
Halakhic (Jewish Law) Queries (Shéélot)

- 1) May non-Jews be buried in a separate section of the historical Emanu-El cemetery?
- 2) If there is a section created for the burials of non-Jews and Jews together, may we create a section for Jews who strictly observe Jewish law?

Halakhic Responses (Tshuvot)

A Short Preamble

It has taken a lot of time in contemplation, study, prayer and dialogue with congregants to ready myself to write this “*Rabbinic Response*”. I acknowledge that a rabbinic response from me, *mará d'atra*, as the final arbiter of *halakhah* (Jewish jurisprudence), has limitations in scope and application. It is my hope that we as a congregation can assimilate not just the letter of the law but more importantly, the spirit of the law as reflected in these *tshuvot* (rabbinic responses), into, may we strive to do it with an open heart and a sense of courage in order future policy that will govern our cemetery. When we read and study these *tshuvot* to live up to our name ***Kehilat Kodesh Emanu-El***, the holy congregation of Emanu-El, that all of our actions and decisions fully reflect our aspirational selves.

Local History and Background

These *shéélot* (rabbinic queries) were given to me over a decade ago. After considerable research and in consultation with numerous rabbinic experts in *halakhah* (Jewish jurisprudence), I came to a creative conclusion. This conclusion was based on the logic of my own personal rabbi and friend Rabbi Arthur Jacobovitz z"l who was a student of Rav Joseph Soloveitchik z"l and my teacher Rabbi Joel Roth, a contemporary expert on *halakhah*. These men represent two *halakhic* voices that were both stringent and balanced. We previously explored the opportunity to add space to our existing cemetery for the purpose of accommodating married interfaith members; the congregation had hopes of petitioning the city of Victoria to gift or sells us at a very reasonable price a parcel of unused land adjacent to the cemetery that is currently unusable. After petitioning three different constellations of civic leadership under different mayors, it was clear that although the city of Victoria was amicable to researching what would be required to deed us the land, the organized opposition from the neighbourhood association and the complexities required for us to add on to the cemetery this parcel of land (that may not have been sufficient from the outset) made this option not viable and returned us to the original *shéélot* culminating in this response.

Halakhic sources and development relevant to this decision

1. Jewish law requires burial known in *halakhic* parlance as *qvurah baqarqa* (burial in ground).
2. From the time of our ancestors Abraham and Sarah, we have buried our dead in plots of land or caves that were owned by the families of the deceased.
3. Most likely during the time of Babylonian exile, burial evolved from privately owned lands to collectively owned cemeteries.
4. According to Jewish law the dead must own their own burial plot. It is understood that it is highly preferable that the collective land whenever possible be fully owned by Jews. (The historical Emanu-El cemetery is owned by Congregation Emanu-El and the plots are sold to individuals in perpetuity.)
5. Rabbi Yehudah Yekutieli Greenwald in his work "*Kolbo al Avlut*" teaches that, "A holy obligation was placed by our sages on *B'nei Yisrael* to have specific Jewish cemeteries owned by Jews."
6. In Tractate Gitin 61a of the Bavli there is a *baraita* (a rabbinic statement found in Talmud from the time of the Mishnah, that was not codified in the Mishnah) that states, "The sages taught that we financially support the non-Jewish poor with the Jewish poor, we visit the non-Jewish sick with the Jewish sick, we bury the non-Jewish dead with the Jewish dead for the sake of peace."
7. Rashi (Rabbi Shlomo Yitzhaki, an 11th-century rabbi and highly important commentator on Torah), understood this statement does not apply to mixed burial in a Jewish cemetery. Rashi also understood that this *baraita* only applies to situations where non-Jewish dead and Jewish dead are found killed together either in times of war or natural disaster. (It would be highly unseemly for the Jews to carry away their dead for burial and to leave the bodies of non-Jews in place.)
8. There is a parallel *baraita* in the *Yerushalmi* (Jerusalem Talmud) that does not use the Hebrew term *im*, meaning with. So it would read, "...we bury non-Jewish dead and Jewish dead"
9. Joseph Karo, a 15th century *halakhist* and codifier of Jewish law, understood Rashi's comments on Gitin 61a through the lens of another Talmudic statement from Tractate Sanhedrin 47a which deals with the reasoning behind why those who are executed by the Jewish court system are buried separately. It reads in Sanhedrin 47a "We do not bury the wicked next to the righteous." If we do not bury the wicked next to the righteous we certainly would not bury non-Jews next to Jews. My teacher Rabbi Ben Zion Bergman z"l, in his *tshuvah* to the Rabbinical Assembly Committee on Jewish Law and Standards "A Grave Concern" 2002, thoroughly rejects the assumption that non-Jews are wicked. Rabbi Bergman points out that this statement equating non-Jews with wicked people is far from its original intent. "The righteous of the nations (non-Jews) have a place in the world to come." (Sanhedrin 105a)
10. The RaN (Rabbenu Nissim of Girona a 14th century Talmudist and *halakhist*); Rambam (Rabbi Moses Maimonides, a 12th century codifier of Jewish law and philosopher); the Bach (Joel Sirkis—a 16th century *halakhist*); and Joseph Karo are all of the opinion that the dead of non-Jews and the dead of Jews do not need to be found together in order to care for their burial. The Bach, Joel Sirkis

