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## EXHUMING THEIR NEIGHBORS: A HALAKHIC INQUIRY<sup>1</sup>

In July, 1941, some 1600 men, women and children, comprising almost the entire Jewish population of the Polish town of Jedwabne, were murdered. Some were beaten to death, some bludgeoned, some knifed, and some beheaded. Most, however, were herded into a barn owned by one Bronislaw Szlezynski where, after the kerosene had been poured and the doors sealed, they were burned to death.

What is considered remarkable about this sorry chapter of the Holocaust is that it was not the Germans who perpetrated this slaughter, but the town's Polish citizenry. In a new book, the historian Jan Gross documents this assertion from diaries and trial records, and in so doing destroys a myth enjoyed until recently by many Poles: that they, like the Jews, were merely victims of the Nazis.<sup>2</sup> The Polish government, in shocked reaction to Gross' book, ordered some preliminary exhumations at Jedwabne to see if he could really have been correct.<sup>3</sup> On July 10, 2001, the President of Poland, Aleksander Kwasniewski, in a ceremony at Jedwabne, apologized for the massacre, and in so doing, accepted Polish responsibility for what happened.<sup>4</sup>

Because there are also intimations that the revelation about Jedwabne is only the tip of the iceberg, a piece of Polish identity has started to unravel, and, in the language of a Polish friend, "there exists no psychiatric couch large enough to help Poles come to terms with the fact that the Poles were *perpetrators* and not just victims of the Holocaust."

One of the groups that had representation, though not participation, at the preliminary exhumations conducted at Jedwabne, was Physicians for Human Rights. A co-recipient of the 1997 Nobel Peace Prize, this Boston-based organization has done forensic exhumations that have successfully resulted in the trials and subsequent prosecutions of war criminals. In exploring the question of doing further exhumations in Jedwabne, Physicians for Human Rights approached some

Polish rabbinical leaders and were told to forget it: exhumation is absolutely forbidden according to Jewish law.

Some of the professional leaders of Physicians for Human Rights who are informed and committed Jews were startled by this opinion. The organization subsequently approached me to see whether such a ruling was halakhically accurate.

“Physicians for Human Rights,” they wrote me, “has as its agenda the exhumation, examination and reburial of individuals and mass graves in the case of war crimes,”

1. in order to determine and expose the truth regarding war crimes, crimes against humanity and genocide;
2. to provide critical physical evidence for prosecutions; our forensic scientists have testified for the prosecution in major cases before the International Criminal Tribunals for Rwanda and the former Yugoslavia, and the forensic evidence is an important part of the trial;
3. to identify remains and return bodies to families for proper reburial, which allows families to know the fate of their loved one and to grieve, and
4. to deter future crimes (admittedly harder to prove).<sup>5</sup>

Can it be, this group wanted to know, perhaps for the Jedwabne case, perhaps for broader considerations, that Jewish law would not support such work in the interest of justice and moral accountability? Can it be that the Polish rabbinical leaders are correct?

In the pages that follow, the argument presented will attempt to show that the tradition, by and large, believes that it is not only appropriate but also *obligatory* to reinter someone buried in an inappropriate grave. Drawing on pivotal responsa ranging from antiquity through modern times, I hope to demonstrate that these considerations clearly apply to the martyrs of Jedwabne, and that any ruling prohibiting exhumation and reinterment in Jedwabne misrepresents the tradition. My task will thus be to set the record straight, clarifying exactly why we are halakhically obligated to move the remains of these martyrs to a Jewish cemetery and bestow on them the dignity of a Jewish burial. I will conclude by suggesting why these halakhic considerations also articulate a symbolically appropriate response to the violations of the Holocaust.

While the responsum elaborated in these pages is meant to address Physicians for Human Rights’ broader questions, since this is to be an essay and not a book, the reply is limited to the reality and situation at

Jedwabne itself. If a question of this sort arises again, as it surely will in the wake of current terrorism, then while this article may be used for guidance in framing the new issues, its conclusions should not be used for anything other than resolving the question of exhumation and reinterment specifically at Jedwabne.

A subtext of this article, integral to its central argument, is a study in halakhic theory which addresses the following question: To what extent can rabbinic (or spiritualistic) assertions which are outside the realm of human experience become the building blocks of binding halakhic practice? The case the author attempts to make in the pages that follow, exclusively from the claim that the dead can feel things, is that they cannot.

## I

There is much in halakhic literature to suggest that exhumation and reinterment are issues that Jewish communities throughout the world regularly faced for over 1500 years. A particularly rich vein of responsa on these topics begins in the sixteenth century and continues into modern times. These responsa, for the most part, use as their point of departure neither the Talmud, the Gaonic writings, nor the writings of Maimonides, but the later *Shulhan Arukh*. In our attempt to mine their consequences we will begin where these responsa do: with the words of the *Shulhan Arukh*, and its precursor, *Tur*, with reversions to earlier sources only when these are necessary to explicate the argument.

*Tur* begins by quoting almost literally a passage from the Jerusalem Talmud:<sup>6</sup>

We may not transfer remains<sup>7</sup> from grave to grave, even where such a move is from a less to a more prestigious burial spot. A lateral move to a comparatively prestigious grave is equally forbidden, as certainly is the case from a more to a less prestigious location. Yet we are permitted to reinter someone “into his own” [*betokh shelo*].<sup>8</sup>

Here considerations of prestige are subsumed, and for “into his own” one is even permitted to reinter the met to a less prestigious spot.

What, then, is “into his own”? Two interpretations are presented: *Bah* says it refers to a grave the *met* purchased while still alive.<sup>9</sup> *Perisha* reads it as the family plot.<sup>10</sup> And here the default mode has been defined: *reinterment is fundamentally forbidden*.

