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Survey of Recent Halakhic Periodical Literature

A $25,000,000 FUNERAL

I. THE NARRATIVE

Some time ago, an intriguing tale of a son willing to forfeit a $25,000,000 inheritance in order to assure that his father be accorded a Jewish burial spread rapidly in observant circles. A report of the incident was published in a popular magazine, *Mishpacha*, no. 87 (20 Kislev, 5766). More recently, the story, accepted as factually correct, became the basis of a halakhic discussion of the son's obligation in that matter.

In the European journal, *Kol ha-Torah*, no. 61(Nisan 5766), R. Yitzchak Zilberstein recounts the details of the incident. Sometime prior to World War II a European Jew married a Jewish woman and they were blessed with the birth of a son. Shortly afterwards the war broke out and the wife was killed. The husband was saved by a gentile woman who declared him to be her husband. They lived together and became the parents of a baby boy. The Jewish son, born of the first marriage, somehow managed to survive but had no contact with his father.

Many years later, the story goes, the Jewish son received notification of the death of his father and of the fact that the father had left an estate of $50,000,000 of which he, as one of two surviving children, was entitled to receive a half. Each of the two sons demanded the right to determine burial arrangements. The Jewish son sought to have his father buried in a Jewish cemetery; the non-Jewish son demanded that his father be buried in a non-Jewish cemetery next to his gentile mother. The issue, we are told, became the subject of litigation in a civil court. The court allegedly ruled, rather Solomonically, that the body be cremated and the ashes be apportioned among the two heirs.[1]

The Jewish son's attorney advised his client to offer a million dollar settlement in return for the exclusive right to dispose of his father's remains in accordance with Jewish practice.[2] The non-Jewish son presented a counteroffer: He surmised that if the Jewish son's concern

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warranted the expenditure of such a large sum it probably was worth an even greater financial sacrifice. Accordingly, he demanded that the Jewish son relinquish his claim to their father's estate in its entirely, i.e., he demanded his brother's entire $25,000,000 share of the inheritance in return for acquiescing to a Jewish burial. The Jewish son, we are told, agreed and the father received a proper Jewish burial.

II. BURIAL EXPENSES AS A CHARGE AGAINST THE ESTATE

Rabbi Zilberstein addresses the question of whether the Jewish son was indeed obligated to incur a loss of that magnitude in order to fulfill the *mizvah* of honoring his father. Indeed, as codified by *Shulhan Arukh*, *Yoreh De'ah* 240:5, that commandment, strictly speaking, is limited to provision of assistance with personal needs but does not require the son to spend his own funds. As explicitly stated by Rema, *ad locum*, the duty to provide financial assistance to an impoverished father is in the nature of a charitable obligation. Since the son had already succeeded to his share of the estate, he was, in effect, being asked to expend his own fortune in order to honor his father.

Rabbi Zilberstein quite correctly counters that such an analysis would be incorrect. As in other systems of law, necessary and appropriate burial expenses constitute a charge against the estate. In effect, the heirs do not succeed to the portion of the estate required to defray the costs of burial. That point can be substantiated on the basis of a number of sources. *Shulhan Arukh*, *Hoshen Mishpat* 253:30 and *Yoreh De'ah* 348:2, rules that a person cannot leave his estate to his heirs and allow himself to be buried at communal expense. If bequests were made to other beneficiaries but the residue of the estate is left to the heirs, the heirs must use their residual share to cover costs of the funeral.

Shakh, *Yoreh De'ah* 348:3, explains that a person lacks authority to conserve his own assets in order to enrich his heirs when such a course of action causes him to become a burden upon the community. R. Joshua Falk, *Sema*, *Hoshen Mishpat* 253:70, explains that property that passes by inheritance remains vested in the progenitor "who is to be buried from his own" resources. The same author, *Perishah*, *Hoshen Mishpat* 253:48, declares:

> Property of the deceased is encumbered for collection of burial needs. Even if he declares before death that he does not wish to be buried, he is

> not heeded; rather, the *bet din* is obligated to seize his property and bury him. *A fortiori*, they may seize funds left to heirs [even] against their will.

Although not cited by Rabbi Zilberstein, that thesis is also supported by the comments of R. Pinchas ha-Levi Horowitz, *Hafla'ah*, *Ketubot* 95b. *Hafla'ah* draws attention to Rashi's comment on the ruling recorded in the Mishnah requiring the heirs of a widow to pay the expenses of her burial. Rashi explains that, since a widow has no husband who is responsible for her burial expenses, "she must bury herself." Accordingly, *Hafla'ah*, both *ad locum* and in his *Kuntres Aharon* 89:1, concludes that the husband's creditors, including those whose liens preceded the marriage, although they may seize property inherited by the husband from his wife to satisfy his debts, cannot seize the portion of the wife's estate necessary to pay the costs of the wife's burial. In effect, the husband does not succeed to the portion of his wife's estate necessary to defray her burial expenses.

Rabbi Zilberstein concludes that, since the son's inheritance passes to him subject to the father's responsibility for his own burial expenses, the son has no choice but to forego his inheritance in order to assure the proper burial of his father's remains.[3]

That analysis is unexceptionable and indeed quite obvious insofar as it goes. Burial expenses are indeed primarily the responsibility of the deceased and constitute a lien against his estate. But left unexamined by Rabbi Zilberstein is the extent to which a person must provide for the costs of his own burial and hence the extent of the resultant encumbrance upon his estate.

III. THE NATURE OF THE CHARGE AGAINST THE ESTATE

Moreover, demonstrating that heirs do not acquire title to the portion of the estate required to satisfy burial expenses does not explain why that should be so. Halakhah accepts the principle that property cannot be conveyed to a cadaver because only a living human being can be seized of property.[4] Property cannot be vested in a chimpanzee, a goldfish or an inanimate object, including a human corpse. For that reason property must pass to heirs immediately at the moment of death and the deceased, even while yet alive, cannot enter into a conveyance that is to be given effect even a moment after his death. How, then, can title to funds needed for burial expenses be retained by the deceased?

