Jewish Bioethics: 
Rabbinic Law and Theology in their Social and Historical Contexts

Yechiel Michael Barilan

In 1772, Olaf Gerhard Tychsen, a professor of Oriental languages and a Protestant missionary, petitioned the Duke of Mecklenberg-Schwerin with regard to Jewish burial practices. The Duke consulted a Jewish convert to Christianity on the question of whether prompt burial was an integral part of the Jewish religion, and, following a negative response, the Duke prohibited the custom of burial on the day of death.

מהשבטים הקטנים מסכת בשמחות פרק ח
הלכה א
יוצאין לבית הקברות ופוקדין כל המתים עד שלשים יום, ואין חוששין משום דרכי האמוריות. מועשהشفוד
אנדר אוח שלישים יומית ויהיוpekدين יהו השירים והמונים ויתר המחור בנות ואתר המחור בנות.

One should go to the cemetery to visit the dead during the first three days, and we need not worry that this is the ways of the Emorites. Once it happened that someone checked after three days, [and found the buried individual was alive] and the person lived another twenty five years and other person was alive and had five children before actually pass in away.

דברים פרק כא
כב
וְכִי יִהְיֶה בְאִישׁ, חֵטְא מִשְׁפַּט -- וְהוּמָת:
וְתָלִית אֹתוֹ, עַל -- עֵץ כָּג
לֹא -- תָלִין נִבְלָתוֹ עַל -- הָעֵץ, כִּי קָבֹר תִּקְבְּרֶנּוּ בַּיּוֹם הַּהוּא -- כִּי קִלְלַּת אֱלֹהִים, תָלוּי; וְלֹא תְטַמֵא, אֶת אַדְמָתְךָ, אֲשֶׁר יְהוָה אֱלֹהִים, נֹתֵן לְךָ נַחֲלָה.

22 And if a man have committed a sin worthy of death, and he be put to death, and thou hang him on a tree 23 His body shall not remain all night upon the tree, but thou shalt surely bury him the same day; for he that is hanged is a reproach unto God; that thou defile not thy land which the LORD thy God giveth thee for an inheritance.

תלמוד בבלי מסכת סנהדרין דף מו עמוד ב
אמר רבינו יחנס משבטים -- inquiry about: מינו עליל תרוב עליי crime in the last generation.
המאסף - מינו עליל תרוב עליי crime in the last generation.

Rav Yochanan said in the name of Rav Shimon Bar Yochai: how do we know that one who leaves his dead violates a prohibited behavior-as it says “you shall surely bury him,” from here we derive that one who leaves over his dead body that he violates a prohibition.

P. 170

I received your letter that the ruler of your area is not allowing burial for three days. And you gentlemen are concerned as if you are being forced to remove yourself completely from religion, or at least violate a Biblical or rabbinic prohibition. I am not certain why are are so very worried...in my humble opinion there is no prohibition at all, as you thought. While there is a prohibition to leave the dead out, over of respect toward the dead
(bringing coffin, tachrichin etc) it is permitted. If for a small matter it is permitted, how much more so if there is a possibility that the person is alive, as there is nothing that stands in the face of saving a life.
The reason the rabbis don’t list this as one of their problems was that they would bury people in caves, keeping them inside for three days to ensure that the deceased were actually dead, as it says in Mesechet Smachot…but we who bury differently, and can’t watch them for the three days, must still make sure that the dead are are not living anymore.
All doctors agree that they don’t have an exact method demonstrating death, but must wait until the skin decays…but if the ruler doesn’t want this they should ask to build a cave as our ancestors did, wash them, and then watch them for three days. This I believe is the obligation of all communities, not to turn from the ways of our ancestors. If however they will not listen to me, as the ancient custom is strong, and I am seen as mistaken in their eyes, behold “behold I saved my life,”
Moshe of Dessau

(P. 172)
To the Great Scholar of Torah and wisdom Moshe.. Even with the weight of all my duties, I couldn’t escape asking him for a small matter, that for me is a big deal, regarding the community of Shwerin...They turned to me to answer their question, but who am I to stand in front of officers, I neither speak nor can write German well. So I had them turn to an esteemed one who has a fine reputation among the officers and kings, he has a beautiful command of their language and others, knowing how to word a request so it enters the ears. He speaks in front of kings without worry. He certainly is better suited than a man like myself for this task. Yet the people persuaded me, so I could not leave them empty, so I quickly wrote something, not knowing if it was mistaken. I said that later I would add to it, but if you, sir, would be so kind, if it isn’t a problem, if you could send me a copy of the letter that you sent them, if that isn’t too much of a burden. My best to you in this from the very busy Yaakov Yisrael who is called Ya’avetz.