Four halakhic value-structures are implicit in this *Yerushalmi*:

1. The dead are entitled to *dignity*; halakha eventually calls this *kavod*.
2. The assumption that the dead need to be buried. This assumption exists irrespective of all considerations of dignity, and is considered to be biblically based.
3. A further assumption: that the dead may not be reinterred. This tradition also exists irrespective of considerations of dignity—in halakhic parlance we would say that it is not linked to issues of *kavod*. A ruling that would want to override this tradition of non-reinterment would have to offer very compelling reason for so doing, and would have to be in the interests of the dead, not the living (like the “*betokh shelo*” of our talmudic passage).<sup>11</sup>
4. Together with the rule forbidding reinterment, its first exception: you *may* reinter in order for the *met* to rest in a plot he arranged during his lifetime. Why would this be an exception? The Talmud itself is quite clear: “It is pleasant for a person to lie with his forefathers.”<sup>12</sup>

Pleasant? Is the implication that the dead have feelings to which we, their survivors, must be sensitive? This theory arises again and again in the halakhic thinking on these topics, and is refuted by Torah scholars as many times—of this more in the pages that follow. Yet even here, that the dead have feelings is hardly a *necessary* conclusion.

Consider: the phrase, “it is pleasant for a person to lie with his forefathers” is the conclusion of the *second* of two adjacent and parallel passages. Here is the first:

It is forbidden for a person to move<sup>13</sup> from a house on the festival,<sup>14</sup> neither from one beautiful house to another, nor from one repulsive house to another, nor even from a repulsive house to a beautiful one; and it goes without saying, neither from a beautiful house to a repulsive one. Yet he may move on the festival into a new home which he owns. [For it is a source of] joy to a person when he lives in his own home [*betokh shelo*].<sup>15</sup>

Just as it is a source of pleasure for the living to live in their own home, so is it of satisfaction to them that they will one day be buried in a grave which is likewise their own, a spot that they themselves acquired and provided for—this is what the juxtaposition of these two rulings in the Jerusalem Talmud says to me. We honor the *met* by extending to his remains the values and wishes he expressed when still alive.<sup>16</sup> Hakham Tsevi, as we will see below, offers a remarkable talmudic source supporting this interpretation.

We return to our reading of *Tur*. Rav Yosef Karo, in his commentary on *Tur*, extends the list of exceptions permitting reinterment, based on the rulings of a range of earlier scholars:

1. A *met* may be exhumed for the purpose of reinterment in the land of Israel.
2. A *met* may be reinterred if the initial grave was intended as temporary.
3. A *met* may be reinterred from an existing grave if it is located in an unsupervised area where there is danger of grave robbing or there is a flooding problem.
4. If a grave is found in an unusual place (outside a cemetery) [*kever ha-nimtsa*], the *met* may be reinterred in a Jewish cemetery.
5. Except for the purpose of reinterment in Israel, a *met* may not be moved from cemetery to cemetery.
6. It is forbidden to move [*le-haziz*] a *met* once the grave has been filled with earth [*nistam ha-golel*], even if to better establish the identity of the *met*.
7. If someone asks that he initially be buried at home and that his remains be moved later on to a cemetery, “then it is a *mitsva* to fulfill his request.”

The reason for the prohibition against reinterment, continues R. Karo, is “because the dissonance [caused by the move] is difficult for the dead [*she-ha-bilbul kashev le-metim*], for they fear the day of judgment.” The “for” in this last sentence is the first of several ambiguous conjunctions that come up in these sources. It is less than clear whether R. Karo means that the dissonance is *because* of the impending judgment, or that we are speaking of two separate issues: dissonance *and* impending judgment.<sup>17</sup> They are, of course, related concepts, and suggest what we already have seen earlier: a belief that the dead have feelings. We return to this theme in some depth below.

There are two other sources upon which the modern decisors in this area draw. Rav Hai Gaon was asked what to do about a cemetery simply too small to accommodate further *metim*: might it be possible to inter in a second layer on top of existing graves? He replies, with some passion, citing a talmudic passage<sup>18</sup> enjoining the burial of *metim* who are “connected” [*midbak*] to each other, and encourages at least six finger-breadths of space between each *met*. Rav Hai’s wording, *midbak*, is revealing because his talmudic source<sup>19</sup> uses the word to refer to *graves* not touching, and not to *metim* not touching. Yet this slip, if it indeed is one, is surely consonant with the Talmud’s intention here, which was to

provide some kind of spatial autonomy and integrity to *metim*. It is surely also useful in any argument calling for the exhumation and reinterment of Jedwabne's martyrs, who are buried (if that is the word) intertwined in a pile, some burned, some not, with a statue of Lenin in their midst. Indeed, *Nimmukei Yosef* writes<sup>20</sup> regarding Rav Hai's source that

While I do not wish to explain this *mishna*, since an explanation would be too lengthy and we do not [build sepulchres and grottos of this kind] in our day, there are nonetheless some things we do learn from it: the necessary length of a grave, its width and its depth; we also learn that the dead may not be buried upright like asses;<sup>21</sup> we also learn that it is inappropriate for graves to touch each other.

Rashba was asked<sup>22</sup> regarding

one who requested that [upon his death] he be transported for burial to the plot in which his forefathers [were buried], but [something] beyond the control of his descendants occurred [*ones*] [preventing them from fulfilling this wish] and they were unable to immediately transport him there. They [then] buried him [near] where he died.

[Responsum:] It is a *mitsva* upon his sons to remove him from [the temporary spot] to fulfill his wishes, and it is permitted to pour lime over his remains to hasten their decomposition.<sup>23</sup> It is [similarly] permitted to reinter someone who is buried in the [non-dedicated] communal area [where it is not permitted to bury *metim*] to the cemetery.

## II

Having highlighted most of the received traditions regarding exhumation and reinterment up to their codification in the *Shulhan Arukh*, we are ready to plumb some of the major responsa springing from these traditions. We shall do this, of course, in order to assess the extent of halakhic precedent justifying exhumation and reinterment in Jedwabne.

Still, before we list the "pro" side of the arguments, we might do well to first list the "con" side: to isolate the *objections* which exist in halakha to exhumation and/or reinterment, and the extent to which such objections, when they are valid, apply to the situation in Jedwabne. If such objections can be sustained, there is surely little purpose in exploring legal precedents *permitting* exhumation and reinterment.