Although property cannot remain vested in a person's body after his demise, liens against real property travel with the land. That is so because a lien is essentially a property interest acquired immediately upon generation of the lien. That which a person does not own he cannot transfer to another by sale, gift or inheritance. Hence, all successors to title acquire title subject to existing liens.

The nature of a person's obligation to defray his own burial expenses, and hence of the lien it generates against his estate, is somewhat unclear. A person cannot have an obligation to pay for his burial based upon his own obligation to fulfill the commandment "and you shall surely bury him on that day" (Deuteronomy 21:23), and certainly not one that survives his demise, for the obvious reason that "once a person dies he is free of the Torah and commandments" (*Shabbat* 30a, *Shabbat* 151b and *Niddah* 61b).

The Gemara, *Sanhedrin* 46b, describes the obligation to bury the dead as a biblical commandment and then proceeds to record a controversy with regard to the underlying rationale. One opinion is that burial is required as a means of *kapparah*, i.e., atonement or expiation. Disintegration of the body and return to the dust from which it was formed serves as expiation of sin. The second opinion maintains that the rationale underlying the requirement of interment of human remains is a need to avoid *bizyona*, i.e., the ignominy that would result from putrefaction were the corpse to remain unburied.

The Gemara indicates that the controversy is not merely theoretical; it leads to cancellation of the obligation in one particular situation, *viz.*, an instance in which the deceased indicated prior to his death that he did not wish to be buried. In that case, explains Rashi, the deceased has renounced the benefit afforded by decomposition and, even if buried, will not be accorded the benefit he has renounced. Hence, burial would be purposeless.[5] That, however, is not the case if the purpose of interment is to avoid indignity to the corpse. As *Tosafot*, *ad locum*, point out, although the deceased has renounced his own claim to dignity, it is not only his honor and dignity that are compromised but the honor and dignity of his entire family. Of course, all surviving family members may also concur and renounce their own individual claims to dignity. Nevertheless, as stated by Ramban in his *Torat ha-Adam*[6] and cited by *Kesef Mishneh*, *Hilkhot Avel* 12:1, the honor and dignity to which reference is made is not simply that of individual family members but the honor and dignity of the entire human race and hence the survivors

have no authority to forego the honor that must be accorded to the corpse. A person may well disdain atonement and may well be disposed to renounce his own honor and dignity. Nevertheless, even an expressly announced directive not to be buried must be ignored because a person has no right to compromise the honor and dignity of his family or of the human community. Both Rambam, *Hilkhot Avel* 12:1,[7] and *Shulhan Arukh*, *Yoreh De'ah* 348:3, rule that a person must be interred even if he has directed otherwise.

When seen as dishonor of the entire human race, the obligation with regard to interment assumes an entirely different guise. Partners in an enterprise assume responsibilities *vis-à-vis* one another that are actionable against property owned by them. Townspeople may compel one another to provide certain amenities, e.g., a wall around the city and fortifications, because in forming a society they enter into a partnership and impliedly agree that they will be financially responsible to one another for such costs. Such undertakings give rise to a lien against property. Similarly, members of society become responsible, not only for maintaining their own personal honor and dignity, but for preserving the human dignity of all fellow members of society, i.e., of mankind at large. Integral to that obligation is the responsibility to provide for proper disposal of one's own body after death so that the ignominy inherent in putrefaction not become an embarrassment and a negative reflection upon mankind at large. The responsibility to prevent one's corpse from becoming a rebuke to society devolves upon every member of the human race by virtue of his or her status as a member of human society. That obligation, although it is discharged only after death, devolves upon a person during his lifetime in the sense that his property becomes hypothecated for purposes of defraying the necessary costs of burial. The obligation is toward other members of society; they, in turn, are beneficiaries of a lien upon the property of each fellow member of society for satisfaction of that contractual obligation. Any property acquired by a member of society is acquired subject to such lien.

Accordingly, to declare that heirs do not succeed to the portion of the estate required to defray burial expenses is not to imply that such funds remain vested in the corpse in a literal sense; it is to say only that such funds are inherited subject to the existing lien for defrayal of burial expenses. Hence the prerogative of enforcing that responsibility may be exercised by the beneficiaries of that lien, i.e., society at large, in order to force heirs to disgorge property encumbered for that purpose.[8]

IV. THE CONTROVERSY BETWEEN BAH AND ROSH

Nevertheless, *Teshuvot ha-Rosh*, *klal* 15, chap. 3, rules that a creditor may seize the assets of an estate in their entirety and is not required to provide for the burial of the deceased. That position is reflected in the ruling of Rema, *Hoshen Mishpat* 107:2. *Tur Shulhan Arukh*, *Hoshen Mishpat* 255:2, similarly rules that a widow who seizes the entire estate in satisfaction of her *ketubah* has no obligation to provide for the burial of her deceased husband. *Bah*, *Hoshen Mishpat* 275:4, clearly understood that there exists a lien against the property of a deceased for the defrayment of burial expenses and that a lien of such nature generates an encumbrance upon the property of the deceased during his lifetime. Accordingly, he questions why the claims of a creditor or of a widow are not subordinate to the prior lien imposed on a person's property for payment of burial expenses. *Bah* responds that the creditor is regarded as already in possession of the property from the moment that the debt was generated. A similar situation does not exist with regard to burial expenses; title to property used to pay burial expenses does not vest in any other party during the lifetime of the deceased. For that reason *Bah* rules that, although the property of a proselyte who has no heirs becomes *res nullius* upon his death, nevertheless, no one can acquire title to the portion of his estate necessary to cover costs of interment.[9]

That position, however, is contradicted by *Teshuvot ha-Rosh* and *Tur Shulhan Arukh*, *ad locum*, as well as by *Shulhan Arukh*, *Hoshen Mishpat* 275:2. Citing *Teshuvot ha-Rosh*, *Tur Shulhan Arukh* declares that the proselyte's property becomes *res nullius* immediately upon his death and that there exists no lien for payment of burial expenses "for this lien did not become effective [during his] lifetime."

