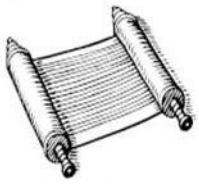
Center for Modern Torah Leadership



חרות ואחריות

www.TorahLeadership.org

"Taking Responsibility for Torah"

CMTL
End-of-2021
Reader

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Part 1: The Walder Case

Note: After this section of the Reader was composed, evidence emerged publicly that demonstrated Walder's guilt, and he was found dead as an apparent suicide (in conventional but not halakhic terms). I address that reality in this week's CMTL essay. One point I make in that essay is that the halakhic standard I argued for will inevitably cause damage to some innocent accusees, and therefore is not justified if a specific accusee, as here, turns out to have been guilty. I'm therefore leaving the section as-is to be evaluated with that inevitability in mind.

A. Public Post to Aryeh Klapper's Facebook Wall, Nov. 18th

I am saddened to hear the allegations of sexual abuse against author Rabbi Chaim Walder. Straightforward Halakhah teaches that we are responsible as a community to take immediate precautions against future harm by acting on the presumption that the accusations are true, while reserving judgement about their truth (see Talmud Niddah 61a).

These precautions include immediately removing Rabbi Walder's books from our stores and shelves. I am specifically grateful to Mr. Mordy Getz of Eichler's Bookstore in Borough Park, Brooklyn, and ShopEichlers.com for initiating this process. I encourage bookstores, publishers[1], and schools and shuls to follow his lead.

Removing the books is necessary for three reasons:

First, if the allegations are true, the books specifically contributed to giving Rabbi Walder access to victims. Experience teaches that this danger persists even after well-publicized allegations.

Second, if the allegations are true, children who read the books now may suffer religious and psychological trauma upon later discovering the author's misdeeds.

Third, whether or not the allegations are true, the continued presence of the books in our institutions at this stage discourages victims of sexual misconduct from coming forward.

These reasons are especially cogent in communities which seek to limit their children's reading to approved authors they can see as role models. In such communities, the continued presence of the books plainly functions as an endorsement.

Neither American nor Israeli nor Orthodox society has yet developed a reliable means of ensuring dignified treatment of both accusers and accused when there are accusation of private sexual impropriety[2]. Supporting victims is essential for their health and healing, and so that other victims will feel comfortable coming forward. Providing the accused with the opportunity to present a social and legal defense, and to regain his or her reputations if the defense is compelling, is a matter of justice. My position that Rabbi Walder's books must be removed is issued in full awareness of this challenge.[3]

[1]*As a draft of this statement was circulating privately, Feldheim Publishers sent the following Statement to its email list: "After consulting daas Torah, we have decided to halt the selling of Chaim Walder's titles while current allegations are being investigated. We do not judge and sincerely hope he will be able to clear his name. We will continue to consult with daas Torah as the situation unfolds.*

[2]*Clarification: Some people criticized the OP (original post) for implying that the crimes of which Rabbi Walder stands accused are mere "improprieties". That was not my intent, but the use of a milquetoast generic to cover a broad variety of cases was an error.*

[3]*Rabbi Walder has since issued a denial which specifically referenced a public Facebook post by Israeli journalist Ariella Sternbach. After reading the post, I messaged Ms. Sternbach asking if I could publish an approved translation. She said yes but has not responded since, repeated requests. I include the original post and my unofficial translation below.*

B. Followups

Q1.

What about keeping these books on one's personal shelves? The stories themselves in the books have value, even if their author no longer does. Does one get rid of the books purchased years ago?

A.

Thank you for commenting. I deliberately avoided giving public instructions to private parties[3]. But the purpose of removing the books from communal spaces now is not to inflict economic harm on the author or anyone else, so when the book was purchased is not a factor in that sense.

The original post was not clear enough about the public-private distinction. On Rabbi Yakov Horowitz's wall, in response to the question "Should we throw out his books?", I published the following: "I fundamentally agree (ביהודה ועוד) with R. Yakov Horowitz, if I understand him correctly, that this question should be handled case by case rather than as a matter of public policy. The issues are not merely the abstractions but also how individual children will react.

Q2.

That makes sense, I guess. I guess I wonder from a sense of "the content of the books have value" contrasted with "(having) the books on my shelf connotes respect for a man we should not respect". I've heard both sides.

A.

I have books by terrible people on my shelves, and terrible books by great people. I don't think that my position regarding this situation requires making an overall choice on the larger issue you raise, and I tend to think that it would not be wise to "pasken" that issue abstractly and absolutely.

I'm not sure these responses conveyed strongly enough my general opposition to using halakhah to censor art on the basis of our disagreement with an artist's values. I'll note again that I have books by terrible people on my shelves, and not primarily in the spirit of "know what you'll say in response to an apikores", even with Rav Aharon Lichtenstein zt"l's comment that this refers to "the apikores within".

There are a variety of ways to separate between art and artist, ranging from a Platonic notion that poets are simply possessed by a Divine madness – they are the shotim to whom Chazal said that prophecy was remanded after the Destruction – to a belief that people can express different aspects of their soul in different aspects of their life. See in this regard

Art is dangerous and valuable, and subjectively, people are entitled to balance that reognition in very different ways. I remember discussions with Rabbi Yaakov Nagen when we were teenagers about his appreciation for Oscar Wilde's The Picture of Dorian Gray, and also how upset a cousin of mine was when he looked Wilde up after I had quoted "The Art of Lying" in a Torah article. Art is dangerous and valuable – see in this regard materials from SBM 2011, for example http%3A%2F%2Fwww.torahleadership.org%2Fcategories%2Fsummary_sbm_fellows0.pdf&clen=63970&chunk=true. But public policy, including halakhic public policy, sometimes requires making decisions for a community that cut across and through this legitimate pluralism.

Q3.
What about the good work that someone has done? How do we balance the ethical and personal need to feel and express gratitude with the ethical and personal need to deny this person any further influence?

A.
Art can be a source of personal power, and gratitude creates opportunities for manipulation. My original post tried to make clear that I was making an immediate decision in this case based on those factors. But a general framework is needed to avoid making decisions arbitrarily. I'm including below my 2014 pre-Yom Kippur article "'Good' Deeds Done in the Service of Evil?" which sets out categories that influence my thinking.

Q4. Granted that these allegations may be true, don't we have to treat the accused as innocent until proven guilty? Until he is convicted in a court, or at least a beit din, or at least some form of neutral proceeding beyond a newspaper article, aren't we violating the prohibition of accepting lashon hora?

A.
SBM alum, noted translator, editor and historian Rabbi Elli Fischer reminded me that I had taught Shoeuil uMeishiv 1:185 many years ago in response to very similar issues. Rabbi Fischer also said that his translation of that responsum on Sefaria was based on one I had made. I can't find my original translation, but I'm including below a summary of the responsum, plus an excerpted text with a modified version of the Sefaria translation.

C. "Good" Deeds Done in the Service of Evil?

Rambam asks us to imagine ourselves and our world at equipoise, virtues and vices cancelling out perfectly, so that our next action decides how G-d will judge. But is it true justice to weigh deeds against one another, rather than responding to each deed independently? This is a metaphysical question, but I want to approach it by putting two very concrete halakhic analyses in dialogue with each other: Professor Jeffrey Rosen's take on *lashon hora*, and Rabbi Shaya Karlinsky's approach to dealing with abuse allegations.

The obvious question regarding *lashon hora* is: Why should it be forbidden? Why shouldn't we see maximum transparency as a good, and celebrate when a false image is shattered? Professor Rosen's answer is that complete transparency is never achieved. We are continually making educated guesses and filling in the blanks of our knowledge about others in order to complete our view of them. In this process, human nature tends to assign negative information disproportionate weight, and therefore a word of *lashon hora* can generate untold numbers of unjustified negative guesses. *Lashon hora* is therefore deceptive in result—it makes us think of people as worse than they are—even when true.

Rabbi Karlinsky notes, however, that abuse allegations against popular rabbis and teachers often generate the opposite reaction. People rush to serve as character witnesses for the accused and argue that their many acts of kindness and compassion make the abuse allegations implausible. Rabbi Karlinsky's response builds off a Kli Yakar. Kli Yakar understands Devarim 25:13-16 as condemning both the honest and dishonest weights of a shopkeeper who maintains two sets, on the ground that the honest weights—and all the transactions for which they are utilized—are essentially covers for the fraud. When accused by a victim, the shopkeeper will produce the honest weights and satisfied customers and use them to attack the credibility of the fraud accusation. So too, Rabbi Karlinsky argues, the abuser's acts of kindness and compassion are a core part of their abuse.

On the surface, Rabbi Karlinsky and Professor Rosen are in serious tension. However, they dovetail in the following way: Our tendency to overplay the sins of others makes it hard for us to believe that someone who has sinned seriously is also capable of great good. Where the good is incontrovertible, we may choose to disbelieve the evil, since we cannot find a coherent narrative that explains it.

Rabbi Karlinsky's solution to this problem is dramatic. He encourages us to disregard apparent good done by abusers, seeing it as instrumental to the evil, and so the evil becomes the only aspect of character left, and cannot be ignored.

I prefer a slightly different framing of the problem. It may not be that people disbelieve the accusations, but rather that they are hesitant to ruin a life for one misdeed when they know of much good the accused has done. Rabbi Karlinsky's solution theoretically works for this version of the problem as well. But I'm not sure it works in practice. Here's why:

If the fundamental issue is whether the allegations are accurate, it is directly useful to explain how the same person could have committed both great and foul deeds. But if the fundamental issue is justice, Rabbi Karlinsky's theory has a more uphill climb. It requires us to believe both that the accused committed evil deeds, and that their good deeds are essentially meaningless.

Divrei Torah during this period of repentance should meet two criteria: cause self-reflection and be concrete. So let me put this question in a framework that functions as a soul-mirror for us, challenging us to make real decisions differently.

Are there people who do good primarily to enable them to do or get away with evil? Is this an underlying motivation for other people? I think the answer to both questions is yes, which is an introduction to more serious questions.

Base motivations can often be bent to positive aims, and one can imagine a person successfully doing good their whole lives by convincing their evil inclination that, on some undefined day, their reputation will be so unimpeachable that they can act as they please without fear of consequences. So the real questions are: How much good is done by being alert for such motivations? How much harm is done by suspicion?

Answering these questions properly likely requires developing a comprehensive taxonomy of people who do both significant good and significant evil. Here is a tentative and very incomplete attempt toward that end:

1. Conflicted: They have tasted the fruit of the Tree of Knowledge of Good and Evil and found it delectable either way. There is no ultimate way to know which will predominate their life. In the terms of *mussar*, we might say that they constantly revisit the same "*bechirah* (choice) points."
2. Consistent: They are fundamentally driven by a single basic passion, regardless of whether it leads to good and evil. Examples of passion include power and eros.
3. Goal-oriented: They believe they have an end that justifies all means, and their actions ultimately aim at that end. In an extreme version, their end not only justifies any means, but fundamentally makes all other values irrelevant. They may believe their attainment of power to be an essential means, and can end up confusing that means with their ultimate end.
4. Manipulative: They have no values other than their own satisfaction, but are capable of making short-term sacrifices and long-term strategies. They will go to lengths to cement relationships that give them what they want. But they will badly use people after a relationship is established, using gratitude, insecurity, and hero worship to maintain control.

These are ideal types, and very few people, if any, fit any of these descriptions precisely. I suspect, though, that each of us can recognize a little of ourselves in at least one.

It is very important to socially reward the conflicted and the consistent for the good they do. But Rabbi Karlinsky argues that we as a community and as individuals must recognize the manipulators for who they are. Gratitude and admiration are natural and generally wonderfully positive human emotions, but they can be perverted. The question is how we can tell which kind of person we are dealing with.

Perhaps the scariest experience of my life was attending a speech by the late Rabbi Meir Kahane. What terrified me was the way he insulted his followers—he seemed depressed that his supporters were generally not intellectually gifted—and nonetheless kept perfect control over them. I submit that the surest sign of a manipulator is the presence of acolytes who cannot tear themselves away no matter how badly they are betrayed or humiliated. When apologists for the accused include people whose trust has been betrayed, look out.

Now it seems to me from a legal theory perspective that in general we rule that *מצות בין אדם לחבירו אין צריכות כוונה*= interpersonal *mitzvot* do not require intent to be legally significant. Money given to the poor is charity even if given for the sake of personal aggrandizement, even

if it is not ideal charity. So from a theological perspective, it may be that G-d rewards manipulators for the interpersonal *mitzvot* they do.

From a human perspective, we cannot allow the good they do to weaken our resolve to stop their ongoing manipulation, and, as Rabbi Karlinsky argues, we cannot think in terms of balancing their good and evil. In particular, we must take a very jaundiced view of any apparent *teshuvah*, demanding it be sustained for many years, without relapse, before even thinking of considering them changed people.

It is also very important that we identify the goal-driven, not because their good deeds are done in service of evil, but because their good deeds are not predictive of how they will behave when faced by similar choices in the future. Most specifically, they are likely to behave differently when trusted with power than when they are powerless.

In the foremath of Yom Kippur, it is and should be emotionally difficult to set high standards for accepting the repentance of others even as we ask G-d to set abysmally low standards for our own. It is similarly hard to judge others by their worst aspects as we ask G-d to judge us by our best. We are mostly, I hope, conflicted or consistent sinners, striving to find ways to empower our best selves. We would rather believe that all others are doing the same, and we pray for G-d to take that as His premise. But that may be a Divine luxury in which we cannot always indulge.

D. Responsum Shoeil UMeishiv 1:185

Introduction, followed by text with English translation

In 5613 (=1852-3), Rabbi Yosef Shaul Nathanson (1808 – 1875) was heading a successful yeshiva in Lvov (Lemberg) rather than serving as a communal rabbi. He was independently wealthy. Teenagers in nearby Community A alleged that the community melamed, or elementary school Torah teacher, had sexually abused them eight years earlier. The local rabbi used technical arguments to ward off a formal investigation in exchange for the teacher's promise to leave town.

The teacher was then hired for the same position in Lvov, apparently without anyone in Lvov knowing about the accusations. However, the rumors soon reached Lvov. One leading community member sought an investigation but was rebuffed. Eventually, an ad hoc beit din was formed in Community A that formally took the boys' testimony. A letter containing the testimony was then sent to Rabbi Nathanson. He ruled in writing that this was sufficient to demand the melamed's resignation.