There are several such objections. Most of them appear to be root-

ed in the principle that “the *met* acquires his place” [*ha-met koneh et mekomo*], which means that once he has been legitimately buried, the *met* acquires an unassailable right to his burial spot. No one can ever take the grave away from the *met*, he may never be reinterred, and the living may derive no benefit from his grave. One may not, for example, plant a field or build a highway over it. His right to rest is inviolate.<sup>24</sup>

One way this right is expressed is in the laws regarding the *tum'a* of the Nazirite. “If three *metim* are found [in an area not obviously designated as a cemetery]”, says the *mishna*,<sup>25</sup> “and there exists four to eight cubits [of space] between them, then [they in fact are lying in—i.e., the finder has stumbled upon] a graveyard [*shekhunat kevarot*].” These fixed measures of proximity prove that this place was once set aside as a burial ground, explain *Tosafot*,<sup>26</sup> and the Nazirite, for whom the Torah has forbidden contact with the dead, may not be in this area. More critical to our purposes is *Tosafot*’s conclusion: this thereby forms a case of the “dead acquiring their place,” they argue, and therefore, reintering a *met* from a *shekhunat kevarot* is strictly forbidden.

It is quite clear that the mass grave at Jedwabne does not have the halakhic status of *shekhunat kevarot* because the dead there do not follow the required measurements of separation articulated here in *Tractate Nazir*. Jedwabne’s martyrs are intertwined. No *shekhunat kevarot*, of course, means no prohibition of reinterment. And even if we were to invoke the halakhic skepticism as to whether decisors are permitted to extrapolate legal rulings from the laws of *tum'a* and *tahara* to other areas of halakha, it is still clear that the dead in Jedwabne are buried in gentile-owned ground, which was neither intended for, nor sanctified as, a Jewish cemetery. This, as we shall discover from other sources, cancels most prohibitions regarding reinterment.

A second objection comes from a related principle: A person who dies where there is no access to a Jewish cemetery (in battle, for example) is termed in halakha a *met mitsva*. He is buried where he dies and then “acquires his place” [*met mitsva koneh et mekomo*]. The Talmud identifies this principle<sup>27</sup> as being one of ten decrees promulgated by Joshua in the biblical conquest of Israel, and Rosh records that these decrees apply to the Diaspora as well.<sup>28</sup> Should a farmer discover a *met mitsva* buried on his land and be commercially inconvenienced by it, then because “the *met mitsva* acquires his place,” the farmer apparently may neither move the *met* nor appeal to the community for funds to reinter the *met* in a Jewish cemetery.<sup>29</sup> He is stuck, so to speak, with this grave on his property in perpetuity.

The Talmud defines a *met mitsva* as “one who has *no one* to bury him.” “If he cries out and others reply, [then] he is not a *met mitsva*.”<sup>30</sup> “*No one*,” explains Rashi, refers to his children. And the Talmud elaborates: even if he does have children, because he is traveling [and his children are inaccessible] it is as if he has no one to bury him. The obligation to bury a *met mitsva* is so compelling in Jewish law that even a High Priest or a Nazirite, each normally forbidden involvement with even their immediate dead relatives, are required to bury him.<sup>31</sup> *Tosafot* add that if the *met* is in a place where no one *wants* to bury him, he immediately acquires the legal status of *met mitsva*, at which point even a *kohen* may bury him.<sup>32</sup>

Jedwabne’s martyrs, our objection would go, are each *metei mitsva*—they are perhaps the paradigmatic case of “they cried out and no one heard them”—and each thus “acquires his place,” and may therefore not be reinterred. This objection is strengthened by another talmudic discussion.<sup>33</sup> Among different categories of graves, we read, the *met* found in a *kever ha-nimtsa* (a single grave in an unusual location) may be reinterred.<sup>34</sup> What, asks the Talmud, if this *kever ha-nimtsa* is the grave of a *met mitsva*? Everyone knows that the grave of a *met mitsva* may not be reinterred. No such danger, the Talmud replies; if it were a *met mitsva*, everyone would know about it (“*kola it lei*”). The conclusion from this source is unassailable: a *met mitsva* may *not* be reinterred.

Yet the law of *met mitsva* is not as firm as it appears. To begin with it exhibits certain fault-lines in its substructure. Thus, while the Babylonian Talmud describes the principle that the “*met mitsva* acquires his place” as being unambiguous, the Jerusalem Talmud presents it as being the subject of a controversy. R. Zera says a *met mitsva* may not be reinterred. R. Hisda, on the other hand, says he may!<sup>35</sup> A second weakness is one to which we have already alluded. Maharsha argues that the prohibition of reintering the *met mitsva* is hardly meant literally. He writes:

Rashi [believes] that the owner of the field [in which the *met mitsva* is found] cannot compel either the relatives of the *met* or the Jewish community to bring the *met* to the cemetery. . . . But if he himself [presumably wants to engage in the expense and effort] of reintering [the *met mitsva* now in his field, either] to the Jewish cemetery or to some other place where he is not causing any [monetary losses and represents no threat of *tum’a* to *kohanim* and/or *Nazirites*] then the matter is completely up to [the farmer], and there is no prohibition of reinterment [*ve’ein kan ha-issur peniya*].



Maharsha thus affords us some relevant conclusions:

1. The principle of "*met mitsva* acquires his place" means that no one can be *forced* to reinter a *met mitsva*.
2. But it does not at all mean that reinterment of a *met mitsva* is uniformly *forbidden*.
3. The principle of "*met mitsva* acquires his place" means that the *met mitsva* is guaranteed rights to the grave in which he is buried. At the same time, it does not condemn him to lie in some farmer's field forever. If the farmer at his own expense wishes to move the *met mitsva* to a more respectful resting-place, he may certainly do so.<sup>36</sup>

But the most significant argument against the *met mitsva*-objection is that the category of *met mitsva* does not apply at all to the martyrs of Jedwabne. In order to *qualify* for the status of *met mitsva*, the *met* needs to be buried beyond a distance of 1000 parsangs from a Jewish cemetery ["*lo betokh ha-tehum*"],<sup>37</sup> and the mass grave of the Jedwabne martyrs is well within these limits; in fact it is within sight of the Jewish cemetery. And of extraordinary significance, the *Shulhan Arukh* concludes here that "[*metei mitsva* buried this close to a Jewish cemetery] *should be moved* to [this] cemetery."<sup>38</sup>

