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"Taking Responsibility for Torah"

## NO PRIEST IS IMMUNE By Rabbi Aryeh Klapper

Qualified Immunity in Federal law means that an officer cannot be sued for actions that he or she reasonably believed to be Constitutional, and that no court had previously declared unconstitutional. In theory, this is a one-officer one-time exemption. Whenever this plea is made, any court accepting it should promptly clarify the law.

The reverse of qualified immunity would be punishing someone for acting in reliance on a legal interpretation that had not yet been rejected explicitly. A step beyond that is a law made to punish an action that has already occurred (ex post facto). This is explicitly unConstitutional.

Within a religious law context, the counter to a plea of ex post facto is that G-d's laws are eternal, meaning that they have always existed. This counter is related to a claim that some kind of "natural law" is binding on everyone everywhere at all times.

Moreover, not only might a natural law argument allow punishing an action based on a law that was only stated post-facto, it might counter a plea of qualified immunity by asserting that the actor should have reasoned that their act was prohibited.

With that background, we can ask: Did Nadav and Avihu die for violating a rule that had been taught to them explicitly by Moshe or Aharon? Were they held accountable for not understanding the rule on their own? Or are punishment and accountability the wrong categories to use for explaining their deaths?

These questions should be kept in mind when reading the midrash we'll focus on below. Since the midrash relates to Mishlei 17:26, I need to caveat up front that I don't pretend to any "pshat" understanding of the book in whole or part. All I can responsibly discuss is what later elements of the tradition thought a verse meant.

Here is Mishlei 17:26:

*Gam anosh latzadik lo tov  
l'hakot nedivim alei yosher*

Assuming that *anosh* = punishment, *tzadik* = righteous being, and *lo tov* = not good, commentators debate whether the 'not-good punishment' is meted out **to** the *tzaddik* or rather **by** the *tzaddik*, and if the latter, whether the righteous being referred to is human or G-d.

Pesikta d'Rav Kehana 26:8 apparently takes the latter approach.

ר' ברכיה פתח

גם ענוש לצדיק לא טוב (משלי יז:כו)

א' הקב"ה: אע"פ שענשתי את אהרן ונטלתי שני בניו ממנו - לא טוב,  
ענוש לצדיק לא טוב,

אלא להכות נדיבים עלי יושר,  
אחרי מות שני בני אהרן

Rabbi Berakhyah opened:  
*Gam anosh latzadik lo tov*  
Said the Holy Blessed one:

Even though I have punished Aharon and taken his two children  
from him – *lo tov*  
*Anosh latzadik lo tov*  
rather *l'hakot nedivim alei yosher*  
after the death of the two sons of Aharon.

Bernard Mandelbaum, editor of the standard edition of Pesikta (published 5747), explains this as follows:

Had the two sons of Aharon died only to punish him for his sin  
regarding the Calf –  
this would truly be "*not good*";  
rather I have punished his sons justly (= *b'yosher*),  
because they themselves sinned.

Mandelbaum thus translates *l'hakot nedivim alei yosher* as "rather (it is good) to strike *nedivim* (possibly "great ones", also a play on *Nadav*, possibly also a play on volunteers) with justice. The transition back to the first verse of Parshat Acharei Mot is that G-d justifies Himself for killing Nadav and Avihu – they sinned in some way.

Among the many weaknesses of this interpretation is that the first verse of Parshat Shemini does not describe Nadav and Avihu as sinning, rather only as "drawing near" or "sacrificing" before G-d. Indeed, the verse twice avoids ascribing their deaths to Divine judgement by describing them as 'having died' rather than 'having been killed'.

Mandelbaum ends his comment by encouraging the reader to examine the 19<sup>th</sup> century commentaries of RaDaL (Rabbi David Luria) and RaSHaSH (Rabbi Shmuel Strashoun) to the parallel midrash in Vayikra Rabbah 20:6. I followed his advice but was surprised by their interpretations.

RaSHaSH reads the *lamed* of *latzaddik* as a possessive, so:

Punishing what belongs to a *tzaddik* (i.e. children) is not good;  
Rather, one should punish the *tzaddikim* themselves.

This assimilates the midrash to the general if immensely complicated theme that G-d does not punish children with death for the sins of their parents. However, this interpretation also

fails to satisfy for many reasons, among them that a) nothing about this interpretation explains how the midrash sheds light on the opening verse of Parashat Acharei Mot, and b) that it identifies *nedivim* as Aharon, thus losing the allusion to Nadav.

RaDal cites “Rather *l'hakot nedivim alei yosher*” and appends one word of commentary: בתמיה, meaning “with astonishment”. In other words, he does not see the two halves of Mishlei 17:26 as contrasting, rather as reinforcing, something like: “*It is not good to punish the righteous: why would punishing the great for doing good make sense?!*”

The sentiment is appealing, but the interpretation of the midrashic “rather” is highly implausible, and the overall interpretation sheds no light on the opening verse of Parshat Acharei Mot.

