuvot Levushei Mordekhai, Yoreh De'ah*, I, no. 216, questioned why proper distancing is not observed since the national government of that locale required “every city to grant sufficient burial space to each religious community.” *Teshuvot Shevet Sofer, Yoreh De'ah*, no. 103, states that where there is sufficient space “and the practice is to inter with a distance six *tefaḥim*,” a grave sold within six *tefaḥim* of distance from an adjacent grave is a “*mekah ta'ut* (erroneous sale) and it is not permitted to steal from the dead.”

- 24 The reading in *Semaḥot*, chap. 13, is “three *tefaḥim*.” *Tashbaz*, III, no. 119, suggests that there is no discrepancy between those sources and that *Bava Batra* 101b refers to the horizontal separation between graves whereas *Semaḥot* refers to vertical separation. In a different context, R. Joseph Molkho, *Shulḥan Gavo'ah, Yoreh De'ah* 362:4, observes that soil between adjacent graves is likely to collapse and cause intermingling of soil whereas vertical rows are likely to remain in place. See, however, R. Joseph Saul Nathanson, *Yosef Da'at, Yoreh De'ah* 362:4, who makes the more cogent observation that particles of two adjacent corpses may each fall into three separate *tefaḥim* and hence there must be a total of six *tefaḥim* between corpses in order to assure that there will be no intermingling of remains, whereas in layered burial, since particles can only fall downward, three *tefaḥim* is sufficient.
- 25 That understanding explains the rationale of the authorities who maintain that the *shi'ur* is not hard and fast but that, for example, if the coffin is encircled by stone, a three *tefaḥim* separation is unnecessary. See *Teshuvot Bet Yizḥak, Yoreh De'ah*, no. 153; R. Yechiel Michel Tucatzinsky, *Gesher ha-Hayyim*, I, chap. 27, sec. 6; and R. Samuel ha-Levi Woszner, *Teshuvot Shevet ha-Levi*, V, no. 177.
- 26 See *Teshuvot Bet Yizḥak, Yoreh De'ah*, I, no. 153.
- 27 See R. Shimon ben Zemaḥ Duran, *Tashbaz*, III, no. 119; R. Jacob Reischer, *Teshuvot Shevet Ya'akov*, II, no. 92; R. Abraham Danzig, *Hokhmat Adam, Mazevet Mosheh*, sec. 10; R. Moshe Feinstein, *Iggerot Mosheh, Yoreh De'ah*, III, nos. 133–134; *Teshuvot Shevet ha-Levi*, V, no. 177 and X, no. 307, sec. 3; R. Israel Jacob Fischer, *Teshuvot Even Yisra'el*, VII, no. 50; and R. Eli'ezer Waldenberg, *Ziz Eli'ezer*, XIII, no. 75. R. Menachem Azariah Meir Kastelnovo, *Misgeret ha-Shulḥan, Yoreh De'ah* 162:4, rules that burial in sand, or “loose earth,” requires additional space.

It would be quite possible to read *Shulḥan Arukh* as ruling that six *tefaḥim* of soil are required to separate two bodies only in instances of layered burial but that in the usual form of horizontal burial the requirement is only that there be a “wall of the grave” separating the bodies, i.e., that each body be buried in a discrete grave rather than in a single trench-like excavation, but without a requirement for a specific amount of space between graves. If so, all that would be required is that the bodies not come into contact with one another and that a quantity of earth be placed between them. The earth placed between the bodies would serve as the “wall of the grave.”<sup>28</sup> However, R. Akiva Eger, in a gloss to the ruling of *Shulḥan Arukh*, defines the term “wall of the grave” as a separation of six *tefaḥim* in width.<sup>29</sup>

R. Akiva Eger was undoubtedly prompted to append that gloss because, otherwise, there would be a contradiction between two separate rulings of *Tur Shulḥan Arukh*. *Tur Shulḥan Arukh* serves as the immediate source of *Shulḥan Arukh*'s ruling regarding adjacent graves and the need for a separation in the form of “the wall of the grave,” which is taken directly from *Tur Shulḥan Arukh* 362. However, *Tur* adds the explanatory words “so that each one will be in his own grave.” That language gives the impression that the concern is simply for demarcation of each grave. Nevertheless, in the immediately following chapter, *Yoreh De'ah* 363, *Tur Shulḥan Arukh* quotes R. Hai Ga'on as bemoaning the fact that some communities were not allowing for “at least six *tefaḥim* between one body and another,” indicating a requirement of a spatial separation of six *tefaḥim*.<sup>30</sup> Presumably, R. Akiva Eger assumes that *Tur Shulḥan Arukh* regards the terms to be synonymous and, accordingly, there is no contradiction in *Tur*'s ruling.

Regarding bodies buried on top of one another with interposition of six *tefaḥim* of soil between them, it is unclear whether *Shulḥan Arukh* rules only that under such circumstances the body, once buried, need not be disinterred or whether *Shulḥan Arukh* rules that the practice is permissible even *ab initio* provided that the requisite interposition of soil is placed between the coffins. Rambam, *Hilkhot Evel* 14:16, rules simply that two corpses may not be placed one on top of the other “because it is a

28 See R. Zevi Ashkenazi, *Teshuvot Ḥakham Zevi*, no. 149, who adamantly insisted upon a separation of six *tefaḥim* between graves in the Amsterdam cemetery and asserted that it was this incorrect understanding of *Shulḥan Arukh*'s ruling that led many communities to ignore that requirement. See also R. Shalom Mordecai Schwadron, *Da'at Torah, Yoreh De'ah* 362:13.

29 Cf., R. Simchah Bunim Sofer, *Teshuvot Shevet Sofer, Yoreh De'ah*, no. 103.

30 Cf., *Bava Batra* 101a.

dishonor”<sup>31</sup> but fails to record an exception to that rule in the event of separation by means of six *tefaḥim* of earth.<sup>32</sup>

*Tur Shulḥan Arukh, Yoreh De’ah* 363, further quotes Rav Hai Ga’on as stating that bodies may be buried one on top of the other provided there is proper separation between them. Rav Hai Ga’on’s terminology is somewhat unclear, but *Baḥ, Yoreh De’ah* 362:4, apparently understood Rav Hai Ga’on as permitting the practice only if no other alternative is available<sup>33</sup> and only if six *tefaḥim* of soil are placed between the coffins.<sup>34</sup> Among later authorities, R. Chaim Ozer Grodzinski, *Teshuvot Aḥi’ezer*, III, no. 64, and R. Joseph Shalom Eliashiv, *Koveḥ Teshuvot*, II, no. 64, state explicitly that layered burial should not be countenanced if other solutions are available. Rabbi Eliashiv adds that layered burial should not be entertained “even if it is necessary to distance the cemetery from the city.”

R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, VI, no. 223, s.v. *amnam*, reports that there are also kabbalistic reasons for abjuring layered burial. Those sources indicate that it is a great benefit (*tikkun gadol*) for the deceased that he be vested with all property rights<sup>35</sup> in the grave *ad coelum et ad astra* in order to deny entry to evil spirits. If that is indeed the

31 Rambam, *Hilkhot Evel* 14:16, rules “A corpse is not buried on top of a corpse, nor two corpses together, for it is ignominy.” In that ruling, Rambam equates layered burial with multiple burials adjacent to one another in a single grave and declares both to be proscribed because “it is an ignominy.” Cf., the strained understanding of Rambam advanced by *Iggerot Mosheh, Yoreh De’ah*, I, no. 234 and the rebuttal presented by R. Shlomoh Amar, *Shema Shlomoh, Yoreh De’ah*, no. 21, sec. 9.

32 Cf., Rambam, *Hilkhot Mekhirah* 21:6 and *Maggid Mishneh, ad loc.* See also R. Yekuti’el Yehudah Greenwald, *Kol Bo al Avelut, Tum’at Met*, sec. 114. Cf., *Iggerot Mosheh, Yoreh De’ah*, I, no. 234.

