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THE SANHEDRIN AND THE SPIES

By Rabbi Aryeh Klapper

Mosheh gives the spies a *tactical* brief. He instructs them to report back to 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. The spies should have alerted Mosheh Rabbeinu to 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 meant that the dispute among the spies was presented to outsiders unmediated (as raw intelligence), and 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 vice versa, is often more powerful than objective truth.

The citizens of a rule-bound democracy expect each presentation they hear to be countered. They want at least the illusion of having heard all plausible positions defended before they vote. In our parshah, the proposal to return to Egypt is made before Calev and Yehoshua have said a word.

Mosheh and Aharon react by (silently) falling on their faces in front of "all *k'hal adat Yisroel*". Yehoshua and Kalev now speak, also to "all *k'hal adat Yisroel*", and try to counter rhetoric with rhetoric. They fail. In verse 14:10:

"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*."

Three distinct terms for collective are used in this episode. Mosheh, Aharon, and all twelve spies speak to "*k'hal adat Yisroel*"; "all the *edah*" speaks about stoning; and the Glory of Hashem appears to "all *B'nei Yisroel*". Prima facie these terms refer to distinct groups, and identifying them correctly may be key to understanding the political dynamics of the situation.

Note also 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. In 14:2, "All *B'nei Yisroel*" complain to Mosheh and Aharon, but "all the *edah*" 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 ראה* – is spoken about "each man to his brother", i.e. within a group.

A clue to unravelling all this is the phrase used for the plan spoken by "all the *edah*" to kill Yehoshua and Kalev: *lirgom otam ba'avanim*. *Lirgom ba'avanim* in Chumash generally refers to judicial execution rather than to lynching.

It therefore seems plausible that the term *edah* here refers to 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* – clearly the Sanhedrin – as atonement when it has erred. The decision to execute Yehoshua and Kalev was a judicial error.

Moreover, there was no deliberation about the verdict, and no attempt to find extenuating circumstances or justifications. Perhaps this episode is one source for the ruling voiced by Rav Kehana on Talmud Sanhedrin 17a that if a Sanhedrin votes unanimously to convict in a capital case, the defendant is acquitted.

The last straw for G-d is not the threat of mob violence, but rather the willing or unwilling surrender of the judicial system to the mob. G-d finds it necessary to intervene only once the Sanhedrin decides to execute those who opposed the newly minted popular will.

The episode of the spies therefore teaches us that a key role of the judiciary is to create time and space and context for substantive political conversation.

Six years ago, I applied this lesson to the Masterpiece Cakeshop ruling of the Supreme Court. I'll reprise what I said then, which I think has aged reasonably well (please email if you disagree!), and then briefly consider some further applications:

“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, meaning 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, rather than 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.”

I recognize that this is hard to prioritize while both sides still see the basic legal issues as in play. Perhaps it is worth considering that in one sense, Yehoshua and Calev, won, but that in another, everyone lost, as the Jews were condemned to wander homelessly for a generation.

On this issue, and many others, true victory requires convincing the other side, not overpowering them. That may be impractical in the short or even the intermediate term. But perhaps making the point now can prevent us from making it impossible in the long term.

Shabbat shalom!