



The Origin of *Aveilut*
By David Silverberg

Parashat Vayechi tells of the passing of the patriarch Yaakov, and of his burial in his ancestral gravesite in the Machpela Cave in Chevron. The Torah describes in detail the funeral procession, which was attended by scores of Egyptian dignitaries, and the mourning and eulogies conducted to mark the loss of this great man. Amidst this description we read of the observance of a seven-day mourning period (50:10), a practice that is of course very familiar to anyone with even the most minimal exposure to Jewish tradition. It would appear, at first glance, that the origin of *shiv'a* – the traditional seven-day mourning period observed for a loved one – is here, in Parashat Vayechi, where we are told that Yaakov's children mourned his death for seven days.

Maimonides, however, writes very clearly that this narrative does not form the halakhic basis for the obligation of *aveilut* (mourning). We cite here his comments in *Mishneh Torah* (Hilkhot Avel 1:1):

There is a commandment to mourn relatives, as it says, "Had I [Aharon] partaken of the sin-offering on this day [on which my sons passed away], would it have been pleasing before God?" (Vayikra 10:19). *Aveilut* from the Torah is only one day – the day of death and burial. The rest of the seven days, however, are not [obligated by force of] Torah law. And although it says in the Torah [regarding Yaakov's death], "He observed for his father seven days of mourning," the Torah was given and the law [of mourning] was introduced anew. And our teacher Moshe instituted for Israel the seven days of mourning and the seven days of celebration [after a wedding].

According to Maimonides, the Torah obligation of *aveilut* applies only on the day of death and burial. The observance of mourning during the remaining six days was enacted by Moshe himself, and was not part of the Torah law that he received from God. The seven-day period observed after Yaakov's death does not indicate a Torah obligation of a seven-day period, because this occurred prior to the giving of the Torah. That Yaakov's sons observed seven days does not reflect the procedure for mourning established by the Torah given at Sinai. The source of the *aveilut*, according to Maimonides, is the refusal of Aharon to partake of sacrificial meat on the day of his sons' passing. The Gemara in Masekhet Zevachim (100b) views this verse as the source for an everlasting prohibition against partaking of sacrifices on the day of an immediate relative's death. Maimonides evidently read the Gemara as deriving from this verse the general obligation of mourning on the day of a relative's death. It is thus Aharon's remarks in Vayikra, rather than the narrative here in Parashat Vayechi, which introduces the obligation of mourning. And since the verse in Vayikra refers to only a single day, Maimonides concludes that the Torah obligation of *aveilut* applies only on the first day.

Maimonides' attitude towards our verse in Parashat Vayechi, dismissing its use as a possible source for the seven-day mourning period, is based on a passage in the Talmud Yerushalmi (Moe'd Katan 3:5):

Where is the origin in the Torah for the seven days of mourning? 'He observed for his father seven days of mourning,' and we derive [a law based on] an incident [that occurred] before *Matan Torah*. Rabbi Yaakov Bar Acha said in the name of Rabbi

Ze'ira: We derive it from here: "You shall not leave the entrance of the Tent of Meeting for seven days..." (Vayikra 8:35).

The first view cited by the Talmud Yerushalmi indeed cites this verse as the Biblical origin of *shiv'a*, and affirms the validity of deducing Torah law based on information concerning events that occurred before the Torah was given. The second view, however, argues, presumably because it rejects this assumption that religious practices observed prior to *Matan Torah* reflect Torah law. According to some readings of the Talmud Yerushalmi, as cited by Rabbi Menachem Kasher in his *Torah Sheleima* (Bereishit, chapter 50, note 33), the Talmud itself outright dismissed the first position. These sources read the comment, "and we derive [a law based on] an incident [that occurred] before *Matan Torah*" as the Talmud's challenge to the stated opinion, that we establish the laws of *aveilut* based on the mourning period following Yaakov's death. The Yerushalmi here asks, "Can we derive a law based on an incident that occurred before *Matan Torah*?" According to this reading, the Yerushalmi itself concludes upon the view that dismisses the possibility of reaching conclusions on the basis of the narrative in Parashat Vayechi.