33 See *Tashbez*, III, no. 119.

34 *Shakh, Yoreh De’ah* 362:4, is widely understood as disagreeing with *Baḥ* and, if necessary, permitting burial even without separation of six *tefaḥim* of soil. See R. Barukh Te’umim Frankel, *Imrei Barukh, Yoreh De’ah* 366; R. Abraham Samuel Benjamin Sofer, *Teshuvot Ketav Sofer, Yoreh De’ah*, no. 184; *Teshuvot Shevet Sofer, Yoreh De’ah*, no. 103; *Teshuvot Levushei Mordekhai, Yoreh De’ah, Mahadura Kamma*, no. 116; R. Shraga Feivel Cohen, *Badei ha-Shulḥan, Yoreh De’ah* 362:1, *Bi’urim*; R. Shlomoh Drimmer, *Teshuvot Bet Shlomoh, Yoreh De’ah*, no. 224; and R. Eliezer Deutsch, *Teshuvot Pri ha-Sadeh*, I, no. 48. See also *Teshuvot ha-Rashba*, I, no. 375; *Shiltei ha-Gibborim, Sanhedrin* 47b; R. Chaim Benevesti, *Shiyurei Knesset ha-Gedolah, Hagahot ha-Tur, Yoreh De’ah* 364:5; *Teshuvot Rema me-Panu*, no. 56; R. David Zevi Hoffmann, *Melamed le-Ho’il*, II, *Yoreh De’ah*, no. 124; and R. Dov Weidenfeld, *Teshuvot Dover Meisharim*, II, no. 78. Cf., however, *Or Zaru’a*, no. 160; *Maḥaneh Efrayim, Hilkhot Zekhiya*, no. 31; R. Shalom Mordecai Schwadron, *Teshuvot Maharsham*, I, no. 62; and R. Shlomoh Yehudah Tabak, *Teshuvot Teshurat Shai, Mahadura Tinyana*, no. 105.

35 For a discussion of property rights vested in the deceased see J. David Bleich, *The Philosophical Quest: Of Philosophy, Ethics, Law and Halakhah* (New Milford, Conn., 2013), pp. 320–322.

case, absent explicit stipulation at the time of purchase of the grave, a second vertical burial constitutes an act of theft.<sup>36</sup>

Moreover, there are a host of authorities who maintain that no variation with regard to burial practices should be sanctioned even if the practice is rooted in custom rather than Halakhah.<sup>37</sup> Quite obviously, no diminution in the honor accorded to the dead is proper.<sup>38</sup> Placing a second grave above an already existing grave is clearly a diminution of the honor of the person buried below.<sup>39</sup>

Rabbi Joseph Shalom Eliashiv, *Kovez Teshuvot*, II, no. 64, notes that even mere customs governing burial practices have always been regarded with the greatest of seriousness. Rabbi Eliashiv finds that stance to be rooted in the discussion of the Gemara, *Sanhedrin* 46b. The Gemara seeks

36 Rabbi Kutkes, in his article published in *Bet Aharon ve-Yisra'el*, p. 195, note 30, reports that proponents of introduction of layered burial in Israel point to the fact that the burial site of the family of the *Rebbe* of Gur occupies a site on the side of a hill over which there is level space containing other graves. In a letter appearing in the following issue of that journal, R. Saul Alter, Rosh Yeshivah of Yeshivat Gur in Jerusalem, cites the Gemara, *Bava Batra* 63b, which states that already existing tunnels and caves are not included in the sale of property unless inclusion is explicitly stipulated. R. Eliyahu Klatzkin, *Hibbat ha-Kodesh*, no. 23, asserts that since it is the practice not to situate one grave upon another that assumption becomes an implied condition of the sale. Rabbi Alter argues that no such presumption pertains to the area of *Har ha-Zetim* to which reference was made since it is readily apparent that the ground both above and below the overhang was intended for grave sites. Actually, a contemporary visitor to that site is not likely to realize that there are two levels of graves, one above the other. It is thus entirely possible that placement of one grave above the other was entirely inadvertent.

37 R. Zevi Hirsch of Vilna, *Bet Lehem Yehudah, Yoreh De'ah* 352:4, cites sources indicating that failure to adhere to such customs presents a danger to the living. That may be why customs associated with burial have been so meticulously observed. Cf., *infra*, note 41 and accompanying text.

38 See R. Shlomoh Kluger, *Teshuvot Tuv Ta'am va-Da'at, Mahadura Telita'a*, II, no. 235; R. Eliezer Deutsch, *Teshuvot Duda'ei ha-Sadeh*, no. 30; *idem*, *Teshuvot Pri ha-Sadeh*, I, no. 48; R. Jacob Tennenbaum, *Naharei Afarsemon, Yoreh De'ah*, no. 138; and R. Isaac Liebes, *Teshuvot Bet Avi*, III, *Yoreh De'ah*, no. 110.

Many authorities add that neither should a new practice designed to enhance the dignity of the deceased be introduced because such a change would reflect negatively upon the dignity of earlier deceased persons. See R. Moshe Schick, *Teshuvot Maharam Shik, Hoshen Mishpat*, no. 56 and *Yoreh De'ah*, nos. 170–171. *Bet Lehem Yehudah, Yoreh De'ah* 352:4, states that deviation from custom should not be allowed because it would constitute a dishonor of earlier persons interred in the same cemetery and further reports that at one time a *Chevra Kaddisha* varied a burial custom and subsequently “many children died.” Cf., *Naharei Afarsemon, Yoreh De'ah*, no. 138. *Pri ha-Sadeh*, I, no. 48, states that no grave should be singled out for individual honor lest Heaven pay particular attention to that deceased person to determine whether he is indeed more worthy of the honor accorded him than the other deceased buried in that locale. *Pri ha-Sadeh's* discussion focuses upon the relatively non-ostentatious matter of erecting a fence around a grave. See also *infra*, note 41.

39 See Rav Hai Ga'on cited by *Tur Shulhan Arukh, Yoreh De'ah* 362.

a biblical verse as a basis for establishing an obligation of burial. The Gemara points to God's burial of Moses as the source of the obligation but rejects that historical event as an insufficient basis for demonstrating the existence of a commandment because it is possible that God did so, not because of a *mizvah*, but in order not to deviate from the custom.<sup>40</sup> Rabbi Eliashiv concludes that customs associated with burial are endowed with particular stringency as evidenced by the fact that the Gemara presumes that God Himself would join in their performance.<sup>41</sup> *Iggerot Mosheh, Yoreh De'ah*, III, no. 143, states that it is an indignity for a person to be buried even in accordance with scrupulous adherence to all customs and traditions if the burial occurs in a cemetery in which others are buried in violation of such practices.<sup>42</sup>

## II. The Problem

In the United States, the Social Security Administration allots the heirs of each recipient of benefits a modest sum for the purpose of defraying funeral expenses. In Israel, in addition to other benefits, *Bituah Le'umi* provides a burial site for each person after his or her demise. Until fairly recently, each person was entitled to *kevurat sadeh* (field burial), i.e., a grave-sized plot within a cemetery for ground-level burial. Several decades ago, various burial organizations that are the owners of tracts of land within the municipal cemeteries realized that they would soon run out of graves and that the cost of acquiring additional similarly located land for cemetery purposes would be prohibitive.<sup>43</sup> Accordingly,

40 This observation was made much earlier by *Teshuvot Pri ha-Sadeh*, I, no. 57 and *Duda'ei ha-Sadeh*, no. 30. See also *Teshuvot Bet Avi*, III, no. 110. See also R. Shlomoh Kluger, *Teshuvot Tuv Ta'am va-Da'at, Mahadura Gimmel*, II, no. 235. For a discussion of the binding nature of custom in general and of burial customs in particular, see R. Aaron Levine, *Zikhron Me'ir* (Toronto, 5745), pp. 1–24. See also *ibid.*, p. 281, note 10.

41 See *Bah*, *Yoreh De'ah* 350 and *Shakh*, *Yoreh De'ah* 350:1; *Teshuvot Bet Shlomoh, Yoreh De'ah*, II, no. 227; *Teshuvot Pri ha-Sadeh*, I, no. 38; R. Jacob Levinson, *Davar be-Itto*, p. 46; *Teshuvot Bet Avi*, III, no. 110; and *Duda'ei ha-Sadeh*, no. 30, explain that deviation in funeral practice draws celestial attention to the deceased, thereby prompting a more intense scrutiny of his misdeeds, with the possible result of enhanced punishment. [*Duda'ei ha-Sadeh* claims that heavenly attention is drawn only if the deviation from usual practice was requested by the deceased but not if initiated by a son as a mark of respect.] See also *Teshuvot Bet Shlomoh, Yoreh De'ah*, II, no. 227 and *Teshuvot Pri ha-Sadeh*, I, no. 38.