Nevertheless, *Teshuvot ha-Rosh*'s position as well as his explanatory comment regarding the non-existence of a lien for defrayment of burial expenses are consistent with the thesis that such a lien does indeed exist. In this writher's opinion, *Teshuvot ha-Rosh* should be understood as denying only existence of a lien for burial expenses that comes into existence prior to generation of a lien in favor of the creditor or of the widow, i.e., contrary to *Bah*, Rosh maintains that the inception of the lien is not at the moment of birth or at the time that a person reaches the age of halakhic majority. Rather, Rosh maintains that the lien comes into existence at the moment of death, rather than much earlier during the lifetime of the deceased, with the result that both creditors and the

widow are senior creditors and hence bear no responsibility for burial of the deceased. This analysis is supported by the comments of *Perishah*, *Tur Hoshen Mishpat* 275:4, who declares that "the title of one who takes title to the property of a proselyte is by virtue of rabbinic decree and he acquires title [to the property] before departure of the soul."[10]

Perishah clearly explains that the proselyte's title is extinguished by rabbinic decree *before* death (as evidenced by the fact that the person acquiring title may not have performed an act of *kinyan* until after the demise of the proselyte) and is not liable for his own burial expenses because no lien is established for that purpose until later, i.e., at the time of death. This analysis is also reflected in the terminology employed by *Teshuvot ha-Rosh*. In explaining why a creditor may attach the entire estate, Rosh declares: "It appears that immediately upon the death of the proselyte his possessions become *res nullius* and we do not find that a lien [to provide] for his burial rests upon a lien against his property." Rosh does not state simply that there exists no lien with regard to burial expenses; rather, he states that no such lien "rests upon a lien against his property," i.e., it does not constitute a pre-existing lien having priority over the creditor's lien.

Rosh's position in this regard is entirely understandable. The obligation of burial by virtue of *bizyona*, if understood as an obligation devolving upon an individual as a member of society, is analogous to similar obligations of that nature. The obligation of townspeople to contribute to the erection of fortifications and to provide for social amenities is assumed upon becoming a resident of the city but there is certainly no actionable lien against property until a tax is actually levied. Such a levy could presumably not be collected from a creditor who forecloses on a prior lien. Similarly, financial obligations assumed in the guise of human dignity or *kevod ha-beriyyot* are not actionable and do not serve to encumber property until an actual need arises, i.e., until the person actually expires.[11]

V. A CHILD'S OBLIGATION

Rabbi Zilberstein's analysis of a child's obligation to bury a parent is less than comprehensive. Indeed, the obligation to honor a parent in death as in life does not mandate expenditure by the child of his personal funds. However, apart from the obligation of honoring one's father there are additional commandments concerning burial, *viz.*, the negative prohibition against allowing a corpse to remain unburied and the positive obligation to provide timely burial as commanded in

Deuteronomy 21:23. When the deceased has no assets, those obligations do require expenditure of personal funds by others to the same extent as is required for the fulfillment of other commandments. It is certainly arguable that those obligations devolve first and foremost upon the decedent's relatives. Moreover, although the obligation of filial honor does not give rise to a financial burden devolving upon the son, the son may well have a charitable obligation to defray the financial needs of an impecunious parent.

Whether or not a son is obligated to expend his own funds to defray burial expenses is a matter of some controversy. *Shakh*, *Yoreh De'ah* 348:5, states that if the heirs inherit no funds they cannot be compelled to pay for burial of the deceased; rather, declares *Shakh*, "it is incumbent upon everyone to bury him." *Shakh* apparently maintains that in such circumstances the obligation devolves upon the entire community.

An eighteenth-century authority, R. Zvi Hirsh ben Ezriel of Vilna, *Bet Lehem Yehudah*, *Yoreh De'ah* 348:2, addressed a situation involving a pauper who died but who had a wealthy son. The *hevra kaddisha* demanded a high fee from the son for burial in accordance with the son's social station. *Bet Lehem Yehudah* ruled that the obligation is to bury the father in accordance with his social station and, accordingly, the fee due and owing is to be assessed in accordance with the economic status of the deceased rather than of his surviving relatives. Accordingly, *Bet Lehem Yehudah* ruled that the son may rightfully refuse to pay a higher amount and the *hevra kaddisha* incurs a transgression if it delays burial on that account.

Bet Lehem Yehduah clearly disagrees with *Shakh*'s position. Although the obligation to honor one's parent does not ordinarily entail a financial obligation, *Shulhan Arukh*, *Yoreh De'ah* 240:5, rules that if the parent is impoverished and the son is financially capable of doing so, the son may be compelled to support a parent. Since the burial is designed for the honor of the deceased, argues *Bet Lehem Yehudah*, a son may be compelled to bear the costs of a funeral, just as he may be compelled to provide for other needs of an impoverished parent. A parent, and indeed other relatives as well, must be accorded priority in the allocation of charitable funds. Although *Bet Lehem Yehudah* regards the son to be financially liable for the burial expenses of his father, he maintains that the financial liability of the son is limited to outlays for accouterments appropriate to the father's social status. It would certainly follow that the son need not expend a sum greater than the total amount he might be required to dispense as charity.

Bet Lehem Yehudah concedes that *Shakh* rules that a son need not expend his own funds in burying his father and ascribes the same position to *Teshuvot ha-Rosh*, *klal* 13, chap. 18, as well as to *Tur Shulhan Arukh*, *Even ha-Ezer* 118. Nevertheless, *Bet Lehem Yehudah* points to the rulings of *Teshuvot Ra'avan*, no. 23 and *Teshuvot Maharam Minz*, no. 54, cited by R. Jacob Reischer, *Teshuvot Minhat Ya'akov*, no. 8, indicating that fulfillment of the commandment regarding burial is a personal obligation of the son and, as such, requires expenditure of his own funds in order to accord his father a funeral in accordance with the honor and dignity of the deceased. *Minhat Ya'akov* further argues that no inference should be drawn from *Teshuvot ha-Rosh* to the effect that *Teshuvot ha-Rosh* intended to limit the obligation of a son to situations in which the father left an estate. *Minhat Ya'akov* asserts that there is no early-day authority who contests his position.

