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## PARASHAT SHOFTIM

### Examining Witnesses, in the Torah and in Halakha

By Rav Yehuda Rock

The law of interrogating witnesses is derived by Chazal from three different halakhic units in *Devarim*, two of which appear in our *parasha*. As we shall see, there is some discrepancy on this issue between the literal reading of these verses and the *halakha* as set forth in the Oral Law. A close examination of the verses and an attempt to explain the relationship between them and the *halakha* will offer a new understanding of the halakhic rules, extending beyond what we could have perceived without it.

The law of examining witnesses is described in the *mishna* (*Sanhedrin* 40a) amidst a series of *mishnayot* (extending from the 36b in the fourth chapter up to the end of the sixth chapter) which describe the procedure for adjudicating capital crimes. The *mishna* teaches:

They used to examine them with seven questions: in which Sabbatical cycle, in which year, in which month, on what date of the month, on which day, at which hour, at which place...

Do you know him; did you warn him?

For one accused of idolatry – which god did he serve, and how?

One who questions at length is to be praised...

What is the difference between interrogating (*chakirot*) and examining (*bedikot*)? During questioning, if one [of the witnesses] says, "I do not know" – their testimony is nullified. When it comes to examining, if one says, "I do not know," or even if both of them say, "We do not know," their testimony remains valid.

[However,] in the case of both interrogating and examining, if [the witnesses] contradict each other, their testimony is invalid.

The *gemara* (*Sanhedrin* 40a) cites a source for the seven interrogations:

Rav Yehuda said: This is as it is written, "And you shall inquire (*ve-darashta*) and interrogate (*ve-chakarta*) and question (*ve-sha'alta*) well" (*Devarim* 13); and it says, "And it shall be told to you, and you shall hear and inquire (*ve-darashta*) well" (*Devarim* 17); and it is written, "And the judges shall inquire (*ve-darshu*) well" (*Devarim* 19).

Similar texts are to be found in the *Sifrei* and in the *Talmud Yerushalmi*. We shall not address here the discussion in the *gemara* and among the Rishonim as to how exactly the seven interrogations are derived from these verses. The important point, for the purposes of our discussion, is that the law of examining witnesses is derived from three textual units that all

mention "*derisha*" (examination).

Obviously, the point of examining witnesses is to ascertain the reliability of their evidence. This requirement may be viewed within the more general context of the need to ensure that the *Beit Din* (halakhic court) does not convict an innocent person. Indeed, it is in these terms that the Rambam formulates the law:

Commandment 179 is that [God] commands us to examine the witnesses' evidence and to interrogate him well, such that afterwards we may issue a ruling and commit truth, and we should do our utmost in this regard, in order that we do not decide the matter on the basis of what is said right at the beginning, hastily, and [thereby] put an innocent person to death. And this is the meaning of the words, "And you shall inquire and interrogate." (*Sefer Ha-mitzvot*, Positive Commandment 179)

Similarly, he writes:

It is a positive commandment to examine the witnesses, to investigate, to interrogate them at length, and to scrutinize details and to move from one subject to another during the interrogation, such that [the witnesses] might fall silent, or recant if their testimony is faulty. As it is written, "And you shall inquire and interrogate and question well." (Laws of Testimony 1:4)

Let us now look at the verses themselves. The first source is to be found in the law concerning the "*ir ha-nidachat*" (city led astray into idolatry):

If you should hear it said in one of your cities... that some wicked people have emerged from your midst and have drawn out the inhabitants of their city... And you shall inquire and interrogate and question well, and if it turns out that the matter is truly correct, that this abomination was carried out in your midst, then you shall surely smite the inhabitants of that city with the edge of the sword... (*Devarim* 13:13-16)

The text makes no mention of questioning witnesses; it speaks simply of clarifying the facts concerning the city. One may, of course, suggest that the Written Law is describing a general concept (investigation), while the Oral Law is setting down defined means of fulfilling that concept. However, it seems that these are actually two contradictory concepts: the verses are talking about locating and interrogating the suspects, with a view to convicting and meting out punishment, while the *halakha* is concerned with jurisprudential caution, establishing the truth, and exonerating the innocent. Admittedly, this latter ideal also has its source in the verse: the repeated emphasis, "if it turns out that the matter is **truly correct**," may indicate that despite the acute importance of convicting the guilty, it is also necessary to ensure that the reports are in fact accurate.