42 See also *Iggerot Mosheh, Yoreh De'ah*, III, no. 144.

43 R. Moshe Kutkes, *Moriah*, Shevat 5777, p. 262, note 1, and *Bet Aharon ve-Yisra'el*, p. 141, note 2, cites a public statement of the Israeli government issued in 5772 claiming that between the years 2004 and 2020 one million dunams of land would be required for normal below ground burial. Using the government's own statistics, Rabbi Kutkes demonstrates that the claim was wildly exaggerated, inconsistent with the government's own figures, and, in retrospect, demonstrably fallacious.

they began petitioning government authorities for permission to make more efficient use of the ground available by employing various modes of above-ground burial. Such arrangements would allow for stacking one grave upon another with the result that an area normally devoted to a single grave might be used for multiple interments.<sup>44</sup>

Rabbinic authorities well understood that the cost of real estate is, to a very great extent, correlated with proximity to Times Square, Piccadilly Circle or Rehov Dizengoff. The obvious solution would be burial some distance removed from major population centers. In recent times that has become the practice throughout the Diaspora. R. Eliashiv, in particular, is widely quoted as emphatically insisting that there is no valid reason for cemeteries to be located in high-cost metropolitan areas.<sup>45</sup> Nevertheless, the Chief Rabbinate reportedly reached an accommodation with the government and approved a number of novel forms of burial, each of which will be discussed presently. Responding to a parliamentary question posed in the *Knesset* on 18 Sivan 5771, the Israeli Minister of Religious Affairs announced that, pursuant to a ruling of the Chief Rabbinate Council certifying that other forms of burial are halakhically acceptable, the government no longer felt obligated to provide “field burial.”<sup>46</sup>

What the Chief Rabbinate Council did or did not approve will be clarified in a later section.<sup>47</sup> But the fact is that *Bituah Le’umi* no longer provides “*kevurat sadeh*,” i.e., customary underground burial. Instead, only burial in an above-ground structure or an underground tunnel, generally located within an existing cemetery, is available without charge. *Kevurat sadeh* remains available to Israelis but only at an extremely high cost, as is the case with regard to non-Israelis.<sup>48</sup>

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See also Rabbi Kutkes, *Moriah*, Shevat 5777, p. 262, note 1 and R. Rafi Ostroff, *Teḥumin* XXXII (5772), 387. Writing in *Hama’yan*, vol. 54, no. 3 (Nisan 5774), R. Israel Meir Levinger estimates that over a period of 120 years a maximum of 28,000 dunams of land would be required for use as cemeteries. Those figures appeared earlier in *Menuḥah Lo Nekhonah*, p. 19, note 3.

44 For an extensive survey of the present-day situation in Israel, see Tzippy Yaron and Rachel Ginsberg, “No Grounds for Burial,” *Mishpacha*, June 15, 2015, pp. 56–64.

45 See R. Joseph Shalom Eliashiv, *Kovez Teshuvot*, II, no. 64.

46 See R. Gedaliah Axelrod, *Kevurat Komot be-Mivḥan ha-Halakhah*, p. 1.

47 See Section VI that will appear in Part 2 of this article.

48 R. Moshe Be’eri, *Teḥumin*, XXXVI (5776), 253, estimates the cost of a “field grave” (*kevurat sadeh*) as NIS 35,000. As noted, the cost of a grave within existing cemeteries is subject to wide variation depending upon location. In 2015, other sources estimated the cost of a grave for an Israeli purchased while still alive to range between NIS 5,709 in Ashdod to NIS 14,425 in Tel Aviv and Haifa, and for non-Israelis to range from \$6,500 outside of Jerusalem and in Jerusalem from \$13,000 on *Har ha-Zeitim* to \$25,000 - \$50,000 on *Har ha-Menuḥot*. See *Mishpacha*, p. 58. The lower prices on *Har ha-Zeitim* reflect the current security situation. The cemetery in Zefat and some cemeteries in Haifa, Tel Aviv and Petach Tikvah are considered closed.

### III. Proposed Solutions

In a contribution to *Hama'yan*, vol. 54, no. 3 (Nisan 5774), R. Israel Meir Levinger offers a solution to the Israeli problem based on the practice of European cities that allowed layered burial by placing a thick cover of soil between each layer of graves. His proposal provides for rows of graves to be stacked one on top of the other with a quantity of earth six *tefaḥim* in height placed between each layer of graves and for each grave to be fully covered by earth on all sides. Graves would be fashioned by using soil to construct an artificial hill rising from ground level, excavating graves in the form of crypts in the soil of the hill and lining each crypt with concrete. When need arises the body would be placed in a crypt which would then be filled with earth and sealed.<sup>49</sup> The proposal parallels the nature of burial in *kukhin* practiced in the talmudic period in that the crypts were hewed into stone while in Rabbi Levinger's proposal some form of burial graves would be "excavated" in an artificially constructed hill. Rabbi Levinger's proposal is the least objectionable of those that have been advanced. The major halakhic issue with regard to that proposal is whether stacked burial with interposed layers of earth is permitted only when no other viable alternative is available or whether it is permissible even *ab initio*.<sup>50</sup>

The Chief Rabbinate Council allegedly gave its sanction to far more questionable arrangements. The proposals reportedly sanctioned by the Chief Rabbinate are three in number but are essentially variations of a single innovation.<sup>51</sup> The first is termed "*kevurat zugot* – couples burial"

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*Chevra Kaddisha Perushim* has some graves available on *Har ha-Zeitim* but will make them available only to descendants of those already buried in that location. See *Mishpacha*, pp. 62–63.

49 This proposal is indeed virtually identical with the plan actually approved by the Chief Rabbinate and R. Yitzchak Yosef. See Section VI to appear in Part 2 of this article. Cf. also, the articles of R. Sha'ul Yisraeli, *Barka'i*, no. 4 (Fall, 5747), reprinted in *idem*, *Teshuvot Helkat Binyamin*, I, no. 24, and R. Shalom Messas, *Barka'i*, no. 4, reprinted in *idem*, *Teshuvot Magen va-Shemesh*, II, no. 7. In his earlier article published in *Barka'i*, no. 2 (Fall, 5745), Rabbi Israeli seems to disapprove of all above-ground burial.

50 See *supra*, note 12.

51 R. David Chaim Shloush, in an article published in *Barka'i*, no. 4, addressing the same problem permits above-ground burial in crypts embedded in a mausoleum-like structure. The same issue of *Barka'i* features rebuttals by R. Sha'ul Yisraeli, then a member of the Rabbinical Supreme Court of Appeals and editor of *Barka'i*, as well as by R. Shalom Messas, who at the time was the Sephardic Chief Rabbi of Jerusalem.

Rabbi Messas engages in a lengthy discussion of references to *kever binyan* in the talmudic commentaries of various early-day authorities. Initially, Rabbi Messas argues that the phrase connotes what is, in effect, a mausoleum but concludes his discussion by acknowledging that the references may well be to a grave dug into

(or “*kevurat al*”), i.e., two graves one on top of the other, is designed primarily for married couples. The second expedient is known as “*kevurat Sanhedrin* – Sanhedrin burial,” i.e., compartments seemingly chiseled into a mountain or a catacomb-like tunnel in which crypts are fashioned and lined with concrete.<sup>52</sup> The edifice itself is constructed of concrete walls on three sides and the fourth wall is attached to the side of a mountain or an artificially augmented slope of a valley. The third is termed “*kevurat komot* – storeys burial” (or “*kevurat ramah*”) and involves stacking concrete crypts above ground in a freestanding mausoleum-like structure. A more apt term for this practice might be “condominium burial” since, ultimately, each crypt is individually owned and stacked alongside and above one another.