Of course, although Maimonides subscribes to the Yerushalmi's conclusion regarding the broader issue of deriving laws based on events that occurred prior to *Matan Torah*, he does not accept the Yerushalmi's conclusion, which suggests a Biblical source of the seven-day mourning period. As we mentioned above, he follows the implication of the Talmud Bavli, in Masekhet Zevachim, that the Torah obligation of mourning applies only on the day of death itself. It should also be noted that the Talmud Yerushalmi itself (Masekhet Ketubot 1:1) states explicitly – as Maimonides here cites – that it was Moshe who enacted the obligation of a seven-day mourning period. Maimonides perhaps concluded that the aforementioned passage in the Yerushalmi, which acknowledged a Torah obligation of *shiv'a*, represents a minority view among the Talmudic scholars. He therefore adopted what he considered to be the mainstream position, that the Torah obligation applies only the first day.

Maimonides here follows the position of the Rif (Rabbi Yitzchak Alfasi, in Berachot 10a), who likewise held that the Torah obligation of *aveilut* applies on the day of death and burial. The Rif argues in this respect with the position held by Rabbi Hai Gaon (cited in the Medieval work *Sha'arei Simcha* by the Maharitz Ge'at, among other sources), viewing the entire seven-day period of *aveilut* as a Torah obligation. At the opposite extreme, the Tosafists and the Rosh (see Tur and *Arukh Ha-Shulchan*, beginning of Y.D. 398) are of the opinion that Torah law imposes no obligation of *aveilut* at all. According to this view, Torah law indeed forbids certain activities before the burial of a loved one, but it does not require any observances of mourning after the burial, even on the first day. The entire institution of *aveilut* as we know it, was, according to these *Rishonim*, instituted by the Sages.

Nitena Torah Ve-nitchadesha Halakha

Let us focus our attention on Maimonides' remark concerning the verse in Parashat Vayechi that tells of the seven-day mourning period observed for Yaakov: "And although it says in the Torah [regarding Yaakov's death], 'He observed for his father seven days of mourning,' the Torah was given and the law [of mourning] was introduced anew." Maimonides here establishes that we cannot derive Torah laws from the practices of our patriarchs, since they lived before the giving of the Torah. Their religious lifestyles thus do not necessarily reflect the specific mandates of the Torah, and cannot be seen as prototypical of religious life as required according to Torah law.

Maimonides elaborates upon this theme more fully in a famous passage in his commentary to the Mishna. The Mishna in Masekhet Chulin (end of 7th chapter) records a debate as to whether or not the prohibition of *gid ha-nasheh* (partaking of the sciatic nerve of an animal, introduced in Bereishit 32:32) applies to non-kosher animals. (See Rashi, Chulin 100b s.v. *ve-eino noheig* for the practical ramifications of this debate.) Rabbi Yehuda argued that since this prohibition was assigned to Yaakov and his children, even before the giving of the Torah, when they could still partake of

meat from non-kosher animals, it must apply to all animals, regardless of their kosher status. In Rabbi Yehuda's view, the initial prohibition of *gid ha-nasheh* in the time of Yaakov establishes the model and parameters of this law for all time. The *Chakhamim* (majority of scholars), by contrast, disagree, claiming that this prohibition "was said at Sinai, only it was written in its place." At first glance, the *Chakhamim* appear to deny Rabbi Yehuda's basic assumption that the prohibition of *gid ha-nasheh* applied during Yaakov's time. They seem to argue that the prohibition was introduced only when *Benei Yisrael* received the Torah at Sinai, but it is recorded in the context of Yaakov's wrestle with the angel because its purpose is to commemorate that event.