Bet Lehem Yehudah's ruling to the effect that a son's responsibility is limited to payment of no more than what would have been customary and usual for a grave appropriate for a person of the father's social station were the payment made by the deceased himself may well be an equitable assessment of the charges the *hevra kaddisha* may morally impose upon him. The $25,000,000 demanded by the non-Jewish son is certainly no different from exorbitant charges imposed by a *hevra kaddisha* and neither may be mandated by reason of a filial obligation of charity. However, according to Ra'avan and Maharam Minz, who maintain that heirs are obligated to defray burial expenses by virtue of the biblical obligation to bury the dead, the son may not be relieved of his obligation concerning burial and *halanat ha-met*, i.e., allowing the corpse to remain unburied overnight, in a situation in which the *hevra kaddisha* or any other individual attempts to extort an exaggerated sum in order to permit proper burial.

IV. OBLIGATION OF THE HEIRS

Teshuvot Maharam Minz, no. 54, asserts that, since the biblical obligation of burial is rooted in the concept of *bizyona*, the obligation devolves not only upon a son but upon all heirs who would themselves suffer ignominy if their relative were to be left unburied. Maharam Minz rules that heirs are financially obligated to defray burial expenses to the same extent that they must expend funds for fulfillment of any positive obligation.[12]

Maharam Minz further cites a responsum of Ra'avan, *Teshuvot Ra'avan*, no. 33, who demonstrates that the biblical obligation of burial is incumbent upon relatives on the basis of two cosiderations:

1) The Gemara, *Yevamot* 89b, defines a *met mizvah*, i.e., an unattended corpse on whose behalf even a *kohen* must defile himself in order to bury the remains, as a corpse found in circumstances in which even "if one were to call, no one would respond on his behalf." The inference is that, if relatives do exist, they would be obligated to respond and the obligation of burial would devolve upon them. In rebuttal, *Minhat Ya'akov* points out that the ensuing discussion of the Gemara might be understood as defining "response" as limited to the response of heirs who actually inherit the estate.

2) A *kohen* is required to defile himself through contact with seven biblically enumerated relatives. Clearly, argues Ra'avan, he must be obligated to assure the burial of such relatives; else, what purpose would be served by his defilement? *Minhat Ya'akov* responds to that argument by pointing to the ruling of *Shulhan Arukh*, *Yoreh De'ah* 373:3, regarding a widow who is the daughter of a *kohen*. A widow has no obligation to bury her husband. Nevertheless, *Shulhan Arukh* rules that the daughter of a *kohen*, no less so than a *kohen* himself, is obligated to defile herself through contact with her husband's corpse.[13] In that case, the requirement of defilement certainly is not a concomitant of an obligation of burial.

R. Ya'ir Chaim Bacharach, *Teshuvot Havvot Ya'ir*, no. 139, is in basic agreement with the position of Maharam Minz. However, *Havvot Ya'ir* asserts that, insofar as apportionment of the financial burden is concerned, not only sons, but also other relatives and even persons living in relatively close proximity to the deceased, should be assessed a larger portion of the costs than others. *Havvot Ya'ir* declares that, since burial is predicated upon the concept of *bizyona*, the potential embarrassment to relatives and townspeople is greater than to others. Accordingly, he reasons that, were the corpse to remain unburied, such individuals would suffer greater embarrassment than others and hence they should bear a greater share of the costs.

The question of whether heirs are under financial obligation to defray funeral costs out of their own pockets would appear to be reflected in two resolutions of a problem presented by *Tosafot*, *Bava Batra* 154b. The Gemara discusses an incident involving a young man who disposed of property and then died and was buried. The validity of the sale was in doubt because it was unknown whether or not he had

reached halakhic maturity as evidenced by the presence of pubic hairs. Opening the grave in order to examine the corpse involves dishonor to the deceased. Nevertheless, the Gemara declares that the purchasers who have paid for the property have a *prima facia* right to demand such examination in order to have the property delivered to them and thereby avoid financial loss. The Gemara explains why such a right cannot be exercised. However, in that discussion, the Gemara also addresses the situation of purchasers who are already in possession of the property and it is the heirs who seek to invalidate the sale in order to recover the property sold by their progenitor. Their claim is peremptorily dismissed and they are told, "You have no right to desecrate [his body]."

On the surface, both the purchasers and the heirs are claiming similar economic loss. Why, then, is the claim of the purchaser given serious consideration whereas the claim of the heirs is dismissed out of hand? *Tosafot* respond with the assertion that, whereas purchasers experience loss, heirs "have given nothing." That distinction can best be understood in light of the thesis that a person's estate is hypothecated to defray any costs associated with dignified disposal of his remains. Included are not only the expenses of actual burial but any expenditure to prevent ignominious treatment of the corpse. To the extent that funds are needed for the purpose, heirs have no claim upon the estate. Thus the heirs "have given nothing" and cannot claim out-of-pocket loss.