*Ayn Chanokh*, cited by Likkutim on Midrash Rabbah, offers a very clever interpretation: *Yosher* is an abbreviation for the first four words of the kaddish, *Yiskadal Veyiskdash Shemei Rabbah*. The upshot is that it would have been “not good” had Nadav and Avihu died as mere punishment, although they were fated to die as part of Aharon’s punishment for the Calf; rather, G-d waited for an occasion of death that would constitute a sanctification of His Name.

The idea that Nadav and Avihu’s deaths were a sanctification is well-rooted in Vayikra 10:3, where Mosheh reacts to the deaths by telling Aharon:

הוא אשר דבר ה' בקרובי אקדש

This is what G-d said: Via those close to Me I will be sanctified

However, the use of the first four words of the kaddish as a metonymy for sacred martyrdom is anachronistic, and that is before one gets to the question of the plausibility of interpretation via acronym. (*Eitz Yosef* arrives at the same interpretation via a different but IMHO no more plausible route.)

*Imrei Yosher* and *MaharZu* suggest that Nadav and Avihu in fact died justly (*alei yosher*), for their own sins, although their deaths were in any case fated as a punishment for Aharon. This is theologically complicated to say the least, and suffers from the same textual weaknesses as Mandelbaum...

Now, I began by saying that I don’t make any claim to understand Mishlei. So it is with trepidation that I note that a flaw common to all the above interpretations other than RaDal’s is that they read the two halves of the verse in Mishlei as in opposition to each other, when it would be simpler to read them via simple parallelism, i.e.

It is not good (either) to punish the righteous  
(or) to smite the great when they act with straightness

They read the verse that way because the midrash inserts the word “rather”. But when so many great scholars produce such an array of implausible interpretations, one must consider the possibility of textual error. Looking at Pesikta Derav Kahana again, there seems to be at least one clear sign of such error (**in bold**):

Rabbi Berakhyah opened:  
*Gam anosh latzadik lo tov*  
Said the Holy Blessed one:

Even though I have punished Aharon and taken his two children  
from him – *lo tov*  
***Anosh latzadik lo tov***  
rather *l'hakot nedivim alei yosher*  
after the death of the two sons of Aharon.

What does the repetition of the first half of the verse accomplish? To be fair, however, almost all the cognate midrashim that I found via a Bar Ilan search (and later found cited by Mandelbaum) omit that line.

All those cognates but one seem to be substantively indistinguishable from Pesikta DeRav Kahana. Midrash HaGadol to Vayikra 10:4, however, seems very different.

ר' ברכיה פתח  
גם ענוש לצדיק לא טוב  
אמר הקדוש ברוך הוא:  
אף על פי שענשתי את אהרן ונטלתי שני בניו ממנו –  
לא טוב,  
אלא שגרמה עליהם מדת דין.  
Rabbi Berakhyah opened:  
*Gam anosh latzadik lo tov*  
Said the Holy Blessed one:

Even though I have punished Aharon and taken his two children  
from him –  
this was not good,  
rather the Attribute of Justice caused this to them.

In this version, as in RaDaL, G-d and the verse make no effort to justify the death of the righteous. Furthermore, I think that we can now explain the connection to the opening of Acharei Mot. G-d follows the tragedy by providing rules THAT WILL PREVENT PEOPLE FROM DYING DESPITE NOT HAVING SINNED (at least not deliberately) WHEN WORKING IN THE TABERNACLE, because He acknowledges that such punishments are “not-good”.

I was and remain nervous about making a strongly-stated claim that Pesikta DeRav Kahana’s text was so badly corrupted, that the entire second half of this section was simply wrong.

However, searching on Otzar HaChokhmah revealed that an anthology wonderfully titled *B'Shem Omro*, published in 5704 (and my son Gershon tells me edited by Rabbi Moshe Sender Zak), attributes the text from Midrash haGadol to Pesikta DeRav Kahana. So far as I can tell the only published edition of Pesikta deRav Kahana, that of Shlomo Buber, had the standard text, and Midrash HaGadol to Vayikra had already been published. Gershon holds that Rabbi Zak simply erred, but I suggest that Rabbi Zak made the same emendation I propose, albeit without informing his readers that he had done so. If I am correctly attributing this position to him, then hopefully he and I are correctly stating this version of the midrash *beshem omro* (=properly attributed).

In this reading, G-d realizes that ex post facto laws are ‘not good’ regardless of whether they can be justified. However, the death of Uzza in II Shmuel 6:6 for touching the Ark in an attempt to keep it from falling suggests that He does not necessarily grant qualified immunity.

*Shabbat shalom!*