At least one local rabbi sent Rabbi Nathanson a written critique if his ruling, and several important laypeople wrote him in support of the melamed's character. Rabbi Nathanson responded to these critiques in writing as well, integrating his joint responses to two of them into the version of the responsum he eventually published.

This case seems highly instructive and reflects mistakes still being made today. Let's look for example at these elements of the narrative and consider possible contemporary parallels:

a. Abuse accusations were ignored locally and addressed by mainstream authorities only after advocates make a big public fuss.

b. The eventual official investigation used technicalities to avoid the substance of the matter.

c. No effort was made to prevent the same cycle from happening somewhere else.

d. Matters improved only when a recognized scholar with independent means but no communal office took responsibility for Torah.

Rabbi Nathanson makes clear that the legal presumption of innocence still applies, and one can believe well-founded allegations only to the extent necessary to prevent harm to others. One cannot punish based on such allegations. However, one can inflict economic harm – such as the loss of a job – when that harm is a necessary consequence of preventing harm to others. Moreover, those holding Torah authority can be held to a higher standard and removed from their positions even if no specific major sins can be proved.

I don't know how the story of this teacher ended. But the fact that Rabbi Nathanson was chosen as rabbi of Lemberg four or five years afterward offers hope that his efforts eventually succeeded.

In this context, it seems appropriate to mention that I have withdrawn after decades of service on the Boston Beit Din, and made clear that I will not return until the profound concerns I have raised about its operations are adequately addressed. These concerns do not touch on the ***validity*** *of gittin issued or conversions performed by the beit din. However, for the foreseeable future, I cannot take responsibility for the beit din's policies, positions, or actions. By the same token, the beit din cannot be held accountable for mine.*

שו"ת שואל ומשיב מהדורה קמא חלק א סימן קפה

1. בשנת תרי"ג אירע בעיר אחד נשמע קול על מלמד אחד שמתגורר שם זה שמנה שנים
2. **והילדים אשר למדו אצלו בקטנותם, וכעת הם בני י"ג שנה ויותר –**
   הם מעידים שבקטנותם כאשר למדו אצלו טימא אותם במשכב זכור ר"ל
3. ובקיץ העבר, כשנודע הדבר לאיש ירא אלקים - צעק צעקה גדולה ומרה
4. ובא הדבר לפני הרב האב"ד
5. **והנה לא רצו לקבל גבי"ע =גביית עדות=**
6. **וזה האיש קבל על עצמו באלה ובשבועה שתיכף אחר ?הזמן? יסע משם**

1. In the year 5613 (1852/3), it happened in a certain city that a rumor was heard about a certain teacher who had been living there for 8 years.
2. The children who studied under him in their youth, and are now 13 or older –
   They testify that in their youth, when they studied under him, he defiled them with homosexual intercourse, God save us.
3. This past summer, when the matter became known to a God-fearing man, he cried a great and bitter cry,
4. and the matter came before the rabbi, the head of the rabbinical court,
5. and behold they did not wish to formally accept testimony,
6. and this man [the accused] accepted upon himself via an oath and a vow that immediately after the ?academic term? he would move away from there.

7. **והנה אח"כ רצה להיות מלמד בלבוב,**
8. **וכאשר נשמע הקול בלבוב - שלח בעה"ב אחד נכבד מכתב להרב אבד"ק**
9. **והוא השיב**
10. **כי ישב עם ב"ד לחקור ולדרוש הדבר**
11. **ולא מצא שמץ פסול עפ"י ד"ת,**
12. **ולא הי' שום בירור על הענין,**
13. **ואין לו לדיין אלא מה שעיניו רואות**
14. והמכתב הנ"ל תחת ידו הוא

7. Behold, afterward he wished to be a teacher in Lvov,
8. but when the rumor was heard in Lvov, one respected layman (of Lvov) sent a letter to the rabbi, head of the rabbinical court of the community[1],
9. and (the rabbi) responded
10. that he sat with a rabbinical court to investigate and inquire into the matter,
11. and did not find a smidgen of ineligibility according to the laws of the Torah (that govern the rules of evidence for ineligibility),
12. and there was no clear evidence in the matter,
13. and "a judge has only that which his eyes see".
14. This letter is in his possession[2].

[1] I think more likely the rabbi of Lvov than of X, but I am not certain

[2] It's not clear to me whether this refers to the layman's letter or the rabbi's response, or whose possession it is in. As can be seen in the first line of the next paragraph and in line 46 - there are places in this responsum where the plural seems misplaced, so perhaps read as if תחת ידי to mean that Rabbi Nathanson is in possession of the letter.

15. **וע"כ הבעה"ב דשם החזיקו המלמד** ?שיהיו? שם, כי אמרו שהוא אומן,
16. והחצוף הנ"ל צווח ככרוכיא שהוא קשר בוגדים שהם קלי הדעת,
17. ומה גם שנתן להפו"מ {=פרנסים ומנהיגים} חמשים ריניש כסף על רעקריטרינג, וע"כ המה נוגעים בדבר.

15. Therefore the laymen there (in Lvov) held on to the teacher there, because they said about him that he is a master of his craft,
16. and (because) the aforementioned brazen one crowed like a crane that (the rumor) was (the result of) a "cabal of rebels" who are frivolous people~~,~~
17. and in addition (the teacher) also gave the providers and-leaders (of Lvov) 50 "Rhinish" gulden to be kept off the army recruitment list[3], and therefore they are interested parties.

18. והנה בפ' וארא הגיעני מכתב עם גב"ע, מחותם בחתימת שלשה אנשים נכבדים

19. והעיד אלי איש אחד שמכיר בטב"ע החתימות
20. והעידו שני בחורים, האחד הוא כעת בן ט"ו שנה והאחד הוא כהיום בן י"ג שנה ויותר,
שבילדותם בהיותם לומדים אצלו כבני ט' שנה או פחות, היה מטמא אותם במשכב זכור כי היו שוכבים אצלו במטה בחדר אשר דר שם
21. והדברים באו ברוב ענין אשר הוא מגונה להעלות על הספר

18. Behold, during [the week of] Parashas Va'era, a letter reached me with formally taken testimony, signed with the signatures of three respected men,
19. and one man testified to me that he recognized the signatures (based on previous familiarity)
20. (In the letter.) two young men testified, one who is now 15 years old, and one who is today 13 years old and more,
that in their youth, while they were learning with him, as boys of around 9 years old or less, he would defile them with homosexual intercourse when they would sleep with him in a bed in the room where he lived.
21. The matters came with much detail that is too disgraceful to put in a book.

22. וזאת אשר השבתי:
23. באמת כבר הארכתי בזה בתשובה
24. דלפסול האדם צריך שיהיו שני עדים כשרים
25. והבאתי דברי הפר"ח והריטב"א דלפסול אדם צריך שני עדים כשרים, והיא כד"נ
26. וא"כ כאן שהיו קטנים בעת שהיה המעשה ואינם נאמנים להעיד בגדלם מה שראו בקוטנם, כמבואר /בחו"מ/ סימן ל"ה, רק במילי דרבנן, וכאן לפסול את האדם - ודאי לא נאמנים

22. This is what I responded:
23. In truth, I have already written about this at length in a responsum[4]
24. that to disqualify a person it is necessary that there be two kosher witnesses.
25. and I cited the words of Pri Hadash and Ritva that disqualifying a person requires two kosher witnesses. and it is like judging capital cases -
26. if so, here, where they were minors at the time of the act, and they are not believed to testify in their adulthood about what they saw in their childhood, as explained in Choshen Mishpat §35[5], except regarding matters that affect only rabbinic law [as opposed to biblical], so here, to disqualify a person - they are certainly not believed.

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[3] That is my best guess as to what the German term refers to

[4] Possibly שואל ומשיב תניינא ד:עד. But this question comes up in quote a few of Rabbi Nathanson's responsa.

[5] שולחן ערוך חושן משפט הלכות עדות סימן לה סעיף ד-ו
מי שהיה יודע בעדות כשהוא קטן, והעיד בה כשהוא גדול, אינו כלום.
ויש דברים שסומכים בהם על עדות שמעיד כשהוא גדול שראה בקטנות, ואלו הם . . .
ונאמן לומר (אפילו הוא לבדו) (טור): עד כאן היינו באים בשבת, כיון שתחומים דרבנן (הגהות אלפסי פ"ב דכתובות).
וה"ה בשאר איסורי דרבנן . . .

27. אמנם לפמ"ש המהרי"ק והתה"ד, וקבעו הרמ"א בש"ע
28. שבמקום שא"א ~~/שא"ד/~~ להיות עדים כשרים, נאמנים אפילו אשה וקטן
29. וא"כ בדבר זה שבודאי א"א להיות גדולים, וא"א שתהיו עדות בדבר
30. דבלי ספק האיש הלז אף אם הוא רשע ופריץ אבל במסתר מעשהו, ורק בילדים קטנים משחק
31. I*כמתלהלה הירה זיקים [חצים ומות כן איש רמה את רעהו] ואומר הלא משחק אני*
32. א"כ פשיטא דנאמנים להעיד

27. However, according to what Maharik and Terumat Ha-deshen wrote, which R. Moshe Isserles embedded in Shulchan Arukh,
28. in a case where it is not possible for there to be kosher witnesses, even a woman and a minor child are given credibility,
29. and if so, in this matter, where it is certainly impossible for there to be adult [male] witnesses, and it is impossible for there to be [formal] testimony regarding the matter,
30. for without a doubt this man, although he is wicked and vulgar, his actions are done in concealment, and he sports only with young children,
31. He is like a "madman shooting flaming arrows . . . who says "I am only sporting." (Prov. 26:18-19).
32. If so, it is obvious that they are credible to testify.

33. ומה גם דאטו, אנו רוצים לפסלו לעדות ולשבועה?! רק דאמרי' דשמא עשה זאת
34. וכבר אמרו בנדה דף ס"א "האי לישנא בישא אף דלקבולי לא בעי למיחש מיהא מבעיא"
35. ובמ"ק דף י"ח אמרו דהאי לישנא בישא עכ"פ מקצתו אמת
36. וא"כ איפוא אוי לנו שבימינו עלתה כך שיהיה איש כזה מלמד תינוקות של בית רבן אשר הבל פיהם טהור, ויש לחוש שהבל פיו הטמא יטמא אותם

33. Especially as, do we wish to disqualify him from testifying or taking an oath?! We are only saying that perhaps he did this,
34. and the [Sages] already said (Niddah 61) "A bad report – even though it need not be accepted, one is obligated to take it into account."
35. And on Moed Kattan 18 they said that "A bad report - in any event, part of it is true."
36. If indeed so, then woe unto us that in our days such a thing arose, that a man like this would be a teacher of young children of the study house, the breath of whose mouth is pure, and there is a concern that the breath of his unclean mouth will defile them.

37. וע"כ על דעתי שמהראוי להסיר כתר המלמדות מעל ראשו
38. ויחוש?ו? לנפש?ם? עד אשר ישוב בתשובה שלימה ובסגופים כראוי
39. ואז ישוב לקבל ד"ח =דברי חבירות= ויהיה לו לכפרה על חטאיו,
40. וכ"ז שאינו מתודה על חטאיו - לא שייך תשובה, כמ"ש התב"ש בסמ"(ב)[ד], והארכתי בזה בתשובה לדראהביטש בדבר השו"ב אשר שם.

37. Therefore, in my opinion it is proper to remove the crown of teacherhood from his head,
38. and ?they should be concerned for their lives? until he repents with a full repentance and mortifications as appropriate.
39. and then he may once again accept the ?obligations marking full committed to punctilious observance?, and he ?will have atonement? for his sins.
40. But so long as he does not confess his sins - repentance is inapplicable, as Tevu'ot Shor #4 states, and as I wrote at length in a responsum to Drohbych concerning a ritual slaughterer there.

ונאמן לומר שהיה פלוני יוצא מבית הספר לטבול לאכול תרומתו לערב, ושהיה חולק עמנו תרומה, ושהיינו מוליכים חלה ומתנות לפלוני כהן על ידי עצמו, ושאמר לו אבא: משפחה זו כשרה, משפחה זו פסולה, (או שעשו איזה סימן להודיע שאחד מן המשפחה נשא פסולה (טור), כמו שנתבאר באבן העזר סימן ב).

41. והוגד לי בשם אחד גדול הגאון הצדיק וחסיד מו"ה דוד זצ"ל בעהמ"ח אהבת דוד ויהונתן
42. שפירש בדרך מוסר מ"ש בש"ע: "המטיל מים מן הצופים ולפנים לא ישב ופניו כלפי הקדש"
43. ואמר שקאי על מי שמטיל קרי ואמר שזה מן הצופים ולפנים, דעינא וליבא תרין סרסורי דעבירה –
44. לזה אמר "לא ישב", שאינו מועיל תשובה ופניו כלפי הקדש, ודפח"ח.

(41-44 cite a homily about repenting for certain sexual sins that I do not understand well enough to translate.)

55. והנה במ"ש למעלה מהך דלישנא בישא אף על גב דלקבולי לא בעי למיחש מיהא מבעיא
56. מצאתי אח"כ במהרי"ק שורש קפ"ח שכתב
דדוקא להציל אותם הוא דמותר להמנע, אבל לא לענוש אותם שום עונש,
ולבייש אותם אסור ע"י לישנא בישא
57. **אמנם זה דוקא שם שלא היה רק לישנא בישא לבד**
58. אבל כאן היה גב"ע אף דאין כאן עדים כשרים עדיף מלישנא בישא
59. ופשיטא דיש למנוע מלתת לו תלמידים
60. כנלפע"ד.

55. Regarding what we wrote above concerning a bad report, that even though one need not accept it, one must take it into account,
56. I later found in Maharik §188 that he wrote
that it is only permissible to (take it into account) in order to save them, but not to punish them with any punishment
and it is forbidden to shame them on the basis of an evil report (about them).
57. However, that was specific to the case there, where there was nothing but a bad report,
58. but here there was formal taking of testimony, so even though there were no kosher witnesses, it is still better than a mere bad report,
59. and it is obvious that it is proper to refrain from giving him students.
60. This is my humble opinion.