Tosafot then procede to advance an alternative explanation: Unlike purchasers, "the deceased is their relative." That explanation is not predicated upon a distinction between actual expenditure of funds and mere non-succession to an estate. Rather, in that explanation, *Tosafot* seem to assume an obligation on the part of relatives to expend their own funds in order to prevent desecration of the deceased and hence they are not able to plead financial loss is demanding examination of the already buried corpse in order to validate their claim to the purchased property.[14]

VII. LIMITATION OF THE FINANCIAL OBLIGATION

The obligation to pay an exorbitant amount in order to assure burial of the remains of one's father should, logically, be similar to the obligation to pay an exorbitant amount for the purchase of a *lulav* and *etrog* or of *mazot* to fulfill those biblical commandments. The extent of the obligation to pay an extortionist in order to avoid transgression of *halanat hamet* should, logically, be no different from the extent a person is obligated to expend even his entire fortune in order to avoid transgression of

the negative commandment "Thou shalt not stand idly by the blood of thy fellow" (Leviticus 19:16). The general rule with regard to the expenditure of resources in order to avoid transgression as recorded by Rema, *Orah Hayyim* 656:1, is that a person is not obligated to expend more than twenty percent of his net worth in order to fulfill, or to avoid transgressing, a positive commandment[15] but is obligated to expend even his entire fortune in order to avoid transgressing a negative precept.[16]

The extent of financial obligation that must be incurred in order to avoid passive transgression of a negative commandment is a matter of some controversy. As cited by *Hiddushei R. Akiva Ezer*, *Yoreh De'ah* 157:1 and *Pithei Teshuvah* 147:4,[17] some authorities maintain that, if the commandment is couched in negative terms, e.g., "Thou shalt not stand idly by the blood of thy fellow," the financial obligation is the same as must be incurred in avoiding active violation, e.g., eating forbidden foods, and hence expenditure of even one's entire fortune is required. Other authorities cited in those sources maintain that the crucial distinction does not lie in the technical linguistic formulation of the commandment but in overt, active violation versus passive transgression and, since non-intervention in order to rescue a person from imminent death constitutes only passive transgression, the mandatory financial obligation is limited to one-tenth or one-fifth of one's fortune.[18] Applying that standard to the commandment "Thou shall not allow his body [to remain unburied] overnight" (Deuteronomy 21:23), a son charged with the burial of his father would be required by some authorities to expend his entire fortune but other authorities would require him to expend no more than one-tenth or one-fifth of his net worth.

This conclusion is somewhat at variance with the position of *Bet Lehem Yehudah* who fails to quantify the extent of a son's obligation other than in terms of the father's social status and, presumably, the extent of the son's obligation to make charitable gifts. Rabbi Zilberstein fails to recognize any filial obligation regarding burial over and above that of honoring one's father and, accordingly, finds no basis for financial responsibility grounded in that consideration.

It also stands to reason that the decedent's own obligation rooted in the concept of *kevoda*, i.e., persevering human dignity, is also not open-ended. *Kevod ha-beriyyot* is certainly a halakhic value; nevertheless, it is the consensus of rabbinic authorities that it does not constitute a *mizvah* in a technical sense. The author of *Pri Megadim*, in his *Shoshanat ha-Amakim*, *klal* 6, presents a lengthy analysis of that question. *Shoshanat ha-Amakim* notes that *kevod ha-beriyyot* is not enumerated as a com-

mandment by any of the authorities who compiled lists of the 613 commandments.[19] Nevertheless, in certain limited circumstances, Halakhah stipulates that biblical prohibitions may be ignored for the sake of preserving human dignity.[20] Indeed, citing the declaration of the Gemara, *Berakhot* 19b, "So great is *kevod ha-beriyyot* that it takes priority over a negative biblical commandment," *Shoshanat ha-Amakim* suggests that the "greatness of *kevod ha-beriyyot* lies in the fact that it is accorded such weight even though it does not constitute a *mizvah*.[21] If *kevod ha-beriyyot* does not represent a formal *mizvah* there is no immediate reason to assume that the financial burden mandated for the purpose of preserving human dignity is identical to that required for the purpose of a fulfilling a *mizvah*.

Nevertheless, there is one area of Jewish law in which *kevod ha-beriyyot* is expressed in financial terms. Return of lost property to its rightful owner represents a biblical obligation. However, the Gemara, *Berakhot* 19b, posits an exclusion from that obligation in the case of a "scholar for whom it is not in accordance with his dignity," i.e., a person for whom the activity involved in rescuing a lost item in a particular set of circumstances would be demeaning or degrading. The exclusion is expressed in terms of a superseding need to preserve the dignity of the scholar.

Rambam, *Hilkhot Gezelah ve-Avedah* 11:13, provides a simple test to determine the circumstances under which this exclusion pertains: the finder must examine his own conscience to ascertain whether he would subject himself to embarrassment or degradation to recover the object were it his own. The answer will certainly reflect a balance between the value of the object and the degree of degradation involved. If the finder would be willing to suffer similar embarrassment in order to avoid personal financial loss, he must accept the same measure of embarrassment in order to preserve the property of his fellow.

Clearly, then, people are prepared to suffer financial loss in order to preserve their dignity—but they are not willing to accept unlimited financial loss for that end. Presumably, the financial loss people are willing to assume is commensurate with their social station and the degree of indignity involved. The dignity they are required to preserve is not simply personal dignity but *kevod ha-beriyyot*, dignity of the entire human race. As members of human society they have entered into a compact requiring them to expend personal funds in order to preserve *kevod ha-beriyyot*. Member of society are mutually and reciprocally obligated to preserve human dignity to the extent of the obligation assumed by virtue of having entered into that compact.

How much, then, must one expend in order not to appear naked in public? If the principle of *kevod ha-beriyyot* as applied to restoration of lost property serves as a paradigm, the answer is that one must expend as much as a normal, rational person of similar rank and station would expend to avoid such ignominy—but one is not required to spend more than that amount. A person, as a member of society, has obligated himself to expend as much as other normal, rational and similarly situated persons would expend for that purpose. Since the obligation is reciprocal in nature it is limited to the degree to which such an undertaking can be imputed to others.

The same analysis applied to the factor of human dignity as a function of burial, rendering it a need and obligation of the deceased himself as well as of the society of human beings of which he was a member, would yield the result that such obligation cannot exceed the sum that normal, rational members of society would spend in order to avoid the ignominy of an unburied corpse. Although determination of the precise amount may be elusive, it may well be the case that it is significantly less than $25,000,000.