Whereas *kevurat Sanhedrin* involves crypts attached to the side of a hill or the slope of a valley, *kevurat kommot* involves “floors” or “storeys” of graves consisting of concrete slabs one above the other supported by pillars of concrete. The floor of each storey is covered with soil of sufficient height so that a grave can be placed within the soil and surrounded with concrete. At the time of the funeral, the body is brought to the designated level and slid horizontally into a preexisting concrete crypt that is then filled with earth so that the body is covered with soil on all sides. One variation provides for putting the corpse in a concrete tub-like container and placing the container in the concrete crypt. Some burial societies insist upon affixing adjacent cylinders in the ground, reaching from ground level to the top floor, and filling them with soil. Openings are created in the sides of the cylinders on each “floor” in order to allow the soil within the cylinder to come into direct contact with the soil inside the crypt or, in the alternative, the edifice is attached to the side of a cliff. The purpose and effect is to fashion an attachment between each grave and the natural ground. A relatively succinct article supporting those modes of burial was published by R. Moshe Be’eri in *Teḥumin*, XXXVI (5776).

*Kevurat Sanhedrin* and *kevurat kommot* both involve above-ground burial and employ the same method in the use of concrete crypts and

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the ground but reinforced on its sides and covered with more robust material. That view is discussed in detail in the following section.

52 In the talmudic period it was indeed the practice to bury in subterranean caves. Many of those burial sites have been identified. One of those sites dating to the first century C.E., located in northern Jerusalem and containing 63 crypts, somehow came to be associated with the *Sanhedrin* composed of 70 members. Hence the term *kevurat Sanhedrin*. The neighborhood in Jerusalem known as Sanhedria derives its name from the proximity of those graves. See R. Yehoshua Ben-Ariel, *Ir be-R’ei Tekufah: Yerushalayim ha-Ḥadashah be-Reshitah* (Jerusalem, 5779), p. 39. Any association of those crypts with the *Sanhedrin* has long been recognized as erroneous. See John Wilson, *The Lands of the Bible Visited and Described* (Edinburgh, 1847), I, 429.

attachment of the edifice directly to natural ground. The distinction between them is that *kevurat Sanhedrin* is attached on one side to the side of a hill or the slope of a valley while *kevurat kommot* consists of a free-standing structure with or without employment of hollow cylinders filled with earth and attached to the ground. *Kevurat Sanhedrin* of the talmudic period involved creation of actual discrete crypts within a subterranean cave. The modern-day proposal calls for erection of an artificial structure to be attached to the side of a hill or the slope of a valley on only one side and for crypts to be situated within that structure. Those various modes of burial involve use of artificially fashioned crypts that may collectively be referred to as *kevurat kukhin*.

Those three modes of burial are basically variations of one method involving a single innovation. As explained by R. Jacob Roza, *Hama'yan*, vol. 54, no. 4 (Tammuz 5774), and R. Moshe Be'eri, *Teḥumin*, XXXVI (5776), concrete is placed between each grave and the graves in the storey above. There is a height of three *tefaḥim* between each layer of graves. Concrete is used to define each individual crypt and bodies are distanced twelve centimeters from one another. Another layer of earth of unspecified thickness is placed underneath and above each body. Those layers are extended over both sides of the corpse and, optimally, are connected to *terra firma* underneath by means of perforations in the concrete floor filled with soil and/or by means of openings in supporting pillar-like cylinders reaching the ground or by a hole in the walls of each adjacent crypt ultimately connecting to the side of a mountain or the slope of a valley.

Each of the three modes of burial accomplishes the same purpose in a somewhat different way. The least problematic method would be to dig a deep grave below ground and to stack concrete containers one on top of the other. In a "couples burial," whichever spouse dies first would be interred on the lower level and, upon death of the second, he or she would be placed in a concrete container placed directly above. In theory, such stacking need not be limited to two graves. Deeper excavation would make it possible to provide for multiple layers of crypts to be stacked one upon the other. The simplest method of execution would be to employ concrete boxes or tubs, place them underground and fill any surrounding space with soil and then to place a layer of soil on top of the concrete container.<sup>53</sup> In a contribution to *Moriah*, vol. 34, no. 10–12 (Nisan 5776), R. Gad Moshe Licht analyzes the halakhic problems associated with each of the proposed modes of burial. The major halakhic problem with these modes of burial is that, with the exception of "couples burial," the corpse is not buried directly in the earth but in a concrete container. Employment

53 See Rabbi Levinger's proposal *supra*, note 12, and accompanying text.

of a concrete container may or may not be a problem depending upon whether concrete is halakhically deemed to be a form of “earth.”<sup>54</sup> A second problem associated with “couples burial” arises from the fact that the spouse, husband or wife, who dies first, is buried in the lower grave and the one who dies second is buried directly above. In one family the husband may die first. In the horizontally adjoining “couples” burial site the wife may die first. The result is that in any horizontal row a male may be buried next to a female who is not his wife and a female next to a male who is not her husband. The practice in many communities is to prevent such a situation from occurring by placing two husbands next to one another and two wives next to one another in alternating gender sequence of each couple in any given row.

Another means of maximizing use of available space might provide for ordinary burial in a tract of land artificially created as a horizontal extension of a flat surface. That procedure would require construction of a concrete roof attached to the top of a cliff, supported by pillars as a free-standing structure, and covering the roof with a deep layer of soil that is either attached to the side of a hill or slope of a valley and then digging graves in the earth-covered roof. This expedient might even be carried out by constructing a roof as a freestanding structure and covering the roof with soil.<sup>55</sup> The advantage of that form of above-ground burial is that it would eliminate both problems associated with above-ground burial and the problem of stacked burial. Such an arrangement might be termed “roof burial.” A proposal for that type of burial has not been the subject of wide discussion because it would result in a limited advantage in providing only a single layer of graves.

The various proposals have received much attention both in the Israeli popular press and in scholarly literature. An undated 36-page monograph supporting those proposals titled “*Kuntres Odot Kevurah be-Mishtaḥim u-be-Kommot*” was authored by R. Zalman Menachem Korn who identifies himself on the title page only by his initials. In its wake came a detailed rebuttal of those proposals, “*Kuntres Kevurat Kommot be-Mivḥan ha-Halakhah*,” 39 pages in length, not counting substantial *addenda*, authored by R. Gedaliah Axelrod, formerly Rabbi of the Chabad community of Haifa and author of *Teshuvot Migdal Zofim*.<sup>56</sup> In response to

54 See Section V that will appear in Part 2 of this article. R. Yitzchak Yosef, *Yalkut Yizḥak: Hilkhhot Bikkur Ḥolim ve-Avelut* (Jerusalem, 5764) 45:8, endorses use of a concrete structure provided that soil is placed “at least” on the floor of the crypt. Cf., R. Ovadiah Yosef, *Teshuvot Yabi’a Omer*, IX, *Yoreh De’ah*, no. 34.

55 See R. Isaac Samuel Schechter, *Teshuvot Yashiv Yizḥak*, XVI, no. 44.

56 An earlier much briefer treatment of the issues involved appears in Rabbi Axelrod’s *Teshuvot Migdal Zofim*, VI, *Yoreh De’ah*, no. 74.

those proposals there also appeared another anonymous 34-page monograph (Elul, 5772) bearing the title “*Menuḥah Lo Nekhonah*” (“Repose that is *Not* Proper”) purporting to represent the views of the individual members of the Chief Rabbinate Council who participated in the deliberations regarding the proposed burial practices as well as the minutes and actual decisions that emerged from those deliberations.<sup>57</sup> In addition, two detailed articles opposing *kevurat zugot* authored by Rabbi Moshe Kutkes were published in *Moriah*, vol. 35, no. 4–6 (Shevat 5777) and *Moriah*, vol. 35, no. 7–9 (Nisan 5777). Rabbi Kutkes limits his discussions in *Moriah* to what he terms “*kevurat makhpelah-zugot*,” which is the earlier described “couples burial.” He does so because, he claims, it is widely assumed that burial categorized in that manner is synonymous with below-ground burial whereas, in actuality, it is above-ground burial within concrete crypts or tubs filled with soil that are cemented in place and attached to the ground.<sup>58</sup> Another lengthy and comprehensive article authored by Rabbi Kutkes opposing stacked burial in tunnels underneath *Har ha-Menuḥot* cemetery was published in the American journal *Bet Aharon ve-Yisra’el*, vol. 33, no. 4. A detailed discussion of the problems involved appears in R. Moshe Kutkes, *Madrikh le-Kever ke-Halakhah* (Jerusalem, 5782).

