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105 River Ave. #301, Lakewood NJ 08701
1.888.485.VAAD (8223)
www.baishavaad.org
info@baishavaad.org

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לע"נ הרב יוסף ישראל
ב"ר משה גרוסמן זצ"ל

Dedicated in loving memory of HaRav Yosef Grossman *zt"l*

THE LIVING DEAD: WHAT MUST BE DONE TO AVOID BURYING PEOPLE ALIVE?

Adapted from the writings of Dayan Yitzhak Grossman

AP reports:

> An 82-year-old woman was pronounced dead at a New York nursing home but found to be breathing three hours later at the funeral home where she had been taken, authorities said.
>
> The woman was pronounced dead at Water's Edge Rehab and Nursing Center at Port Jefferson on Long Island at 11:15 a.m. Saturday, Suffolk County police said.
>
> The woman, whose name was not released, was taken to the O.B. Davis Funeral Homes in Miller Place at 1:30 p.m., police said in a news release. She was discovered breathing at 2:09 p.m., they said.
>
> The woman was taken to a hospital. No update on her condition was available Monday...
>
> The apparent premature declaration of death occurred days after a continuing care home in Iowa was fined $10,000 over a similar episode.[1]

In 1772, Moses Mendelssohn took the position that to make sure that the dead were really dead prior to burial, interment should be delayed, in order to give misdiagnosed decedents the opportunity to wake up. The Torah's concern for *pikuach nefesh,* he said, should override the prohibition against delaying burial beyond the day of death.[2] He reasoned that this prohibition does not apply when the delay is for the sake of the deceased's honor, e.g., to bring a coffin or shrouds for his burial, so a fortiori should it not apply when the delay is in order to avoid burying him alive:

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1 Funeral home finds woman breathing hours after declared dead. AP News. https://apnews.com/article/new-york-state-government-7caaefc9d212da3556e4c163a7a29f6c.

2 See Sanhedrin 46a-b.

The Bais Havaad on the Parsha

Bring the Parsha to Life!

PARSHAS MISHPATIM

FOUND FAVOR

Excerpted and adapted from a shiur *by HaRav Chaim Weg*

When you will encounter an ox of your enemy or his donkey wandering, you shall surely return it to him.

Shmos 23:4

If one finds a lost object with no *simanim* (characteristics by which the owner could identify it), we assume the owner gave up hope of getting it back (*yeiush*) and relinquished ownership, so the finder may keep it.[1]

If it bears *simanim* and was found in a majority-Jewish location, the mitzvah to return it (*hashavas aveidah*) applies. One must take the object and publicize what he found (*hachrazah*) to locate the owner. He has the status of a *shomer* (custodian) and is liable if the item is damaged. The Shulchan Aruch (C.M. 267:16) cites a dispute whether he is a *shomer chinam* (unpaid custodian) or a *shomer sachar* (paid custodian, with greater liability).

If no one claims the item for a few weeks, the finder must hold it for the owner *ad sheyavo*

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1 If the owner has not yet discovered that the item is missing (*yeiush shelo mida'as*), *Amora'im* disagree whether it is already ownerless; the halacha is that it's not. R' Akiva Eiger holds there is no obligation to return such an item, but R' Moshe Feinstein disagrees.

Q&A from the BAIS HAVAAD HALACHA HOTLINE

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Halfwit

Q I made two two-pound batches of dough, one of white flour and the other whole wheat, and baked them together. Should I separate challah?

A For a dough to be subject to challah, it must have 43.2 *beitzim* of flour (Y.D. 324:1), which is 2-2/3 pounds according to R' Chaim Na'eh.

Two batches of dough that were kneaded separately, even at the same time by one person, are considered separate. For them to combine for challah, they need to be joined, either by touching and sticking enough that pulling them apart will cause *neshichah* ("biting," where one takes a piece from the other), or by being together in a rimmed pan (ibid. 325:1). Otherwise, they are exempt from challah.

