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MASTERPIECE CAKESHOP AND THE SPIES

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Mosheh gives the spies a *tactical* brief. He wants them to tell him *how* best to conquer Canaan. The spies instead present a *strategic* evaluation. They tell the people *whether* it would be best to try to conquer Canaan.

From a leadership theory perspective, there is room for blame all around. Administrators need to know their personnel well. They should not be surprised when independent and creative subordinates exceed their brief. Trusted subordinates should try their best not to surprise the administrators who trust them, so the spies should have warned Mosheh Rabbeinu what they would be saying. All this is wholly independent of the religious or practical correctness of the spies' strategic conclusion.

The breakdown in the chain of command means that the dispute between the spies is presented to outsiders unmediated (as raw intelligence), and perhaps in a context of unmoderated direct democracy. In such contexts (and many others), rhetoric, defined as the capacity to make the stronger argument appear weaker, and the weaker argument appear stronger, is generally more powerful than objective truth. Rule-bound democracies create the expectation that each presentation will be countered. The audience knows enough not to act until it has at least the illusion of having heard all plausible positions defended. Here the proposal to return to Egypt is made before Calev and Yehoshua have said a word.

Mosheh and Aharon respond by (silently) falling on their faces in front of "all *k'hal adat Yisroel*". It is not clear whether their gesture is directly to the people, or rather whether they are assuming an attitude of prayer. Yehoshua and Calev now speak, also to "all *k'hal adat*

Yisroel", and try to counter rhetoric with rhetoric. The response, in verse 14:10, is:

"all the edah spoke to pelt them with stones; but the Glory of Hashem appeared in the Tent of Meeting to all B'nei Yisroel."

It is challenging throughout Chumash to determine with any precision what is meant by the various terms for aggregations of Jews *kehal*, *edah*, *kehal adat*, *Yisroel*, *bnei Yisroel*, etc. But careful readers cannot help noticing that three different such terms show up here. Mosheh, Aharon, and all 12 spies speak to "*k'hal adat Yisroel*"; "all the *edah*" speaks about stoning; and the Glory of Hashem appears to "all *Bnei Yisroel*". Presumably these refer to separate groups, and we should at least try to identify them.

Once we undertake that task, we have to take note that in 13:26 the spies appear to report separately to "Mosheh, Aharon, and all *k'hal adat Yisroel*" and to "all the *edah*". In 14:1, it is "all the *edah*" that raises its voices", while it is the "*am*" that cries. "All *Bnei Yisroel*" complain to Mosheh and Aharon, but it is "all the *edah*" that expresses the complaint verbally. In 14:4., the plan to return to Egypt – possibly after appointing a new leader, depending on how one translates **נתנה ראש** – is spoken about "one man to his brother", i.e. within a group.

One clue to unravelling all this, I suggest, is the term *lirgom otam ba'avanim*. As used in the rest of Chumash, this does not seem to refer to mob killing, but rather to a form of judicial execution.

If we accept this, it follows that the *edah* is a judicial body with capital jurisdiction, aka a Sanhedrin. This reading is strengthened by the inclusion in chapter 15 –

apparently entirely out of context – of a sacrifice brought by the *edah* = Sanhedrin when it errs. Presumably the decision to execute Yehoshua and Calev was an error.

Our image of one aspect of the episode of the spies therefore has to change. The final step of the sin is not mob violence, but rather the politicization of the judicial system. There is hope for human agency until that point. G-d finds it necessary to intervene only when the Sanhedrin decides to execute those who oppose the newly minted popular will.

The episode of the spies of course has eternal religious significance. I want to suggest here that it also has very immediate political lessons to teach about the role of the judicial system. Specifically, I want to talk about the Masterpiece Cakeshop ruling of the Supreme Court. Let me be clear upfront that I think the lessons go both ways, and that poskim can and should learn from that ruling.

Masterpiece Cakeshop tested whether religious opposition to homosexual behavior could be legally stigmatized in the same way as racism, antisemitism, and misogyny.

Justice Kennedy's opinion rested largely on the undisputed fact that an earlier person with authority over the case had condemned as "despicable" the use of religious arguments to refuse to provide a cake for a same-sex wedding. This meant, he said, that the earlier hearing had been tainted by obvious and legally unacceptable hostility to the baker's religion.

I doubt that the same argument would have been found convincing if the issue had been refusal to bake a cake for a mixed-race wedding. Moreover, Justice Kennedy's opinion fudges in that it leaves open the possibility that this kind of official animus toward a religious position was out of bounds only because it took place before Colorado had legalized same-sex marriage, in other words before homosexuality had been fully assimilated into prior civil rights paradigms.

I do not want to address the religious substance of the issue in depth here. Suffice it to say that there are Orthodox Jews who believe very strongly that the halakhic prohibitions in this regard are rationally defensible and socially essential, while others believe as strongly that it is purely a *chok* that cannot be justified on any ground other than obedience to Divine Will. Those in the former category have every reason to maintain a fighting retreat, and hold out the hope of regaining lost political ground. Those in the latter category have no real basis for carving out any but the narrowest legal protections for their religious needs.

I do want to argue that we should recognize as a society that moral changes which occur with sweeping rapidity are risky – that's why we have a Constitution – and therefore where possible, people who stick to their suddenly unpopular moral positions should be protected. In that regard, to the extent possible, even if we feel compelled to enact our current beliefs into law – and often we should feel the moral compulsion to do that – we should try our best to leave the courts as neutral arbiters of that law, rather than turning them into further vehicles of popular moral expression.

I am sure that the Sanhedrin saw it very differently. From their perspective, the people had now been subjected for a year (or perhaps several hundred years) to ceaseless propaganda demanding the conquest of Canaan. The spies' rhetoric provided a brief and fragile opportunity to overcome that propaganda, and it was essential to solidify that opportunity as rapidly and irreversibly as possible.

The spies were terribly wrong, and the Sanhedrin was wrong to accept their position. But I wonder whether G-d would have found it necessary to intervene had they been willing to let Yehoshua and Calev have their say, without resorting to the threat of judicial violence. Allowing the law to stigmatize moral dissent undermines the social contract which allows people with differing opinions to constitute and accept a common authority.