Rabbi Kutkes introduces his incisive halakhic discussion in *Moriah* with a series of serious charges. He alleges that the Israeli government provides incentives for construction and upkeep of newly-fashionable forms of burial and either engages in outright refusal to grant permits for opening new cemeteries or insists upon conditions that make it difficult or even halakhically impossible for a *Chevra Kaddisha* to accept.<sup>59</sup> Perhaps the most serious allegation is that there is an element of consumer fraud involved in that, at the time of the funeral, relatives who bury their loved ones in graves provided by *Bituah Le’umi* are often unaware that they have been assigned an above-ground burial site. Members of the family become aware of the nature of the burial only at a later date when they visit the grave and are at leisure to scrutinize the surroundings more carefully. Families living outside the State of Israel who purchase such graves have no opportunity to conduct their own examination prior to the funeral. The perception of the below ground nature of burials in such instances may not be merely inadvertent but intentionally and

57 Those individuals included Rabbis Mordecai Eliyahu, Abraham Kahana-Shapiro, Sha’ul Yisraeli, Shalom Messas, Moshe Molkoh as well as David Shloush. The only person who was living at the time of publication of that monograph in 2012 was Rabbi David Shloush.

58 For a description of various iterations of this method see *Moriah*, Shevat 5777, pp. 264–267.

59 See *Moriah*, Shevat 5777, p. 362.

fraudulently engendered. That surmise, namely that some proponents of above-ground burial intentionally misled relatives of the deceased, is evidenced by a citation of R. Moshe Be'eri, *Teḥumin*, XXXVI, 256, note 22, from Rabbi Korn's article in which Rabbi Korn concludes his discussion with the advice that, since above-ground burial is not acceptable to all, the structure be erected adjacent to a mountain or to the slope of a valley in a manner such that the uppermost storey will appear to be at ground level and that those below are simply part of the mountain slope.<sup>60</sup> That phenomenon may readily be perceived by any motorist traveling on the Tel Aviv-Jerusalem Highway. *Har ha-Menuḥot* becomes visible just before entering Jerusalem. A structure can be observed jutting out of the mountain that has the appearance of a series of extremely large cement terraces. In reality, what is observed is a multi-level cement structure connected to the mountainside.<sup>61</sup>

In addition to the requirement for subterranean burial, Rabbi Kutkes, *Bet Aharon ve-Yisra'el*, p. 158, identifies a number of other problems associated with burial in crypts as practiced in *kevurat kukhin*. Some of those issues arose earlier with regard to mausoleum burial. As described by Rabbi Kutkes, the body is placed in a concrete vault but not covered by earth. The opening is temporarily closed with a concrete grave marker supported by wooden props. The marker itself remains unattached and freestanding until a later date at which time it is permanently attached by means of cement or glue.

The problems identified by Rabbi Kutkes are:

1. Burial in a manner that leaves the corpse unprotected does not satisfy the requirement of burial. *Ḥazon Ish*, *Yoreh De'ah* 208:9,<sup>62</sup> comments that interment in a manner that does not prevent a foraging animal from violating the corpse is not considered burial.<sup>63</sup> Temporary closure by an unsecured marker, contends Rabbi Kutkes, *Bet Aharon ve-Yisra'el*, p. 158, does not present adequate protection.<sup>64</sup>

60 Rabbi Sha'ul Yisraeli, *Barka'i*, no. 4, p. 148, in permitting burial in an "artificial valley" advises, without explaining his reason, that, although a lesser covering of soil would suffice, nevertheless, the construction "should be carried out in a manner such that it have the appearance of a valley."

61 See *Mishpacha*, p. 58.

62 See also *Ḥazon Ish*, *Toharot*, I, *Ohalot* 22:38, and *Iggerot Mosheh*, *Yoreh De'ah*, III, no. 233.

63 See also *Iggerot Mosheh*, *Yoreh De'ah*, III, no. 142, sec. 1.

64 *Semaḥot*, chap. 8, reports that, in earlier times, relatives visited the burial crypt during the three-day period following interment in order to assure that death had actually occurred and the body had not been buried alive precipitously. In a letter advocating delayed burial published in *Bikkurei Ittim*, 5584, pp. 220–222, Moses Mendelsohn sought to show that the practice was to leave the body

- R. Abraham Aaron Yudelovitz, *Teshuvot Av be-Hokhmah* (New York, 5687), p. 63a, goes even further in asserting that burial in a mausoleum—or in any above-ground structure—is precluded for an identical reason. Rabbi Yudelovitz argues that any structural edifice will become defective or be destroyed with the passage of time. With the deterioration of the above-ground structure the corpse will no longer be protected and burial that does not assure permanent protection does not satisfy the requirement of burial.<sup>65</sup>
2. Interment in crypts as practiced in the days of the Gemara included covering the body with earth as stated by Rambam, *Hilkhot Evel* 4:4. Rema, *Orah Hayyim* 256:4, rules that even when interment occurs on *Yom Tov*, the grave must be filled in after the corpse has been lowered into the ground. *Mishnah Berurah* 526:28 explains that filling in the grave, although an act that would ordinarily be forbidden on *Yom Tov*, constitutes the “final step in burial.” Filling the grave with earth on *Yom Tov* is permitted even though wooden boards might be employed to cover the grave temporarily. The reason is clearly that a readily removable covering does not provide the requisite protection and hence does not constitute burial.
  3. Among the reasons advanced by *Iggerot Mosheh* in his responsum opposing use of mausoleums is that decomposition of the body is a factor in expiation of sin as reflected in the ruling of Rema, *Yoreh De'ah* 363:2. *Iggerot Mosheh* observes that the process of disintegration of the body is accelerated by contact with earth. The same objection applies to *kevurat kummot* if there is no direct contact with earth.
  4. When interment takes place in a mausoleum, the body is embalmed in order to retard decomposition and its accompanying odor.<sup>66</sup> Rabbi Kutkes, *Bet Aharon ve-Yisra'el*, p. 160, assumes that since modern-day concrete crypts employed in stacked burial are not tightly sealed, they similarly allow the repulsive, malodorous smell to be readily perceived. Obviously, embalming is forbidden and cannot be utilized to rectify the problem. That result is incompatible with the dignity that must be

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uncovered in order to make examination possible. However, Rambam, *Hilkhot Evel* 4:4, and *Yad Ramah, Bava Batra* 100b, describe interment in a cave as including placement of earth on top of the corpse. Cf., R. Nisan Yablonsky, *Teshuvot Nizanei Nisan*, no. 4. In a letter also appearing in *Bikkurei Ittim*, 5584, R. Jacob Emden, pp. 222–223, strongly insisted that the body was covered with a thin layer of earth that was easily removed. See also *Teshuvot Hatam Sofer, Yoreh De'ah*, no. 338, s.v. *hineh*, s.v. *akh* and s.v. *ve-od derekh*. Cf., R. Natrunai Ga'on cited by *Tur, Yoreh De'ah* 362, who states that burial in *kukhin* was designed “so that soil would not touch his face.”

65 Cf., R. Elijah of Vilna, *Bi'ur ha-Gra, Hoshen Mishpat* 95:10–11.

66 See *Kol Bo al Avelut*, II, pp. 45–47.

accorded the deceased. Moreover, as recorded by *Shulḥan Arukh, Oraḥ Ḥayyim* 79:5, the smell of decaying flesh renders prayer impermissible and hence effectively precludes prayer in conjunction with visitation of the burial site.

In addition to the issues identified by Rabbi Kutkes there is yet another issue that has apparently not been raised. *Tosafot, Mo'ed Katan* 8b, s.v. *ein*, declares that “in our day we do not make crypts and graves during [a person’s] lifetime.” With the possible exception of *kevurat zugot* the various modes of burial that have been proposed involve *inter vivos* construction of graves in the form of crypts for future use.

