



Parashat Chukat
By David Silverberg

Parashat Chukat briefly reports the death of Miriam, the sister of Moshe and Aharon: "The nation settled in Kadesh; there Miriam died, and she was buried there" (20:1). The Talmud (Avoda Zara 29b) draws a syntactical association between the clause "*va-tamat sham Miriam*" ("there Miriam died"), and another verse, where the Torah also adds the seemingly unnecessary word "*sham*" ("there"). In the Book of Devarim (21:2-9), the Torah outlines the procedure known as *egla arufa*, a ceremony involving the killing of a calf to atone for a murder, in situations where the killer cannot be identified. In this context, too, the Torah appears to emphasize that the ritual is performed "there" – "*ve-arfu SHAM et ha-egla*" (21:4). Noting this subtle, stylistic parallel between the contexts of Miriam's death and the *egla arufa* ritual, the Talmud enlists the exegetical tool known as *gezeira shava*, whereby a halakha relevant to one area of Halakha can be applied to another on the basis of textual commonality. The common term shared by two different contexts allows for transferring a halakhic detail from one area to the other. In this instance, the Gemara establishes that the remains of a deceased person share, in one sense, the halakhic properties of the calf in the *egla arufa* ceremony. Just as it is forbidden to derive any personal benefit from the calf (given its status as a quasi-sacrifice), so is benefit from a corpse likewise prohibited. The shared term *sham* suggests a degree of halakhic parity between the two contexts of death and *egla arufa*; tradition identifies this parallel as relating to the issue of *issur hana'a* – a prohibition against deriving benefit from the remains of the calf, and the remains of a human being. Later we will address several situations where this prohibition might be of practical significance. But first, we will examine Maimonides' approach to the origin and general nature of this halakha.

Biblical Origins?

Maimonides codifies this prohibition, against deriving benefit from a person's remains, amidst the laws of death and bereavement, in *Mishneh Torah* (Hilkhos Avel 14:21). Somewhat suspiciously, however, he does not cite or make any reference to the Biblical source for this law. Generally, when Maimonides first introduces a Torah prohibition or obligation, he briefly explains the origins of the given law. In this context, however, he states simply that a corpse may not be used for any personal benefit, without providing any basis or explanation.

This omission by Maimonides may perhaps shed a light on a controversy that arose among later scholars as to how he perceived this prohibition. Rabbi Yehuda Rosanes, author of the work *Mishneh Le-melech*, claimed (albeit with some hesitation) that Maimonides denied the Biblical origin of this prohibition. Although the Talmud does, as mentioned, appear to extract the prohibition through the *gezeira shava* mechanism, the *Mishneh Le-melech* argued that Maimonides read this Talmudic passage as referring to an *asmakhta* – a subtle allusion in the Biblical text to a provision ordained by the Rabbis. We find many examples in the Talmud where the Rabbis suggested a novel reading of a verse in the Torah whereby it refers to a provision enacted by the Rabbis. In these cases, the Talmud does not approach these allusions as an actual Scriptural source. Similarly, the *Mishneh Le-melech* argued, according to Maimonides, the prohibition against deriving benefit from the remains of a human body was legislated by the Rabbis, and does not constitute a Torah prohibition. The *gezeira shava* inference discussed in the Talmud should be treated as merely a subtle allusion to this law, rather than an actual Biblical source. Most other writers, however, dismissed the *Mishneh Le-melech's* contention, and insisted that all authorities view this prohibition as Torah law. The work *Ar'a De-*

rabbanan, an early 18th-century book discussing the origins of many different laws, claimed that it cannot be conclusively determined whether this prohibition is Biblical or rabbinic in origin.

Clearly, Maimonides' silence with regard to the source of this prohibition lends support to the *Mishneh Le-melekh's* stance. The most likely explanation as to why he provided no source is that this halakha belongs to the category of laws discussed in this chapter – the 14th chapter of *Hilkhot Avel* – which presents the guidelines for caring for the sick and the dead. Maimonides introduces this chapter as follows: "There is a positive commandment enacted by them [the Rabbis] to visit the sick, comfort mourners, remove the dead [for burial], marry off a bride, accompany guests, deal with all the needs of burial..." Maimonides later clarifies that although the Torah issued a general obligation to "love your fellow as yourself," which certainly covers all these categories, nevertheless, the Sages specified certain acts of kindness and benevolence incumbent upon all Jews. Maimonides devotes the remainder of this chapter to the halakhot of attending to the needs of the sick and the deceased. Seemingly, all these laws belong to the category he introduced at the beginning of the chapter: acts of kindness ordained by the Rabbis, which also fulfill the dictum, "Love your neighbor as yourself."