It should also be noted that the tradition of burying the *met mitsva* where he is found has long run its course in Jewish law. It has not been observed for hundreds of years, and in order to assure proper supervision of his grave, the current practice is to bury the *met mitsva* at once in the nearest Jewish cemetery.<sup>39</sup>

### III

We have concluded our list of objections to reinterment in the case of the martyrs of Jedwabne save for one, and we shall use this final objection also as our transition point for exploring several of the *responsa* that, under appropriate circumstances, permit exhumation and/or reinterment. There is an extensive list of such *responsa*, and we have selected for discussion those that contain pivotal decisions in the history of this problem, those that are representative of the genre, and frequently, *responsa* that are both.<sup>40</sup>

The new objection has to do with an idea already introduced—that the flesh of *metim* can experience pain when moved or lanced. The Talmud has many references to this notion: "Worms are as difficult to the *met* as a needle [is] in the flesh of the living [*kasheh rima le-met kemahat be-vasar hai*]."<sup>41</sup>

Rashba, in the responsum already cited, has this to say on the subject:

[With respect to adding lime to hasten decomposition, I say that] all that is done of this nature to accelerate the decomposition of the flesh [of the met] that he might [more hastily] be brought to [the appropriate, final resting] place he desired is permitted. There is no [violation of the law] under the category of abuse [*bizayon*], neither is there under the category of pain [*tza'ar*], for the flesh of the met does not feel the [pain of the] scalpel [*izmel*], nor certainly, of lime. The embalmers dissect [the bodies] and withdraw their innards,<sup>42</sup> and there is no [violation of the law under the category] of pain, nor [under the category] of abuse.

It should not be lost upon the reader that what Rashba is offering here is nothing less than a wholesale, wave-of-the-hand dismissal of a concept rich in talmudic history and central to at least a part of the rabbinic imagination with regard to *metim*. And he is not alone in this exercise, although others are more cautious.

*Sefer Hasidim*, for example, tries via allegory to accommodate the talmudic assertions that the body of the *met* experiences pain. The *soul* looks down upon the body after death, *Sefer Hasidim* maintains, and finds it painful to witness the body in its decomposition.<sup>43</sup> A similar, though not identical, approach is taken by Ri ibn Sasson: "The phrase [of our Sages] 'worms are as painful to the *met* . . . ' [is not meant to imply] that the dead feel. Rather that everyone who is of a pure mind [*she-da'ato nekiya*] will surely be troubled at [the prospect of] decomposing when he dies."<sup>44</sup>

*Tosafot Yom Tov*, it turns out, also does not believe that *metim* feel things. The author allegorizes and joins *Sefer Hasidim* and Ri ibn Sasson in maintaining that it is the soul, not the body, which experiences pain after death. This pain, he remarkably asserts, is *for* the body that it inhabited for so long.<sup>45</sup>

Two other concepts, possibly related to "pain," need to be explained in order to make sense of the responsa we will soon present. When discussing reinterment, the rabbis often bring up two psycho-ethical consequences which occur with exhumation: 1) disgracing the *met* [*nivvul*]; and 2) imposing on the *met* yet again the terror of divine judgment [*haredat ha-din*].

Regarding the first, the Talmud<sup>46</sup> relates how a young man in Benei Berak sold an estate he had inherited from his father, and then died. The family members challenged the legality of the sale on the grounds that the deceased was a minor when he sold the estate. The court

approached R. Akiva, asking him whether it was permitted to exhume the *met*, examine him for the standard symptoms of puberty, and thereby determine whether or not he was a minor at his death. R. Akiva replied: "You are not permitted to disgrace him [*le-navvelo*], moreover [*ve-od*] symptoms usually undergo a change after death."<sup>47</sup> (In addition to introducing us to the concept of *nivvul*, this quotation from R. Akiva displays another textual ambiguity: does the word "*ve-od*" mean that both reasons are necessary to prohibit exhumation, or does it mean that *nivvul* alone is sufficient?<sup>48</sup>) *Nivvul* means that when we see the *met*, the dignity of the person who once occupied this body has been impugned. We have seen him in a state of dissolution that he would rather not have had us see—we have seen what is left of the person in his ultimate vulnerability. Avoiding seeing *nivvul* is the final act of respect we can pay to the *met*.

As to the second, *haredat ha-din*, the Talmud reports:<sup>49</sup>

R. Elazar, when he came to the following verse, wept: "Why have you disquieted me [by] bringing me up [i.e. exhuming me]?"<sup>50</sup> Now, if Samuel the righteous was terrified of Judgment, how much more so should we?

The tradition reads this talmudic text as follows: Samuel, the great and righteous prophet of Israel, is brought up from the dead by a sorceress of the pagan deity called Nov. The biblical verse voicing Samuel's objection to this awakening is taken by R. Elazar to mean that when the *met* is removed from his grave—or, as the aggadic commentary *En Ya'akov*, has it, when body and soul are re-united—divine judgment is repeated, and it is of this trial that the prophet is fearful. This judgment is what is called *haredat ha-din*.

*Shevut Ya'akov* almost does away with this text by suggesting that Samuel is upset by his exhumation not because his repose is interrupted, nor even because his dignity is violated, but specifically because he was called up by a pagan sorceress.<sup>51</sup> But this is a minority view, and over the centuries *haredat ha-din* has taken a remarkable foothold in the annals of halakha as a factor for prohibiting exhumation. It is quite likely that R. Karo was referring to *haredat ha-din* when he explained (in our quote at the beginning of this essay) that the reason for halakha's opposition to reinterment was "because the dissonance [caused by the move] is difficult for the dead [*she-ha-bilbul kasheh le-metim*], for they fear the day of judgment."