#### IV. Subterranean Burial

The halakhic problems posed by the newly introduced practices arise from the premise that burial must be below ground. *Ḥiddushei ha-Ran, Sanhedrin* 46b, observes that the requirement for burial in the ground reflects God’s decree to Adam, “For you are earth and unto the earth shall you return” (Genesis 3:19). *Anaf Ya’akov*, in his commentary on *Ein Ya’akov, Berakhot* 48b, finds the relationship between underground burial and expiation of sin to be expressed in the verse “And the dust shall return to the earth as it was and the spirit shall return to God who gave it” (Ecclesiastes 12:7), i.e., the soul will not return to God until the body turns to dust. Basing himself on *Bereshit Rabbah* 20:6, R. Meir Dan Plocki, *Kli Ḥemdah, Parashat Ḥayyei Sarah*, sec. 2, remarks that Adam was created out of earth and charged with fulfilling a designed purpose. Instead, he sinned and in doing so misused the earth from which he was fashioned. Since Adam committed larceny by conversion therefore the earth that he misappropriated must be restored to its original owner.<sup>67</sup>

The requirement that burial be below ground is explicit in the writings of numerous early-day sources. Ramban, *Torat ha-Adam*, II, *Inyan ha-Avelut*,<sup>68</sup> writes:

For this is the nature of graves: A large, deep and wide excavation is dug in the ground and built-up walls are constructed for it...: We find in all places reference to “digging” with regard to graves...: “They dug a grave for him” (*Shabbat* 151a); “One who digs a grave for the deceased” (*Berakhot* 14b); “One does not dig crypts and graves on the festival” (*Mo'ed Katan* 8b). The reference to graves in a “building” (*Sanhedrin* 47b) means [only] that, at times, they built walls [within the excavated grave]; the walls are

67 See also *Ziz Eli'ezer*, XI, no. 74.

68 *Kitvei Ramban*, R. Chaim Dov Chavel, ed., (Jerusalem, 5724), II, 127.

raised much above the ground and that is the “monument” of the grave referred to in all places.

Rabbenu Ḥananel’s version of *Sanhedrin* 46b reads: “How do we know that the Torah requires burial... in the ground?” Rambam, *Hilkhot Evel* 4:4 declares, “One digs a cave in the earth and makes a crypt in the side of the cave and buries within it.”

Even more explicit is Ramban’s further statement in *Torat ha-Adam*: “... one who fashions a coffin for a corpse and places it in a cemetery is not ‘buried’ and has transgressed ‘you shall not allow the corpse to remain all night’ (Deuteronomy 21:23), [but] if he fashions a coffin and buries [the corpse] in a grave he does not transgress.”<sup>69</sup> That language is incorporated in *Tur Shulḥan Arukh, Yoreh De’ah* 362 and *Shulḥan Arukh, Yoreh De’ah* 362:1, who both rule that burial must be “in the earth.” The *Zohar, Parashat Terumah*, p. 151b, states: “How good it is both for the righteous and for the guilty for their bodies to be attached to the earth and to decompose within the earth.” *Midrash Tehillim*, commenting on the verse “and to the holy ones who are in the earth (*ba-arez*)” (Psalms 16:3), explains “Where are they holy? When they are placed in the earth.” That view is accepted by a host of authorities, including *Minḥat Yizḥak*, X, no. 122, and *Shevet ha-Levi, V, Yoreh De’ah*, no. 176.<sup>70</sup>

The Gemara, *Sanhedrin* 46b, states explicitly that the commandment “for bury shall you bury him on that day” (Deuteronomy 21:23), cannot be satisfied simply by enclosing the corpse within a coffin. Ramban is one an early-day authority, who, as already noted, states explicitly that burial must be “*be-karka*,” or “in the earth,” i.e., subterranean. The issue is the definition of the term “bury.” Does the term “bury” include not only virgin ground or primordial earth, but also burial beneath ground level in soil that has been excavated and transferred to some other place?<sup>71</sup>

Is it possible to interpret the term “bury” as also including soil that is not necessarily below ground level, or even in soil within an above-ground structure that is not a utensil, or a structure attached to the

69 *Torat ha-Adam*, p. 117.

70 See also Rabbi Axelrod, *Kevurat Kommot*, pp. 2 and 4.

71 *Rema me-Panu*, no. 46, followed by many other authorities, asserts that soil may be excavated and transferred to another site and a grave dug within the newly spread soil. Those authorities reason that the newly transferred soil becomes adjunctive to the ground upon which it has been placed and acquires the identity of the underlying *karka*. Otherwise, resolution of the question would, ostensibly, be dependent upon the status of *talush u-le-ba-sof ḥibbero* – severed and ultimately reattached. For a further discussion of this principle, see Section V that will be published in Part 2 of this article. See also *Teshuvot Tuv Ta’am va-Da’at, Mahadura Gimmel*, no. 236, who suggests that the principle is comparable to *maḥa min et mino*, i.e., intermingled material of a single species acquire a single identity.

ground such as a mausoleum, and/or any one of the contemporary forms of *kevurat kukhin*?

There are two brief talmudic passages that serve as the *loci principii* of subsequent rabbinic discussions regarding the obligation of burial. The Gemara, *Sanhedrin* 46b, seeks to elucidate the rationale underlying the commandment to bury the dead. The Gemara queries, “Is burial because of *bizyona* (i.e., to prevent ignominy) or because of expiation?”<sup>72</sup> Rashi explains that the concept of “*bizyona*,” advanced by the Gemara as the rationale underlying the requirement for burial of a corpse, is that burial is required “lest [the deceased] be humiliated in the eyes of everyone when they see him dead, decomposing and [his abdomen] splitting.”<sup>73</sup> Rashi explains that “*kapparah*,” or expiation, the alternate rationale posited by the Gemara as the requirement for burial, means “[the deceased] achieves expiation as a result of interment in which he is caused to descend and is brought low into the nether area.”<sup>74</sup> Similarly, *Hiddushei ha-Ran*, *Sanhedrin* 46b, comments, “burial is lowering the corpse and placing it in the depths,” i.e. burial in the ground serves to atone for sin because the body is secreted in the nether area of the earth “and that is great humiliation because when [the deceased] was alive, he was the ruler of all species of living creatures.” According to both Rashi and Ran, below-ground burial is integral to expiation of sin.<sup>75</sup>

Among the many contemporary authorities who refuse to countenance above-ground burial, R. Joseph Shalom Eliashiv, *Koveṣ Teshuvot*, II,

72 Cf., the comments of Rabbenu Hananel, *Hiddushei ha-Ran* and *Nimmukei Yosef*, *ad loc.* Cf., also R. Abraham Aaron Yudelovitz, *Teshuvot Av be-Hokhmah*, s.v. *safek* [sic] *ha-revi'i*, p. 62b.

73 *Yad Ramah* assumes that there is a discrepancy between the rationale of *bizyona* and the rationale of *kapparah* that is resolved in favor of *bizyona*. *Tosafot* and other early-day authorities maintain that both talmudic formulations regarding the need for burial are in agreement that burial is required for purposes of expiation; in their opinion, the controversy is only whether an additional rationale of *bizyona* is operative as well. Rosh, Ramban and Radvaz, *Hilkhot Evel* 12:11, regard the matter as unresolved. See also *Shulḥan Arukh*, *Yoreh De'ah* 348:3.

74 Cf., however, Rabbi Shloush, *Barka'i*, no. 4, p. 143, who understands Rashi's comment as a reference to the general concept of *hibbut ha-kever*, i.e., contact with the grave that is associated with *kapparah*. See *Semaḥot*, ed. Michael Higger (New York, 1931), *Sefer Hibbut ha-Kever* 1:8. That interpretation is difficult to read into Rashi's words “*she-moridin u-mashpilin oto le-taḥtiyot*.”

75 Rabbi Sha'ul Yisraeli, *Barka'i*, no. 2, p. 49, asserts that “lowering the corpse” is required even if burial is designed for *bizyona*. He argues that such a conclusion is evident from the fact that the Gemara seeks to find a practical distinction between *bizyona* and *kapparah* as the rationale for burial but does not advance “lowering” the corpse as such as distinction. That argument was earlier advanced by *Duda'ei ha-Sadeh*, no. 30, s.v. *ve-hinneh*. *Duda'ei ha-Sadeh* rebuts that argument in espousing the view that all agree that interment is required for purposes of *kapparah* and that the only question is whether *bizyona* constitutes an additional rationale.