Accordingly, we might conclude that in Maimonides' view, the prohibition against making use of a person's remains constitutes but one detail within the general framework established by the Sages regarding proper treatment of the dead. Just as they forbade unnecessarily exhuming a body, in order to preserve the deceased's dignity and respect, so did they forbid deriving personal benefit from a person's remains, which would amount to a callous sign of disrespect.

Other Possible Indications

What prompted the *Mishneh Le-melekh* to advance his theory, of the rabbinic origins of this prohibition, was that Maimonides makes no mention of corporal punishment in this context. Generally speaking, a person who commits an act proscribed by Torah law is – under certain conditions – liable to punishment at the hands of *Beit-Din* (the rabbinical court). And whenever Maimonides addresses a Torah prohibition in the *Mishneh Torah*, he very clearly states whether or not the given law is subject to corporal punishment. His silence in this regard with respect to the prohibition against deriving benefit from a person's remains is thus quite conspicuous. On this basis, the *Mishneh Le-melekh* asserts that Maimonides likely perceived this prohibition as a rabbinically ordained provision, for which one is not liable to court-administered punishment.

Others, however, refuted this proof. Rabbi Moshe Sofer of Pressburg (the *Chatam Sofer*, Chief Rabbi of Austria-Hungary, early 19th century), in his commentary to the Talmud (*Avoda Zara* 29b), suggests a different reason why this prohibition is not subject to corporal punishment. As we discussed earlier, the Talmud derives this law through the mechanism of *gezeira shava*, whereby the Torah links two otherwise unrelated categories of Halakha by employing parallel syntax in the two contexts. Based on a comment by Rashi in his commentary to *Masekhet Sanhedrin* (73a), the *Chatam Sofer* distinguishes between two different types of *gezeira shava*. In some cases, the common term is otherwise superfluous in both contexts. Since the Torah could have formulated the relevant verses in both contexts without the common word, its usage points to an absolute parity between the two laws. In other cases, however, the common word is superfluous in only one of the two contexts, while in the other, the Torah in any event had to employ the given term. While this partial superfluity does not undermine the *gezeira shava* altogether, it does limit its scope, to the extent to that a violator of the resultant halakha is not liable to court-administered punishment.

As the *Chatam Sofer* demonstrates, the word *sham* in the context of Miriam's death cannot be considered superfluous. In *Masekhet Bava Batra* (17a), the Gemara reads this word as a subtle indication that Miriam earned *mita be-neshika* – a type of death, described as a "kiss" from God, that is reserved only for the exceedingly righteous. Elsewhere (*Mo'ed Katan* 27a), the Talmud derives from this verse guidelines for the burial procedure for women. In any event, given the fact that the word *sham* is indispensable in this verse, the association drawn between this context and that of *egla arufa* must be classified as a "limited" *gezeira shava*. For this reason, the *Chatam Sofer* argues, Maimonides did not mandate corporal punishment for violation of this law. The *Chatam Sofer*

thereby refutes the *Mishneh Le-melekh's* proof to Maimonides' having viewed this prohibition as rabbinic in origin.

We might suggest a different piece of evidence to the *Mishneh Le-melekh's* theory, by considering Maimonides' approach to other issues that arise from the Talmud's discussion of this prohibition. In the aforementioned passage in Masekhet Avoda Zara, the Talmud searches for the Scriptural basis of the prohibition against partaking of meat from a pagan sacrifice. It locates a verse in the Book of Tehillim (106:28) referring to pagan sacrifice as *zivchei meitim* – "offerings of the dead," establishing an association of sorts between idolatrous sacrifice and corpses. The Talmud thus concludes that just as the remains of a human body are forbidden for personal benefit, so may one not derive any benefit from pagan sacrifices. Thus, the Talmud here views the prohibition against deriving benefit from a dead body as the basis for another prohibition – enjoying the meat of pagan sacrifice.

At first glance, this discussion conclusively refutes the *Mishneh Le-melekh's* contention. If the law forbidding benefit from a human corpse forms the basis of another Torah prohibition, then it must itself originate from the Torah itself, and not from rabbinic enactment. How could the Talmud establish the Torah prohibition against partaking of pagan sacrifice on the basis of the law proscribing benefit from human remains, if the latter is not itself prohibited by the Torah?