Yet we must point out that *haredat ha-din* is inapplicable to the situation at Jedwabne because there is wide agreement among the major

halakhic decisors that it is applicable only while decomposition is taking place. There is therefore no *haredat ha-din* after the *met* has been buried for twelve months.<sup>52</sup>

That *nivvul* and *haredat ha-din* are separate rather than co-extensive concepts forms the major discussion in a responsum by Hakham Tsevi,<sup>53</sup> which deals with the following case. A child dies and is erroneously buried in a gentile farmer's field. The farmer is not interested in selling this grave, and will tolerate its being left there only if he retains the right to farm over it, and this, too, only for a price. A two-fold question emerges from this circumstance: May the child be reinterred, and in the process of reinterment, may the casket be opened to see whether the remains of the *met* are in the proper reposing position?

Hakham Tsevi argues that if *haredat ha-din* were a serious halakhic consideration, then R. Akiva in the incident in Benai Berak would have included it in his reply, together with the concept of *nivvul*. But (as our quote above indicates) he did not, and saw *haredat ha-din* for what it is—a minor concern. *Nivvul* was seen by R. Akiva as sufficient in and of itself to prohibit the exhumation of the orphaned inheritor, writes Hakham Tsevi.

His reasoning for this conclusion is what interests us. If a person has committed a capital crime for which the punishment is stoning, the question is raised whether he should be clothed or naked during his execution. If he is naked, his death is swifter; if he is wearing clothes, the argument goes, he dies with greater dignity. The Talmud suggests that the differing opinions among the Sages as to this question are based on the differing opinions among the Sages with respect to the criminal's preference.<sup>54</sup>

There are two critical conclusions to be drawn from all this:

1. There is a legitimate halakhic position that maintains that because in our lives we may sometimes prefer dignity over pain, it is legitimate to transfer such a value-judgment to a *met* as well. This supports our interpretation of the Jerusalem Talmud earlier in this essay, when we pressed the intended analogy there from permitting moving to one's own new home on the festival to moving from an initial grave to one which the *met* prepared for himself during his lifetime.
2. What this proves to Hakham Tsevi is that for R. Akiva, *nivvul* (which has to do with dignity) overrides *haredat ha-din* (which has to do with pain), and he therefore felt no need to discuss the latter in his reply to the family of the deceased orphan in Benai Berak.

Hakham Tsevi only gets around to answering these questions posed to him in a later responsum,<sup>55</sup> where he writes as follows:

Your case is no [different] from *kever ha-nimtsa*, from which we are permitted to move the *met* based on *halakha le-Moshe mi-Sinai*. It is moreover a mitsva to thus reinter him, since the gentile insists on farming over [the grave], and there is no greater disgrace [to the *met*] than this. Moreover, even without this argument it would be permissible to reinter him, for to so move him is [legally even more compelling] than to move him from a temporary grave “to his own” [which we know is permitted]. . . . But to open the coffin and examine him in his death is a far more serious matter than reintering him, for it raises the specter of *nivvul*. . . . So that [opening the casket and seeing the *met*] would only be permitted if some extraordinarily great end were thereby being served for the *met*, such as gathering his bones from among those of others, and providing him with an autonomous grave . . . . As for the issue of *haredat ha-din*, it is clear [that the other authorities I have cited in this responsum] only included it [in their writings] to strengthen [rather than to make] their case.

Rabbi Moshe Feinstein agrees that *nivvul* and *haredat ha-din* are separate issues with differing valences.<sup>56</sup> If a woman is buried at the edge of a cemetery, and her children seek to have her reinterred to a more central area, on the assumption that more central means more prestige, R. Feinstein forbids the reinterment, and in the process clarifies some fundamental issues:

- *Kohanim* are normally interred at the edge of the cemetery,<sup>57</sup> and given their prestige in the community, any notion that the edge of a cemetery is not prestigious has to be erroneous.

- The primary reason for prohibiting reinterment is *nivvul*.

- He agrees with a ruling of Maharsha that *haredat ha-din* is operative only when moving the *met*, and not when simply exposing him. This is why R. Akiva makes no mention of it when asked about exhuming the orphaned inheritor, who did not need to be moved to be examined.

- This analysis accommodates what is otherwise a problem among the major commentators on the *Shulhan Arukh*<sup>58</sup> who maintain that the reason one may not transfer a *met* from a less to a more prestigious grave is because of *haredat ha-din*. Why do they not invoke *nivvul*, he asks—the major talmudic reason used by R. Akiva? *Nivvul*, R. Feinstein argues, in and of itself, would have been an insufficient reason to prohibit reinterment to a more prestigious grave.

• Allied with the obligation of mourners to bury (in itself a biblically based requirement according to most decisors) is the concept of *kavod*, honor for the dead. This allied obligation, R. Feinstein says, *ends* with the completion of the initial burial and cannot be invoked as a basis for reinterment. (Although R. Feinstein does not mention it, this helps explain why the farmer saddled with the *met mitsva* had no *obligation* to reinter him in the closest Jewish cemetery.) But where someone *requests while alive* to be reinterred, the concept of *kavod* remains operative, and overrides, as it always does, considerations of *nivvul* and *haredat ha-din*.

The question that thus presents itself in light of R. Feinstein's analysis is whether the concept of *kavod* with respect to the martyrs of Jedwabne is still operative such that it would override any concerns of *nivvul*.<sup>59</sup> The martyrs, it will be recalled, hardly requested reinterment.

In 1832 Rabbi Moses Sofer offered a solution to this issue.<sup>60</sup> A cholera epidemic had raged in Vienna, and its Jewish victims were buried in a public graveyard that happened to be scheduled for cultivation six years hence. Vienna's Chief Rabbi, Elazar Segal Horowitz, inquired of R. Sofer whether the victims could be reinterred with their forebears in the Jewish cemetery. R. Sofer replied that not merely was it permitted; it was a *mitsva* to do so. And this was true not only of those whose ancestors were buried in the Jewish cemetery, who would be classified as cases of "*betokh shelo*," sanctioned, as we have seen, by the *Shulhan Arukh*, but also the others. Among the sources he marshaled to verify this opinion was an unchallenged rabbinic tradition that a synagogue in a small town may be sold to purchase a Torah.<sup>61</sup> This is not true for a large town, where everyone, even those from outlying districts, is presumed to have a share in the synagogue. R. Sofer argued that this was also true of the cemetery, and Vienna was by all definitions a large town. Thus "*betokh shelo*" was operative even for those cholera victims who did not have "their own" in the Jewish cemetery.