Indeed, the *gemara* includes a *beraita* that derives a law concerning contradictory testimony from these very words:

'(truly) correct' – meaning, that it is mutually established (*nakhon*). If one says, 'He killed him with a sword' while the other says, 'He killed him with a dagger', or if one says 'his

clothes were black' while the other says, 'his clothes were white' – then it is not '*nakhon*.' (Sanhedrin 41a)

Thus, in order to draw a correlation between the law of halakhic examination and interrogation and the verse, we have to assume that the Oral Law is setting down definitions and means that relate to a concept that arises from a different part of the verse: not the part that reads, "And you shall investigate and examine and question well," but rather the condition: "and if it turns out that the matter is truly correct." It is not clear why the Oral Law bases the *halakha* on "examination and interrogation" rather than on "if it turns out that the matter is truly correct."

The second source from which the *gemara* derives the law of examining witnesses concerns the idolater:

If there should be found among you, in one of your gates... a man or a woman who performs evil in the eyes of the Lord your God, to transgress His covenant and to go and serve other gods... and it is told to you and you hear of it, and you inquire (*ve-darashtra*) well and it turns out that the matter is truly correct, that this abomination has been committed in Israel, then you shall bring out that man or that woman... and you shall stone them with stones... and you shall get rid of the evil from your midst. (*Devarim* 17:2-7)

Here again, "you shall inquire well" expresses the idea of seeking out and examining the idolaters, with a view to conviction and punishment; conversely, the words "and it turns out that the matter is truly correct" sound a note of caution, warning that the idolater can be convicted only on the basis of clear, solid proof.

The third source concerns a false witness:

Should a false witness arise against any man, to testify against him wrongly, then the two people who share the dispute shall stand before the Lord, before the kohanim and the judges who will be in those days, and the judges shall investigate (*ve-darshu*) well, and if it turns out that the witness is a false witness, having lied in his testimony against his brother, then you shall do to him as he schemed to do to his brother, and you shall be rid of the evil from your midst, while those who remain shall hear and fear... (*Devarim* 19:16-20)

Once again, the Torah is talking about finding and examining the transgressors, about conviction and punishment. Yet, there is no parallel expression of "if it turns out that the matter is truly correct"! There is no indication here that the veracity of the testimony must be carefully ascertained. This being the case, it is difficult to understand why Rav Yehuda cites this verse as one of the sources for the law of examining and questioning.

Rashi (in his commentary to *Sanhedrin* 40a and *Devarim* 19:18) attempts to draw the meaning of these verses closer to the halakhic requirement of investigating and questioning by explaining that "the judges shall investigate well" means that they should question the scheming witnesses. In other words, since, according to *halakha*, witnesses are only considered "scheming witnesses" and punished accordingly when a second group of witnesses testifies that the first group could not have been present to see what they claim to have seen, we may explain that the

"investigation" in this verse refers to questioning this second group, testifying about the first group. However, the need for this second group is not mentioned in the verses; it represents a formalization of the Oral Law. On the literal level, the verses are talking about a general process of investigation and questioning with a view to convicting and punishing a scheming witness; further explanation is needed as to how these verses present a basis for the halakhic mechanism of interrogating the witnesses generally, with a view to verifying their testimony.

### **Testimony that cannot be proven to be a scheme**

The law of "testimony that cannot be proven to be a scheme" appears in several places in the *gemara*. It states that where there is no possibility of proving that those offering testimony are scheming witnesses, their testimony is ruled invalid. In the *gemara* (*Sanhedrin* 41b) this law is used to explain why, during the course of interrogation, if one of the witnesses answers, "I do not know," his testimony is invalid:

[Rami bar Chama] said to [Rav Kahana and Rav Safra]... What is the reason for the teaching, "What is the difference between interrogating and examining? In the case of interrogation, if one [of the witnesses] says, 'I do not know' – their testimony is nullified. When it comes to examining, if one says, 'I do not know,' or even if both of them say, 'We do not know,' their testimony remains valid." Yet, both are biblical in origin; so why the difference between interrogations and examinations?