61. והנה בש"ק פ' תולדות בשנה ההיא
62. הגיעני שני מכתבים המדברים ומליצים טוב על האיש הלז.
63. וזה אשר השבתי לשניהם ביחד

61. Behold, on the week of the holy Shabbat of Parashat Toldot that same year,
62. two letters reached me speaking and advocating on behalf of that man.
63. And this is what I responded to them both at once:

64. מ"ש הרב להתנצל על מה לא קיבל עדו
65. וכתב בתחלה עפ"י דברי מוהר"ם מינץ בתשובה סי' ע"ה
שאין לגבות עדות להוציא לעז
66. הנה תשובתו בצידו, וכמ"ש בעצמו,
דשאני כאן דהוא לאפרושי מאסורא
67. ואני מוסיף שכן מבואר גם לענין עדות א', קי"ל דטוביה חטא וזיגוד מנגד
68. ומבואר בש"ע חו"מ סימן כ"ח דאם הוא לאפרושי מאסורא - שרי

64. That which you the Rabbi wrote to excuse why you didn't accept testimony,
65. writing first on the basis of the statement of Maharam Mintz in Responsum 75
that one must not take testimony in order to publicize negative material about someone
66. the response is evident from his argument, and as he wrote himself
that the present case is different, because the purpose is to keep him from sinning.
67. I add that this is evident also regarding the case of a single witness (who is whipped for coming alone to testify to someone's sin), where we maintain that "Tuvia sins but Zigod [the lone witness] gets lashes,"
68. yet Shulhan Arukh Hoshen Mishpat 28 explains that to prevent someone from sinning, it is permitted [to testify as a lone witness].

69. ומ"ש מעלתו דגוף דברי העדים אינם כלום דהם קטנים
70. כ"כ בזה בתשובתי
71. וע"כ לא הבינותי
72. גם מ"ש מעלתו דהם עדות מיוחדת ולפסול אדם בעי שיהיה עדות אחת דהוה כד"נ =כדיני נפשות=
73. לא הבינותי דאני אמרתי עדיף מיני' דאפילו עדות מיוחדת ליכא
74. ודמי להאי ציידא {ב"ק מב.}

69. That which Your Honor wrote that the content of the witnesses' words are worthless because they are (testifying about what happened when they were) children –
70. I wrote the same in my responsum,
71. Therefore I did not understand (your response).
72. Also that which Your Honor wrote that they are separable witnesses, and to invalidate a person requires that the testimony be unified because it is like judging a capital case –
73. I did not understand, because I made an even stronger statement, that there isn't here even separable testimony,
74. and (so your response is) similar to that fisherman (who kept a small fish even though he already had caught a larger fish)

75. והנה עתה אשיב כסדר

75. I will now respond seriatim (to the remainder of your objections).

76. מ"ש על דברתי דלאפרושי מאיסורא ל"צ לגבות בפני בע"ד
77. ומ"ש מעלתו די"ל דבאיסורין, כיון דל"צ הגדה בב"ד, כמ"ש הגאון בעל נתה"מ בסי' ל"ח ובסי' כ"ח באורך,
    a. ה"ה דא"צ לקבל בפני בע"ד, דדוקא על הב"ד הזהירה תורה לקבל בפני בע"ד –
78. הנה גוף סברתו אינו מתקבל,
79. כי גם דברי הגאון במחכ"ת לא נהירין כלל,
80. ויפה השיב עליו במשובב
81. דרשו משם ואינו רוצה להתווכח עם הגאון מפני עשה דכבוד תורה

76. What you wrote about my statement that to prevent sin it is not necessary to collect [testimony] in the presence of the accused,
77. and that which your honor wrote, that one can say in cases of *issurin* (non-capital ritual law), since they can be adjudicated on the basis of testimony not taken in court, as the author of Netivot haMishpat writes at length in §38 and §28, that it is also true that the testimony need not be collected in the presence of the accused, because it was only courts that the Torah specifically enjoined to accept (testimony) only in the presence of the accused –
78. behold Your Honor's basic rationale does not meet with acceptance,
79. because even the words of the gaon [Netivot Mishpat], begging forgiveness of the honor of his Torah, so not seem at all illuminated (i.e. correct),
80. and the response in Meshovev Netivot is excellent,
81. but learn it from there, because I do not wish to dispute that eminent sage owing to the DO of honoring the Torah.

82. והנה מ"ש לחלק
83. דדוקא אם אנו באים לפסול האדם מחזקת כשרותו - בזה צריכין לקבל בפני בע"ד,
84. אבל כאן - אין אנו באים רק להרחיקו שלא ילמוד עם תלמידים עד שישוב -
85. אין אנו באין לפסול אותו,
86. וע"ז כתב מעלתו שלא הבין כלל שיחתי,
87. דבכ"מ שאנו פוסלין אדם - אינו רק עד שישוב בתשובה, ואפ"ה אי אפשר לפסלם -
88. ואני אומר דיפה כתב שלא הבין שיחתי,
89. דכוונתי בפשיטות דדוקא היכא שאנו מוציאים אותו מחזקת כשרותו –
90. בזה אמרינן דסתם כל אדם בחזקת כשרות וא"א לפסלו שלא בפניו,
91. ובפרט לקפח פרנסתו,
92. אבל כאן, אטו נפסל בשביל זה מחזקת כשרותו?! רק שאנו אומרים שמלמד תינוקות צריך להיות ירא וחרד לדבר ד' **יותר** משאר בני אדם,
93. וכאן אנו רואין דהוא קל,
94. ע"כ צריכין אנו להרחיקו שישוב בתשובה שלימה,
95. א"כ ע"ז ל"ש שום קבלת עדות שלא בפני בע"ד, וכל שנשמע עליו קול כזה כדאי בזיון וקצף שיהי?ו? מלמד שם עד שישוב בתשובה שלימה

82. And that which I wrote to distinguish,
83. that it is only if we are trying to disqualify someone's presumption of eligibility as a witness–
84. in that regard [the testimony] must be taken in the presence of the accused –
85. but here - we are coming only to distance him~~,~~ so that he does not study with students until he repents -
86. we are not coming to disqualify him (as a witness) –
87. regarding this your honor wrote that he did not understand my discourse at all,
88. for any time we disqualify someone it is only until he repents, but nevertheless we are not empowered to disqualify (on the basis of testimony taken not in his presence.)
89. I say that you wrote well that you did not understand my discourse.
90. My intent was simply that that it is only when we are removing someone from his presumption of credibility – it is there that we say that the default is that everyone has a presumption of credibility and it is impossible to disqualify him (on the basis of testimony) not in his presence,
91. especially if it will constrict his livelihood.
92. But here, has his presumption of credibility been disqualified?! We are merely saying that a teacher of children must be more in awe and fear of God's word than other people,
93. but here we see that he is frivolous ,
94. therefore we must distance him so that he returns in full repentance.
95. Thus, on such a matter it is impertinent whether testimony was accepted while the accused was not present, and as long as such rumors about him are heard, it is disgraceful and outrageous for him to teach there until he repents fully.

96. ומ"ש דכבר נפסלו כיון שקבל עדות שלא בפני בע"ד –
97. ?הנה רואה אנכי שבשביל זה לא רצו לקבל העדות תחלה,
98. שאם יקבלו אחרים – בודאי לא ירצה לבא לפניהם, וא"צ לבא לפניהם,
99. וגם מתיראים לקבל עדות,
100. וא"כ, אף שיקבלו עדות - שוב יפסלו –
101. אבל לא הועילו בתקנתם, דלא קי"ל דעביד איניש לאחזוקי דיבוריה,
102. כמ"ש הקצה"ח סי' כ"ח ס"ק ז' וסימן ל"ג ס"ק ב', והקצה"ח האריך בראיות ברורות,
103. וכן נכון לדינא, כמ"ש בתשובה לק"ק פרעמישלאן.

96. And your contention that [the court panelists] are disqualified because they accepted testimony without the accused present –
97. I indeed see that this is the reason they did not want to accept the testimony at first,
98. ?so that if others accepted the testimony –
99. he certainly would not want to appear before them, and (now) he need not appear before them, and (also) [so] they were afraid to accept testimony –
100. and so now, even if the (original court) accepts the testimony, they (the witnesses) will nonetheless be disqualified –
101. But their (attempt to) repair would? not have helped, since we do not maintain that one always corroborates his original statement, (and therefore we would allow their testimony anyway?)
102. as Ketzot Ha-hoshen states in 28:7 and 33:2, and brings clear proofs at length.
103. This is correct as a matter of law, as I wrote in a responsum to the holy community of Przemysl.

104. ומ"ש על מ"ש בשם מהרי"ק והש"ע סימן ל"ה דנהגו לקבל אף עדות קטן כל דא"א שיהיה שם עדים כשרים,
105. וע"ז כתב דבמהרי"ק מבואר שצריך להיות התובע טוען ברי –
106. תמהני! דשם שייך טענת בריא ומהטעם שכתב מהרי"ק, דאל"כ לא שבקת חיי,
107. אבל כאן, מה ריעותא יש במה שאינם טוענים ברי, ואטו היו צריכין לדעת, ואנן על זה העדות סומכין?!

104. What you wrote regarding what I wrote in the name of Maharik and Shulhan Arukh §35 that the practice is to accept the testimony of even a minor when it is impossible for valid witnesses to have been present -
105. about this you wrote that it is clear from Maharik that the claimant must be making a claim out of certainty (for us to accept the corroboration of a minor) –
106. I am astonished! There, a claim of certainty is relevant, for the reason that Maharik states: that otherwise, [if claims need not be made with certainty], you would not be allowing anyone to live a normal life (owing to frequent false accusations)
107. But in the present case, why does it matter that (the adults who want the teacher fired accusers) lack certainty?! Should they have known (what the teacher was doing?!) Are we relying on their testimony?!

108. ומ"ש דל"ש אין אדם מע"ר =משים עצמו רשע=, דרצונו לעשות תשובה,
109. וע"ז כתב מעלתו דזה שייך דוקא לגבי עצמו, אבל לא לענין לפסול האדם עי"ז –
110. מאד תמהני, דאטו פוסלין ע"י עדותם?! דהא באמת עדות קטנים היו, אבל העדות לפסול הוא מצד התקנה!

108. Regarding what I wrote that the principle "A person does not establish themselves as wicked" (meaning that we do not give a confessions credibility to disqualify the confessor) does not apply here, where their desire (in confessing) is to repent (of their sinful deeds, so their confession will anyway not result in their disqualification),
109. and regarding this, Your Exaltedness wrote that this (exception for confessions in the course of repentance) is so only with regard to the confessing person, but with regard to disqualifying someone else –
110. I am very astonished, because are we disqualifying someone based on their testimony!? In fact they were minors, and the testimony to invalidate is accepted only because of the decree (that we should accept their testimony in cases where there is no alternative).

111. ומ"ש דשייך פ"ד {=פלגינן דיבורן} –
112. לא יפה כוון,
113. דכאן, כשאנו מפלגין דבורא שלא רבע לזה - שוב אין כאן שום עדות, דבאמת הוא קטן,
114. רק דאמרינן מ"מ היו שם, ומפני התקנה מקבלים,
115. אבל שיעיד שרבע - ע"ז לא מהמנין ליה, וז"ב.

111. Regarding what I wrote, that the issue of "splitting the statements (of the witnesses) is relevant here (meaning that to accept their statement, we have to believe that the sexual activity occurred but not that they took part in it willingly) -
112. You misunderstood me,
113. because here, when we split his words and say that he did not have intercourse with this specific boy, there is still no valid testimony, for in truth he was a minor;
114. just (what I meant was) that we say that regardless they were in fact present, and we accept their testimony because a decree was made (that accepting such testimony is necessary, as explained above)
115. But for [them] to testify that [the teacher] committed sodomy (and therefore should lose his presumption of credibility – for that they would not be given legal credibility (since they are testifying about events that they witnessed as minors. This is clear.