*Shevut Ya'akov* discusses an instance of a vandalized cemetery.<sup>62</sup> Bodies have been exhumed and stripped, some have been reburied—is it permissible to exhume the *metim*, dress them in the proper shrouds, and rebury them? *Shevut Ya'akov*'s solution is remarkably similar to that of R. Feinstein. From the precedent in Benei Berak with R. Akiva, he says, it would not seem permissible. Yet, he argues, the reason our laws permit reinterment for the purpose of lying with one's forefathers is because making it possible for the *met* to do so constitutes *kavod*.<sup>63</sup> He completely disagrees with R. Karo's admonition that *kavod* is limited to

lying with one's forebears (i.e. *betokh shelo*), and argues it is rather a wide-ranging concept, and when it has integrity, overrides considerations of *nivvul* and *haredat ha-din*.

*Shivat Tsiyyon* imposes a restriction on exhumation in ruling on the following case:<sup>64</sup> A drowned man was found, and without much attention paid to his features by those attending his body, was buried. A woman came along some six months later reporting her husband missing, and speculated that he may have been the drowned man. A positive identification of her husband (who had a missing finger and toe) would liberate her from the bonds of being an *aguna*.<sup>65</sup> *Shivat Tsiyyon*, in a startling responsum, states that we may not exhume him, arguing that if the wrong man were uncovered, the exhumation would be for naught, and would thus violate the stricture against *nivvul*. It may even serve as an instance in which one Jew sins for the benefit of another, which is likewise forbidden.

*Sho'el u-Meshiv*<sup>66</sup> shows little patience with this ruling and offers a creative solution based on a talmudic reading elsewhere in *Baba Batra*. When an exhumation has a purpose, he says, agreeing with most decisors we have discussed thus far, *nivvul* is never an issue. At this point he introduces a more radical notion: *nivvul*, as a halakhic trespass, can only take place when there is some *intention* on the part of the perpetrator to disgrace the *met* ("le-navvel ha-met"). And that is clearly not the case here.

R. Ovadia Yosef cites a range of decisors agreeing with *Sho'el u-Meshiv*, including Rabbi Yehoshua Leib Diskin.<sup>67</sup> R. Yosef buttresses *Sho'el u-Meshiv*'s argument by pointing out that it is supported by the ancient halakhic principle that "the dignity of man overrides all negative commands in the Torah,"<sup>68</sup> and employs this principle in the service of a dispensation permitting the extraction of an eye of a *met* for the benefit of a living person.

#### IV

We are now ready to draw some conclusions.

The victims of Jedwabne should be exhumed and reinterred, either in the nearby Jewish cemetery or in the State of Israel. That this is not merely a halakhic option but a fundamental *obligation* is perfectly clear from many of the sources we have considered. R. Karo says it in his commentary on *Tur*, and he repeats it in the *Shulhan Arukh* under the discussion of *metei mitsva* buried within sight of the Jewish cemetery. Hakham Tsevi says it explicitly in permitting the reinterment of a child,

as does Hatam Sofer when discussing the reinterment of the Viennese victims of the cholera plague.

When people are buried enmeshed with each other in mass graves, as they are in Jedwabne, this alone is an urgent reason for their reinterment. This imperative forms the central argument in the responsum of Rav Hai Gaon quoted early in this essay, and is included in the responsum of Hakham Tsevi. It is also the considered opinion of *Nimmukei Yosef*, who reminds us of the Talmud's stricture against burying people upright like asses; of *Noda bi-Yehuda*, and of R. Moshe Feinstein, who forbids the mixing of bones of different *metim* in a single grave,<sup>69</sup> and who argues with great moral force that if there are only fragments of bones left, then these alone merit full reinterment in the name of *kavod*.<sup>70</sup>

When Jews are buried in non-consecrated or gentile cemeteries, then they need to be reinterred. This is the view of *Noda bi-Yehuda* (who is asked about a Jewish cemetery about to revert back into ownership by the municipality<sup>71</sup>), Hakham Tsevi, and R. Feinstein.<sup>72</sup> Maharam Shik permits the reinterment of an entire cemetery on these grounds when threatened by the building of a railway,<sup>73</sup> and argues that the dispensation for reinterment may be extended to any Jewish cemetery anywhere (Israel was not yet a Jewish state) because there is always a danger of political appropriation of the land.<sup>74</sup> While some of Jedwabne's victims are buried in the Jewish cemetery, most are not, and should be exhumed and reinterred.

The idea of consecrating the mass graves in which Jedwabne's martyrs are buried, or extending the borders of the existing Jewish cemetery to accommodate them, is not acceptable because of the way they are buried: enmeshed with each other and with a statue of Lenin.

Another factor halakhically supportive of reinterment comes from the notion of *bizayon*—that it is offensive to *metim* that they remain in unsupervised burial grounds, and particularly when such grounds become pasture. This is true certainly for some of the burial pits of some of the martyrs in Jedwabne,<sup>75</sup> and may be true of other death-camp sites in Europe as well. The obligation to reinter under such circumstances is also supported by Rabbi Yitshak Ya'akov Weiss,<sup>76</sup> who in the 1960's permitted reintering the entire Jewish cemetery of the Slovakian town of Nitra. *Shivat Tsiyyon*<sup>77</sup> suggests that the basis for *bizayon* may not be *kavod*, but *kalut rosh*, essentially the notion of trivializing the dead.

*Nivvul* and *haredat ha-din*, contrary to the intuitions of the Polish rabbis, are not factors in prohibiting exhumation and reinterment in



Jedwabne, both because twelve months have elapsed since the massacre, and because exhumation for the purpose of dignified reinterment, as we have seen from *Sho'el u-Meshiv* and his intellectual successors, can never be characterized as *nivvul*.

