

DRASH

MISHPATIM

13 Feb 2021

c.s.f.

Shabbat Shalom.

Our parasha, *Mishpatim*, provides a richness of topics: murder, an eye for an eye, rumor-mongering, and *twice* the command to treat strangers well because you were a stranger in Egypt. But I was struck by a nuance in this *parasha*: a concern for *intention*.

Here are the texts (in Alter translation):

Ex 21:12-13: “He who strikes a man and he dies is doomed to die. And he who did not plot it but God made it befall him, I shall set apart for you a place to which he might flee.” That is, “he who did not plot it” can flee to the sanctuary cities to avoid an avenger.

Verses 18 through 21 are about killing a man in a brawl and killing a slave. In both cases the passages suggest that, if the victim recovers, then it was probably *not* an *intentional* effort to kill and so little or no penalty is assessed.

Verses 28-29 are about an ox goring and killing someone. If the ox had been known to have gored people before, we should assume that the ox’s owner *intentionally* disregarded the danger that the ox posed. The owner is to be executed.

Chapter 22:1-2 describes when a homeowner can and cannot kill a would-be thief. It distinguishes a thief who comes at night from one who comes in the day. The one at night, when residents would be at home, presumably *intends* to murder the residents. Killing that thief is OK. The thief who tries to break in during the day when the residents are supposedly away presumably has *no intention* to murder. And owner who kills that thief should be punished.

Discussion of intentionality, killing, and sanctuary cities is repeated at least twice more in Torah. Numbers 35 presents some proofs of intention. For example, if the killer used an iron tool or a hand stone or a wooden hand tool, then the killing was *intentional* and the killer *cannot* flee to the sanctuary cities. He must be left to the victim's avenger. Also, if the killer struck the victim "with hatred" or "by design," he should die. But if the killing happened "on an impulse" or by accidentally dropping a stone, then he can seek refuge.

Deuteronomy, Chapter 19, presents other proofs: "Should a man be a foe to his fellow man and lie in wait for him... and strike him down mortally," he is to be handed to the avenger. Being a past foe and lying in wait are signs of *intention* to kill.

Torah discusses intentionality in other ways, too. For example, expiation by sacrifices is, for the most part, only possible for *unintentional* sins.¹

So, what we see here is a concern with a subtle thing—that *intentions*, not just acts, really matter—and also concern with how we are to discern intention. This is not a simple matter. We often don't understand our own intentions; thus the profession of psychotherapy.

The background for the Torah's discussing of intentionality is an ancient world of feuding clans and families that exact vengeance for losses at the hands of outsiders—*no matter what their intention*. But in Torah intention matters.

Torah is not novel in this way. A quick look at other ancient, middle-eastern, legal codes shows that intention is mentioned here and there. But my impression is, not with nearly as much focus as the Torah gives it. More often in those texts, if an outsider harmed an insider, that's enough to render them a fair target for vengeance.²

What do we make of this?

¹ Akeidat Yitzhak 86: 1: "On the other hand, crimes and sins committed due to ignorance, lack of awareness of the significance of one's actions, bring only minimal retribution to its perpetrator, since the latter is relatively innocent. For this reason the Torah distinguishes between the deed of a shogeg, a person acting inadvertently, and a meyzid, someone acting with deliberation. Major sins must not only be listed in the written part of the Torah, but the penalties for them must be spelled out.

² Original Hammurabi & Hittite texts. Plaut commentary suggests Hammurabi laws are mainly about whether you caused it, not intent.

Intentionality assumes free will and personal responsibility. But if we also accept the theology that God directs everything, then people have no free will, no free intention, no responsibility. These matters are a bit of a muddle in Torah.

Recall the part of the Joseph story where, upon their reunion, Joseph tells his brothers that their selling him into bondage was just part of God's plan. So, their *intentions* against him when they committed that crime seem to be morally irrelevant. The brothers were instruments of God and therefore innocent. On the other hand, the whole blesses-and-curses format in Deuteronomy—*choose life!*—implies that people have free will, intention, and personal responsibility.

