

## Halachic Hide and Seek

### I. The Spectrum

אונס.....שוגג.....מזיד

### II. The Rules

#### דברים יט:א-י

כי־יכרית יקוק אלקיך את־הגוים אשר יקוק אלקיך נתן לך את־ארצם וירשתם וישבת בעריהם ובבתיהם שלוש ערים תבדיל לך בתוך ארצך אשר יקוק אלקיך נתן לך לרשתה תכין לך הדרך ושלשת את־גבול ארצך אשר ינחילך יקוק אלקיך והיה לנוס שמה כל־רצח וזה דבר הרצח אשר־ינוס שמה וחי אשר יכה את־רעהו בבלי־דעת והוא לא־שנא לו מתמל שלשם ואשר יבא את־רעהו ביער לחטב עצים ונדחה ידו בגרזן לכרת העץ ונשל הברזל מן־העץ ומצא את־רעהו ומת הוא ינוס אל־אחת הערים־האלה וחי פן־ירדף גאל הדם אחרי הרצח כי־יחם לבבו והשיגו כי־ירבה הדרך והכהו נפש וולו אין משפט־מות כי לא שנא הוא לו מתמול שלשום על־כן אנכי מצוך לאמר שלש ערים תבדיל לך ואם־ירחיב יקוק אלקיך את־גבלך כאשר נשבע לאבתיך ונתן לך את־כל־הארץ אשר דבר לתת לאבתיך כי־תשמר את־כל־המצוה הזאת לעשתה אשר אנכי מצוך היום לאהבה את־יקוק אלקיך וללכת בדרכיו כל־הימים ויספת לך עוד שלש ערים על השלש האלה ולא ישפך דם נקי בקרב ארצך אשר יקוק אלקיך נתן לך נחלה והיה עליך דמים

When HaShem your God has cut down the nations whose land HaShem your God is assigning to you, and you have dispossessed them and settled in their towns and homes, you shall set aside three cities in the land that HaShem your God is giving you to possess. You shall survey the distances, and divide into three parts the territory of the country that HaShem your God has allotted to you, so that any manslayer may have a place to flee to.— Now this is the case of the manslayer who may flee there and live: one who has killed another unwittingly, without having been his enemy in the past. For instance, a man goes with his neighbor into a grove to cut wood; as his hand swings the ax to cut down a tree, the and the iron slips from the *etz* and strikes the other so that he dies. That man shall flee to one of these cities and live.— Otherwise, when the distance is great, the blood-avenger, pursuing the manslayer in hot anger, may overtake him and kill him; yet he did not incur the death penalty, since he had never been the other's enemy. That is why I command you: set aside three cities.

And when HaShem your God enlarges your territory, as He swore to your fathers, and gives you all the land that He promised to give your fathers— if you faithfully observe all this Instruction that I enjoin upon you this day, to love HaShem your God and to walk in His ways at all times—then you shall add three more towns to those three. Thus blood of the innocent will not be shed, bringing bloodguilt upon you in the land that HaShem your God is allotting to you.

Based upon the passages here and in Bamidbar, the Mishnaic scholars record procedures to be observed following an event of murder/manslaughter within the community:

1. An individual who kills another, under any circumstances, should immediately flee to a city of refuge.
2. The court of the city where the event occurred then summons the perpetrator to return and stand trial.
3. A perpetrator who is found by the court to have acted b'meizid, with full intent; and to be guilty of the death penalty under the law; is handed over to the Go'el Hadam, the blood avenger, for execution. The Go'el Hadam is a close relative of the victim who serves as the agent of the court in carrying out the sentence of execution.
4. A perpetrator who is found to have acted b'oness, as a result of coercion or force of circumstance (accident), is set free.
5. A perpetrator who is found guilty of an act that falls into the category of shogeig, a specific level of unintentionality, is returned to the City of Refuge, where he is to remain until the death of the Kohen Gadol, High Priest.
6. A perpetrator found liable to exile who fails to flee to a City of Refuge or who leaves such a city prematurely, becomes liable to death. Rabbi Yossi the Galilean maintains that, under such circumstances, the Go'el Hadam is obligated to execute the criminal, while others have the right to do so. Rabbi Akiva argues that the Go'el Hadam is permitted to execute the criminal, while others are forbidden from, but not punished for, doing so. The Rambam codifies the law according to Rabbi Akiva.
7. Clear, direct paths must be established towards the Arei Miklat and two sages are assigned to accompany the convict back to the city after the court hearing, in order to dissuade a Go'el Hadam from taking action before the city is reached.

