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"Taking Responsibility for Torah"

TRUTH AND CONSEQUENCES

Rabbi Aryeh Klapper, Dean

Devarim 19:18 tells us that an impeached witness (*ed zomem*) in a capital case should be punished "in the same way that he plotted to do to his brother." Should it matter whether the plot succeeded? Mishnah Makkot 5a tells us that the Sadducees applied poetic justice only when the victim was in fact executed; but our Sages held that a guilty verdict was sufficient, even if the perjury was exposed before the sentence was carried out.

Talmud Makkot 5a cites Beribi (likely a nickname for Rabbi Elazar Hakappar) as adding a twist: impeached capital witnesses are executed **only** if their plot is exposed before their victim is executed. (This position is not recorded in the Mishnah or the midrashei halakhah, but as the 20th century commentator and poseq Rabbi Dovid Tzvi Hoffman notes, it seems to be assumed by all subsequent rabbinic literature.) Beribi's father wonders why halakhah sustains this counterintuitive result: Shouldn't the witnesses be executed *kal vachomer* if their plot succeeds? He is reminded that he himself taught that Biblical punishments cannot be derived via *kal vachomer*.

One might reach the same result a different way. Perhaps the law of impeached witnesses is intrinsically counterintuitive, so that we cannot have any confidence in reason's ability to determine where it applies and where it doesn't.

My basis for this suggestion is Sanhedrin 27a. According to Rava, an *ed zomem* becomes an invalid witness from the date the perjury is exposed, not from the date of the perjury itself. The Talmud explains his reasoning as follows: "*The entire law of ed zomem is counterintuitive: Why do you rely on (the impeaching witnesses)? Rely on (the impeached witnesses) instead! Since it is counterintuitive, it should be applied narrowly.*" Abayay disagrees with Rava's legal result, but probably only for technical reasons.

Nonetheless, commentators have spent the last millennia offering rationales for the law. For example, Ramban answers Rava's question as follows. In halakhic criminal law, witnesses are believed even when they testify against multiple defendants. Halakhic impeachment occurs only when impeaching witnesses testify that the original witnesses were not present at the time and place of the crime; in other words, they charge the witnesses with the crime of perjury, rather than offering testimony about the original crime itself. **THEY TURN THE WITNESSES INTO DEFENDANTS**, and witnesses are always believed against defendants.

This explanation merely begs the question: Why are witnesses believed against defendants?

A very different approach is taken by the medieval exegete and Tosafist Rabbi Yosef of Orleans (Bekhor Shor). He argues that there is no reason to believe the second witnesses more than the first, but that we believe them anyway, because the alternative is a system in which perjury runs rampant. (Won't impeachment run rampant instead? Mitch Klausner suggested in the Young Israel of Sharon parsha shiur that impeaching witnesses themselves must worry about being impeached, and so are not likely to come forward falsely.)

Ramban also offers two answers to Beribi's father's question. If the witnesses came between verdict and execution, that indicates that G-d intervened to save the defendant, who must therefore be innocent. But if they came too late to prevent the execution, G-d must not have cared to save the defendant, who can therefore be presumed guilty of this or an equivalent crime. Perhaps the original witnesses were "testilying" to ensure conviction of the guilty rather than seeking to convict the guilty. Alternatively, perhaps we can be sure that G-d would not allow a halakhic court to execute anyone truly innocent (*dam naki*).

The medieval philosopher and Bible commentator R. Yitzchak Arama (Akeidat Yitzchak) challenges Ramban: Why should the law care about substantive rather than procedural justice? The witnesses sought to have the courts kill someone on the basis of false testimony. Why should it matter that the defendant "deserved to die?"

Ramban's language of *dam naki* also seems almost deliberately ironic. Immediately after discussing Beribi's position, the Talmud cites a *beraita* in which Rabbi Yehudah ben Tabai takes pride in having executed an impeached witness "so as to confound the Sadducees." In other words, he executed the witness immediately after the verdict was brought in. Shimon ben Shetach responds that he has certainly shed *dam naki*, as the law permits the execution only of impeached witnesses, plural.