(P.173) Sivan
The pleasant words of my beloved teacher reached me, they never informed me of the letter you had written to them. It has been a month since i wrote back to them regarding the ideas of the Duke to have them violate the custom of their fathers...I would love to see the thoughts and analysis of my teacher and master. I wrote that it is not a distancing from ancient custom who would place the bodies i a cave and check for three days...so I advised them to build a cave at the cemetery to keep the bodies for three days...

(P. 178) Tamuz
To the Great Scholar of Torah and wisdom Moshe.. your precious letter reached me, and I saw your desire to know of my analysis to justify the custom, so I will provide you with my full letter...They turned to me to remove the decree of the Duke with proofs from the Torah and our tradition, and not that our tradition needs defending. And even though
a Jew shouldn't go against tradition, even a hairbreadth, and thus I shouldn't have to do the following. Nevertheless, Sir, I need to respond to your claims, and the doubts that have arisen as a result to the idea that you can't truly determine death for three days, I say heaven forbid, and how can you question a custom that spans all four [of our communities] the Ashkenazim, Sephardim, Easterners and Westerners. We have never heard of any other custom anywhere that our brethren live. Even if in the past in Israel they buried in caves, or recesses hewn out of rock, they no longer do so today. And, there is no way that all of our people are mistaken in this way, and if they are not themselves prophets, then they are the children of prophets. Even though, sir, you believe that there is possibility of saving people's lives, why is it that not one of our great leaders, the shepherds of our people spoke about it? That it is the nations who raised the issues in order to overturn our custom that differentiates and separates us. This is not the portion of Jacob, we only have our tradition and Torah that had been passed down to us. It is not that which we live through and die for...the only concern is for a person who dies suddenly and is buried quickly, but when a dead person is dealt with slowly, carefully and compassionately as is done by the Chevra kadishah there is no concern it is a minute of a minute of a minute. We are concerned by a minority, but this would only occur as a miracle, and we aren't concerned as I wrote in my letter. and to rely on the doctors, as you sir wrote, heaven forbid to rely upon them in matters of Torah....listen my son the exhortations of the father, and don't turn from the words of my mouth, and don't turn towards the doctors. Our sages wrote in regards to when a building falls on a person on Shabbat, we only check up to the nose relying upon a verse, so we can see that we don't rely upon doctors, but the words of our sages are like a medicine to the Jew who trusts his G-d.

(p. 187)
You were a bit surprised by the words of my previous letter, because I didn't hide the truth on my tongue. I don't know why you were angry? What harm have I done you? Testify against me. All my words were spoken with a soft tongue. After all, I saw your merit, I judged you favorably. It must have been done in haste, and without premeditated thought. Since I sensed that it is difficult for you to bow your head to the truth it would have been proper for me to not bother you anymore, because all my words are correct and truth to anyone who has attained the truth.

In a place where there is an order from the king to wait until three days to bury a person, we wash him immediately, clothe him and leave him as such until the third day, and prior to the burial clean him up. When this is done due to the proclamation of a king, one doesn’t violate the prohibition of leaving over, because the prohibition is only when it is
done to embarrass/disrespect. In the Sifrei they expound this way, "His body shall not remain all night upon the tree," just as hanging on the tree is disgusting so only items that are disgraceful to the deceased. This excludes when the body is left over to honor it or obtain shrouds, or for many people to accompany the dead, or making a coffin,...in such instances one doesn't violate the prohibition, since it isn't being done in a disgraceful way. So too in this instance, however, if there is no decree then one violates the prohibition.