If doughs are baked together, the oven may combine them. Although the halacha follows the

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In 1772, Duke Friedrich of Mecklenburg-Schwerin enacted a law requiring a three-day delay to burial in order to avoid accidentally burying someone alive.[3] The local Jewish community appealed to Mendelssohn to intercede on their behalf. Jewish law requires immediate burial based on the *pasuk*, "Do not leave his body overnight; you shall surely bury him that day" (Dvarim 21:23).

Mendelssohn successful reached a compromise—Jews could bury immediately if a doctor certified the death. However, privately he commented that Jewish law allows burial delay to save someone's life—*piku'ach nefesh*. If there is even a remote concern that someone still living will be buried, we must violate almost any law to save even a few extra moments of life. Mendelssohn points to a practice in the times of the Mishnah to place bodies in caves for a few days before burial, which he suggests was in order to confirm death...Rav Yaakov Emden strongly disagreed...[4]

R' Yaakov Emden did not accept that there was a serious concern of *pikuach nefesh* here:

When the deceased was properly dealt with, with appropriate patience and care, as per the custom of the *chevra kadisha* in these times...then we are never concerned at all in any context for a remote possibility and a minuscule chance (*miuta demiuta*)...without a doubt, there is a distinction between an eventuality that occurs at least occasionally and one that never occurs at all except as an astonishing event. Such an eventuality (although technically possible) is considered impossible as well, and we are not concerned for it...[5]

In response to Mendelssohn's argument that

All the medical scholars will testify and declare, that there is no reliable indicator of death, and sometimes a person will faint to the point that his pulse will quiesce and his breath will cease...and observers will think that he is dead, but that is not the case...[6]

R' Yaakov Emden responded:

And that which his excellency[7] wrote regarding the consensus of the masters of medicine, *chalilah* for us to pay attention to them with respect to absolute laws of the Torah, for then *chas veshalom* [the Torah's] foundations would be undermined and its pillars would explode.[8]

About sixty years later, R' Tzvi Hirsch Chajes (Maharatz Chajes) and the Chasam Sofer debated whether a physician who was a kohein was permitted to come into contact with a dead body in order to inspect it for the purpose of making a legally mandated determination of death. In a series of responsa,[9] the Maharatz Chajes argued at length for leniency, based in part on the precedent of "some scholars" having permitted the delay of burial for the purpose of verifying death.[10] The Chasam Sofer responded by vehemently denying that any halachic authority had sanctioned such a thing; it was only Moses Mendelssohn who had advocated this, whereas R' Yaakov Emden (as well as R' Mordechai Yaffe of Schwerin) had adamantly rejected his position:

As long as he lies like an inanimate stone, and he has no pulse, and his breathing subsequently ceases, we have nothing but the words of our holy Torah that he is dead and he may not be left overnight, and one who becomes *tamei* from him, if he is a kohein he is flogged if he does so after being warned...

The truth is that this is but a chance occurrence, the sort of remote occurrence that occurs once in a thousand years, that someone arises after falling and ceasing to breathe and being given over to experts, and it is not even a *miuta demiuta*, like Choni Hame'agel who slept for seventy years[11]...and it is not included in the category of being concerned for low-probability events in the context of *pikuach nefesh*.[12]

It should be noted that despite the fact that the Maharatz Chajes here claimed that there were two legitimate sides to the question of delaying burial for the purpose of verifying death, elsewhere he himself argues strongly against doing so, because "according to all the expert physicians, [the premature diagnosis of death] occurs exceedingly rarely ('*echad min ribo rivevos benei adam*')."[13]

While R' Yaakov Emden, the Chasam Sofer, and the Maharatz Chajes seem to be asserting a general principle that the halacha does not take exceedingly remote possibilities into account even in *pikuach nefesh* contexts, R' Yitzchak Shmelkes explains that this is a rule specific to the mitzvah of burial. He cites the Chasam Sofer's assertion that the possibility of a mistaken determination of death is not even a *miuta demiuta*, but he nevertheless argues that in a case of *pikuach nefesh* we ought to be concerned even for an exceedingly remote possibility. He therefore concludes that since if we were to apply the standard principle that a concern for *pikuach nefesh* overrides other halachic considerations, the entire mitzvah of burial on the day of death would be nullified (since it is generally impossible to be absolutely certain of death), so the Torah is decreeing that in this particular context we disregard the unlikely possibility that the deceased is still alive.[14]

3 The duke's edict was actually targeted specifically at the Jewish community; see Mishulchano Shel Yechiel Goldhaber, Mishpatim 5774, pp. 3-4).