goes as far as teaching that we may bury non-Jews and Jews together in the same courtyard for the sake of peace.

11. Rav Moshe Feinstein a 20th century Orthodox *halakhic* authority states in his *tshuvah* dealing with the burial of Conservative converts in a Jewish cemetery that although in his opinion (may I add, highly erroneous opinion) people who have undergone conversion under the supervision of Conservative rabbis are not Jews, however their burial in a Jewish cemetery does not prevent the burial of observant Orthodox Jews in the same cemetery.

12. Rabbi David Golinkin, a contemporary leader of Masorti Judaism and *halakhic* expert, determined that a cemetery in Beersheva may allow for non-Jewish burial to resolve some of the issues posed by immigrants from the former Soviet Union who may have questionable *halakhic* status as Jews. His recommendation is to have a barrier that demarcates and separates the two sections by either a wall or bushes that have the height of ten *t'fahm* (~ 3 ft., or 80–96 centimetres) or a path or road that is four *amot* wide (~6½–7½ ft, or 1.9–2.3 metres).

13. The Conservative movement Rabbinical Assembly, through the Committee on Jewish Law and Standards, holds a wide range of opinions from forbidding the burial of non-Jews in Jewish cemeteries (the opinion of Rabbis Joel Roth and Daniel Gordis); to permitting non-Jewish burial provided there is a separation the size of one empty grave around the grave of a non-Jew; to the statement by Rabbi Harry Sky "Non-Jewish spouses who raise their children to be Jews when their days on earth end we should permit internment in our burial grounds."

Summary

It is abundantly clear that Jewish communities have an obligation to own and operate burial grounds for Jews. It is abundantly clear that these burial grounds must be cared for and owned in perpetuity by Jews. The question that was posed is not asking if we should create a multi-faith cemetery. It is asking if it is permissible to bury non-Jews in our Jewish cemetery.

We are the inheritors of a thousand year old tradition in which non-Jews were not buried in Jewish cemeteries. When we trace the textual sources, it is clear that there is a chronological gap from the *baraita* that states "We bury the non-Jewish dead with the Jewish dead" (likely dating from the second century) to our commentary and interpretation from Rashi in the 11th century which says we bury non-Jewish dead but not in a Jewish cemetery.

It is also clear from the survey of the various arguments of our medieval and post-medieval *halakhists* that it is possible to read their *baraitot* to be either exclusive, i.e., we only bury non-Jews when we find their dead mixed with Jewish dead, or inclusive, i.e., we bury the non-Jew whether found with Jewish dead or not.

If we apply the heuristic known as *Occam's Razor*, the simplest and most elegant argument is most likely the closest to truth, then we can depend on the simple understanding of the *baraita* from Gitin 61a, that we bury the dead of non-Jews with the dead of Jews. If the caveat for not burying them together is based on the statement from Sanhedrin 47a that states we do not bury the wicked with the righteous, then I believe that we must strongly reject the notion that non-Jews are wicked.