A person is halakhically powerless to bequest his fortune to relatives and friends and expect that his dignity will be preserved at the expense of the public treasury. A person must provide for his needs, such as food, clothing and shelter, from his own funds when such funds are available. A person must also defray the costs of his own burial since avoidance of the ignominy of being left unburied is also a human need. The *bet din* will seize his property in order to provide for such needs rather than allow him to become a public charge. In satisfying basic needs there is no upper limit in the sense of a percentage of net worth.

There is certainly no limit upon the amount of money a person can be compelled to spend for basic necessities such as food, clothing, shelter or even medical expenses. But is there no limit to the sum that a person may be required to expend in order to preserve personal dignity? For example, when no other clothes are available, must a person expend $25,000,000 in the purchase of clothing in order to avoid appearing naked in public? Assuming that he may forego his own personal dignity, may he be compelled to expend that sum to clothe his wife whose necessities he is halakhically obligated to provide? Assuredly, a person has the right to spend $25,000,000 of his own funds to purchase a suit of clothes if he so desires, particularly if otherwise he would remain naked. But suppose the deceased left specific instructions declining such exorbitant burial expenses and the heirs, at least under such circum-

stances, are unconcerned with considerations of family honor, may society demand an expenditure of that magnitude in order to preserve the dignity of the human race? Such a requirement may well require expenditure of a sum even greater than the maximum financial burden that must be assumed in order to fulfill a *mizvah* but it does not appear to be open-ended. Rather, it would seem that the obligation is limited to the amount that normal, rational persons of comparable social station would expend for that purpose.

To be sure, there is no ceiling upon the amount a person may choose to spend for clothing to avoid public exposure in a naked state and, similarly, there is no upper limit to the portion of his estate that a person may designate to defray the avoidance of his body being left uninterred. In order to achieve that end a person may well desire to expend an amount far greater than that to which he has bound himself by virtue of entry into a social compact. Nevertheless, in the absence of indication to the contrary, the presumption would be that the deceased's needs, desires and wishes parallel those of other persons similarly situated.

Indeed, there is a halakhic basis for assuming that the deceased would not have wished to deprive his children by allowing an inordinate portion of his estate to be appropriated for use in sparing his corpse dishonor. Mutilation of a corpse is forbidden because it constitutes defilement of the corpse, or *nivul ha-met*, and as such is antithetical to the honor and dignity due to human remains. The prohibition against violation of a corpse is suspended, as are virtually all halakhic restrictions, for purposes of rescuing a human life. A number of authorities find independent reason to permit an autopsy in order to prevent or cure a hereditary disease.[23] Their reasoning is based upon the consideration that a person is willing to forego at least a measure of honor and dignity for the benefit of his progeny. The consideration is reflected in the ruling recorded in *Shulhan Arukh* 356:1 providing that funds collected for burial expenses in excess of actual disbursements for that purpose should be given to the heirs of the deceased. As explained by both *Shakh* and *Taz*, *ad locum*, on the basis of the reasoning advanced by the Gemara, *Sanhedrin* 48a, the recipient of charitable funds is embarrassed thereby but the deceased is willing to accept such embarrassment for the benefit of his heirs. Rashi, *Sanhedrin* 48a, s.v. *tanna kamma*, comments that the deceased "while yet alive, forgave his ignominy and is content that he be dishonored after death for the benefit of the heirs." Although Rashi's comment is somewhat ambiguous, it may readily be understood as connoting constructive rather than actual forgiveness.

Similarly, the Gemara, *Sanhedrin* 46b, states the Sarah was glad to accept a measure of dishonor involved in delaying her burial until Abraham's arrival "so that Abraham would be honored through her." Assuredly, the degree of embarrassment or dishonor suffered by the deceased cannot be disproportionate to the benefit accruing to the heirs. Indeed, in each of the instances cited the embarrassment to the deceased is relatively minor. Nevertheless, it may certainly be argued that, although burial is a human need to be defrayed from a person's own funds, the deceased would not have required that his heirs succumb to extortionate demands in order to effect his burial.

The notion that there is a limit to the amount that a person can be compelled to spend in order to defray his own burial expenses is cogent if interment is rooted in the concept of *bizyona*. If, however, the rationale is *kapparah*, atonement or expiation of sin, it may certainly be argued that expiation of sin constitutes a basic human need akin to sustenance and shelter. If so, there may well be no limit to the costs that might be levied upon the deceased himself for that purpose just as there is no limit upon the value of a person's resources that may be seized in order to meet the expenses involved in satisfying that person's needs. However, the consideration of *kapparah* does not appear to give rise to an obligation upon the deceased during his lifetime and hence does not serve to explain how a lien against the estate might arise. If the heirs are indeed under personal obligation to fulfill the *mizvah* of burial, the extent of that obligation should be similar to the extent of financial expenditure required for fulfilling similar commandments as has been discussed earlier.

VIII. "RANSOM" OF A CORPSE

There is, however, one further consideration that would serve to mitigate that obligation. *Shulhan Arukh*, *Yoreh De'ah* 252:4, records the rabbinic enactment that forbids ransoming of captives for a sum "greater than their worth" which is generally defined as the price a person would command in a slave market.[23] That edict was promulgated in order to discourage captors or kidnappers from making extravagant demands. The effect of the ordinance was to put them on notice that only "reasonable" demands would be met. The ordinance effects only communal responsibility with regard to ransoming captives. A person may pay as high a ransom as he wishes provided that he uses his own funds.

The demand of the non-Jewish son for $25,000,000 in order to

release his father's body for burial is halakhically naught but a demand for "ransom" of the corpse. The demand is extortionate and the sum outrageous or, in halakhic terms, it is far in excess of the "value" of the corpse.