Maimonides, however, in his commentary to this Mishna, seems to have understood the *Chakhamim*'s position differently:

Take note of the fundamental principle latent within this Mishna, namely, that which it says, "it was prohibited at Sinai." You have thus been shown that everything from which we refrain or that we observe today we do so only by force of the divine command through our teacher Moshe *a"h*, and not because the Almighty said this to the earlier prophets. For example, we refrain from eating flesh from a living animal not because the Almighty forbade this upon Noach, but rather because Moshe forbade upon us flesh from a living animal by commanding us at Sinai that the prohibition of flesh from a living animal shall remain in force. Similarly, we circumcise not because our patriarch Avraham *a"h* circumcised himself and his household, but rather because the Almighty commanded us through our teacher Moshe that we should circumcise just as our patriarch Avraham *a"h* circumcised. The same applies to *gid ha-nasheh*: we follow not the prohibition imposed upon our patriarch Yaakov, but rather the command of our teacher Moshe *a"h*.

According to Maimonides, the *Chakhamim* do not dispute Rabbi Yehuda on the historical issue of whether the prohibition of *gid ha-nasheh* was in effect during the time of Yaakov and his children. The *Chakhamim* concede that Yaakov and his family were bound by this prohibition from the time of his famous struggle against his mysterious, angelic assailant. However, the *Chakhamim* claim that observance of this law after *Matan Torah* is required not because of the initial prohibition, imposed upon Yaakov, but rather by force of *Matan Torah*. Our obligation with respect to *gid ha-nasheh* stems only from the law transmitted to us from God through Moshe, and not through any previous prophetic teaching.

It should be noted that Rabbi Yehuda very clearly disagrees with this principle. Rabbi Yehuda explicitly applies the model of the pre-*Matan Torah* prohibition of *gid ha-nasheh* to later generations, arriving at conclusions regarding the prohibition's scope based on how it was practiced during Yaakov's time. Rabbi Yehuda's view would thus accommodate the position recorded in the Yerushalmi that we cited earlier, which points to the mourning period for Yaakov as the basis for the obligation of *aveilut*. This view, like Rabbi Yehuda, seems to accept the notion of laws and customs observed before *Matan Torah* serving as an authoritative source for *mitzva* observance after the Torah was given. Maimonides, of course, very strongly dismisses this view in favor of the *Chakhamim*'s position, whereby our *mitzva* obligation today stems solely from God's instruction to Moshe at Sinai, and not from any corresponding observances before *Matan Torah*.

This principle advocated by Maimonides surfaces on several occasions in the Talmud, as well. The phrase employed by Maimonides in *Mishneh Torah* – "*nitena Torah ve-nitchadesha halakha*" ("the Torah was given and the law was introduced anew") – is taken from the Gemara in Masekhet Shabbat (135a). The Gemara there records a view that in situations of childbirth that do not render the mother *temei'a leida* (ritually impure as a result of the birth), the child's circumcision should be performed immediately, rather than on the eighth day, as would normally be done. The scholar Abaye attempts refuting this view based on the model of pre-*Matan Torah* generations, who circumcised their young on the eighth day (see Bereishit 21:4), despite the fact that the concept of

tum'at leida (ritual impurity through childbirth) did not yet apply. The Gemara responds by citing this rule, "*Nitena Torah ve-nitchadesha halakha*." Meaning, the patriarchs' observance of circumcision provides no model for the *mitzva*'s observance after the Torah was given. As Maimonides explained, we perform this *mitzva* because of the Torah's obligation, and not in keeping with the practice observed by the patriarchs. Therefore, the fact that Avraham waited until the eighth day before circumcising his son despite the absence of *tum'at leida* has no bearing on the procedure dictated by *Halakha* once the Torah was given.