In the course of reinterment, minor forensic procedures may be carried out by respectful scientists, according to R. Moses Feinstein.<sup>78</sup> My own recommendation would require a knowledgeable rabbinic presence to supervise the halakhic side of such procedures. These procedures would need to be particularly sensitive to the 364th chapter of the *Shulhan Arukh Yoreh De'a*, and to the protocol recommended by R. Moses Feinstein in his *Iggerot Moshe (Yoreh De'a 1:246)*.<sup>79</sup>

An early presentation of this material to a pre-ordination class of the Boston summer Kollel resulted in a disturbing question: Don't you think, a young man asked, that a dramatic reinterment ceremony either to Jedwabne's Jewish cemetery, or to Israel, closely monitored by the international media, would again unleash the fans of anti-Semitic hatred in Poland, putting whatever Jews are left there in danger?

To which, to my own astonishment, I offered the following answer: "I hope you are wrong; but in the event you are right, what you are saying is that Polish Jewry today is in mortal danger. If this is the case, then in every instance in Jewish history where a Jewish community has been in mortal danger, in the end no amount of goodwill and clandestine negotiations with their persecutor made an iota of difference. In the end they were all killed. If you are right, then Jews should leave Poland now. If you are right, then Jedwabne reinterments or no Jedwabne reinterments, they will not leave Poland alive."

The prayer Jews recite when remembering the dead ends with the words "and may they rest in their reposing-places in peace" [*veyanuahu al mishkavom be-shalom*]. Thoughtful people intoning this prayer for the victims of the Holocaust leave out this phrase, because by far the majority of the martyrs have no resting places. The seven tons of human ash left at Majdanek is a monument to the absence of graves.

And even as they have no graves, for the most part, they had no funerals. Jedwabne, it seems to me, provides us with an opportunity to have a funeral for the Six Million. I cannot imagine that Polish leadership, given its new self-awareness and contrition, would not support in the full such an event.

That halakha would be for the most part supportive of the agendas of Physicians for Human Rights and the International Court almost goes without saying, given Judaism's own horrendous experiences with

genocide. Yet we could add that the obligation of establishing courts of law to practice and enforce justice is one of the seven so-called Noahide Laws that the Torah holds to be mandatory for gentiles.<sup>80</sup> These courts are specifically meant to try violations of the Noahide laws themselves, one of which is the prohibition of murder.<sup>81</sup> This means, of course, that the International Tribunal for War Crimes in The Hague is a halakhic desideratum of a very high order, and supporting it and those indispensable to its just and effective functioning constitutes, in no uncertain terms, supporting the values of the Torah.

## NOTES

1. The author wishes to acknowledge a debt of gratitude to the Ariel Center for the Training of Rabbinical Judges in Jerusalem, and its revered president, Rabbi She'ar Yashuv Cohen, for their hospitality and for full access to its rabbinic library while this article was being researched. Special thanks are also due Rabbi Chaim Tabasky and Dr. Alan Rosen, both of Bar Ilan University, who made helpful comments on this manuscript. All conclusions, of course, remain the responsibility of the author.
2. *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland* (Princeton, NJ: Princeton University Press, 2001).
3. "Poland Starts Exhuming 1941 Massacred Jews," *The Jerusalem Post*, May 24, 2001.
4. "Penance from the Poles," *The New York Jewish Week*, July 13, 2001.
5. E-mail to the author from Susannah Sirkin, Deputy Director, Physicians for Human Rights, July 23, 2001.
6. *Tur*, *Yoreh De'a*, 363, beginning; Jerusalem Talmud, *Mo'ed Katan*, end of second chapter.
7. "Remains," "bodies," "the deceased," "corpses," "the dearly departed," "those no longer with us," "the dead": a dreadful lexicon, surely. Instead, because it does not invoke this grim vocabulary of the funeral industry and its attendant language of denial, I have elected to mostly employ the Hebrew noun "met" ("metim": plural).
8. All translations from the Hebrew/Aramaic are my own, unless otherwise indicated.
9. *Bab's* interpretation here is the most likely since it is supported by the Jerusalem Talmud from which the phrase "*betokh shelo*" is derived. (See the ensuing discussion in the text.)
10. This is also the view of *Korban ha-Eda* commenting on the Jerusalem Talmud (op. cit.).
11. See the explication of this in R. Moshe Feinstein, *Iggerot Moshe*, *Yoreh De'a* 2, no. 160.
12. Jerusalem Talmud, op. cit.

13. The Talmud in these twin passages employs the same verb (*pinnuy*) for moving homes that it uses for moving graves.
14. Doing so would take the joy out of the Festival, when joy is what is commanded on the Festival.
15. And thus consistent, rather than at odds, with the joy of the festival.
16. So long as such values are consonant with the values of the Torah.
17. R. Karo's source here is *Kol Bo* who is similarly unclear (see Ze'ev Wolf Leiner's edition [New York: 1946], p. 80b). A cursory look at the two verses upon which *Kol Bo* based his reasons does not resolve the ambiguity (*Job* 3, *I Samuel* 28).
18. *Bava Batra* 100b. (Jerusalem Talmud *Bava Batra* 20a). There are minor variations between the talmudic text and R. Karo's text of Rav Hai that do not affect our argument. All plain references to the Talmud refer to the standard Vilna edition of the Babylonian Talmud.
19. *Ibid.*, 101b.
20. *Bava Batra*, *ibid.*
21. "Asses" is the Babylonian Talmud's formulation; the Jerusalem Talmud has "dogs."
22. *Responsa Rashba*, 369.
23. So that only his bones be moved; eliminating the halakhic problems of *rekev* (earth which has absorbed some of the composition of the *met*—see *Nazir* 49b), and consonant with the practice of reintering *metim* executed by the courts, whose bones were also eventually transferred to their home cemeteries (*Makkot*, chapter 2). This practice was also true of the person found guilty of manslaughter, whose bones, when he died prior-to-term in the Cities of Refuge, were reinterred in his home cemetery when his release came up. (*Makkot* 11a).
24. The sources for this principle will become clear in the course of the discussion that follows.
25. *Nazir* 64b.
26. S.v. *Matsa*.
27. *Bava Kamma* 80b.
28. *Rosh*, *ibid.*, 81b.
29. This is the interpretation of Maharsha, based on what I feel is a correct reading of Rashi here. Maharsha's analysis appears in the *addenda* to his commentary on *Bava Kamma*.
30. *Eruvin* 17b, *Yevamot* 89b, *Nazir* 43b.
31. *Nazir* 47a.
32. *Nazir* 43b, s.v. "*ve-hai*."
33. *Sanhedrin* 47b.
34. See also *Shulhan Arukh*, *Yoreh De'a* 363:1.
35. J. *Bava Batra*, chapter 5, halakha 1.
36. This may also help account for Rav Hisda's position in the Jerusalem Talmud permitting reinterment of a *met mitsva*. Note that the farmer would have to be doing this in the interest of the dignity of the *met*, and not out of his own commercial concern. See the discussion of R. Moshe Feinstein's responsum on this issue below.
37. *Shulhan Arukh*, *Yoreh De'a* 364:3.