E. Facebook <u>Post by</u> Ariela Sternbach **<u>November 14, 3:54 pm</u>**

<u>followed by un</u>authorized English translation by Aryeh Klapper

פוסט שלא רציתי לכתוב אבל היושרה הפנימית מחייבת, ומקווה שה' יהיה בעזרי לומר את המילים הנכונות.
ב-2016 רציתי כשעבדתי בידיעות אחרונות נפגש איתי מישהו זר שלא הכרתי והחתים אותי על סודיות תוכן הפגישה ביננו. נושא הפגישה היה חיים ולדר. אחרי ההלם הראשני והאגרוף לבטן התחלתי לפעול.
לא נתנו לי הרבה מידע, עודכנתי שיש הסכם סודיות עם נפגעת שלא רוצה לדבר וביקשו ממני למצוא נפגעות אחרות.
הפכתי עולמות באופן מאד יצרתי להגיע לנפגעות, אפילו יצאתי לדייט בוגדני עם מטפח מהמרכז לילד ולמשפחה בבני ברק שלחץ להכיר אותי יותר (סליחה לגרושתו, שמחה בשבילך שהתגרשתם) כדח לנסות לדלות ממנו מידע על ההתנהלות של ולדר במרכז הטיפולי.
לא עליתי על קצת חוט משמעותי וזנחתתי את העניין, חשבתי גם שאולי השתמשו בי לנסות למצוא עליו רפש.
ב-2018 זרקתי כבדרך אגב את השם של ולדר לדמות ציבורית מקושרת מאד, יומיים אחרי פנה אליי חבר טוב של ולדר ביקש להיפגש איתי ולהציע עסקת חליפין (במילים האלו, מתועד) נפגשתי איתו הוא אמר לי בפנים ״חיים הוא חבר טוב שלי, היה הסכם בין מישהי עם טענות לבין אישתו של חיים, חיים אפילו לא יודע על ההסכם. מדובר בבחורה מסכנה שחיפשה אותו. אני מציע שתפגשי עם חיים יש לו הרבה סיפורים על המגזר החרדי לתת לך הוא ממש רוצה להיפגש איתך.״ העסקת חליפין הייתה - ניתן לך סיפורים אחרים על המגזר ואל תחפרי .
מכיון שלא מצאתי עליו כלום אמרתי לו את האמת ״חיפשתי ולא מצאתי על ולדר כלום, הנחתי לזה, לא מחפשת להשחיר אדם בכוח״
אבל חיים התעקש להיפגש איתי.
ביולי 2018 הוא כתב לי שיש לו הרצאה בביתר וישמח שניפגש, נפגשנו. הוא הביא איתו לפגישה ערימת ספרים שלו והתעקש להעניק לי אותם דיברנו באופן כללי על העבודה שלנו ובכנות לא זוכרת מה דובר על העניין הספציפי הזה.
ועכשיו לתקופה האחרונה:
כשהתפוצצה פרשיית משי זהב השם של חיים ולדר עלה שוב שוב, כל עיתונאי כמעט קיבל את השם שלו .
אין טעם שאכנס לפרטים של פוליטיקה פנימית אבל ״אנשי משי זהב״ ניסו בכל דרך לקדם תחקיר על ולדר. הפעם לא הייתי צריכה לנחש - ידעתי שיש גורמים אינטרסנטים שרוצים את הראש שלו.
בבסיס כל תחקיר יש גורם עם אינטרס וזה בסדר ולגיטימי כל עוד יש אמת בפרסום וחשיבות ציבורית אבל הפעם פחדתי שיפילו אותי עם עדויות שקריות שנתפרו בתחבולה ובכסף רב.
באחד הימים כמעט השתכנעתי, מכר כתב לי, שהמטפל שלו - דמות חסידית רצינית ביקש לשוחח איתי ולתת לי מידע על ולדר, לאחר שבירר עליי והבין שאפשר לסמוך עליי.
החלטתי להקשיב אולי בכ״ז יש דברים בגו אבל כבר ביום שלמחרת אותו מכר לחץ עלי ״תעשי לו טלפון. הם בתחושה שיש להם שעון חול ופוחדים לאחר את הרכבת. לוחצים עלי״.
הרגשתי ששוב מנסים להשתמש בי, מה הלחץ? למה כל כך דחוף להם לפעול?
קיימתי שיחה עם אהרון רבינוביץ, שיתפנו אחד את השניה במידע שברשותנו, הוא הודה בפני שלא מצא כלום על ולדר ומבחינתי זה היה אישור לכך שחיים ולדר קורבן.
יותר מכך, מאז הפגישה עם ולדר שמרתי איתו על יחסי ידידות. התייעצנו אחד עם השניה בשלל נושאים והיה ביננו קשר טוב של אמון.
חיים ולדר ידע לכל אורך הדרך שרוצים לפרסם את מעשיו, בשלב הזה הוא כבר שיתף אותי והתייעץ איתי ואני שהאמנתי לחפותו המלצתי לו לשתוק ולא להגיב לשמועות שרצות אודותיו. באמת האמנתי או שרציתי להאמין שמדובר ברדיפה אישית.
היו לנו לא מעט שיחות והתכתבויות על כך, פעם אפילו כתבתי לו בהומור ״רק אם מוצאים עליך משהו אל תעשה לנו משי זהב״.
והנה התפנית: הבוקר פגשתי את אהרון רבינוביץ, שמעתי ממנו את הפרטים שאי אפשר לפרסם - הסיבה העיקרית היא שמירה והגנה על הנפגעות.
אני מאמינה לנפגעות. אני מאמינה לפרסום שחיים ולדר פגע בנשים וניצל אותן מינית וחמור מכך נפשית.
הרבה יותר נוח לי לשתוק, להתעלם מתחקיר, בטח כזה שאינו שלי.

דווקא בגלל שכל כך הרבה אנשים מתקשים להאמין שחיים ולדר האגדי עבריין מין כנראה, חשוב לי לומר - אני מאמינה לנפגעות. הן לא פעלו מתוך אינטרסים ולא ששו לשתף פעולה, שירה ואהרון (המדהימים!) עמלו רבות לקנות את אמונם ולחקור ולבדוק היטב שלא טמונה כאן מלכודת אינטרסים.
ועוד נקודה חשובה ביותר - מטבע הדברים, במסגרת תפקידו החינוכי חיים ולדר מחזיק מידע מסווג על המון המון אנשי מפתח, בכירים ורבנים במגזר החרדי - התלונות הנואשות מגיעות ישירות אליו - אל היועץ החינוכי מספר אחד בחברה החרדית.
לא אגזים אם אומר שבארון האישי של ולדר נמצאים השלדים הגדולים ביותר של החברה החרדית. עכשיו אתם יכולים לשער לכמה אנשי תקשורת, רבנים, ומנהלים יש עניין לשמור על שמו הטוב.
ברור לי שהרבה אנשים יקחו את המילים שכתבתי כאן וישתמשו בזה כדי להוכיח עד כמה רדפו את ולדר -הנה אני בעצמי מפרטת לפרטי פרטים כמה ״חיפשו״ אותו. ההפך הוא הנכון - כתבתי באופן הכי שקוף שיכולתי כדי להבהיר עד כמה אנחנו נזהרים.
מתים מפחד ליפול כלי משחק בידיים לא נקיות.
הפחד הכי גדול שלי הוא לטעות ולהרוס חיים של בן אדם. אנחנו לא קמים בבוקר לעריפת ראשים, יש אייטמים שנפשית הרבה יותר כיף לעבוד עליהם, ולא חסר אבל השליחות הציבורית מחייבת להזהיר ולפני הכל להגן ולמנוע פגיעות נוספות.
לפני כחודש התפרסם תחקיר שבמרכזו אנשי תקשורת חרדים, מישהו כתב לי שהבריות מרננות אחריי שאני לא מפלילה את אחד המרכזיים שם כי הוא קונה לאבא שלי עליות בבית הכנסת.
צחקתי בקול.
המחויבות שלי היא כלפי שמים בלבד, ואת האמת צריך לומר ואת הנפגעות צריך לחבק ולחזק גם אם זה כולל מחיר אישי ושריפת קשרים וגשרים.
אנחנו כאן למען החלשים, לא כדי לשרת את מניעהם של החזקים.
לואיס ברנדייס, שופט יהודי אמריקני בבימ״ש העליון אשר כונה פרקליט העם אמר: ״אור השמש הוא חומר החיטוי הטוב ביותר״.
תודה לכל קרני השמש שעמלו על החיטוי הזה.
הפוסט נסגר לתגובות כי אין לי יכולת לשלוט במה שייכתב ולהיחשף לתביעת דיבה.

Unauthorized English translation by Aryeh Klapper

A post that I did not want to write, but that integrity requires. I hope that Hashem will aid me to say the proper words.

In 2016, when I worked at Yediot Acharonot, I met a stranger who made me commit to confidentiality about the content of our meeting. The topic of the meeting was Chaim Walder. After the initial shock, which was like a punch in the gut, I began to work.

They did not give me much information. I was told that there was a nondisclosure agreement with a victim who did not wish to speak, and asked to find other victims.

I turned over worlds in a very creative fashion to reach victims. I even went out on a treacherous date with a therapist from the Center for Children and Families in Bnei Brak who pressured to "know me better" (I apologize to his ex-wife, and am glad for her sake that they divorced) to try to extract information from him about Walder's conduct in the treatment center.

I did not alight on even a thread bordering on significance, and I abandoned the matter. I thought that perhaps they had used me to try to find dirt on Walder.

In 2018, I tangentially threw Walder's name out to a public figure with many, many connections. Two days later, a good friend of Walder reached out to me and asked to meet with me in order to suggest an deal (in those words, documented). I met with him, and he said to me openly: "Chaim is a good friend of mine. There was an agreement between someone who had complaints and Chaim's wife. Chaim didn't even know about the agreement. We are speaking of a pitiable young woman who sought him out. I suggest that you meet with Chaim. He has many stories about the Charedi sector to give you. He genuinely wants to meet with you." The deal was – we will give you other stories about the sector, but don't dig (into this story).

Since I had found nothing against Walder, I told the truth: "I have searched but not found anything against Walder. I let it be – I don't seek to blacken someone actively".

But Chaim insisted on meeting me.

In July 2018, he wrote me that he was giving a lecture in Beitar and would be happy if we met. We met. He brought with him to the meeting a stack of his books and insisted on giving them to me. We spoke in general terms about our work, and frankly, I don't remember what was said about this matter specifically.

Now to the last period:

When the story of Meshi-Zahav blew up, the name of Chaim Walder came up again and again. Just about every journalist received his name.

There is no reason for me to enter into the details of internal politics, but "Meshi-Zahav's people" tried in every way to push forward an investigation of Walder. This time I did not need to speculate – I knew that there were sources who wanted his head to further their own interests.

At the foundation of every investigation, there is a self-interested source, and this is in order and legitimate so long as the published story is true and has public significance. But this time I was afraid that they would entrap me with false testimony sewn together by trickery and lots of money.

One of those days I was nearly convinced. An acquaintance wrote me that his therapist – a serious chasid – sought to speak with me and give me information about Walder, since he had

researched me and realized that he could rely on me. I decided to listen – maybe nonetheless there was something there – but already the next day that same acquaintance pressured me: "Call him! They gave the impression that their sandclock is running out, and they are afraid lest they delay the train. They are putting pressure on me!"
I realized that they were again trying to use me. What was the pressure? Why was It so urgent for them to get action?!
I had a conversation with Aharon Rabinowitz, so that we could each provide the other all the information in our possession. He admitted to me that he had found nothing on Walder. From my perspective, this certified that Chaim Walder was a sacrificial lamb.
More than that – since my meeting with Walter, I had kept up a friendship with him. We consulted with each other on a rich variety of topics, and we had a good and trusting connection.
Chaim Walder knew all the long way through that they wished to publicize his deeds. At this stage, he partnered with me and consulted with me, and I, believing in his innocence, advised him to be silent and not to respond to the rapidly circulating rumors about him. I truly believed, or wished to believe, that we were dealing with an effort to destroy based on personal enmity. We had not a few conversations and written exchanges about this. Once I even wrote him humorously: "Just if they find something on you, don't do a Meshi-Zahav (=attempt suicide) on us!"
Here's the turning point: This morning I met Aharon Rabinowitz. I heard from him all the details that cannot be published – the main cause for this being to protect and defend the victims.
I believe the victims. I believe the report that Chaim Walder hurt women and abused them sexually, and even more seriously, psychologically.
It would be much more pleasant for me to be silent, to look away from any investigation. Certainly from one such as this which is not mine.
More than that, this post burns so many ties I had with public and media figures who would certainly have "compensated" me for my silence in the matter and given me "good items", but the truth is more important than anything. It is specifically because so many people are having difficulty believing that the legendary Chaim Walder is a sex offender, as It appears, that it is important for me to say: I believe the victims. They did not act out of self-interest and were not overjoyed to work together. Shira and Aharon (both amazing!) worked hard to gain the victim's trust and to investigate and check carefully that there isn't some interest-driven trap hidden in this.
Another, more important point – by the nature of his educational position, Chaim Walder has access to confidential information about many key people, leaders and rabbis in the Charedi sector – the most desperate complaints go directly to him as the number one educational counselor in Charedi society.
I would not be exaggerating if I said that Walder's personal closet contains the largest skeletons of Charedi society. Now you can imagine how many media figures, rabbis, and executives have an interest in preserving his good name.
I recognize that many people will take the words that I have written here and use them to prove how far they went to purse Walder – indeed I myself have detailed, in great detail, how far they went to look into him. But the opposite view is correct – I wrote as transparently as I could in order to make perfectly clear how cautious we are.

We are in deathly fear of becoming playthings in unclean hands.
My greatest fear is to err and destroy a human being's life. We do not wake up in the morning seeking to chop someone's head off. There are many items that psychologically I would enjoy working on more, and they are not lacking, but my public mission requires me to be cautious, and before all to protect and to prevent additional victimizations.
About a month ago, an investigation was published that had at its center Charedi media figures at its center. Someone wrote to me that there was a widespread rumor that I was not condemning one of the central figures because he buys my father aliyot in shul.
I laughed out loud.
My obligation is only to Heaven. The truth needs to be said; the victims need to be embraced, even if this entails paying a personal price and burning ties and bridges.
We are here for the sake of the weak, not to serve the purposes of the strong.
Louis Brandeis, the Jewish American Supreme Court Justice who was known as "the tribune of the people", said: "Sunlight is the best disinfectant". Thank you to all the rays of sunlight who worked on this disinfection.
The post is closed to comments because I have no ability to control what will be written and no interest in being sued for libel.

Part 2 – SBM 2021

A. *Lashon HaRa*: Law or Ethics?

Week 1 Summary of SBM 2021

By Tani Greengart and Jacob Klein

Halakha is generally thought of as a set of established rules that mandate detailed and objective behavior. However, in the area of *lashon hara*, this may be incorrect. The widely accepted concept/psak that *lashon hara* is permitted when it leads to a sufficient positive purpose (*leto'elet*), without rigorously defining which purposes are sufficient, presents the *halakhot* of *lashon hara* as more akin to broad principles that are left for each person to interpret in their own lives.

Rav Elchanan Wasserman makes the radical move of seeing *lashon hara* as a paradigm rather than as an exception. He contends that all interpersonal halakhic prohibitions are permitted *le'toelet* (Kovetz He'arot, Yevamot 90b).

Rav Wasserman's derives this stance from Ketubot 32a. The Talmud there cites *beit din*'s legal power to administer lashings as punishments for Torah-level crimes as an exception to the Torah prohibition against *chavalah* (injuring another person). Rav Wasserman wonders why the gemara does not instead cite the authorization for parents or teachers to administer corporal punishment. He answers that because those authorizations apply only when the punishment is administered for the benefit of the person being punished, they are not exceptions to *chavalah* – rather, they do not fall into the category of *chavalah* in the first place. (Therefore, in a society which views corporal punishment as against the best interests of children, we might interpret that it is forbidden.)

Rav Wasserman expands this into a more blanket statement: All purely interpersonal prohibitions are defined to exclude cases where the action is done for a positive purpose. Thus the prohibition against afflicting an orphan does not prohibit chastisement necessary for job training; one may hate a person who commits certain sins without repenting; and one may speak evil of others (*lashon hara*) to break up a fight. One question Rav Wasserman does not answer, however, is what specific level of "positive purpose" is required to void all these prohibitions. In shiur, we discussed whether we felt that the concept of *leto'elet* needs to be defined rigorously for each situation, or is it instead better to leave the definition of *leto'elet* open for each person to interpret in whichever way they think is right for each situation. According to the first position, interpersonal *halachot* seem like formal laws, while according to the latter position, they seem more like general ethical principles.