They said to him: ...During interrogation, if one says, "I do not know" – their testimony is nullified, since this is testimony that cannot be proven to be a scheme. In examining, if one of them says, "I do not know," then their testimony remains valid, for it is testimony which you are able to prove to be a scheme.

In other words, since the "interrogation" of the Mishna concern the time and place of the event, they represent the conditions for the possibility of proving that the testimony was a scheme; it can be proven that they were elsewhere during the time of the alleged crime. For this reason, if the witnesses are unable to supply this information ('I do not know'), then there is no possibility of proving their testimony to be a scheme, and it is ruled unacceptable.

We need not necessarily bind together the law of examining witnesses and the law of testimony which cannot be proven to be a scheme. It is certainly possible to regard these two laws as fundamentally independent entities, with a coincidental overlap between them in questions of time and place: when a Beit Din poses these questions, aside from the fact that it is fulfilling the commandment of "examining and interrogating," it is also facilitating and verifying the testimony, since the information concerning the time and place of the event is critical for the definition of this testimony as being falsifiable. On the other hand, when the Beit Din continues with questions that belong to the category of "examination," then it is merely fulfilling the requirement of ascertaining "that the matter is truly correct," and therefore only if the witnesses contradict one another can the testimony be invalid. If they say, "I do not know," it remains valid.<sup>1[1]</sup>

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<sup>1[1]</sup> An explanation for the law of testimony which cannot be proven to be a scheme that is not connected to the law of examining witnesses is set forth by the Rambam in his *Perush Ha-mishnayot* (5:2). To the Rambam's view, testimony that does not include indication of time and place is deficient, since we suspect

However, Rashi, commenting on the *mishna* on the subject of the seven questions, views the law of testimony that cannot be proven to be a scheme as a fundamental motivation for such interrogation:

For all seven (questions) are meant to lead them to disproving the testimony (*Sanhedrin* 40a).

Rashi's reason for offering this interpretation is, apparently, the very fact that all seven questions defined by the Mishna as "interrogation" – and derived, according to Rav Yehuda, from the expressions of "*derisha*" and "*chakira*" in the verses – deal with time and place.<sup>2[2]</sup>

Rashi's explanation does not necessarily contradict the general explanation for the law of interrogation as set forth by the Rambam. We may explain that the point of interrogating and examining is to ascertain the veracity of the testimony, and that the way of doing this is to facilitate and encourage the attempts to falsify it. Thus, if the testimony is really false, there is a chance that it will be exposed, and then the innocent subject will not suffer. This in fact represents a reason for the invalidation of testimony which cannot be proven to be a scheme: the possibility of falsification is a fundamental, necessary precondition to acceptable testimony, a deterrent against perjury, and a protection of the accused from a false conviction. Thus, the law of testimony which cannot be proven to be a scheme may be understood in the context of the law of interrogating and examining.

However, on the basis of this understanding of Rashi – that the law of testimony which cannot be proven to be a scheme is a most basic motivation for posing questions concerning time and place – we may take a different direction and propose that, in fact, the law of interrogation is identical to the law of testimony that cannot be proven to be a scheme. The first establishes that the witnesses must be asked to supply information as to the time and place of the event, in order that their testimony might be falsified, and that in the absence of this information, the testimony cannot be accepted by the *Beit Din*. The point of the halakhic requirement of interrogation, accordingly, is not to establish the veracity of the testimony, but rather to expose scheming witnesses. Whenever evidence is brought before the *Beit Din*, the possibility that those bearing it are conspirators must be taken into consideration, and even at the early stage of their presentation of the testimony it is necessary to prepare for the possibility of falsifying it and punishing them.