Many of our historic luminaries like Rashi lived through turbulent and violent times and experienced

horrors that were perpetuated on the Jews by non-Jews like the Crusaders, and those experiences informed their attitudes towards the non-Jewish other. There is a ubiquitous idea that manifests in our tradition that the non-Jew is wicked, is less-than-human and only has an animal soul. We must not only reject this but we must work to repair our collective Jewish world view, understanding that all humans are created in God's image. Anything less is racist. We can also surmise from more recent *halakhic* decisions, as well as the silence of our tradition regarding the burial of non-Jews who were not wicked in life in a separate section of the cemetery, that burial of non-Jews in a separate section of a Jewish cemetery does not affect the status of the historical graves of Jews within a strictly Jewish section.

Much of the *halakhic* argument that deals with the burial of Jews and non-Jews pivots on the *baraita* in Gitin 61a that states that we bury the non-Jewish dead with Jewish dead "for the sake of peace." What does the term "for the sake of peace" in Talmud fully mean? One possible interpretation refers to avoiding actions that may stir the anger of non-Jews. This interpretation is not about shalom but rather about avoiding violence towards the Jewish community. This line of thinking also assumes that there is a power differential between Jews and non-Jews where the power of Jews is diminished. The *halakhic* concept of *pikuah nefesh* which states that saving a life is paramount over other *halakhic* concerns - especially ritual, such as breaking Shabbat laws to save a life, traditionally only applies to Jews. The same religious/moral axiom when applied to non-Jews is termed "for the sake of peace" and not *pikuah nefesh*. This terminology holds within itself some of the same fear and disdain towards non-Jews that historically has manifested itself within Jewish tradition and is discordant with core Jewish values that our congregation holds.

For many generations, fear of non-Jews combined with physical separation from non-Jews served as a means for Jewish continuity. As we acculturated with the majority community in the diaspora, certain *mitzvot* like observing *kashrut* took on a new understanding that was extraneous to the spiritual practice of *kashrut*, mainly seeing keeping *kosher* a means of not socializing with non-Jews. This is no longer the context we live in. We do not connect to God and *mitzvot* out of a sense of fear, pleading for protection from the non-Jews. In our community we maintain an awareness to the interplay between the particular, the rituals, rites and ideas that make us authentically Jewish and the universal values also embedded in Torah that we share with all of humanity. It is essential that we have a fully Jewish cemetery that reflects Jewish values through practice. We as a congregation fully interact with the non-Jewish world and we are tasked to employ Jewish tradition and Jewish wisdom (Torah) to be a light unto the nations. It is my hope that the practices of Congregation Emanu-El reflect our aspirations to serve as vehicles for redemption and increasing God's presence in our world.

In Conclusion

It is of paramount importance that Congregation Emanu-El maintain and care for our Jewish cemetery, keeping with the obligation of our sages of blessed memory that Jewish communities and congregations have Jewish burial grounds owned by Jews. We are a congregation with a number of people who would fall into the category of *Yir'ei HaShem*, people who hold awe for Divine Source, many of whom contribute enormously to the betterment and maintenance of our congregation. Some are spouses and partners of Jews and some are people deeply connected to the Jewish tradition and

who, for a host of personal reasons, choose not to enter a formal *halakhic* conversion process.

I believe that it is our responsibility to ensure that these people who care for and are part of our Jewish congregation in life can find a place of eternal rest within the same congregation.

My recommendations

With respect to the first *shéelah* — May non-Jews be buried in a separate section of the historical Emanu-El cemetery? **I recommend** —