4 Delayed Burial Redux. Torah Musings. Dec. 28, 2017. Cf. Delayed Burial and Modern Orthodoxies. Torah Musings. Jul. 27, 2011.

5 Rav Goldhaber pp. 19-20.

6 Ibid. p. 15.

7 R' Yechiel Goldhaber notes (p. 8) that "Despite the gap in age and culture between them, R' Yaakov Emden esteemed R' Moshe Dessauer (Moses Mendelssohn)–[later to become] the father of German-Jewish *haskalah*–with love and admiration. 'My student, who is loved as my son,' R' Yaakov Emden wrote to him, and the latter responded to him in the same vein: 'His student, who drinks his words thirstily.' Despite this, however, to a certain extent the teacher kept his distance from his student and related to him in accordance with the principle of 'respect him but suspect him *(kabdeihu vechashdeihu)*.'" Rav Goldhaber also notes (p. 18 n. 59) that "It is necessary to note that this correspondence took place about ten years before (Mendelssohn's) well-known Biur first appeared..."

8 Rav Goldhaber p. 20. Cf. Mishulchano Shel Yechiel Goldhaber, Trumah 5774.

9 Kol Kisvei Maharatz Chajes, Darchei Hora'ah *cheilek* 2 *simanim* 1-3.

10 *Siman* 1 pp. 254-55.

11 Ta'anis 23a.

12 Shu"t Chasam Sofer Y.D. *siman* 338. See the Maharatz Chajes's response to the Chasam Sofer in Darchei Hora'ah *simanim* 4-5, and the Chasam Sofer's subsequent response to him in ibid. *siman* 6 and Likutei Teshuvos Chasam Sofer (5725) *cheilek hamichtavim* pp. 109-10.

13 Shu"t Maharatz Chajes *siman* 52.

14 Shu"t Bais Yitzchak Y.D. *cheilek* 2 *siman* 91 os 2. Rav Shmelkes's main application of this idea is actually to *milah*, which he argues always entails at least some risk, and it therefore follows that the ordinary principle that any concern for *pikuach nefesh* overrides other halachic considerations does not apply to *milah*, which is to be performed even in certain situations that entail some low level of risk.
His position obviously requires further elucidation, because circumcision is certainly not performed in cases of *substantial* risk, and it is unclear how we infer from the Torah's commandment to perform bris *milah* in the face of the very low risk associated with a normal circumcision with no additional risk factors, that we are to do so even in cases involving slightly elevated risk, as long as this risk is not *too* elevated.

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RAV ARYEH FINKEL

Rambam who says that ovens don't have this effect, some *poskim* rule that contemporary ovens are utensils and combine the doughs (Chelkas Binyamin 325:18). One should separate challah without a *bracha*.

To avoid the need to break baked loaves, combine the doughs before baking. Place them together in a rimmed pan, or just drape a towel over both doughs (Y.D. ibid.). They should preferably touch, but in this case *neshichah* is not necessary (Mishnah Brurah 457:7). Challah may be taken even after the doughs are separated.

The Shulchan Aruch (Y.D. 326:1) writes that doughs of different types don't combine, because the baker is hesitant to mix flours. He uses the example of coarse flour and fine flour; some say whole wheat and white flour are similar, but it depends on the owner's personal preference (Chelkas Binyamin ibid. 25), as many whole-wheat eaters are content with "half wheat." If you are unsure of your preference, separate challah without a *bracha*.

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Eliyahu (until Eliyahu comes). R' Moshe Feinstein and other contemporary *poskim* say that if the item is easy to replace, the finder may record the *simanim* and sell or keep it, and when Eliyahu identifies the owner, the finder will pay him or replace the item. An item that would have sentimental value to the owner should be retained.

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