It is certainly arguable that the ordinance promulgated with regard to ransoming a captive applies to ransoming a corpse as well. Otherwise, the purpose of the edict, i.e., to discourage future acts of kidnapping or prevention of the impoverishment of the community, would be defeated: the captors would merely have to hold the prisoners until their death and then demand the same sum in return for relinquishing the body. If so, the community has no obligation to submit to extortion in order to provide proper burial.

It is indeed the case that, as recorded by *Shulhan Arukh*, *Yoreh De'ah* 252:4, a person may, at his discretion, provide funds for purposes of his own ransom without any limitation. Accordingly, while yet alive, an individual may well direct that his funds, and hence the funds available in his estate, be used for assuring proper burial by "ransoming" his corpse, but he is under no obligation to do so. In the absence of an earlier clearly expressed desire on the part of the deceased it would seem that the rabbinic ordinance should govern. Hence, the fact that the estate is charged with defrayment of expenses associated with interment of the decedent's remains does not demand acquiescence to an extortionate demand.

It is remarkable that the question of extortionate, or even extraordinary, expenditure for purposes of assuring proper burial has not been addressed in the responsa literature of previous generations. In the case under discussion, whether or not he was actually obligated to do so, the conduct of the son who was unhesitant in surrendering the inheritance of a fortune in order to accord his father a proper Jewish burial commands approbation and respect.

NOTES

1. The account in *Mishpacha* appears in greater and more heart-rending detail. According to that version the non-Jewish brother residing somewhere in South America, where the father had made his home after the war, arranged for a church funeral to be followed by cremation.
2. *Mishpacha* reports that the initial offer of the Jewish son was in the sum of $10,000,000.

3. The Gemara, *Bava Batra* 112a, declares that it is an indignity for a person to be buried in a grave that he does not own. The obvious problem is that, since property cannot be vested in a corpse, immediately upon a person's death the grave becomes the possession of his heirs and hence is no longer his. R. Meshullam Roth, *Teshuvot Kol Mevaser*, I, no. 56, asserts that neither a grave nor funds needed for burial expenses pass to the heirs but remain vested in the deceased. *Kol Mevaser* takes the notion that a corpse can be seized of property required for burial a step further in declaring that a grave provided by others on behalf of a person who dies without funds also becomes the property of the deceased. R. Elchanan Wasserman, *Kovez Shi'urim*, *Ketubot*, sec. 314, ascribes a similar position to Rashba, cited by *Shitah Mekubbezet*, *Bava Batra* 8b, with regard to all funds collected for the burial of the deceased. *Kovez Shi'urim* suggests that vesting of title in the deceased may be a rabbinic enactment.

   However, Ramah, *Sanhedrin* 48a, states explicitly that title to such funds do not vest in the deceased. That position is also atttributed to *Teshuvot ha-Rashba*, I, no. 375, by *Mahaneh Efrayim*, *Hilkhot Zekhiyah u-Matanah*, no. 31. That is also the view of *Hazon Ish*, *Likkutim*, no. 20 and *Sanhedrin* 48:1. Cf., *Shurat ha-Din*, XI (Jerusalem, 5767), 92-95.
4. The comment of *Bah*, *Hoshen Mishpat* 275:4, to the effect that chattel of a proselyte located within four cubits of his corpse become the property of the deceased for purposes of burial is not to be construed literally as evidenced by *Bah*'s supporting comment citing the statement of the Gemara, *Berakhot* 18a, declaring that "A corpse is seized of four cubits for purposes of [causing others to be prohibited from] reciting *Shema*." That dictum certainly does not reflect the existence of a property interest vested in the corpse. See *infra*, note 10 and accompanying text.
5. Cf., however, *Yad Ramah*, *Sanhedrin* 46b, who understands the Gemara as stating only that there is no *mizvah* requiring that the deceased be provided with undesired atonement but not that burial would be of no purpose in that regard.
6. See *Kitvei Ramban*, ed. R. Bernard Chavel (Jerusalem, 5724), II, 118.
7. Citing Ramban, *Kesef Mishneh*, *ad locum*, explains that the question of whether burial is required by virtue of *bizyona* or for the purpose of *kapparah* is left unresolved by the Gemara. Accordingly, opines *Kesef Mishneh*, Rambam rules that burial is required by reason of doubt even if the deceased had directed otherwise. *Teshuvot Maharam Minz*, no. 45, states that the Gemara indeed accepts *bizyona* as the rationale for burial but further states that the two rationales are complementary rather than exclusive and hence both must be regarded as normative.
8. The conclusion that heirs may be compelled to defray burial expenses on the basis of this consideration rests upon acceptance of the talmudic opinion that burial is necessary because of *bizyona*. Accordingly, that conclusion is valid only if Rambam and *Shulhan Arukh* are understood as ruling definitively that burial is required by reason of *bizyona* either because the talmudic opinion that burial is required because of *kapparah* is rejected or because the two explanations are complementary. See *supra*, note 7. If, however, the issue of *bizyona* versus *kapparah* remains a matter of doubt, as

Ramban in his earlier-cited comments maintains, and funeral expenses represent a lien against property to which heirs have succeeded, the heirs should logically be considered to be *muhzakim*, i.e., in possession of the property. If so, those seeking to compel the heirs to pay for the burial bear the burden of proof, a burden which, if the halakhic issue is unresolved, can never be satisfied. Ramban, however, declares that the heirs are compelled to bear the costs "because of doubt," i.e., because stringency is mandated in instances of doubt with regard to fulfillment of a religious obligation. It seems to this writer that Ramban in that comment adopts the view that heirs have a personal religious obligation to bury their deceased relatives and is in agreement with the authorities cited in the following section who espouse that view. See also *Teshuvot Radvaz*, II, no. 780.