38. See also *Hazon Ish*, *Ohalot*, 22:22.
39. *Shah* on *Yoreh De'a* 364:3, (#10), based on a tradition from Maharshal.
40. A critical, descriptive and annotated collection of decisions in this area can of course be found in the 19th century commentary *Pithei Teshuva* on *Shulhan Arukh Yoreh De'a* 363 and 364. A more contemporary, also thoughtful and useful list can be found in *Responsa Sho'alin ve-Dorshin* by Rabbi Shlessinger, the current chief rabbi of the Gilo neighborhood in Jerusalem, vol. 2, p. 277. This list is limited to decisors who permit reinterment for a higher purpose.
41. *Berakhot* 18b, *Shabbat* 13b, *Sota* 10a, *Sanhedrin* 48b, see also *Tanhuma Leviticus*, 8.
42. The reference is probably to the embalmers of the biblical Joseph (*aharonim*).
43. Section 1163. *Lo she-koev lo, ela ha-neshama kashev la-zilat*.
44. Cited in *Midrash Shemuel* to *Avot* 2:7.
45. *Avot* 2:7, s.v. *marbeh zima*.
46. *Bava Batra* 154b.
47. This last phrase is from the Soncino translation of the Talmud (London, 1935), *Bava Batra* op. cit.
48. *Nivvul* is considered a prohibition with origins in the Bible, based on the position of Rav Kahana articulated in *Hulin* 11a. For a full discussion, see *Iggerot Moshe*, *Yoreh De'a* 2, no. 159.
49. *Hagiga* 4b; see the full text there.
50. *I Samuel* 28:18.
51. *Responsa Shevut Ya'akov*, vol. 2, resp. 97.
52. This is the ruling of R. Ezekiel Landau (*Noda bi-Yehuda*), R. Israel Lipshitz (*Tiferet Yisrael* on the *Mishna*), R. Moses Shik (*Responsa Maharam Shik*), R. Yitshak Elhanan Spector (*Responsa En Yitshak*), R. Moshe Feinstein (*Iggerot Moshe*), and others. For a more exhaustive list, for the full citations, and for his agreement with these rulings, see R. Ovadia Yosef, *Responsa Yabia Omer*, Vol. 7, *Yoreh De'a*, no. 37.
53. *Responsa Hakham Tsevi*, no. 47.
54. *Sanhedrin* 45a, and Rashi there s.v. *bizyonci*. See also Rambam, *Commentary on the Mishna* here.
55. *Ibid.*, no. 50.
56. *Iggerot Moshe*, *Yoreh De'a*, I, resp. 242.
57. Rambam, *Yad*, *Avelut*, end of chapter 2.
58. *Shah* and *Taz* at the beginning of *Shulhan Arukh*, *Yoreh De'a* 363.
59. *Haredat ha-din* having been eliminated as a concern, it will be remembered, because it does not function after twelve months.
60. *Responsa Hatam Sofer*, *Yoreh De'a* 334.
61. *Megilla* 26a. The issue here is that holy things may be sold only for the purpose of purchasing holier objects, and a synagogue is considered less holy than a Torah.
62. *Responsa Shevut Ya'akov*, vol. 2, resp. 103.
63. It should not be lost on the reader that this contradicts the talmudic text, which says, it will be recalled, that the reason is that "it is pleasurable for a person to lie with his forefathers." We have a different kind of dismissal

- here of the notion that *metim* have feelings, perhaps a new level of halakhically-grounded allegorization.
64. *Responsa Shivat Tsiyyon*, no. 64.
  65. Unable to remarry because there is no proof of her husband's death, nor was there a divorce.
  66. Book 1, Section 1, no. 231.
  67. *Yabia Omer*, Vol. 3, *Yoreh De'a*, no. 23. The responsum covers most of the issues raised in this paper, but incorrectly attributes the *aguna* query addressed to *Shivat Tsiyyon* as having been addressed to *Shoel u-Meshiv*.
  68. *Gadol kavod ha-beriot she-dohet lo ta'aseh ba-Torah*.
  69. His argument is based on a source in *Responsa Hatam Sofer*. See *Iggerot Moshe*, *Yoreh De'a* 1, no. 246.
  70. *Iggerot Moshe*, *Yoreh De'a* 2, no. 150, end of section 2.
  71. Op. cit.
  72. Ibid., 1, no. 241.
  73. *Yoreh De'a* 353.
  74. Based on *dina de-malkhuta dina*.
  75. E-mail to the author by William Haglund, Chief Forensic Anthropologist for Physicians for Human Rights, 25 July, 2001.
  76. *Responsa Minhat Yitshak*, vol. 9, no. 129.
  77. Op. cit.
  78. *Iggerot Moshe*, *Yoreh De'a* 2, no. 151.
  79. One could claim that separating *metim* from each other is part of the *tahara* ritual, in which gentile involvement might be inappropriate. See, however, *Hazon Ish*, *Laws of Tefillin*, 6:10, who establishes that where the Jew *requests* the services of the gentile even for ritually-related matters, the category *goi a-da'ato de-nafsho ka-avid* ("the gentile's activities are always autonomous") is inapplicable, regardless of the length of his activity on the Jew's behalf, with certain provisos. See also a marvelous discussion of this problem by R. Ben Tsiyyon Abba Shaul of Jerusalem, in his *Responsa Or le-Tsiyyon*, vol. 1, no. 2.
  80. *Sanhedrin* 56b.
  81. Rambam, *Yad*, *Kings* 9:14.