One might respond that Yehudah ben Tabai made a legal rather than a factual error, and that G-d only intervenes to prevent the latter. Indeed, the existence of "the bull brought to atone for a

communal lapse” makes it impossible to claim that even the Great Sanhedrin is immune to legal error, even to legal error that causes more than half the Jewish population of Israel to sin. So Ramban must intend some such distinction.

But I confess to not understanding why G-d would prevent one kind of error and not the other. It seems to me much simpler to say that G-d does not prevent human beings from erring, because that would deprive us of responsibility for Torah.

Akeidat Yitzchak himself inverts Ramban. Beribi’s position is not based on Rabbinic infallibility, but rather *darka* on Rabbinic fallibility. Akeidat Yitzchak develops his thesis via a fascinating but terrifying *beraita* cited on Sanhedrin 44a:

A story about a person brought out to be executed.

He said:

“If this sin (for which I was convicted) is found in me – let my death not atone for my sins;

But if this sin is not found in me – let my death atone for all my sins, and let the court and all Israel be innocent, but the witnesses – let them not find forgiveness eternally.”

When the Sages heard this matter, they said:

“To return him (and not execute him) is impossible, as the decree has already been decreed;

Rather, let him be killed, and let the chain be around the neck of the witnesses.”

The Talmud notes that the defendant’s compelling plea would not have been enough to cause such Rabbinic angst, so it must be that the witnesses to the crime also retracted (without admitting to having perjured themselves). Akeidat Yitzchak asks: What irreversible decree has been made? He responds:

The whole matter is about protecting the honor of the courts, because what would ensue when their shame was publicized by returning this man on the basis of the witnesses’ retraction, when they erred by reaching a verdict on the basis of their original testimony. That day it would be known to all that neither their wisdom nor the hand of G-d prevented them from shedding dam naki on the basis of those witnesses. From then on, the power of the court would be inconsequential in the eyes of the people, and they would remove their yoke of reverence for them. The result would be great damage to the entirety of Torah and mitzvot which the courts are obligated to enforce. Therefore they saw fit that this one should be executed in consequence of their verdict, as if he was killed to sustain the public welfare, and let the chain be around the neck of the witnesses with regard to this evil to an individual. All the more so we must protect their honor when they have actually killed (on the basis of perjured testimony) . . .

Versions of Akeidat Yitzchak’s are cited with approval by commentators throughout the subsequent centuries, including Rav Dovid Tzvi Hoffman.

I confess to finding that profoundly disturbing. Credibility cannot be sustained by coverups, and coverups tend to produce much worse crimes. Letting successful perjurers escape leads to the rampant perjury Bekhor Shor feared. If we allow the execution of a possibly innocent defendant in order to maintain faith in the legal process, what should we do to reporters who seek to expose that truth? And so it goes . . . Our generation has seen the immense damage this approach causes, and how in the long run it destroys all credibility.

Taamei Hamitzvot, rationales provided for commandments, have no binding force. We can accept the Rambam’s Code while rejecting his Guide, if we wish, or accept the Shulchan Arukh without endorsing Rabbi Yosef Caro’s version of Jewish mysticism. *Halakbab* is often better left unexplained than badly explained, whether the poor fit is objective or subjective.

Of course, there are also explanations for the details of *ed zomem* that do not carry the same dangers (although they may carry others). For example, a tradition with roots anteceding Akeidat Yitzchak explains Beribbi’s position as saying that witnesses who actually cause an execution are so terrible that they do not deserve the atonement automatically provided by execution. (I will leave for another day the question of whether that atonement can be voluntarily waived, as per the defendant in the story above.)

Finally, humility demands that we not simply dismiss concerns that our great predecessors found compelling. Sometimes the explanations for commandments are historically contingent, and should be. Maybe the concerns are genuine, but the balance of values changes. Maybe we are missing something critical.

The question we should then ask ourselves is: How do we prevent transparency from generating **disproportionate** loss of faith in public institutions? After all, the laws of *lashon hora* teach us that an isolated truth can contribute to an overall false picture.

I believe that we – by which I mean separately the people of the United States, and the Jewish community - can develop the social maturity necessary to face our past and present flaws honestly without concluding that our past and present are so tainted as to be valueless, and must be torn down before any progress can be made. If I am wrong, perhaps Akeidat Yitzchak is right.

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