In truth, however, this Talmudic passage actually lends strong support to the *Mishneh Le-melekh's* position. Both in *Sefer Ha-mitzvot (lo ta'aseh 25)* and in *Mishneh Torah (Hilkhot Avoda Zara 7:2)*, Maimonides cites a different source for the prohibited status of meat from idolatrous sacrifice ("You shall not bring an abomination into your home" – Devarim 7:26). Apparently, for one reason or another, Maimonides did not view the passage in Masekhet Avoda Zara as establishing the final, authoritative sources of the laws it addresses. Perhaps based on other rabbinic sources, Maimonides did not accept the entire system developed by the Talmud in determining the Scriptural origins of the prohibitions regarding corpses and objects of pagan ritual. And since he provides no other source for the prohibition against making use of human remains, it stands to reason that he saw this as a provision enacted by the Rabbis, to preserve the dignity of the deceased.

Evidence From the Talmud?

Among those who vehemently rejected the *Mishneh Le-melekh's* position was Rabbi Moshe Shick (known as the "Maharam Shick"), who brought what he deemed conclusive proof from the Talmud to the Torah origins of this prohibition (*She'eilot U-teshuvot Maharam Shick*, Y.D. 349). In Masekhet Sanhedrin (47b), the Gemara addresses the various exceptional situations where Halakha permits disinterring and reburying a body. One such situation is where the grave is situated along a public road, such that the many people who travel that route will invariably contract *tum'a* (ritual impurity) during travel. (The Talmud refers to this as *kever ha-mazik et ha-rabim* – literally, "a grave that causes harm to the public.") After the body's relocation, the Gemara asserts, the grave no longer transmits *tum'a*, but it nevertheless retains its *issur hana'a* – prohibition against deriving benefit. Rashi explains that the *tum'a* status of a grave after the body's exhumation was imposed by the Rabbis, and they made an exception in this case, when this status would cause such widespread inconvenience. The prohibition against deriving benefit from a grave, however, is of Torah origin, and it thus remains in force despite the imposition on travelers. Clearly, then, this ruling works off the assumption that the prohibition against making use of a corpse (and even a grave) constitutes a Torah violation. On this basis, Maharam Shick dismisses the *Mishneh Le-melekh's* theory, and insists that according to all views, including that of Maimonides, this prohibition is of Torah origin.

We might, however, easily refute this proof based on Maimonides' ruling with regard to the situation addressed by the Talmud. In Hilkhot Tum'at Met (8:6), Maimonides rules that after removing the body from this type of grave, the status of *tum'a* remains – in direct opposition to the Gemara's ruling, that the *tum'a* dissolves after the body is disinterred. As the *Kessef Mishneh* commentary (to 8:5) documents, Maimonides' position originates from other sources (including the Tosefta, Ohalot 17) which evidently disputed the ruling set forth in the Gemara. Hence, we cannot

question Maimonides' ruling based on this Talmudic passage, which he in any event considers non-authoritative.

Cornea Transplants

This question, regarding the origin of the prohibition against deriving benefit from the remains of a human being, will affect the common halakhic issue as to whether a Jewish patient may have a cornea from a dead body transplanted in his eye to enable him to see. Seemingly, using a cornea removed from a deceased person constitutes a derivation of benefit from human remains, and should thus be forbidden. If, however, this prohibition is of rabbinic origin, there is much greater room for leniency. Generally speaking, ordinances enacted by the Rabbis are suspended for the sake of avoiding or relieving considerable pain and discomfort. Presumably, then, were we to accept Maimonides' position as understood by the *Mishneh Le-melekh*, viewing this prohibition as rabbinic in origin, we would allow an otherwise blind patient to make use of a cornea removed from a deceased person's eye.

Practically speaking, the authorities generally approach this prohibition as Torah law, and thus forbid transplanting a cornea taken from a Jewish body. Many halakhic decisors permit using the cornea taken from a gentile, since in any event considerable controversy exists among the Medieval scholars as to whether the prohibition against deriving benefit applies to the remains of non-Jews. Given the gravity of blindness, many authorities are inclined to rely on the lenient position in this regard, so as to enable patients to receive a cornea from the body of a gentile and thereby regain their vision.

(The issue of deriving benefit from a dead body has no bearing on the more controversial issue of organ transplants, such as kidneys, hearts, and livers. These transplants are performed to rescue patients from life-threatening conditions. Therefore, assuming other halakhic factors are not involved – which is the subject of heated debate – the procedure would certainly be permitted, as the prohibition against benefiting from a body is suspended by the concern to save a human life.)

