

# *Small Tastings of Torah, Judaism and Spirituality*

From Rav Binny Freedman

## Portion of Shoftim

(2018)

*Imagine the scene: A beautiful afternoon, with a westerly wind blowing cool air in from the Mediterranean and a group of children and teenagers playing with kites, flying in the wind.*

*The sounds of the children's laughter carry across the sand; such an innocent scene on a beautiful late afternoon along the Mediterranean coast.*

*Only this is not Long Island Sound; it's the Gaza strip. And the innocent kites these children are flying are laden with incendiary devices and petrol bombs, and they are not innocently flying kites; they are releasing weapons aimed at their Jewish cousins playing in playgrounds and summer camps a short few kilometers away. This is the new generation of 'RPG kids', and just like the seven and eight-year-old Lebanese children trained by the PLO to fire RPG anti-tank weapons at Israeli tanks in Lebanon in the First Lebanon War of the early 1980's, these children are soldiers in the new children's army of Hamas.*

*So how are our soldiers with their tanks and sniper rifles facing the Gaza border meant to respond?*

This week we read the portion of *Shoftim*, which is the practical application of last week's vision of the portion of *Re'eh*. If last week we spoke of choosing the path of blessing, and how we chose to see the world, this week we read of the need for judges and police. And if last week we spoke of the goal of a healthy environment that can create a society of peace and morality, and the dangers of false prophecy and cities of idolatry, this week we read of the need for a monarchical system that can enforce law and order and lead us in our political decisions as well as on the battlefield.

In the midst of all this, the Torah (*Devarim* (Deuteronomy) 19:15-21) teaches us the need for a minimum of two witnesses in criminal cases, and describes a fascinating case:

Two witnesses testify that someone has committed a crime. Upon interrogation, they are believed, and the criminal is apprehended. Subsequently if a second set of witnesses comes forward and declares that the first set of witnesses could not have witnessed the crime as they were with us, the second set of witnesses is believed and the first set of witnesses are now the criminals.

And the punishment given to this first set of witnesses is whatever punishment would have been bestowed upon the target of their false testimony. This is a **chiddush**, or novel and even illogical idea; after all, by what logic should we accept the testimony of the second set of witnesses as preferable to the first witnesses? Perhaps it is the second set of witnesses that are lying? Indeed, **Rav Chisda** posits in the Talmud (Tractate *Baba Batra* 31b) that we actually should simply invalidate both sets of witnesses!

Indeed, there is an interesting debate in the Talmud (*Baba Kama* 75b) between Abaye and Rava as to *when* the first set of witnesses are declared to be 'wicked' and their testimony invalidated. Rava says that since this is a **chiddush**, they are not considered invalid for testimony until the second witnesses come forward and the first witnesses are declared to be wicked (and defined as *eidim zomemim* or scheming witnesses). Thus, if they

testified in a case or signed documents beforehand (even though they had already given their false testimony as would subsequently be 'discovered') their testimony stands.

Abaye, on the other hand believed that their testimony should be disqualified retroactively (*le'mafreah*). After all, once the second set of witnesses' testimony is accepted and it is clear that in the original case we now believe the original witnesses gave false testimony (for subsequent witnesses declared them to be in an entirely different location it thus being impossible for them to have witnessed the act at all ...), how can we possibly accept any subsequent testimony on their part?

The question that results from all this of course, is why we find the testimony of the second set of witnesses preferable to that of the first set? Why don't we accept **Rav Chisda's** ruling that we simply invalidate *both* sets of witnesses? How can we assume the second set of witnesses are telling the truth and the first set are lying?

There are many different ways to understand this conundrum: the **Ran** (Rabbeinu Nissim of Girona 14<sup>th</sup> century Spain in his *Derashot Ha'Ran*:11) suggests a practical solution: simply put, the second set of witnesses are taking a much greater solution: if they are lying, it will be much easier to prove them wrong (i.e. if anyone comes forward and says they saw the first set of witnesses where they claimed to be etc.).