Another example can be found in Masekhet Sanhedrin (46b), where the Gemara searches for the Biblical origin of the obligation to bury a deceased relative. Initially, the Gemara suggests that the Torah introduces this obligation through the accounts of the patriarchs' efforts in burying their relatives (see Bereishit chapter 23, 25:9, 35:8, 35:19, 35:29, and 50:13). But the Gemara rejects the enlisting of these references as a suitable source for the obligation, noting that this may simply have been the practice in the ancient world. Once again, the rituals observed by the patriarchs do not necessarily establish the eternally binding obligation.

That said, many scholars have struggled to justify the many instances where the Gemara determines *halakha* based on events that occurred before *Matan Torah*. Rabbi Menachem Kasher (*Torah Sheleima*, appendices to the Book of Bereishit, end of vol. 7) attests to having counted over two hundred examples of *halakhic* discussions in Midrashic and Talmudic literature that revolve around verses in the Book of Bereishit, where *Chazal* draw proof for a *halakha* from this Book, which obviously records events that occurred before *Matan Torah*. For example, Tosefot (Mo'ed Katan 8b) cite a passage in the Talmud Yerushalmi that derives the principle of *ein me'arvin simcha be-simcha*, which forbids combining two celebrations into a single event, from a verse in Parashat Vayetze (29:27). And in Ketubot (57b), the Gemara establishes based on a verse in Parashat Chayei Sara (24:55) that a bride is given a period of twelve months after betrothal to prepare for her marriage. More famously, in Masekhet Yevamot (65b), the Gemara rules that one may distort the truth for purposes of avoiding social discord, based on a narrative in Parashat Vayera (18:13). If, as Maimonides so emphatically asserts, we observe *mitzvot* only by force of the Revelation at Sinai, and not as part of an ancestral tradition dating back to the patriarchs, how can *Chazal* derive *halakha* based on the practices observed before *Matan Torah*?

Rabbi Kasher addresses this question in the aforementioned essay, and answers by distinguishing between the different types of exegetical deduction that exist in Talmudic and Midrashic literature. In Rabbi Kasher's view, the rule that we cannot reach *halakhic* conclusions based on pre-*Matan Torah* information applies only to what he terms, *derashot gemurot*, or outright extrapolations. Meaning, the fact that Avraham, Yitzchak or Yaakov performed a certain ritual in a specific fashion does not set a binding precedent. The seven-day mourning period would be a classic example of this kind of invalid deduction. That the brothers mourned for seven days in no way obligates future generations to observe *shiv'a* for their loved ones. This does not mean, however, that we cannot derive practical information from the narratives in the Book of Bereishit. Most obviously, general ethical and spiritual guidelines may – and, indeed, must – be inferred from the conduct and lifestyles of the patriarchs. Furthermore, Rabbi Kasher contends, *Chazal* are licensed to determine the definition or subtle implication of a Biblical term based on its usage in the Book of Bereishit, and apply that definition in reaching practical, *halakhic* conclusions. Finally, when the Sages of the Talmud search for an *asmakhta* – a subtle allusion in the Biblical text for a law enacted centuries later by *Chazal* – they are entitled to invoke verses from pre-*Matan Torah* narratives.

Thus, Maimonides' rule that we do not derive *halakha* from pre-*Matan Torah* events applies only to establishing specific *halakhot* based on direct references to customs and practices in the pre-*Matan Torah* world.

Furthermore, Rabbi Kasher suggests a limitation on the kinds of verses that fall under this rule. When the Torah records God's instructions to the patriarchs, or the patriarchs' instructions to their offspring, we may assume that these commands are recorded as normative guidelines for posterity.

When Maimonides insists that we cannot determine practical *halakha* on the basis of events that occurred before *Matan Torah*, he refers specifically to recorded events, but not to explicitly stated instructions.