According to this explanation, although the *gemara* – as explained – cites the expressions

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that the fact that the witness fails to convey this information shows that he is lying, and is afraid of having his testimony disproved. This explanation seems somewhat extreme: is it truly reasonable to posit that someone who cannot remember when exactly some event took place, is probably lying – to the extent that his evidence should be discounted?

<sup>2[2]</sup> From the Rambam (Laws of Testimony 1:4) it would seem that the only special feature of these questions is that they are "universally applicable" – i.e., identical in every instance, as opposed to other questions concerning the act itself, which vary from one situation to the next. However, this serves to explain only the categorization of the *mishna*, not the fact that the *beraitot* in the *Sifrei* and the *Yerushalmi*, as well as the opinion of Rav Yehuda in the *Bavli*, all base the biblical requirement for the seven questions about time and place on these verses.

of "*derisha*" and "*chakira*" from three different halakhic units, the true source for the law is the unit on false witnesses alone. It is here that the Torah introduces the concept that just as it is necessary to investigate and seek out those who have committed idolatry (whether in the case of an entire city, or individuals) in order to convict and punish them, it is likewise necessary to investigate and seek out false witnesses in order to rid Jewish society of this evil phenomenon. The Oral Law introduces and makes mandatory a certain mechanism for achieving this objective: the solicitation of information concerning time and place as a pre-requisite for accepting the testimony, ensuring the possibility that scheming witnesses will be exposed and punished in accordance with whatever he had planned for the accused to suffer. Thus, instead of explaining the law of testimony which cannot be proven to be a scheme in keeping with the law of examining and interrogating, we do the opposite: we understand the law of examining and interrogating in light of the law of testimony that cannot be proven to be a scheme.

### **Examination and questioning in monetary matters**

On the biblical level, the law of interrogating and questioning applies both in capital cases and in monetary matters (*Sanhedrin* 32a). However, in practice (i.e., according to rabbinical law), this requirement does not apply in monetary cases (32a-b).

As part of the *gemara's* discussion on this point (before it concludes that there is a difference between the "biblical" level and the "rabbinic" level) it cites a *mishna* and a *beraita*, both of which set down that post-dated promissory notes remain valid even if a second group of witnesses came and testified that the witnesses signed on the note were not present at the time and place indicated on the note. The reason for this is that it is possible that the witnesses did indeed see the lender at the time of the transaction, but only signed the note at a later stage. The *gemara* invokes this as proof that there is in fact no requirement for interrogating the witnesses when it comes to monetary matters, providing the following rationale:

If you think that [monetary cases] require interrogation and examination, then why are post-dated contracts valid?

Rashi explains the proof as follows:

We see that interrogation and examination are not required, for if they were, how would we explain the matter of the contract? We would say that it is forged, and that the signatory witnesses never saw this loan!

In other words, according to Rashi, the connection between the law of interrogation and the case of a post-dated promissory note is the level of suspicion with which the testimony should be regarded. If the law of interrogating and examining applies to monetary matters, then testimony in such matters should be regarded with suspicion rather than being allowed the benefit of the doubt. If the law of examining does not apply to monetary matters, then even questionable testimony may be acceptable.

Hence, Rashi actually agrees with the Rambam that the point of the law of interrogation is to ascertain the veracity of the testimony. The fact that Rashi states that the point of the interrogation is to facilitate the disproving of the testimony may be

explained by the fact that this is a specific verification mechanism. However, according to the explanation that we have proposed above, asserting that the most fundamental source for the law of questioning arises from the unit on false witnesses, and that the main objective of interrogation is to remove the evil phenomenon of false witnesses, the whole issue looks much simpler: if the law of interrogation applies to monetary matters, this means that information as to the time and place of the event are required as an integral part of the testimony; if this information is lacking, then – insofar as the testimony cannot be falsified – it is invalid, and therefore post-dated promissory notes are invalid. If, on the other hand, the law of interrogation does not apply to monetary matters, then there is no categorical requirement for information as to the time and place, and post-dated notes may be acceptable. The relative simplicity of this explanation of the *gemara* is itself a support for our explanation of the law of interrogation, and for our understanding of the relationship between the verses and the halakhic rule in this regard.

Translated by Kaeren Fish

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