And the **Ramban** (*Devarim* 19:18) suggests that since the case now becomes about the validity of the first set of witnesses they are now biased as they are now the subject of the case and so their testimony can no longer be accepted!

**Rava's** understanding however, that it is only when the second witnesses come forward that the first witnesses are declared wicked (such that any of their testimony up until that point stands and is accepted) is due to the nature of this being a *chiddush*: it actually is illogical and a decree of the Torah and up until that declaration, logic dictates their testimony to be valid and so it remains.

Which again leaves us trying to understand this decree: what are we meant to understand from the fact that the Torah prefers the testimony of the second set of witnesses? What is the nature of this *chiddush*?

Perhaps what the Torah is trying to share is how much we *want* to find a person innocent. Think about it: to find a person guilty of murder and liable for a death sentence is nearly impossible in Jewish law; consider the following:

Tradition teaches us (*Mishna Makkot* 1:10) that

*"... if a Sanhedrin puts a man to death once in seven (and according to Rav Elazar ben Azaria once in **seventy**) years it is considered a cruel court..."*

A court ruling on a capital case had to consist of a *minimum* of 23 judges!

If a Sanhedrin (High Court of at least 23 judges) issued a unanimous guilty verdict, the defendant is automatically exonerated (it being assumed they must not have reviewed the case exhaustively enough or perhaps the judge's ruling later may have been unduly influenced by the unanimous verdict of the previous judges ... if there was not at least one judge finding him innocent!) (Maimonides *Hilchot Sanhedrin* 9:1)

And the witnesses had to both see each other as well as issue a very specific warning to the person committing the action immediately prior to the action, and the list goes on ...

[perhaps the Torah is suggesting that even in the context of such a terrible offense as murder we should want to see the person as innocent, and certainly should seek every avenue to avoid meting out punishment...To quote the English jurist William Blackstone : “...*better that ten guilty persons escape than that one innocent suffer*”,

That said, it is interesting that the Torah adds a line here which is somewhat unique:

When describing how the first set of witnesses, for having attempted to declare a person a murderer, should themselves be put to death (as they would have effectively done to the person they falsely testified against) the Torah says:

“... *Velo’ tachos einecha...*”

“...*Your eye shall not pity: a life for a life...*” (ibid. 19:21)

On the one hand we should want to find a person innocent and we should not want to mete out difficult punishments; on the other hand, when a judgement needs to be harsh we need to know when pity can be dangerous, and when the moral fabric of society and the effective rule of law requires a harsh verdict.

Perhaps this is the true challenge for a Jewish soldier in a Jewish army:

We should **want** to see children playing with kites as innocents in an idyllic scene and we should **want** the sounds of their laughter to warm our hearts and bring a smile to our lips.

At the same time: “*Velo’ tachos einecha...Your eye shall not pity*”:

We have a responsibility to know when our priorities demand we see them for the terrible tools of terrorism (in this case) Hamas has made them to be. And make no mistake about it: incendiary kites laden with petrol and exploding in Israel’s towns and villages are as much an act of terrorism as bombers with explosive vests walking into and onto crowded restaurants and buses are, the difference is only a question of degree.

This week in the portion of Shoftim, we begin to see the Torah’s recipe for how the second generation about to enter and conquer the land of Israel are meant to maintain their vision and the soul of their morality, while practically managing the inevitable practical challenges of building a society of laws and policies. And three thousand years later, we are still struggling with these same questions and challenges. We dare not presume to ignore the terrorism that plagues our borders, but we must be careful lest we stop seeing them as human beings even as they yet remain our enemies ....

We have to see the kites as weapons of terror while yet seeing the children who fly them as children. And the resulting challenge is a good challenge to struggle with even as the unfortunate resulting conclusion and course of action may nonetheless be all too clear.

To paraphrase Golda Meir: We will finally know peace when they love their children more than they hate ours....

Shabbat Shalom from Jerusalem,

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