Offering Sacrifices During *Shiv'a*

Many scholars have addressed what appears to be a contradiction within *Mishneh Torah* concerning the status of the seven-day mourning period. Whereas in the passage we have been discussing Maimonides explicitly limits the Torah obligation of *aveilut* to the day of death and burial, elsewhere, in *Hilkhot Bi'at Mikdash* (2:11), he seems to indicate otherwise. Maimonides there codifies the *halakha* prohibiting a mourner from offering sacrifices in the Temple, even if he does not personally visit the Temple and instead sends his sacrifice through a messenger. This *halakha* is discussed in *Masekhet Mo'ed Katan* (15b), where the Gemara explains that one may offer sacrifices only under circumstances where he can be described as *shalem* – "complete," or generally content. The grief and anguish experienced by a mourner obviously detracts from his sense of contentment and thus disqualifies him from offering sacrifices. In articulating this law, Maimonides explicitly writes that it applies to all seven days of mourning. Seemingly, if the Biblical status of *aveilut* does not apply after the first day of mourning, the prohibition forbidding mourners from offering sacrifices should no longer be in effect after that first day. Why, then, does Maimonides forbid a mourner from offering sacrifices throughout the week of *shiv'a*, if he loses the Biblical status of "mourner" after the first day of *aveilut*?

One answer, which appears in the famous Talmudic commentary *Keren Ora* (*Zevachim* 99b), claims that in fact no Torah prohibition against offering sacrifices applies after the first day of mourning. Since mourning is observed during the final six days on the level of *de-rabbanan* (rabbinic enactment), correspondingly, the prohibition against offering sacrifices during those six days likewise applies merely by force of rabbinic enactment, and does not take effect at the level of Torah law.

Others, however, dismiss this answer, noting that Maimonides would presumably have clarified the different levels of prohibition between the first and remaining six days had this been his intent. Furthermore, if, indeed, a mourner is barred from offering sacrifices after the sixth day only by force of rabbinic enactment, it would follow that if he did offer a sacrifice, his offering would, *ex post facto*, be a valid sacrifice and permitted for consumption. Maimonides, however, appears to rule otherwise. In the next passage, he discusses the status of a *menudeh*, a person under rabbinic excommunication, and notes that *Chazal* were uncertain as to whether he may offer sacrifices. Practically speaking, Maimonides writes, he should not offer sacrifices, but if he nevertheless does bring an offering it should not be invalidated. By mentioning this provision in the context of a *menudeh* but not in reference to a mourner, Maimonides implicitly – but very strongly – indicates that a mourner's sacrifices – throughout the week of *shiv'a* – would be disqualified. The question, then, resurfaces, why does this Torah prohibition against offering sacrifices apply throughout the seven days of mourning, if according to Torah law one is considered a "mourner" only the first day?

Rabbi Avraham Moshe Chevrone, in his work *Mas'at Moshe* (Jerusalem, 5730), reconciles Maimonides' rulings by more closely examining the prohibition against bringing sacrifices during mourning. As the Gemara indicates, this *halakha* involves the emotional state of the individual, the absence of *sheleimut* sensed by a bereaved relative. The prohibition hinges not on the formal halakhic status of *avel* ("mourner"), but rather on the individual's frame of mind. If so, then we can easily imagine applying this Torah law to a mourner during the rabbinically mandated period of *aveilut*. Even when the Biblically ordained term of mourning has passed, and the individual observes the additional days prescribed by the Sages, this observance – by definition – imposes upon him an emotional state characterized by the absence of *sheleimut*. After all, what is mourning if not a period of somber reflection on the loss that the mourner has just suffered? (Rabbi Soloveitchik famously developed the notion that the specific laws governing a mourner's conduct serve as merely

the outward manifestation of the essence of this *mitzva*, which entails an emotional state of grief and solemn contemplation.) Hence, even during the period of *aveilut* imposed by *Chazal*, the Torah prohibition against bringing sacrifices during bereavement remains in effect. (Rabbi Moshe Feinstein alludes to this approach, as well, in his *Dibberot Moshe*, Gittin, end of chapter 25.)