### III. Defining שוגג in the Case of Manslaughter

#### דברים יט:ה

ואשר יבא את־רעהו ביער לחטב עצים ונדחה ידו בגרזן לכרת העץ ונשל הברזל מן־העץ ומצא את־רעהו ומת הוא ינוס אל־אחת הערים־האלה וחי

#### משנה מכות ב:א

נשמט הברזל מקתו והרג, רבי אומר, אינו גולה. וחכמים אומרים, גולה. מן העץ המתבקע, רבי אומר, גולה. וחכמים אומרים, אינו גולה:

The text is not completely clear. What are the details of this crime? At issue is the meaning of the enigmatic phrase *v'nashal habarzel min ha'etz*, “the iron slips from the *etz*.” The term *etz* can either be defined as “tree” or as “wood.” The text is, therefore, open to interpretation. What exactly causes the death of the bystander?

Two distinct opinions are presented in the Mishna based on the two possible understandings of the term *etz*. Rebbe (Rabbi Yehuda Hanasi) interprets the term *etz* as “tree” and maintains that the Torah refers to a case where the striking ax causes a woodchip to fly off the tree, tragically “finding” and killing the bystander. Rebbe’s rabbinic colleagues, however, interpreting the term *etz* as “wood,” insist that the Torah refers to a case where the *ax head* slips off its wooden handle, becoming a lethal projectile that strikes and kills the victim.

Rebbe’s benchmarks for guilt are clearly much more onerous than those of his colleagues. The woodcutter is guilty, *b’shogeg*, even for lethal damage caused by a flying splinter, a phenomenon which reflects minimal negligence on the part of the woodcutter. Had the ax head killed the victim, Rebbe feels, exile would not have been an adequate sentence. The woodcutter’s degree of guilt for failing to keep his equipment in good working order would have placed him too high on the spectrum of intent, somewhere between *shogeg* and *meizid* (intentional acts).

Rebbe’s colleagues, on the other hand, adopt a more lenient view. The category of *shogeg* reflects the case where the ax head causes the damage. Had the wood chip killed the victim, the woodcutter would have been almost blameless, not responsible for indirect events beyond his control. In such a case, a sentence of exile would have been too severe.

The Rambam and other halachists codify the practical law in favor of the lenient position of Rebbe’s colleagues.

#### משנה מכות ב:ב

הזורק אבן לרשות הרבים והרג, הרי זה גולה. רבי אליעזר בן יעקב אומר, אם מכשיצאתה האבן מידו הוציא הלז את ראשו וקבלה, הרי זה פטור. זרק את האבן לחצרו והרג, אם יש רשות לנזק לכנס לשם, גולה. ואם לאו, אינו גולה, שנאמר "ואשר יבא את רעהו ביער, מה היער רשות לנזק ולמזיק לכנס לשם, יצא חצר בעל הבית שאין רשות לנזק ולמזיק לכנס לשם"

If a man threw a stone into the public domain and killed a person, he goes into banishment.

Rabbi Eliezer ben Jacob says: "If after the stone had left his hand another person put out his head and caught it, the thrower is exempt [from banishment]." If a man threw a stone into his [own] court and killed a person, then, if the victim had a right of entry there, the thrower goes into banishment, and if not, he does not go into banishment, as it says, "As when a man goes into the forest with his neighbor": the forest is a domain accessible to the victim and to the slayer and it therefore excludes the court of the householder where the victim has no right of entry.

#### IV. Examples of Requirements for an Ir Miklat (Talmud Bavli Makot 10a-b and commentaries)

- Mid-sized cities
- Animal traps, nets, weapons prohibited
- Percentage of convicts no more than 50%
- Cities of Leviim also serve as refuge

#### V. Purpose:

- Protection
- Punishment
- Atonement

#### V. Length of Term: Death of Kohen Gadol

##### ספרי במדבר

ר' אומר: רוצח מטמא את הארץ ומסלק את השכינה, וכהן גדול גורם לשכינה שתשרה על האדם בארץ. אין בדין שיהא מי שמטמא את הארץ לפני מי שגורם להשרות את השכינה על אדם בארץ:

Spiritual opposites should not co-exist

##### ספורנו במדבר לה:כב

עד מות הכהן הגדול כבר באר שהגלות היא על השוגג ובהיות מיני השגגות בלתי שוות כי מהם קרוכות לאונס ומהן קרובות אל המזיד נתן לגלות זמן בלתי שווה בכל השוגגים כי מהם שתהיה שגגתו מעט קודם