- That Congregation Emanu-El creates a modest space in the cemetery for these particular non-Jewish individuals who cared for and were part of our Jewish congregation in life.
- That within this space where Jews and non-Jews alike may be buried together there will be no symbols or rituals that derive from any faith tradition other than Jewish.
- That all burials within the cemetery including the section that would allow for non-Jews will adhere to the tradition of using either a plain wooden casket or any other *halakhically* appropriate material that is fully compostable to ensure that all burials will return to the earth.
- That the *Chevra Kadisha* learn and explore and carry out alternative, respectful means of preparing non-Jewish bodies for burial in a manner that is commensurate with Jewish tradition and law.
- That, in keeping with the recommendation of Rabbi David Golinkin, there be a pathway or road that is four *amot* (~6½ – 7½ ft., or 1.9-2.3 metres) wide to allow for separation and demarcation.
- That this modest space be kept only for those who are truly connected to Congregation Emanu-El through continuous membership and never be open to the general public. There is an alternate option for interfaith burial in Victoria for non-members. The historical Emanu-El cemetery holds a special aesthetic and many Emanu-El congregants hold a special bond with our cemetery and it is precisely because of that bond that we are addressing this issue.

With respect to the second *shéelah* — Can we create a section for observant Orthodox Jews.?

Comment

There are Haredi, ultra-Orthodox Jews who understand themselves to be the *edah* (the congregation of Israel), while all other Jews are within the *maḥaneh* (the camp). This configuration implies that some Jews are better or more essential than others. I believe that this is a dangerous and slippery slope in terms of defining who is a Jew and who is considered a Torah observant Jew, and can lead to questions of lineage and often reeks of classism.

I believe that Jews are Jews. The fact that in some contexts conversion has become a political football and that real people's lives are used as a means of garnering power by delegitimizing and calling others "inauthentic" is not in accordance with being an *Ohev Yisrael*, one who loves and supports other Jews. I would never want to see in our community this kind of a class system.

For this reason, I do not recommend that there be a separate section for observant Orthodox Jews.

Conclusion

After much study and contemplation, I recommend that we create within the cemetery of Congregation Emanu-El a separate section for non-Jews and their Jewish loved ones who choose to be buried with them within the fully and authentically Jewish Emanu-El cemetery.

Glossary

<i>amah</i> , (pl. <i>amot</i>)	אַמָּה (אֲמוֹת)	Biblical unit of length: approximately six <i>t'fahim</i>
<i>baraita</i> (pl. <i>baraitot</i>)	בְּרִייתָא (בְּרִיתוֹת)	(Aramaic) a Tannaite tradition not incorporated in the Mishnah; later it was applied also to collections of such traditions.
<i>édah</i>	עֲדָה	Congregation, community, parish, denomination; swarm, flock
<i>halakhah</i>	הֲלָכָה	Jewish religious law
<i>Kolbo al Avlut</i>	כָּל-בּוֹ עַל אֲבֻלוֹת	Halakhic compendium and digest on the relevant laws of death and mourning
<i>maḥaneh</i>	מַחֲנֶה	camp
<i>mara d'atra</i>	מֵרָא דְאַתְרָא	(Aram.) "local master"—refers to the local rabbi in his capacity as the sole halakhic authority of the locality in which he lives
<i>Ohev Yisrael</i>	אוֹהֵב יִשְׂרָאֵל	"Lover of Israel"—the title of the published collection of Avraham Yehoshua Heshel's thoughts, arranged according to the weekly Torah portions.
<i>pikuah nefesh</i>	פִּיקּוּחַ נֶפֶשׁ	Principle in Jewish law that the preservation of human life overrides virtually any other religious consideration
<i>qvurah baqarqa</i>	קְבוּרָה בַּקֶּרֶקַע	Burial in the ground
<i>shéelah</i> (pl. <i>shéélot</i>)	שְׁאֵלָה (שְׁאֵלוֹת)	Question(s) addressed to the rabbi(s) pertaining to Jewish law
<i>tefah</i> (pl. <i>t'fahim</i>)	טֶפַח (טִפְחִים)	Biblical unit of length equal to a hand's breadth, or palm
<i>tshuvah</i> (pl. <i>tshuvot</i>)	תְּשׁוּבָה (תְּשׁוּבוֹת)	Answer(s) to question(s) addressed to the rabbi(s) pertaining to Jewish law
<i>(Talmud) Yerushalmi</i>	תַּלְמוּד יְרוּשָׁלַּיִמִּי	Jerusalem Talmud—collection of Rabbinic notes on the second-century Jewish oral tradition
<i>Yir'ei Hashem</i>	יְרֵאֵי הָשֵׁם	"Those who fear the Lord"