9. This analysis serves to dispel the criticism of *Bah* expressed by *Shakh*, *Hoshen Mishpat* 275:1.
10. *Perishah* establishes that point by pointing to a discrepancy between the rule applied in the case of a person who seizes the property of a deceased proselyte and the rule applied to the beneficiary of a gift *mortis causa*, i.e., a *mattnat shekhiv me-ra*. The latter is liable for burial expenses whereas the former has no such liability. *Perishah* explains that rabbinic decree established *mattnat shekhiv me-ra* as a conveyance comparable to inheritance, i.e., in both cases title vests after death and hence is subject to a lien with regard to burial expenses, whereas the property of a proselyte becomes *res nullius* before his death by virtue of rabbinic decree and thus is not subject to a similar lien.
11. For a parallel analysis of the inception of a lien in favor of a wife for support and maintenance as a widow see *Sema*, *Hoshen Mishpat* 242:2.
12. See also R. Chaim Halberstam, *Teshuvot Divrei Hayyim*, I, no. 64.
13. Rambam, *Hilkhot Avel* 2:6, disagrees with that position but only on the grounds that the *mizvah* requiring defilement is addressed only to those who are otherwise forbidden to defile themselves. The daughter of a *kohen* is not bound by the strictures regarding defilement addressed to *kohanim*.
14. Rema, *Hoshen Mishpat* 107:2, rules that in some circumstances a creditor may prevent burial of the deceased until the debt is satisfied by the estate. Rema further rules that if the creditor is a relative of the deceased he may not cause the corpse to be disgraced by forcing burial to be delayed. *Bi'ur ha-Gra*, *Hoshen Mishpat* 107:14, cogently comments that the Rema's latter ruling is predicated upon *Tosafot*'s second explanation. If so, Rema must be regarded as ruling that heirs have a personal financial obligation with regard to the burial of the deceased. See also the analysis of Ramban, cited *supra*, note 8. It should be noted that *Kesef Mishneh*, *Hilkhot Avel* 12:1, apparently ascribes Ramban's position to Rambam as well. Thus, *Shakh* appears to be the only authority who explicitly rejects the notion that relatives have a personal financial obligation to assure burial of the deceased.

    Note should be made of a perplexity inherent in Rema's ruling. A creditor not related to the deceased may prevent burial in order to effect payment of the debt owed him. A creditor who is also a relative may not make a similar demand because he is bound by the commandment that forbids allowing the corpse to remain unburied even though avoidance of

the transgression will entail an expense to him. If relatives are bound by that commandment and are required to expend funds in order to avoid transgression, why, then, are they not required to satisfy the deceased's debt in order to fulfill their obligation to assure prompt burial? If they are not required to satisfy a just debt, *a fortiori*, they cannot be required to submit to extortion, as in the situation under discussion.

Teshuvot Havvot Ya'ir, no. 139, understands Rema in precisely that way and states, without explanation, that in such circumstances there is no transgression. *Pithei Teshuvah*, *Yoreh De'ah* 347:1, expresses puzzlement at that understanding of Rema. *Pithei Teshuvah* asserts that Rema's comments should be construed only as acknowledging the crditor's right to cause burial to be delayed without transgression on the part of the creditor but that the relatives who do not satisfy the creditor's demands are in violation of the prohibition against delaying burial. Rema's comments are indeed directed only to a lack of culpability on the part of the creditor; Rema is entirely silent with regard to the responsibility or absence thereof on the part of the relatives of the deceased.

15. Cf., *Magen Avraham*, *Orah Hayyim* 656:7, who cites the variant opinion of Rabbenu Yeruham who maintains that a person should not expend more than one-fifth of his fortune for this purpose but that the obligatory expenditure is limited to ten percent. See also *Mishnah Berurah* 656:8 and *Bi'ur Halakhah* 656:1.
16. Cf., however, *Bi'ur ha-Gra*, *Yoreh De'ah* 157:5.
17. For additional sources see this writer's *Bioethical Dilemmas*, I (Hoboken, New Jersey, 1998) 108-109, notes 57-58
18. See *supra*, note 16.
19. *Shoshanat ha-Amakim* suggests that if *kevod ha-beriyyot* does constitute a *mizvah* it is derived from the commandment regarding burial of a corpse. See also that author's *Teivat Goma*, *Parashat Hayyei Sarah.*
20. For a full discussion of the ramifications of that principle see *Encyclopedia Talmudit*, XVI, 477-542.
21. Cf., however, R. Joseph David Sinzheim, *Yad David*, *Berakhot* 19b; R. Menachem Taryosh, *Orah Meisharim*, *kevod benei adam* 4:1; *Shitah Mekubbezet, Bava Mezi'a* 32a, s.v. *katuv be-gilyon*; and *Pnei Yehoshu'a*, *Megillah* 3b, s.v. *batra*, who do regard *kevod ha-beriyyot* as a *mizvah.* See also sources cited in *Encyclopedia Talmudit*, XXVI, 483, note 70.

    See also R. Moshe Shmu'el Glassner's comments in his work on *Hullin*, *Dor Revi'i*, introduction, sec. 2 and *Hullin* 89b. Rather remarkably, *Dor Revi'i* seems to recognize a normative natural law prohibition with regard to matters such as cannibalism and appearing in public in a state of nudity. Cf., J. David Bleich, "Natural Law," *Jewish Law Annual*, VII (1988), 7-42.
22. See R. Yitzchak Arieli, *No'am*, VI (5723), 98; *Teshuvot Sho'alim ve-Dorshim*, no. 52; R. Yekutiel Yehudah Grunwald, *Ha-Posek*, vol. 10, no. 40 (Heshvan 5704), sec. 529, and *ibid.*, vol. 11, no. 41 (Kislev 5704), sec. 545; as well as *idem*, *Kol Bo al Avelut*, chap. 1, sec. 1:10; and R.Yitzchak Oelbaum, *Teshuvot She'ilat Yizhak*, *Mahadura Tinyana*, no. 144.
23. See *Teshuvot Maharam Lublin*, no. 15. Cf., however, *Teshuvot Radvaz*, I, no. 40 and *Pithei Teshuvah*, *Yoreh De'ah* 252:4.