מיתת הכהן ומהן שימות הרוצח בגלות קודם שימות הכהן וזה במשפט האל יתברך היודע ועד שיענוש את השוגג כפי מדרגת שגגתו כאמרו והאלהים אנה לידו:

Only God can determine

### תלמוד בבלי מכות יא.

ההוא סבא מפירקיה דרבא שמיע לי שהיה להן לבקש רחמים על דורן ולא בקשו

Kohen's responsibility

### משנה מכות ב:ו

לפיכה אמותיהן של פהנים מספקות להן מחיה וכסות, כדי שלא יתפללו על בניהם שימותו.

The Power of Prayer?

## VI. Confronting the “Blood Avenger”

In her studies on Parshat Shoftim, Nechama Leibowitz offers a bold solution by suggesting that the Torah's acceptance of the blood avenger's involvement in the proceedings must be viewed as part of God's plan to slowly wean the nation away from the existing mores of the day. Citing the Rambam's approach to korbanot in his Guide to the Perplexed as precedent (See Vayikra, Vayikra 1 Approaches II 2 A-B), Leibowitz argues that: “The Torah does not demand an immediate and drastic change of life but reforms man through a gradual educational process.”<sup>1</sup>

Whereas the Rambam was willing to consider existing societal practice as the basis for the establishment of korbanot in Jewish tradition, however, Leibowitz goes a major step further. The court appointment of the blood avenger in cases of murder/manslaughter is not only a concession to existing societal practice. This limited appointment is the first step in a conscious, gradual process designed to ultimately “stamp out the blood feud” entirely from Jewish experience.

Leibowitz quotes the observations of Shmuel David Luzzatto. This scholar insists that any attempt on the part of the Torah to completely deny a family's right to avenge the killing of one of their own would not have been successful. So ingrained were the attitudes of the day that failure of the part a family member to seek such vengeance would have been interpreted as a lack of love for the deceased. *God, therefore, makes the extraordinary decision to co-opt the problem.* He decrees that the blood avenger be incorporated into the legal process in a controlled, limited way. Prohibited from taking the law into his own hands, the Go'el Hadam can now only act as an agent of the court and is forced to respect its rendered verdict. He must accept the security granted to the convict by the City of Refuge and can only act against the

<sup>1</sup> Leibowitz, Nechama Studies in Devarim The World Zionist Organization 1980 p190

convict outside its walls and, even then, only as allowed by the law. Any extralegal action taken against the convict by the Go'el Hadam will be prosecuted to the fullest extent of the law. In this way the blood avenger becomes part of the legal process, creating a paradigm vastly different from the vigilante justice that characterizes surrounding society. And slowly, by denying the blood avenger the right to administer justice, by limiting his avenging powers only to the sphere of execution upon the decision of the court, the Torah will remove the bloodlust from Jewish society and eradicate the very institution of the "blood feud."

Leibowitz suggests that proof of the success of this process can be found in the changing emphasis in Jewish law across the ages. The Torah, when discussing the establishment of the Arei Miklat, repeatedly stresses their role as protection for the perpetrator:

"... and I shall provide for you a place to which *he shall flee*."

"For the people of Israel and for the convert and for the resident in their midst these six cities shall be a refuge; for anyone who kills a person *b'shegaga to flee there*."

"...*he shall flee* to one of these cities and live. Lest the blood avenger pursue..."

By the time we reach the era of the Mishna, however, the picture changes. The legal text no longer speaks of a perpetrator's *flight* to the Arei Miklat. Instead, the Mishna speaks of the perpetrator's journey as *exile*.

"These are those *who are exiled*..."

In Leibowitz's view, this shift of emphasis in the halachic text is indicative of a much larger shift in reality. By the time of the Mishna, God's plan to eradicate the institution of the blood feud from the psyche of the Jewish Nation has succeeded:

"... The cities of refuge were no longer needed as a protection against the angry pursuer since the blood avenger no longer pursued his victim. This instinct of personal vendetta had been blunted. No longer was it so deeply felt that the son who did not avenge his father's death was shirking his duty. The city of refuge remained not as an asylum but as a punishment, an exile that atoned for the iniquity."

In carefully identified cases of unintentional manslaughter, when capital punishment would be too onerous for the crime and full release too lenient, the Arei Miklat emerge as the appropriate measure of punishment/atonement.