*Yoreh De'ah*, no. 64,<sup>76</sup> and R. Sha'ul Yisraeli, *Barka'i*, no. 2, p. 49, are most concerned that above-ground burial is antithetical to Rashi's explanation of *kapparah*. Rabbi Yudelovitz, *Teshuvot Av be-Hokhmah*, p. 62a, in a responsum forbidding mausoleum burial, seems to have been the first to cite Rashi's definition of *kapparah* as a necessary condition for expiation of sin. Indeed, Rashi's words are echoed by a host of early-day authorities. Rabbi Licht, *Moriah*, Nisan 5777, p. 357, cites a lengthy list of latter-day authorities who voice an identical concern based upon Rashi's definition of *kapparah*.<sup>77</sup>

Whether above-ground burial is prohibited because of lack of *kapparah* or whether it does not constitute "burial" results in a significant halakhic outcome. If forbidden only on the basis of lack of *kapparah*, the commandment concerning burial and the prohibition against allowing a corpse to remain unburied are nevertheless no longer applicable. If *kevurat kammot* does not constitute "burial," the attendant violation of commandments continues on an ongoing basis.<sup>78</sup> At the same time, absence of *kapparah* is sufficient reason for exhumation after a twelve-month period for proper reinterment in order to achieve *kapparah*.

It is reported that, consistent with his position that *kevurat kammot* is forbidden solely because it does not lead to *kapparah* and is a violation of established custom but does constitute "burial," Rabbi Eliashiv refused to append his signature to a public statement denouncing *kevurat kammot* because it included a statement decrying the practice as antithetical to fulfillment of the commandments concerning burial.<sup>79</sup>

The second focus of rabbinic discussion is the meaning of a phrase employed by the Gemara, *Sanhedrin* 47b. The Gemara, recounts that people were wont to take soil from the grave of Rav for use in the treatment of a particular ailment. A report of that activity reached the ears of Samuel whose reaction was: "They conduct themselves properly. [The grave] is primordial land (*karka olam*) and primordial land cannot become forbidden." The issue was permissibility of using the soil of a grave for mundane purposes. Although a deified object can no longer be used for human benefit, that is the rule only with regard to chattel or movable objects.

76 See also R. Ben-Zion Kook, *Ziyunei Halakhah: Hilkhot Avelut* (Jerusalem, 5782), pp. 125–126.

77 Cf., however, *Iggerot Mosheh*, *Yoreh De'ah*, III, no. 144, who cites Rashi but does not predicate his objection to above-ground burial upon a literal reading of Rashi's words.

78 See *Ziyunei Halakhah*, pp. 128–129. Rabbi Kook correctly suggests that, if the purchaser was unaware of the acceptability of *kevurat kammot*, the purchase of the crypt would be invalid because of error. Burial in a site not owned by the deceased is itself reason for exhumation.

79 See *ibid.*, pp. 126–127.

The Gemara, *loc. cit.*, basing itself on Deuteronomy 12:2, establishes that “mountains” that become objects of cultic worship are not subject to that prohibition. The biblical term “mountains” is understood as a paradigm encompassing all forms of *terra firma*. Thus, a rock or a tree that is venerated as a deity is not rendered an object from which it is forbidden to derive benefit. Invoking an exegetical principle, the Gemara proceeds to transpose the prohibition against deriving benefit from objects of idolatrous worship to laws governing interment of a corpse. Consequently, although it is forbidden to derive benefit from objects dedicated to use in burial of a deceased person, just as it is forbidden to derive benefit from objects used for idolatrous purposes, the burial plot itself is not included in that prohibition.

The Gemara continues by citing an apparently contradictory *baraita*: “If a person hews a grave for his father but buries him elsewhere, [the first grave] may not be used for burial for all of eternity,” i.e., the grave becomes *assur be-hana’ah*. But, queries the Gemara, the recognized principle is that “primordial earth,” i.e., the ground itself and that which emerges from it, are not subject to becoming *assur be-hana’ah*. If so, why, as recorded in the *baraita*, does a grave become *assur be-hana’ah*?

The Gemara resolves the contradiction by stating that the subject of the later *baraita* is a *kever binyan*, i.e., a “constructed grave.” Ostensibly, the principle thereby established is that anything detached from the ground, including wood and stone, acquires the status of a movable object and retains that status even if returned to its original site and reattached to the ground as a building. The Gemara reconciles the two sources by stating that not all graves are *assur be-hana’ah*: a grave excavated in the ground is not *assur be-hana’ah* but a “*kever binyan*,” viz., a “constructed grave,” does become *assur be-hana’ah*.<sup>80</sup> The statement of the *baraita*, “If a person digs a grave for his father..., [the first grave] cannot be used for all of eternity” is an exception to the general rule and is limited to a *kever binyan*. Rashi expressly associates the Gemara’s statement with regard to a *kever binyan* with the talmudic controversy concerning the status of “*talush u-le-ba-sof ḥibbero*,” i.e., material severed from the ground and ultimately reattached.

If *talush u-le-ba-sof ḥibbero* is accepted as a normative principle, a building constructed of materials that had originally been attached to the ground but severed therefrom for use as construction material in erecting an edifice dedicated to above-ground burial is *assur be-hana’ah* even

80 There is an additional reference to a *kever binyan* in *Mo’ed Katan* 8b. The Mishnah declares, “One does not dig crypts (*kukhin*) and graves on the Festivals.” The Gemara defines “*kukhin*” as excavated graves and “*kevarot*” as the product of *binyan* or construction. That reference has no bearing upon this discussion.

though it is presently attached to the ground. Expressed in the Gemara's resolution of that contradiction is the principle that anything taken from the ground, including soil, acquires the status of a movable object and retains that status even if returned to its original site and reattached to the ground.<sup>81</sup> Rashi implies that the *kever binyan* of which the Gemara speaks is an above-ground edifice.<sup>82</sup> Consequently, since there is no intimation that the utilization of a *kever binyan* is improper, it would seem that mausoleum-style above-ground burial is entirely acceptable.

However, a host of other sources make it clear that the "constructed grave" to which the Gemara refers is an edifice built over a grave but that the grave in which the corpse is buried is located entirely underground. Ramban in his earlier cited statement in *Torat ha-Adam* declares that the "construction" of a *kever binyan* takes place below ground. *Yad Ramah, Sanhedrin 47b*, comments, "What is a *kever binyan*? [It is a grave that] one digs in the ground and afterward covers it with a structure and the result is that the corpse is buried within a structure." *Yad Ramah* explains that the *kever binyan* to which the Gemara refers is not a building constructed for above-ground interment of the dead, i.e., a mausoleum, but rather a below-ground grave that is reinforced by shoring up the earth surrounding the coffin and further protected by construction of a covering that constitutes a roof. Those walls also extend higher than ground level in the manner of a present-day *ohel*<sup>83</sup> without changing the halakhic nature of the structure since the burial of the corpse in such a structure is entirely below ground. Rosh, *Sanhedrin 6:3*, states, "But an excavated grave that does not have a structure atop it does not become prohibited because it is primordial ground." Each of those authorities makes it abundantly clear that burial of a corpse must be beneath ground level. A *kever binyan*, as they explain, is not really a grave; it is an edifice constructed within or above a subterranean grave.

According to those authorities, there is no reference in the Gemara to actual burial in an above-ground structure or crypt. Indeed, the very reference to "one who hews a grave" indicates that the grave itself is below ground. As has been stated, Rashi seems to imply that burial of a corpse in a *kever binyan* takes place within that above-ground structure, that it is an

81 The principle *talush u-le-ba-sof ḥibbero* will be discussed in further detail in the following section V.

82 For example, R. Joshua Weingarten, *Teshuvot Ḥelkat Yo'av, Yoreh De'ah, Mahadura Kamma*, no. 31, understands Rashi as describing a structure that is entirely above ground because any item detached from the ground and later reattached to the ground regains its original status. Rabbi Sha'ul Yisraeli, *Barka'i*, no. 2, p. 48, challenges that premise as contra-halakhic.