We then compared Rabbi Wasserman's broad perspective on *bein adam lechavero* to the analysis of *lashon hara* in Minchat Asher Vayikra 41:3 (Rav Asher Weiss). Minchat Asher references the Vilna Gaon's (GRA) commentary to Esther 10:3, which cites *lashon hara* and anger as examples of bad *middot* (character traits). He understands this to mean that *lashon hara* is not a legal prohibition in the usual sense of an aversion to specific actions. Rather, while *lashon hara* is not an emotional state like anger, which is entirely a middah, *lashon hara* is prohibited as an expression of bad middot.

Lashon hara therefore falls into a nuanced category lying between *middot* and *halacha*. Words that can be taken as *lashon hara* are not inherently sinful. To be careless and speak *lashon hara* in levity is sinning through negligence, and intentionally attempting to hurt someone with words is certainly *lashon hara*. However, if one speaks in a way that

unintentionally harms someone else, not through carelessness, Minchat Asher contends that one has not sinned even accidentally, because the action in no way reflects character. He also uses this approach to explain the Chofetz Chayyim's contention that the same words can be innocent reproof when said in a sincere attempt to help a friend improve, but become *lashon hara* when said hypocritically by someone who shares the fault they are criticizing.

Minchat Asher uses this understanding of *lashon hara* to address the question of whether teachers can ask students to inform on their misbehaving fellow students. Rav Weiss contends that it depends on the maturity of the students. As they approach bar or bat mitzvah, they will be more able to understand that *lashon hora* is generally wrong but that exposing a sinner may nonetheless be permitted or even obligatory when done *leto'elet* and with good intentions (these being described by Rav Weiss as *devarim peshutim*, simple matters).

Rav Moshe Feinstein (Igrot Moshe YD 2:103 and 4:32) contends that while *lashon hara* is theoretically permitted in a case of *leto'elet*, nevertheless telling students to inform is always forbidden. (Rabbi Klapper suggested that he meant this only when the misbehavior would not cause interpersonal harm.) Rav Feinstein calls it an "ugly matter" for a teacher to encourage such a thing, as he fears it would cause students to take the stringent prohibition of *lashon hara* less seriously. Rav Feinstein acknowledges that stories abound in the gemara about great rabbis telling their teachers about their friends' faults, but he explains that in those cases, the rabbis who told did it with pure intentions, to help their friends improve. If one could be sure that all students would have such pure motives in telling the teacher, there might be room to say it is permitted. However, practically one cannot assume that even teachers have the proper motives in these situations, much less that the children do, and therefore teachers should not encourage students to tell them about classmates' wrongdoings.

Rav Feinstein further contends that even in talmudic times, teachers never told students to inform. The Talmud only tells of cases where students decided this of their own volition.

We wondered why there should be a difference between students informing on their friends of their own volition, and doing so after being told to by a teacher. Some SBM Fellows suggested that the teacher's pronouncement would lead to the students speaking more *lashon hara*, or that students would be more likely to speak with improper motives after being encouraged by the teachers. Alternatively, Rabbi Klapper suggested that perhaps the whole purpose of education is for teachers to show students how to make their own decisions in complex situations like these, and the only way to do that is to give them full autonomy to choose whether to tell on their friends. Regardless, we noted that it was interesting that while it is fundamentally permitted for students to tell on each other, so long as this is done for the right reasons, their teachers are not allowed to tell them that it is the right thing to do.

This connects to the suggestion we made when discussing Rav Elchanan Wasserman's broad view of interpersonal mitzvot. It is possible that halakhic concepts, such as *leto'elet*, are deliberately left vague and undefined so as to leave room for people to make their own moral decisions and develop their moral character. This means that as we move into this summer's discussion of privacy in halakha, we need to be thinking not only about what Jewish law in this area should be, but about the extent to which halakha should be formulated as law in this area rather than left as broad principles for individuals to apply in accordance with their own values and character.

B. Privacy and Halakhah

Week 2 Summary of SBM 2021

by Miriam Smirnov and Lexie Botzum

SBM 2021 is focused on the rights and obligations inherent in the concept of privacy. But we discovered this week that we don't really even know what the word "privacy" itself means! Certainly the word never appears in TaNaKh. So we read the seminal 1890 article "The Right to Privacy", by Samuel Warren and his law partner, the future Justice Louis Brandeis. We looked at some potentially connected halakhic cases such as the Ba B'Machteret, the thief who is caught tunneling into someone's home, and the rules for partners who wish to divide a previously shared space. We also examined the relationship between halakha and other sorts of Torah norms, and the relative strengths of mitzvot. Even if the Torah values privacy, what status and force do values have?

In this article, we will give you a peek into our amazing week of learning together - we will review sources, share interesting questions, go on an apparent tangent, and *perhaps* even emerge with a working definition of how "privacy" can be understood within a halakhic context. Thanks for joining us on our journey!

A. Warren-Brandeis Article:

Warren and Brandeis reviewed almost 400 years' worth of common law precedents to create a definition of privacy, its limits and obligations, that continues to have enormous influence on American law.

They presented a fascinating history of privacy protection in the common law. The law provided "full protection in person and in property" from the start, but understood that to mean only that law gave a remedy for **physical** interference with **physical** life and property. Over time, the definitions of "person" and "property" expanded to recognize the legal value of "sensations", so that the law now sought to protect against things such as intimidation (as in our days cyberbullying) or discomfort (such as that caused by neighbors playing loud music at 2am), or libel and slander, lest we be publicly shamed. The basis for this development was not property law - the (primary) concern wasn't with the possibility of losing income or customers - but rather a new recognition that we all have the right to our own "inviolable personality".

Warren and Brandeis argue that this right applied regardless of the objective value of someone's ideas or art or work products. I have the same and equal right to my doodle as the greatest artist has to their masterpiece. They posit a general right to privacy for thoughts, emotions, facial expressions (!), personal conduct, attitudes and conversations.

Interestingly, they make an exception in the case of political figures. They say that people running for public office must surrender their right to privacy, because the needs of democratic process trumps notions of privacy. But for almost all others, there is a general "right to be left alone", which everyone has the responsibility to protect for each other.

Does halakhah recognize a "right to be left alone"?

B. Ba baMachteret

The Torah tells us that a homeowner may (and perhaps ought to) kill a furtively trespassing thief (unless the thief would certainly flee rather than kill if confronted). Does the Torah's ruling emerge from something akin to the 'right to an involate personality", free from threats to life (and with a right to private space)? Is it rather a psychological accommodation to the reality of the homeowner's fear (like the case of the blood avenger, comparison implicit in Rav Yosef Bekhor Shor's commentary)? Or is it a pragmatic move to create a deterrent against people tunneling into other people's houses for the purpose of assassination?

C. Eavesdropping

The opening Mishnah of Tractate Bava Batra rules that partners who divide a shared courtyard can compel each other to build a community-standard wall between their newly separate spaces. The Gemara wonders whether this demonstrates that *hezek reiya* (= damage by seeing) is called "hezek", meaning that it has legal force. The outcome is that it may in some sorts of spaces and cases and not in others; there is no one all-encompassing rule. We attempted to determine what *hezek reiya* fundamentally *is* - is it the embarrassment or discomfort I experience from having my private matters observed? Is it that a loss of privacy lowers my property's value, so that I can force a contribution for preventative measures?

Chashukei Chemed (Rav Yitzchak Zilberstein) on this Gemara connects this question to the issue of whether eavesdropping is forbidden. Am I permitted to listen to someone who is unaware that I am listening? (It's unclear to what exact scenarios this refers—is the sheilah about permissibility of purposefully and intently "listening in" on another conversation, or is it about whether I must actively avoid overhearing others' conversations?) On the other extreme, he considers whether one may surreptitiously put listening devices in the home of someone you suspect of intending to damage you.

Chashukei Chemed initially presents the issue as a *machloket rishonim.* Why doesn't the Mishnah require the partners to build walls that effectively block sound as well as light? Meiri explains that the Talmud's apparent lack of concern for *hezek shmiya* is grounded in the empirical reality that "people are careful with their words". This suggests that where people are *not* careful with their words, halakhah would be concerned for *hezek shmiya*. By contrast, Rabbi Eliyahu Mizrachi states categorically that unlike *hezek reiya, hezek shmiya* is not considered *hezek*.

However, Chashukei Chemed concludes that even Mizrachi may concede that halakhah forbids listening to others' conversations, in person or via device. Mizrachi's point is only that the law does not force people to build walls or otherwise prevent themselves from accidentally overhearing - because "the walls have ears" anyway, it is the speakers who bear the burden of preventing accidental overhearing.

Finally, Chashukei Chemed makes a concession that harkens back to R. Elchanan Wasserman claim (see last week's summary) that all interpersonal mitzvot are permitted when done *l'toelet*, for a positive purpose. He suggests that eavesdropping is permitted for reasons beyond protecting oneself from damage. For example, a teacher who suspects a student of wrongdoing may listen in on the student if their purpose if to fix the students' ways. (Rabbi Klapper and some fellows were skeptical of this strategy.)

D. Mushba V'Omed M'Har Sinai

The Talmud in several places describes the Jewish people as mushba v'omed m'har sinai (sworn to observe the mitzvot at Sinai). The halakhic implication is that oaths to refrain from Torah violations are redundant and have no legal force.

On Shavuot 23b, the Gemara raises an apparent contradiction based on this principle. The Mishnah states that a Jew who takes an oath not to eat violates their oath by eating *neveilot* and *tereifot*. Since *neveilot* and *tereifot* are already forbidden by the Torah, shouldn't the oath be considered redundant?

R. Yochanan responds that the oath is an *isur kollel*: even though the Jew ate forbidden foods, the oath is not intrinsically redundant since it also forbids eating foods that would otherwise be permitted.

Reish Lakish offers a different suggestion: this is a case of one eating only a "*chatzi-shiur*" = less than the amount necessary to deserve lashes for the violation. He notes that there is a dispute between Rabbi Akiva and his colleagues as to whether an oath "not to eat" includes such small amounts. According to Rabbi Akiva, it does; according to the Rabbis, one has to explicitly state that such small amounts are included. Either way, Resh Lakish contends that Jews are not foresworn from Sinai not to eat a *chatzi-shiur* of forbidden foods.

The Gemara then goes through a formalistic process of determining why each amora didn't use the other's resolution. It asserts that R. Yochanan prefers his solution because it enables him to explain the Mishnah in accordance with all opinions without varying the text of the oath.

Tosafot ask: Isn't there an obviously better answer for why R. Yochanan's rejects Reish Lakish's *teirutz*? Yoma 73b teaches that while Reish Lakish holds that eating a *chatzi shiur* is at most rabbinically forbidden, R. Yochanan holds that it's *d'oraita*, Biblically forbidden. Therefore, shouldn't the Gemara have said that for R. Yochanan, the oath wouldn't take effect on a *chetzi shiur*, since a Jew is already *mushba v'omed m'har sinai*?

Tosafot are forced to respond that the *d'oraita* prohibition of *chatzi shiur* is only "*isur b'alma*", and doesn't fall under the category of *mushba v'omed*. But how can a biblical prohibition not be included within the oath at Sinai? Nonetheless, we saw that Rambam joins Tosafot in categorizing *chatzi shiur* as Biblically forbidden and as not sworn from Sinai. This reading of Rambam is explicit in R. Yosef Caro's commentary Kessef Mishneh.

Yemei Shlomo, however, cites Rashba as contending that Rav Yochanan in fact rejects Reish Lakish's assertion that an oath takes effect on a *chatzi shiur*, and that by definition, a Jew is *mushba v'omed* on every *issur d'oraita*.

Yemei Shlomo may be trying to forestall an intriguing and seemingly contradictory notion that attracted Rabbi Klapper. Yoma 73b suggests that Reish Lakish holds that a *chatzi shiur* is Rabbinically prohibited, and that a Jew is *mishba veomed* regarding *chatzi shiur*. Our sugya in Shavuot leads Tosafot in Rambam to conclude that for R. Yochanan *chatzi shiur* is Biblically prohibited and yet a Jew is not *mushba v'omed* regarding *chatzi shiur*. Can the two sugyot be put together so that Rabbinic prohibitions are foresworn from Sinai, and yet some *deoraita* prohibitions (those considered *issur b'alma*) are not? What would this mean for our conception of these mitzvot, of the rabbis' power and halakhic project, and of the role halakhah serves? Where would a right to privacy derived from specific mitzvot, but not subsumed under any specific mitzvah, fit in that scheme?

C. Privacy, Halakhah and Constitutional Interpretation

Week 3 Summary of SBM 2021

The U.S. Constitution nowhere mentions a right to privacy explicitly. Nonetheless, whole swathes of current Constitutional law are predicated on the existence of such a right. Supreme Court opinions have grounded rights to abortion and gay marriage in privacy. Partially as a reaction, conservatives have gravitated toward "Constitutional originalism". Can these controversies about privacy in specific, and interpretation in general, teach us useful lessons about Halakhah? Does Halakhah have anything to say on these issues that might contribute to the broader discussion?

Mishnah Chagigah 1:8 describes "*heter nedarim*" (annulment of vows) as "suspended in air", and those of Shabbat and *meilot* (abuse of sacred objects) as "mountains hanging by a hair, because they have little Scripture and many laws". Halakhah is certainly no stranger to the concept that an unwritten tradition can assign meanings to a legal text that no outside reader could derive. But – there is a difference between accepting a traditional meaning and creating one, and the Mishnah points to these examples precisely because they are exceptional.

In the 1960s, Rabbi Normal Lamm z"l testified to the Senate Judiciary Committee that Jewish values supported "more active and aggressive civil legislation to protect privacy" and that "the spirit of Jewish law rejects the idea of a national databank". The article is noteworthy for its mode of argument, and for its specific arguments, even more than for its conclusion.

Rabbi Lamm's article was originally published well before Roe v. Wade; a postscript in a later edition added that Roe had taken "the legal concept of privacy to what I consider an extreme", and that "there is to my knowledge nothing in the Jewish legal literature that countenances such an extension of privacy to cover the exclusive right of a woman to decide the life and death of a fetus". Nonetheless, I think it's fair and necessary to consider the possibility of Roe when evaluating the article, just as it's fair and necessary to consider it when evaluating whether constitutional law should include a right to privacy.