The rabbis tried to combine notions of free will with a belief that God determines everything. They debate what is right think to do and with what intention. Yet, a passage of Talmud reads “No man injures his finger unless it has been decreed for him on high.”³ Maimonides argued that God can foresee our actions, but our actions are still free.⁴ Pretty complicated.

It gets yet more complicated. In Christian thought—which shapes our thinking, too—we also see contradictions. Notions of original sin and of God's omniscience—“not a single sparrow can fall to the ground without your Father knowing it” [Mat 10:29]—minimize human intentionality and responsibility. Yet, the confessional in the Catholic church implies personal responsibility.

In Calvinist Protestantism, everything is predestined; your salvation or damnation was determined before you were even born. Your acts don't matter, so neither do your intentions.

However, later versions of Protestantism teach that acts and, even more, intentions *do* matter. Choosing to believe will bring salvation. This Protestantism gave us our sense that individual will, purpose, and character are critical. In this individualism, the self-defining, self-reliant individual is the captain of his or her ship. We are *always* responsible; our intentions are critical.

And the third hand, or the fourth hand—I've lost track-- 19th- & 20th-century developments in our culture have questioned just how responsible we really are for our acts or even for our intentions.

³ Ency Judaic, “Free Will.”

⁴ Ibid.

For one, modern social thought seems to say that it's our *environment* that is responsible, not us. Here a useful *pasuk* comes from Reb Stephen Sondheim, in these lyrics from *West Side Story*:

Dear kindly Sergeant Krupke
You gotta understand
It's just our bringin' up-ke
That gets us out of hand
Our mothers all are junkies
Our fathers all are drunks
Golly Moses, naturally we're punks!

Then, there's psychology which tells us that deep urges which we may not even be aware of make us intend what we intend. It's not real intention; it's compulsion or impulse.

Yet more recently, behavioral genetics seems to tell us that we are predestined to, say, have hot tempers, or suspicious natures, or psychotic tendencies which lead to committing acts like murder or to ignoring the aggressiveness of our oxen.

All these sources feed into American law. Culpability in law requires, among other things, determining the intention of the actor. For example, we have the distinction between murder and manslaughter: "Manslaughter is an unlawful killing that doesn't have [the] intent to seriously harm or kill....."⁵ But that can get pretty complex. For example, according to one source,⁶ if someone breaks into a house with the *intention* of stealing and does steal, that's burglary. If, however, he breaks into a house to find shelter on a cold night and later decides to take something with him as he leaves, that's *not* burglary, because stealing was not his *intent* in breaking in.

As a side note, much of the argument in the current impeachment trial is to divine Donald Trump's *intent* on January 6.

There are many ways we use *today* to ascertain the intentions that lie behind actions: There could be social circumstances like a abusive childhood, or psychological conditions like temporary

⁵ <https://www.nolo.com/legal-encyclopedia/homicide-murder-manslaughter-32637-2.html#>

⁶ <https://lawshelf.com/coursewarecontentview/model-penal-codes-mens-rea/>

insanity, or rare genes that can undermine a judgement of intentionality. It's all a lot more complicated than the Torah's rules about inferring intention from the specific weapon used or from the time of day.

In this quick review of 2500 years of intentionality, I haven't yet mentioned another pervasive concern about intentionality in Judaism: *kavanah*—and the proposition by some that *mitzvot* count only if they are done with specific, conscious *intention*. If you give charity to stop someone from emailing you all the time, but without clear charitable *intention*, it's not a *mitzvah*.

I have no solution to the opaqueness about intention, now nor at the writing of our *parasha*. We would not want a world in which truly accidental acts are treated as if they were intentional. But, we have to be aware that the topic sends us deep into trying to understand human nature.

What I will say with clear intention is that I wish you all a *shabbat of shalom*.