Retrieving Pacemakers After Death

In his discussion of this prohibition in *Hilkhot Avel*, Maimonides writes explicitly that it does not pertain to hair; one may derive benefit from hair taken from a person after death. (Maimonides mentions this halakha also in *Hilkhot Sanhedrin* 12:4.) Many other early authorities, including the Rashba (among the most famous rabbinic figures in Medieval Spain), disagreed, and forbade making use of hair taken from a dead body. This debate essentially originates from a debate in the Talmud (*Arakhin* 7b) regarding the halakha stated in the Mishna (*Arakhin* 1:4) permitting one to use hair taken from a woman executed by the court. According to one view, the Mishna refers to a wig that had been attached to the woman's head at the time of her death. Although the prohibition against benefit generally applies – according to this position – even to items worn by the deceased at the time of death, including hairdressing, the Mishna speaks of a case where the woman gave explicit instructions before her death granting her wig to a different woman. The second view, by contrast, argues, quite simply, that Halakha does not consider hair part of a person's body, and it is therefore not included under the prohibition against deriving benefit from a deceased person's body. Maimonides appears to follow the latter opinion, and thus permits using hair taken from a body after death.

Many writers have noted an apparent contradiction between Maimonides' ruling in *Mishneh Torah*, which permits using hair unconditionally, and the position he advances in his commentary to the Mishna (*Arakhin* 1:4). In his commentary to the Mishna, he writes explicitly that one may use hair taken from a body only if the deceased individual had explicitly instructed during her life to give her hair to somebody else. (In other words, he applies the qualification stated by the first view recorded in the Talmud, to the second view, as well.) This ruling stands in direct contrast to his comments in *Mishneh Torah*.

Rabbi Yosef Kapach, in his commentary to *Mishneh Torah*, suggests that Maimonides' ruling in his commentary to the Mishna is the more accurate reflection of his position. In *Mishneh Torah*, Maimonides simply establishes the principle that hair is not considered an actual part of a person's body with respect to this prohibition. In his commentary to the Mishna, however, he clarifies that a person's hair may nevertheless not be used after death unless the deceased had explicitly granted permission to this effect before death. Most other scholars, by contrast, accept the straightforward reading of Maimonides' ruling in *Mishneh Torah* as the definitive expression of his stance, and essentially disregard his remarks in his commentary to the Mishna.

As far as normative Halakha is concerned, the *Shulchan Arukh* (Y.D. 349:2) adopts the stringent view of the Rashba, whereas the *Shakh* (famous commentary to certain sections of the *Shulchan Arukh*) follows Maimonides' lenient ruling.

This debate has been addressed in more recent times with regard to the issue of pacemakers (electric devices surgically implanted inside cardiac patients to regulate their heartbeat). Given the high cost of these machines, hospitals generally remove them from the patient's body after death to serve other patients. In 1978, a cardiologist from Bnei-Brak presented the question to Rabbi Eliezer Waldenburg of Jerusalem of whether or not Halakha permits a cardiac patient to use a machine removed from a previous patient's body after death. Since this device is connected to and even situated inside the patient's body, might we consider it part of his remains, from which one may not derive any benefit? If so, then we should perhaps require a patient to purchase a new pacemaker, which would obviously entail a considerable expense.

In his response (recorded in *Tzitz Eliezer* 14:83), Rabbi Waldenberg permitted the use of a pacemaker removed after death. He argues that Maimonides, who permitted the use of hair, a substance naturally and organically attached to the body, would undoubtedly allow using a foreign device implanted within the body. And since a prominent halakhic authority such as the *Shakh* accepted Maimonides' view, then even if this position is not generally accepted as normative Halakha, it may nevertheless be relied upon to avoid substantial financial loss. (Nevertheless, Rabbi Waldenberg recommends that cardiac patients receiving a pacemaker sign a document stating that they grant others permission to use the machine after death.)

Interestingly, the late Rabbi Shlomo Zalman Auerbach (as cited in the work *Nishmat Avraham*) argued that even those who forbid deriving benefit from hair would rule leniently with regard to pacemakers. These authorities considered hair part of the human body because it does, indeed, grow naturally from, and remain attached to, a person's body. A pacemaker, by contrast, is a completely foreign object which is never deemed an integral part of the body. In fact, a pacemaker must be removed every so often for the batteries to be changed. Thus, Rabbi Auerbach claimed, even the Rashba and *Shulchan Arukh* would permit patients to use a pacemaker that had been inside another patient at the time of his death.