One of Rabbi Lamm's contributions was to consider privacy in a theological as well as anthropological framework. G-d is not only unknowable, and He does not hide His face only to protect human beings; rather, he "asserts his exclusive Divine privacy", and "if this is true of the Creator, it is true of His human creatures as well". One who seeks to understand G-d beyond the boundaries He sets infringes the dignity (*kavod*) of G-d; dignity is therefore a correlative of privacy. Finally, human beings have a right to their privacy and dignity even in the presence of G-d; "So sacred is this center of privacy in man that even G-d does not permit Himself to tamper with it; that is the meaning of the freedom of the will, the moral autonomy of man." "Certainly, then, it is criminal for man to attempt thought control, even if benevolent."

Now one might think that theology has no place in Constitutional law. But reading Justice Goldberg's opinion in Griswold, as SBM did this week, gives one a very different impression. Goldberg rejects Connecticut's law against contraception because it would allow police to invade the "sacred precincts" of the marital bedroom. Similarly quasireligious language can be found just about every time the Supreme Court extends privacy to new cases, and this is no coincidence. Since privacy is not explicit in the Constitution, it must be grounded in something else that can plausibly claim to have been assumed by the Constitution, and that can plausibly claim to represent a cross-generational consensus.

One obvious problem is that according to Jewish tradition human beings are under G-d's constant omniaware surveillance. "Know what is above you: A seeing eye, a hearing ear, and a book in which all your deeds are recorded". Indeed, one of my high school rebbeim was fond of quoting the Chofetz Chayyim as celebrating the advent of cameras for enabling us to experience that Mishnah for real/

Rabbi Lamm with classically deft *chutzpah* suggests that this "sage advice should be paraphrased to counsel us on how to avoid the breakdown of our privacy". But it is not clear why should human rulers not take G-d's surveillance as their model as much as His respect for autonomy. More precisely, it is not clear how one could persuade a human ruler that doing so would be wrong.

The conceptual movement from privacy to dignity to autonomy also creates new spheres of conflict. It is rare for my right to privacy to conflict with yours. But my right to privacy by definition restricts your autonomy.

The starting question of SBM this summer suggests a way that my right to privacy can also conflict with your dignity. I submit that self-knowledge is an element of dignity; at the least; more precisely, the Torah and halakhah seems to endorse the idea that one's *kavod* is enhanced by knowing where one comes from and to whom one is related. So submitting DNA to services such as 23 and ME can enhance your dignity, but it may also violate the privacy of your relatives, or of the allegedly biological parents who raised you.

Rabbi Lamm cites a series of halakhot that have the effect of protecting privacy. Rabbeinu Gershom (or someone else near the same time) banned reading other people's mail; the Talmud considers, and halakhah accepts, the category of *hezek r'iyah*, there is a general prohibition against revealing secrets (*gilui sod*); damage of or caused by being seen; and the rule that a creditor (and some argue: even an agent of the courts) cannot enter a debtor's house to obtain the collateral for a loan. We added in shiur that the Biblical rule permitting the killing of a *ba bamachteret* (thief who enters via a tunnel) can also be understood as a defense of privacy. None of these halakhot taken individually proves the existence of a general right to privacy – can they do so together?

In Griswold, Justice Douglas made at least three sorts of arguments for a Constitutional right to privacy. Among them was his famous claim that each amendment in the Bill of Rights has a "penumbra", and that the right of privacy emerges from looking at how the penumbras intersect. Rabbi Lamm may be making a similar claim here.

We suggested in shiur that this might be parallel to the technique of midrash halakhah that the Talmud calls "*hatzad hashaveh*". For example, the opening of Talmud Bava Kamma notes that each of the four "*avot nezikin*" (categories of liable damagers) mentioned in the Torah has unique legal characteristics, so that they cannot be made a homogeneous whole. Nonetheless, what they have in common can be used as a principle that decides how the specific case mentioned in the Torah are generalized into categories. Rav Aharon Lichtenstein zt"l taught that Rav Velvel Soloveitchik went further and saw the general characteristic as an "ur-mazik", a legal category that was conceptually prior to the cases in the Torah.

Justice Stewart's dissent in Griswold memorably criticizes this method. "In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law." Rabbi J. David Bleich

consciously echoes Justice Stewart in his critique of Rabbi Lamm: “It took American jurists more than one hundred and seventy-five years to discover a constitutionally guaranteed right to privacy. And even then the members of the nation's highest court could not agree with regard to which of the various provisions of the Bill of Rights serves as the locus of that right. Nevertheless, prominent Jewish thinkers have asserted that the notion of a fundamental right to privacy is something that Judaism taught 2,000 years ago.” Rabbi Bleich expresses general suspicion of “an unfortunate tendency among Jews to engage in a certain form of behavior that is best described as "me-tooism." This behavior consists of asserting that whatever truths others have taught, we taught much earlier than they; whatever moral or social values they profess, they acquired from us.”

There is no necessity for consistency here: one can be an originalist with regard to the Constitution and believe in a Torah Chayyim (living Torah), or vice versa, without hypocrisy. Nor can either method be relied upon to consistently reach the results demanded by any particular political or religious ideology. Nonetheless, it seems likely that the arc of American law regarding privacy has important lessons to teach halakhists as they approach the same issue, whether or not we accept Rabbi Lamm’s claim that Halakhah originally got there first.

In the final week of shiur SBM will read articles that extend Rabbi Lamm, one that critique him for repeating the mistake of Griswold, and that praise him for following in Griswold’s footsteps. We’ll also explore whether halakhah recognizes a “right to know” that can trump its commitment to privacy, and whether that right and the right to privacy can be seen as two aspects of a unified Torah concept of selfhood.

D. Is There a Prohibition Against Revealing Secrets? If Yes, Does It Apply Only to Secrets?

SBM 2021 Week 4 Summary

by Tzipporah Machlah Klapper (A) and Rina Ofman (B); edited by Rabbi Klapper

(A)

The halachic discourse regarding revealing secrets (*gilui sod*) largely revolves around two sources. One of these sources is neither straightforwardly halakhic nor straightforwardly about secrets, and the other may be about a specific case rather than establishing a general principle.

The first source is Talmud Yoma 4b:

אמר רבי ~~מוסיא בר בריה דרבי מסיא משמיה דרבי מוסיא~~ [מסורת הש"ס מנסיא] רבה:
מניין לאומר דבר לחבירו שהוא בבל יאמר, עד שיאמר לו 'לך אמור'?
שנאמר *וידבר ה' אליו מאהל מועד לאמר*.

R' Menasya Rabbah said: From where do we derive that one who says something to his fellow that he is in the category of 'Do not say 'until his fellow says to him, "Go say"? As it says, *"And God spoke to him from the Tent of Meeting to say…"*

While the source and nature of the prohibition "Do not say" are unclear, the upshot is that repeating private conversations without explicit permission is wrong. The use of terms that normally appear in halachic discourse (*minayin, bal, shene'emar*) emphasizes the severity with which Chazal regarded the matter. Nonetheless, because there is in fact no verse "Do not say", it is not clear that the intent is to establish a *halakhah* rather than to express ethical disapproval.

Meiri connects our statement to a general idea of revealing secrets. He comments:

למדנו דרך ארץ
למי שאומר דבר לחבירו, אף על פי שלא מסרה לו בסוד,
שהוא 'בבל יאמר' אא"כ אמר לו בעל דבר שהוא אומר לו אותן הדברים ב'לך אמור'
והוא ענין אומרו
נאמן רוח מכסה דבר , כלומר: *דבר* = אף על פי שאינו סוד,
והולך רכיל מגלה סוד - אף על פי שנאמר לו בסוד.

We have learned (from here) proper behavior (*derekh eretz*)
that one who says something to his fellow, even though he did not declare it a secret, that he is under "Do not say"
unless the speaker says that he is saying those things to him under "Go and say."
This is the meaning of [Mishlei 11:13)] that
"One who is faithful of spirit hides a thing" - meaning even if it is not a secret;
"*And a gossipmonger reveals a secret*" - even though it was said to him as a secret.

It's unclear whether Meiri's categorization of this passage as teaching *derekh eretz* is intended to say that it is not *halakhah*, or whether he applies that term to the general issue of revealing secrets (*gilui sod*). Note that Meiri in his Chibbur Hateshuvah (1:4) seems to limit this obligation to matters which the hearer knows there is a compelling reason to conceal.

The second source is Mishnah Sanhedrin 3:7, which discusses the procedure for delivering the verdict of the beit din after deliberations. The Mishnah states:

גמרו את הדבר - היו מכניסין אותן.
הגדול שבדיינים אומר: 'איש פלוני אתה זכאי; איש פלוני אתה חייב'.
ומנין לבשיצא אחד מן הדיינים לא יאמר:
'אני מזכה וחבירי מחייבין, אבל מה אעשה, שחבירי רבו עליי?'
על זה נאמר: (ויקרא יט) *לא תלך רכיל בעמך*, ואומר: *הולך רכיל מגלה סוד.*

When they had finished with the matter [of reaching a verdict], they would bring [the litigants] back in.
The greatest of the judges says: "So-and-so, you are innocent; so-and-so, you are liable."
And from where do we derive that when one of the judges leaves, he may not say, "I make him innocent and my colleagues make him guilty, but what can I do, for my colleagues have outnumbered me?"
About this it is said: "You shall not be a gossipmonger among your nation" (Leviticus 19) and it says, "A gossipmonger reveals a secret."

Some halakhic writers read this mishnah and the Talmudic commentary on it as indicating a broad prohibition against revealing secrets that falls under *Lo teileikh rakhil* (*Do not gossip-monger*). Their primary evidence is that Talmud Sanhedrin 31a, after citing a beraita nearly identical to our Mishnah, reports the following case:

ההוא תלמידא דנפיק עליה קלא דגלי מילתא דאיתמר בי מדרשא בתר עשרין ותרתין שנין - אפקיה רב אמי מבי מדרשא. אמר: 'דין גלי רזיא'.

A certain student was rumored to have revealed something said in the beit midrash twenty-two years after it was said.
R' Ami removed him from the beit midrash. He said: "That one is a revealer of secrets."

Rabbi Norman Lamm's groundbreaking article "Privacy in Law and Theology" cites this case as evidence that halakhah recognizes a wide-ranging right to privacy and prohibits "disclosure", a category spanning *lashon hara, rekhilut, and hotza'at shem ra*. This is not an inevitable conclusion from the two sources we have seen; one could just as easily argue that Yoma is about ethics rather than law, and that Sanhedrin applies specifically to the context of court deliberations. Rambam and Shulchan Arukh do not cite Yoma in their codes, and Rambam (in Hilkhot Sanhedrin) replaces "Rav Ami" with "the court" when retelling the story from Sanhedrin 31a. (See also Shu"T Aseh Lekha Rav 3:52, which derives from the Talmud's case that courts generally met in batei midrash)

Nevertheless, Rabbi Lamm is far from alone in using these sources to build a broader category. Rav Shlomo Aviner, for example, in an article regarding kibbutz membership votes, applies the second source to prohibit revealing the deliberations or vote of "כל מוסד שבקבוצה ובל ועדה... לגבי הענינים שהם קבלו סמכות מהקבוצה לחליט עליהם" ("any institution in the collective

and any committee… with regard to the things for which they have received authority from the collective to decide on their behalf."

Other poskim do not see the obligation as nearly as concrete or far-reaching.

For example, Rav Nosson Geshtetner (*Shu"T L'horot Natan 16:68)* addresses someone who wishes to refer a friend with a sick child to a rabbinic healer, even though the person who gave him the name told him not to pass it on. He cites our first source but concludes that avoiding revealing information disclosed in private conversations is merely a "מדה טובה" akin to (or perhaps identified with) the Chofetz Chayim's recommendation to avoid repeating even things which will cause no harm, and therefore it does not apply when there is (a) no harm caused and (b) substantial benefit gained by revealing the contents of the conversation.

Rav Mordechai Yaakov Breisch (*Shu"T Chelkat Yaakov EH 79*) addresses the heartbreaking case of a cancer-stricken 20-year-old who, by the norms of mid-twentieth-century medicine, would not yet be told of his diagnosis (life-expectancy of a maximum 1-2 years). He argues that the patient's doctor is obligated to disclose the patient's condition to his fiancect"e so that she can make an informed decision as to whether to marry him. Interestingly, the value which in his analysis counters to her right to the information is not any kind of Jewish obligation to avoid telling secrets, but rather the convention among doctors (at the time) not to reveal such information.

Bottom line, a claim that past Halakhah has consistently included an expansive right to privacy seems overstated. The question then is whether it can nonetheless be legitimate to "construct" such a right out of the halakhic past by showing that a similar intuition is implicit in a variety of halakhot.

(B)

Rabbi Dr. Judah Goldberg's article "Towards a Jewish Bioethic: The Case of Truth-Telling" (Tradition 43:2) integrates Torah and contemporary medical ethics to discuss the complex question of what information health care workers must share with patients about their conditions.

Dr. Goldberg acknowledges that past medical consensus, endorsed or assumed by several poskim, assumed that truthtelling can have a significant adverse effect on a patient's condition. However, he cites Dr. Alan Jokowitz and Shimon Glick to the effect that contemporary research does not show this effect. If we accept that finding as given, what would the halakhic implications be?

Here's an extreme example of the situations faced by doctors and ethicists. Suppose an apparently healthy patient is diagnosed with an extremely painful disease that has no known cure and will kill them in at most a month. Telling the patient would not improve treatment or prognosis. Should the patient be informed? Should doctors be concerned that the information will generate despair, or should their primary consideration be allowing the patient to make decisions about their own life?

In the mid 20th century, medical paternalism was assumed. Patients expected and wanted doctors to tell them what to do. They did not fell a need for involvement in the decision-making process. Today in America, people often feel a stronger sense of trust in the doctor-patient relationship when they feel a stronger sense of autonomy and are making

decisions together with the doctor. Dr. Goldberg challenges us to consider whether and how the halakhic model of the doctor-patient relationship should change in response to these changes.

E. SBM 2021 Sheilah

Nadav and Itamar Amramson are twins. They were born in 1993, just about nine months after the engagement and seven months after the wedding of Elisheva and Aharon Amramson. Each twin weighed more than seven pounds at birth.