83 A room-like structure erected entirely above ground and used for purposes of prayer.

appropriate form of burial, and that, although the *kever binyan* is presently attached to the ground, burial in such a structure nevertheless renders the building *assur be-hana'ah*. *Hagahot Asheri, Mo'ed Katan* 3:79, also describes the *kever binyan* that is *assur be-hana'ah* as having been fashioned in this manner.<sup>84</sup>

The foregoing reflects a literal understanding of Rashi's interpretation of the Gemara's resolution of the contradiction between the conflicting sources. Rashi quite literally identifies a *kever binyan* as a structure "built above ground in a manner analogous to a building initially constructed for idolatry in the nature of 'talush u-le-ba-sof ḥibbero – severed and subsequently attached.'" Many of those who claim that mausoleum burial is acceptable point, *inter alia*, to this comment of Rashi and assert that, in explaining the Gemara in that manner, Rashi declares that above-ground burial in a building attached to the ground is permissible.<sup>85</sup>

However, in forbidding mausoleum burial, many latter-day scholars dispute that understanding of Rashi. Those scholars do not content themselves with relying upon the early-day authorities who disagree with Rashi. Instead, they interpret Rashi's comment that a *kever binyan* is built "above ground" to mean either that a grave is dug in the ground and subsequently lined with a structure that also rises above ground but that the corpse is buried below ground within the structure<sup>86</sup> or that interment is in the ground and the structure is built entirely above the grave.<sup>87</sup> Those authorities understand Rashi as presenting an abbreviated version of *Yad Ramah's* interpretation of *kever binyan* and that Rashi's depiction of a building "above ground" connotes no more than a building in the nature of a structure built within and above a grave excavated beneath ground level.

The scholars who understand Rashi in that manner point to the terminology "*ḥoṣev* – one who hews" as indicating that burial itself is below ground—otherwise, why would one "hew"?<sup>88</sup> As has been noted earlier,<sup>89</sup> Rashi, *Sanhedrin* 46b, defines the expiation of sin associated with burial as "the result of putting down or lowering [the body] in a nether spot." Such

84 See *Teshuvot Bet Yizḥak, Yoreh De'ah*, II, no. 161 and *Duda'ei ha-Sadeh*, no. 30, s.v. *yikrato*. See also *Nimmukei Yosef, Sanhedrin* 57a; *Kol Bo*, no. 114; and *Orehot Hayyim, Evel*, no. 31.

85 *Iggerot Mosheh, Yoreh De'ah*, III, no. 144, not only understands Rashi in this manner but, moreover, asserts that Rosh, who speaks of a structure within the excavation, does not disagree with Rashi as a matter of Halakhah.

86 See *Duda'ei ha-Sadeh*, no. 30.

87 See *Teshuvot Helkat Binyamin*, I, no. 64 and *Davar be-Itto*, p. 45.

88 Cf., however, *Hagahot Asheri, Mo'ed Katan* 3:79, who seems to speak of "digging" a *kever binyan* that is entirely above ground.

89 See *supra*, notes 74-77 and accompanying text.

a procedure is hardly compatible with interment in a compartment within an above-ground edifice.<sup>90</sup> If so, Rashi's understanding of *kever binyan* would be contradicted by his definition of *kapparrah*.<sup>91</sup>

It should be further noted that the only early-day authorities who explicitly appear to define a *kever binyan* as an above-ground edifice are *Hagahot Asheri*<sup>92</sup> and *Or Zaru'a*, II, *Avelut*, no. 423.<sup>93</sup>

R. Isaac Schmelkes, *Teshuvot Bet Yizhak*, *Yoreh De'ah*, II, no. 161, sec. 3, points out that the *kever binyan* is described by the Gemara as an entity from which it is forbidden to derive benefit. The Gemara does not state that a *kever binyan* may be used to fulfil the commandment of burial. *Bet Yizhak* suggests that, even if the commandment is not fulfilled by interment in a *kever binyan*, it does serve to prevent the ignominy of leaving the corpse exposed. As such, it serves to satisfy a *zorekh*, or need, of the deceased and because of that reason becomes *assur be-hana'ah*. It should be obvious that, if *Bet Yizhak's* thesis is accepted, the contradiction between Rashi's depiction of a *kever binyan* and his understanding of *kapparrah* is dispelled.

Unlike Rambam, *Perishah*, *Yoreh De'ah* 362:8, and *Shakh*, *Yoreh De'ah* 362:1, understood that in times of yore, when burial took place in crypts, the body was not covered with earth. R. Nisan Yablonsky, *Nizanei Nisan*, no. 4, argues that, if so, ostensibly, a body might be placed in an above-ground structure or mausoleum without being covered by earth, provided that the edifice is permanently sealed. Indeed, according to *Perishah* and *Shakh*, that may indeed be the nature of the *kever binyan* to which the Gemara, *Sanhedrin* 67a, refers. Nevertheless, *Nizanei Nisan* finds such burial unacceptable because it fails to assure expiation of sin. As noted, Rashi explains that it is lowering the body and causing it to descend into

90 Cf., however, note 77 and accompanying text.

91 *Duda'ei ha-Sadeh*, no. 30, s.v. *u-le-homer*, suggests that Rashi's comments regarding a *kever binyan* apply only to an individual who declared in his lifetime that he did not desire *kapparrah*. If so, concludes *Duda'ei ha-Sadeh*, Rashi would agree that in such circumstances above-ground burial is precluded because of *kapparrah*.

92 See, for example, *Teshuvot Bet Yizhak*, *Yoreh De'ah*, II, no. 162. See also *supra*, note 82. Cf., however, Rabbi Messas, *Barka'i*, no. 4, p. 151, who interprets *Hagahot Asheri* differently. Cf., Rabbi Yisraeli, cited *infra*, note 93.

93 *Or Zaru'a's* position seems to be quite clear and is cited in this manner in many sources. See, for example, *Nizanei Nisan*, no. 4. Cf., however, Rabbi Yisraeli, *ibid.*, pp. 155–156, who understands *Or Zaru'a* as referring to an entirely different matter. Rabbi Messas, *Barka'i*, no. 4, p. 152, similarly states that *Or Zaru'a* does not disagree with Rosh and maintains that “we have no found any decisor who explicitly permits burial above ground.” Rabbi Yisraeli, *ibid.*, pp. 148 and 157, states emphatically that no authority disagrees with the ruling of *Shulhan Arukh* to the effect that burial must be below ground.

the ground that constitutes a form of humiliation that is a condition of atonement.

It is clear that the rabbinic decisors who permitted raising the ground-level of a cemetery by placing quantities of earth over existing graves regarded digging a grave within the artificially constructed layer of soil as equivalent to excavating a grave in virgin ground.<sup>94</sup> Presumably, they regarded that arrangement as also satisfying Rashi's requirement that the corpse be "lowered" into the ground in order to achieve expiation of sin.<sup>95</sup>

*Nizanei Nisan* recognizes that a building or a wall might be attached to the ground, a hollow area fashioned within the wall, and the body of the deceased lowered into the wall from above and then sealed. Such a procedure would constitute a type of "lowering." Nevertheless, that authority finds such an arrangement unacceptable even according to *Perishah* and *Shakh*. *Nizanei Nisan* asserts that there are greater and lesser degrees of humiliation. Descent from the top of a wall, even a long descent until the ground is reached, would certainly be less ignominious than descent into the ground itself. Consequently, there is no evidence that descent to a lower point above-ground level or even to ground level is accompanied with humiliation sufficiently severe to serve as expiation.<sup>96</sup>

94 *Teshuvot Bet Yizhak, Yoreh De'ah*, II, nos. 160–161, engages in a lengthy discussion with regard to whether burial must be in virgin ground or whether excavated earth may be placed below ground and in the coffin encased therein. Rabbi Axelrod, *Kuntres Kevurat Kommot be-Mivhan ha-Halakhah*, secs. 4–7, demonstrates that *Bet Yizhak* was misunderstood by Rabbi Korn, *Havvat Da'at Hilkhaitit*, sec. 2.

95 Those authorities maintain that the freshly added layer of soil effectively becomes the new ground level and excavation at that level allows for "lowering" the body. The question is whether the ground level of a significant area must be raised to achieve that purpose or whether raising the ground level of a single grave or small number of graves suffices for that purpose. Rabbi Kutkes, *Moriah* (Shevat 5777), pp. 268–269, questions whether raising the ground level of a single grave or of a small number of graves by constructing restraining walls around a limited area and filling the enclosure with a sufficient quantity of earth is also permissible. *Teshuvot Bet Yizhak, Yoreh De'ah*, II, no. 161, cites Ran in ruling unequivocally that burial must be below ground.

96 Moreover, such an understanding of "lowering" seems to be incompatible with Rashi's use of the phrase "brought low into the nether area." See *supra*, note 74 and accompanying text.