They have a sister Yocheved, three years younger, who is single.

Aharon was killed in the World Trade Center on 9/11. His body was identified, and Elisheva released from *iggun*, through DNA evidence. Two years later Elisheva married Israel Israelson. She had dated him off and on until just before deciding to get engaged to Aharon.

Nadav is impulsive and extroverted. He lives in Monsey with his wife and 6 year old boy-girl twins of his own. He attends a charedi shtiebel and wears the levush and goes to shiurim etc. as necessary to fit in, but is best described as Social Orthodox.

Itamar was briefly married but now lives alone in a medium-sized Orthodox community "out of town". He is cautious, spiritual, and punctilious about ritual observance in what sometimes seems a Bal Tosify sort of way. He is gabbai of the young adult minyan at the large Modern Orthodox shul. The Community Scholar gives the weekly shiur after that minyan. She is a generally wonderful pastor who sometimes gets into trouble for things she says during "pure learning" conversations

Aharon is a Cohen whose family has a long *yichus* tradition that they claim goes all the way back to Sinai, and that can be traced with some certainty for at least 500 years. Nadav and Itamar have always been proud of their *kehunah,* each expressing it in their own way. For example, Nadav tends to pay exorbitant sums for כהנך ילבשו צדק in אתה הראית, while Itamar often insists on being asked for reshus at zimmun. They both love duchening despite having terrible voices that are infamous in their respective shuls.

Itamar's Community Scholar taught a shiur several months ago about the position that all kohanim nowadays are only kohanei chazakah. He went to her afterward to show off his family's yichus shtar. She pointed out that even a direct male-line couldn't prove that none of the mother's involved were pesulim, or that there weren't hidden adoptions etc. "Even in the deepest charedi enclaves", she said with a smile, "I'm told that first children of rushed shiddukhim are sometimes born rather soon after the wedding".

Itamar didn't smile back. He went home and moped. Finally he decided that while he couldn't do anything about the past, he could at least prove his own direct yichus. So he resolved to send his own DNA for matching to the record of his father's DNA. He called Nadav to tell him he would be doing this.

Nadav was very unhappy with him. "Why would you do that? What if it turns out that our father wasn't our father, and you're not a kohen – what will you do?" "Stop duchening, of course", Itamar replies. "But won't that get back to my shul?", asked Itamar plaintively. After some discussion, Nadav agrees to ask the Community Scholar whether he is permitted to do the test over Itamar's explicit objection, and whether he has to ask his mother and sister's permission as well.

F. SBM 2021 Responsum

Can Revealing Information About Another Person Constitute a Breach of Halachic Privacy?

By Tani Greengart

Question:

Nadav and Itamar are identical twins born nine months after their mother's engagement and seven months after her marriage to her husband Aharon, who was a Kohen. Thus, Nadav and Itamar have always assumed that they were Kohanim. However, their mother was also dating another man shortly before she got engaged to Aharon, and there is a possibility that it is this man, not a Kohen, who is the biological father of Nadav and Itamar. Itamar wishes to take a genetic test to determine whether Aharon is his real father and whether he is in fact a Kohen (the practical ramification being whether Itamar will do *birkat kohanim*), while Nadav does not want him to, fearing a potential loss of his Kohen status. Can Itamar take the test despite Nadav's objections, or would the possibility of people finding out that Nadav is not a Kohen constitute a violation of his privacy?

Answer:

I. Introduction

In order to determine whether Itamar taking the genetic test is a violation of Nadav's privacy, we must split the question into three parts and make a couple of assumptions.

First, we must deal with the necessity of the genetic test. Is the likelihood of a positive test result (meaning that Aharon *is* Itamar's father) low enough to require Nadav and Itamar to examine their lineage in order to act as Kohanim? Or on the other end of the spectrum, is the likelihood of a positive result so high that there is no reason to worry at all about the potential effects of loss of *kehunah*? For purposes of this essay, we will assume that this case exists in a sweet spot of halachic probability: The likelihood that Aharon is Nadav's and Itamar's father is high enough that the twins are presumed to be kohanim in lieu of a genetic test, but that likelihood is also low enough that we must reckon with the effects of a negative test result on the twins' *kehunah*.

Second, we must deal with the likelihood that information about Nadav's parentage will become public in his community. Even if the genetic test determines that Aharon is not Itamar's father, there would be no violation of Nadav's privacy if \ the information would never become public. On the other hand, if Itamar and Nadav are part of a tight-knit community, there would be much more reason to argue that the results of the genetic test could constitute a breach of privacy.

For purposes of this essay, we will assume that Nadav and Itamar are sufficiently close that the knowledge that Itamar has stopped doing *birkat kohanim* would swiftly and inevitably make its way to Nadav's community.

Third, we must deal with whether the public revelation that a given person is not a Kohen would be halachically proscribed in the first place, or whether this is completely permissible. It is this question which comprises the bulk of the essay.

II. Privacy in Halacha?

Before we can determine whether revealing information about someone's ancestry is a breach of halachic privacy, we must examine whether there is such a thing as halachic privacy, and if so, what it would encompass.

As many have noted, there is not an explicit halachic concept called "privacy," but there are various areas of halacha that protect various aspects of what we today would call privacy. Such areas of halacha include: *hezek re'iyah*, the requirement for people to construct their houses in such a way that they cannot see inside their neighbors' homes or yards;[6] *lashon hara/rechilut*, the prohibitions against speaking badly about other people;[7] *tzeni'ut*, the requirement for people to behave modestly in all their actions;[8] *gilui sod*, the prohibition against revealing secrets;[9] *boshet*, monetary payments that one must make for revealing an embarrassing aspect of another person;[10] *cherem deRabbeinu Gershom*, an 11th century decree by Rabbi Gershom ben Yehuda prohibiting people from reading others' mail; and a prohibition against a moneylender entering a borrower's house to collect his debts.[11]

It seems to me that these disparate areas of halacha can be consolidated into three distinct conceptual categories that reflect different aspects of halachic privacy: *tzeni'ut*, *lashon hara*, and *nezek* (damages). Once we have defined each of these categories and shown how all the areas of privacy halacha fall into them, we will then return to the case of Nadav and Itamar and see how each conceptual area of halachic privacy would apply there.

a. *Nezek*

The simplest conceptual area to explain is that of *nezek*. It is a general rule in Jewish law that if a person does damage, he must pay for it, and there are certain types of privacy violations that constitute damage to the offended party. For example, one may not forcibly remove another person's cloak or uncover a woman's hair, as this embarrasses the other person, and embarrassment (*boshet*) is considered a form of damage.[12] Two Medieval commentaries on the Torah, Rabbeinu Bachyei and the Bechor Shor, say that the prohibition for a moneylender to enter a borrower's house to collect the debt is also rooted in this type of embarrassment-damage – the borrower, who is likely to be poor, will be embarrassed if the rich moneylender sees the inside of his house.[13] (This reasoning helps to explain why a moneylender is permitted to enter the house of a guarantor to collect money;[14] the guarantor is likely wealthy and therefore will not be embarrassed for the moneylender to see his house.)

Other types of breaches of privacy can also be forbidden because of *nezek*. The gemara in Bava Batra states that one may not stare at another person's field while there is standing

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[6] Bava Batra 2a, 59b
[7] Arachin 15b
[8] Sukkah 49b
[9] Sanhedrin 31a
[10] Bava Kamma 90a
[11] Bava Metzia 113a
[12] Bava Kamma 90a
[13] Rabbeinu Bachyei and Bechor Shor, Devarim 24:10
[14] Bava Metzia 115a

grain in it because that will invoke the evil eye and damage the field.[15] Ramban in his commentary on gemara brings one possibility that the whole halacha of *hezek re'iyah* exists because a person looking into another person's house or yard will bring the evil eye upon them and cause damage.[16]

If halachic privacy is based upon *nezek*, it becomes both a right and an obligation, depending on the circumstance. The general rule by *nezek* is that a person may allow others to damage his property, but he may not allow others to damage his body.[17] This would mean that a person is allowed to waive his right to the privacy of his house or field, but he may not waive the obligation of privacy in relation to his body.

Another characteristic of *nezek*, which limits its applicability towards halachic privacy, is that it only applies when there is clearly defined damage done to a person, as opposed to breaches of privacy that do not involve clear damage. In our case with Itamar and Nadav, it would be difficult to argue that public knowledge that Nadav is not a Kohen would constitute formal damage to Nadav, and therefore the category of *nezek* seems to not be applicable.

b. *Tzeni'ut*

Let us move on to the second concept relating to halachic privacy: *tzeni'ut*. The source for it as a concept is a verse in Micha, which states that God wants only three things from mankind: doing justice, loving kindness, and walking modestly (*hatznei'a lechet*) with God.[18] It is clear from this verse that *tzeni'ut* is an important concept in Judaism – apparently God only wants three things from humanity, and *tzeni'ut* is one of them – but it is very unclear from the verse exactly what *tzeni'ut* means and what sorts of actions it entails.

Several gemaras invoke the concept of *tzeni'ut* in different contexts, and by putting those cases together, we can gain a sense of what *tzeni'ut* means. A gemara in Sukkah links *tzeni'ut* to one's conduct at both public events, like attending a funeral or a wedding, and private events, such as the study of Torah.[19] A gemara in Eruvin says that *tzeni'ut* can be learned from cats; the commentators say that this is a reference either to cats' unwillingness to engage in sexual conduct in front of people or their unwillingness to excrete in front of people.[20] Finally, a gemara in Bava Kamma says that if a homeowner allows a woman to bake in his house, he must leave the premises while she bakes because of *tzeni'ut*; Rashi attributes this to the fact that women would expose their upper arms while they baked.[21]

From all these gemaras, the definition of *tzeni'ut* appears to be that a person must be careful not to show aspects of themselves to other people that are not typically shown. Such behavior is proscribed regardless of whether it A person should not behave more ostentatiously

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[15] Bava Batra 2b and Rashi there. A full discussion of the evil eye and its modern-day applicability is beyond the scope of this paper, but suffice it to say that in the times of the gemara, this was considered legitimate damage.
[16] Chiddushei HaRamban, Bava Batra 59a
[17] Mishna Bava Kamma 8:7
[18] Micha 6:8. In modern Jewish society, the concept of *tzeni'ut* is invoked most commonly in relation to women's clothing. While this can be a valid application of *tzeni'ut*, the concept itself applies to far more than dress codes, as we will see.
[19] Sukkah 49b
[20] Eruvin 100b and Rabbeinu Chananel and Rashi there
[21] Bava Kamma 48a and Rashi there

than normal at a wedding or funeral, nor should people show others their activities in the bedroom or the bathroom, nor should women show off their upper arms.

Furthermore, the gemara about the woman baking proves that *tzeni'ut* not only creates an obligation on a person not to show themselves off to others; it also creates an obligation on other people not to look at such a person at those times. The bakery owner must leave his own house to avoid violating the woman's *tzeni'ut*. The Rashba applies this paradigm to *hezek re'iyah*, saying that a person must build a fence between his property and his neighbor's to avoid seeing his neighbor's private activities and thereby violating his neighbor's *tzeni'ut*.[22] The Ramban also raises *tzeni'ut* as a potential source for *hezek re'iyah*.[23] Chizkuni, a 13th century commentary on the Torah, links the prohibition for a moneylender to enter a debtor's house to *tzeni'ut*[24] – if the moneylender enters the house, he might see something that is not to be shown to outsiders.

Part of the character of *tzeni'ut* is that it can never be waived because it is an obligation, not a right. The Rashba, who links *hezek re'iyah* to *tzeni'ut*, speaks out very strongly against people who have a custom not to build walls between neighboring houses and yards. He writes that "A person may only waive his objection in monetary matters, where a person is permitted to damage his own property. But he may not dismantle the boundaries of Israel by not acting with *tzeni'ut*, as this will cause the Divine Presence to depart from Israel."[25] So if halachic privacy is based on *tzeni'ut*, it can never be waived.

Another aspect of the definition of *tzeni'ut*, one which limits its applicability to matters of privacy, is that *tzeni'ut* is only violated when people *see* another person showing themselves off; it does not seem to matter whether other people *know* that it happened. For example, in the gemara about the woman baking, the owner of the bakery certainly knows that the woman using his facilities has rolled up her sleeves to knead the dough, but *tzeni'ut* is not violated so long as he does not see her upper arms. So too, the gemara in Sukkah extols the *tzeni'ut*-based value of learning Torah in private, even though a parallel gemara in Mo'ed Kattan says that "Anyone who learns Torah inside, his Torah proclaims [his greatness] outside."[26] There does not seem to be any issue with the public *knowing* that a person is a Torah scholar; the value of *tzeni'ut* only means that they should not *see* him learning.

A question arises: If one person *hears* another person doing private activities, is that similar to seeing and therefore a violation of *tzeni'ut*, or is it not similar to seeing and therefore permitted? This may be a way to explain the debate of whether *hezek re'iyah*, a tort related to seeing one's neighbors, encompasses a category of *hezek shemi'ah*, a tort related to hearing one's neighbors. According to Rabbi Eliyahu Mizrachi, there is no such concept of *hezek shemi'ah*; we might explain that Rabbi Mizrachi thinks that hearing someone's private activities is not similar to seeing and is therefore not a breach of *tzeni'ut*. On the other hand, several modern-day authorities interpret Rabbi Menachem Me'iri as saying that there is a concept of *hezek shemi'ah* analogous to *hezek re'iyah*; we might explain that these authorities think that hearing private affairs is similar to seeing and is therefore a breach of *tzeni'ut*. As far as I know,

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[22] She'eilot UTeshuvot HaRashba 2:268
[23] Chiddushei HaRamban, Bava Batra 59a
[24] Chizkuni, Devarim 24:10
[25] She'eilot UTeshuvot HaRashba 2:268
[26] Mo'ed Kattan 16b

no one, however thinks there is a concept of *hezek yedi'ah*, a tort of knowing things about another person, as knowing information does not constitute a violation of *tzeni'ut*.

In our case, because the members of Nadav's community have not seen anything unseemly in Nadav with their eyes, their knowledge of his non-Kohen status would not be a violation of *tzeni'ut*, and therefore the category is not applicable.

c. *Lashon HaRa*

Like *tzeni'ut*, *lashon hara* is a well-known concept in Jewish law whose conceptual definition is difficult to pin down. Clearly it is some form of forbidden speech, but what type of speech, and what aspect of it makes it forbidden? As we did with *tzeni'ut*, we will look to case studies in the gemara to narrow down the definition.

The gemara in Arakhin, in defining *lashon hara*, makes a distinction between two similar cases. If a person says that fire can be found in a certain person's house, his statement is not *lashon hara* because it is merely *gilui milta*, revealing information. But if a person states in a derogatory manner, "Where else can fire be found but at so-and-so's house, for they are cooking all the time," that is *lashon hara*. What is the difference between these two cases? It appears that *lashon hara* only exists when one speaks negatively about another person, not when one reveals neutral information.

The Talmud Yerushalmi in Pe'ah helps to further refine our definition of *lashon hara*. The Yerushalmi asks, "What is defined as *lashon hara*?" and it answers, "[Both] one who speaks it and one who makes it known." The Yerushalmi proceeds to relate two stories of people who hint to governmental authorities that a given person had not shown up to a work draft; the hinters violate *lashon hara* even though they explicitly mention neither the absentee's name nor his crime. From here it seems that the root of the prohibition of *lashon hara* is not the speech itself. Rather, the root is the negative information that is spread about another person.

Another halacha in the aforementioned gemara in Arachin supports this idea. The gemara says that once a piece of negative information has already been shared in front of three people, it is not *lashon hara* to repeat it because the information will spread anyway. If *lashon hara* were forbidden because of the speech itself, this halacha would be bizarre – the words a person says are the same regardless of whether the information he relays has been shared previously. But if we understand that *lashon hara* is forbidden because of spreading information about a person, it makes perfect sense. Once the information has already been spread, there is no prohibition.

The Rambam, in codifying this halacha, adds a caveat that also fits well with the definition of *lashon hara* as spreading negative information. He writes that if one repeats negative information that was already said in front of three people, it is not *lashon hara* unless the teller intends to spread the information farther. According to our understanding, it is the spreading of negative information, not the specific words said, that define an action as *lashon hara*.

Other prohibitions also fall into this conceptual category of *lashon hara*. The Magen Avraham states that if a person reveals information told to him in confidence by another person, that act also violates *lashon hara*, even if the information does not necessarily reflect negatively on the person who originally told it. The Ramban brings a possibility that *hezek re'iyah* is forbidden because of *lashon hara*; perhaps a person observing his neighbors will lead

to the negative information about the neighbors being revealed. Rabbeinu Gershom's edict prohibiting people from reading each other's mail could also be linked to *lashon hara*, the issue again being the revelation of information.

How would this expansive definition of *lashon hara* apply to our case? It seems that if Itamar were to go around telling people that his brother is not a kohen, he would violate of *lashon hara* because he would be revealing negative information about another person. The Rambam states explicitly that relating derogatory information about a person's ancestry is a violation of *lashon hara*. However, Itamar in our case is not planning to go around telling people about his brother's lack of *kehuna*. As far as we know, his only plan if he receives a negative genetic test result is to stop doing *birkat kohanim*. Even if we include hinting at negative information in the scope of *lashon hara*, as the Yerushalmi does, it would be extremely difficult to argue that Itamar's action of stopping to do *birkat kohanim* would constitute formal *lashon hara*.

III. Conclusion

We have now elaborated on three broad areas of halacha that relate to privacy. N*ezek* exists when a breach of privacy directly damages the offended party. *Tzeni'ut* is a factor when a person is seen by others in ways that people are not usually seen. And *lashon hara* applies when a person reveals negative information about another. But as we have shown above, none of these halachic areas directly apply to our case.

Does this mean that Judaism is indifferent to the question of whether Itamar takes the genetic test? Not necessarily. The Ramban famously points out that it would be impossible for the Torah to give rules for every single area of life, but the injunction of "you shall do what is right and good in Hashem's eyes" means that people should extrapolate from the rules that are given what God would want them to do in all different situations. This gives rise to the idea of the halachic value. Even if there is no strict halacha that mandates behavior in a given situation, we can still look to the existing halachot for guidance.

If Itamar were to take a genetic test and stop doing *birkat kohanim*, he would not violate *lashon hara* formally, but he would still be publicly revealing negative information about his brother, and also, for that matter, about his mother (who is revealed to have slept with another man before marriage). I believe it is fair to extrapolate from the prohibition of *lashon hara* that the Torah frowns on the revelation of negative information about other people, even if it is revealed in an indirect way. If Itamar were to take the genetic test, he would be acting not in accordance with this Torah value.

However, there is one more factor that must be mentioned, and that is that even formal *lashon hara* becomes permitted to say if there is a *to'elet*, a constructive reason, for doing so. For example, one may speak badly about a thief in order to save a potential victim from coming to monetary harm. If the formal prohibition of *lashon hara* becomes annulled in the face of a *to'elet*, the Torah value of not revealing negative information about people would certainly not exist when there is a *to'elet*. If the uncertainty of not knowing the identity of his biological father would cause Itamar mental or emotional anguish, that could conceivably be enough of a *to'elet* to render the Torah value of revealing negative information a non-issue, and the Torah would then encourage Itamar to take the genetic test.

The Community Scholar should relate all these factors to Itamar, explaining that while there is no halachic prohibition against him taking the genetic test, there is a Torah value against revealing negative information about others, but this value does not exist in the face of a *to'elet*. Itamar can then decide for himself how he understands the situation and what he thinks God wants him to do.

G. האם כהנים מחוייבים לעבור בדיקת רקמות (DNA) קודם שעולים לדוכן?

אריה קלאפפער

הנה לפי שיטת האגרות משה, ולא ראיתי חולק עליו, אין חיוב לברר דבר שידוע בודאי על פי ההלכה ולא נולד בו ספק, ואפילו אפשר לברורי יותר. ובמקרה דנן, הרי חזקת 'בנו הכרוך אחריו' הוי כודאי לכל עניני הלכה, עאכ"ו אם הוא בנו מאשתו, וכן הבעל החזיקם כבניו כל ימי חייו, ומה שנולדו שבעה חדשים אחר החתונה - אינו נחשב לריעותא, מאחר שכן דרך תאומים להיוולד מוקדם. עיין קידושין פ.

דאמר רבה בר רב הונא:

איש ואשה, תינוק ותינוקת, שהגדילו בתוך הבית - נסקלין זה על זה ונשרפין זה על זה.

א"ר שמעון בן פזי אמר רבי יהושע בן לוי משום בר קפרא:

מעשה באשה שבאת לירושלים ותינוק מורכב לה על כתיפה, והגדילתו ובא עליה, והביאום לבית דין וסקלום, לא מפני שבנה ודאי, אלא מפני שכרוך אחריה.

(ואל תשיבני מלשון "לא מפני שבנה ודאי", שהרי כהר פירשו העולם שאין לשון זה בא אלא לומר שאם הכחישו ההורים קודם שהוחזקו - יש להאמינם, וכן אם יש עדות ברורה שאין אלו ילדיהם.)

וכן לא ראיתי אפילו הוה אמינא בשום פוסק שכל כהן חייב לעבור בדיקת רקמות קודם שיעלה לדוכן. הגה עצמך: אם סתם אדם מן הרחוב לוקח שערות מראשי כהנים המוחזקים כאב ובנו ובודק רקמותם, האם לא ייחשב זה פגיעה בפרטיותם אפילו אם יימצא שאין זה בנו ואין "בנו" כהן? נהי דוודאי אם נבוא לדון לאחר מעשה משום נזק או קנס, עלינו לקחת בחשבון את העובדא שכלפי שמיא לא היו כהנים מתחלה. אבל לענ"ד אין זה משנה את הדיון על מה מותר לעשות לכתחלה.

Part 3 - Halakhah and the Kyle Rittenhouse Case

"It would be irresponsible and arrogant to move directly from textual interpretation to public policy. But perhaps halakhah - done well and with integrity - can provide a perspective that helps us see past partisan blinders."

שו"ת שבות יעקב חלק ב סימן קפז

שאלה מנער אחד שדמעתו על לחיו
בהיותו בדרך עם עוד נער, והתחיל לריב זה עם זה, ושלף הנער סכינו ובקש להמית את השני, וקם הוא והרגו – ועכשיו בא לקבל עליו תשובה
או נימא דהבא להרגך השכם להרגו.
תשובה
הנה בזמנים הללו אין בידנו להתעסק בדינים אלו שהוא דיני נפשות ממש
מ"מ לא אמנע מלחוות דעת תורה מה שנלע"ד דרך משא ומתן ולא לדינא
. . .

Responsa Shevut Yaakov 2:187

A question from a lad with tears on his cheeks
He was travelling with another lad, and they began to feud with each other, and the other lad unsheathed his knife and sought to kill him, but he arose and killed him –
and now he has come to accept penitence upon himself,
or should we say "the one who comes to kill you – kill him first"?
Response:
Nowadays, it is not in our hands to engage with these laws, which are actual capital cases –
Nonetheless I will not refrain from expressing the Torah perspective as it appears to my humble intellect in the manner of intellectual exchange, but not as a halakhic ruling.
. . .

A. A Jewish Perspective on the Kyle Rittenhouse Trial

Kyle Rittenhouse killed two unarmed people with his rifle. The defense claimed that he brought the rifle to the scene for the legitimate purpose of defending private property against looters, and shot the victims in order to prevent them from grabbing the rifle and turning it against him. Prosecutors countered that he initiated the life-and-death element of the confrontations by wrongfully bringing the rifle to the scene, and by shooting the first victim in circumstances that witnesses reasonably saw as unjustified. A jury acquitted him. How should we regard the verdict and the laws that made it plausible?

Jewish tradition can't tell us what Rittenhouse's underlying motivations were. Nor can it tell us how American law ought to decide such cases. Because halakhah (Jewish law) has not adjudicated capital cases for many centuries, it would be irresponsible and hubristic to move directly from textual interpretation to public policy. But halakhah done well and with integrity can provide a nonpartisan perspective that may help us see the issues and circumstances more clearly. I pray this essay lives up to that standard.

Halakhah (Jewish law) recognizes a right of preemptive self-defense, an obligation to proactively defend oneself and others, and a prohibition against allowing others to die through inaction. Each of these rules may legitimate the use of deadly force, excuse the misuse of deadly force, or exempt the misuse of deadly force from human justice while declaring it an offense against G-d. The last category of course has no formal analogue in American criminal law.

1. Preemptive Defense/*ba bamachteret*

The right of preemptive self-defense is derived from Exodus 22:1-2, which declares that there is no bloodguilt for killing a thief who enters one's home furtively. On Talmud Sanhedrin 72a, the fourth century sage Rava grounds this law in a presumption that the thief would kill if confronted:

> The Rabbis established a legal presumption
> that people do not exercise self-restraint with regard to their money.
> Therefore, the thief reasons:
> 'If I go, the owner will confront me; and if the owner confronts me, I will kill him';
> and the Torah says:
> 'The one who comes to kill you – kill that one preemptively'.

(RAK: Oddly, "The Torah says" in Talmudese does not introduce a Biblical quote, but rather an implication.)

Rava's multistep rationale raises the question of why the homeowner is allowed to confront the thief in the first place, rather than retreating: isn't that wrongly choosing money over life?

The simple explanation is that the legal presumption codifies a right to resist deadly force in one's home/castle. Abravanel on Exodus adds piquantly that otherwise assassins would be able to sneak in with impunity to kill, and if confronted, disengage without risk until their next try. Chiddushei HaRan on Sanhedrin (misattributed to Rabbi Nissim Gerondi) offers an "unclean hands" doctrine, under which whomever does the first wrong is responsible for subsequent escalations. Thus the thief can be killed preemptively because he or she trespassed with intent to steal. Rabbi Meir HaLevi (Yad RaMaH on Sanhedrin) contends that responsibility lies with

whomever makes the first escalation to life-or-death, and identifies the thief as making the first decision to kill.

These explanations all assume that there is nothing wrong with the homeowner killing the thief. Rabbi Yoseph of Orleans (Bekhor Shor on Exodus) displays more ambivalence: the homeowner is "as if compelled, because people are unable to exercise self-restraint with regard to their money." This suggests that it would be morally preferable for the homeowner to retreat. This explanation is consistent with the use of the presumption on Shabbat 153a to explain why the mishnah relaxes Rabbinic decrees to enable people trapped outside a city on Shabbat to get their money home; faced with such a loss, people would wrongfully violate even Biblical decrees unless provided with a permitted option.

The Talmud and subsequent tradition discuss the conditions under which we do or do not assume a thief's willingness to kill when confronted. However, the straightforward law appears to be that the right to act preemptively does not apply to open robbers (as opposed to furtive thieves). Regardless, the right to act preemptively applies only when protecting one' own life, not when protecting others, and it applies only in the context of a right to not retreat from one's own private space. And while third parties also have the right to preemptively protect the homeowner against the trespasser, that derivative right can't apply to someone who autonomously chooses to protect someone else's property in their absence. Therefore, I cannot see this right as a valid basis for Kyle Rittenhouse's defense.

2. Proactive Defense/ *Rodef*

Talmud Sanhedrin 73a cites an array of Biblical sources for the obligation to defend oneself and others against an attacker who has deadly intent and means. Deadly force is permitted only when necessary to prevent the killing of oneself or another innocent party. One must walk away from the confrontation if possible. Nonetheless, use of excessive force may not be humanly punishable in the context of defending against a genuinely deadly threat, especially if walking away was not an option.

Rav Shlomo Zalman Auerbach suggests that walking away might not be necessary in some cases, but the distinction he makes is not clear to me. I am confident that even Rav Shlomo Zalman permits risking the initiation of a kill-or-be-killed situation only with regard to activities that are both ordinary and legal, and I suspect that he refers only to attempts to extended efforts to deny someone the right to "live a normal life". Rabbi Auerbach certainly does not say that a person can kill preemptively in such situations. (Note: I reanalyze Rav Auerbach's position in the next essay in this Reader, and then provide several other reactions to his position, plus his text with my translation.)

I therefore do not see anything in the general circumstances of Kenosha, according to any position, that would justify Kyle Ritterhouse in initiating a confrontation, or that would justify or excuse his shooting someone rather than walking away from the confrontation. The question arises only if he or someone else were threatened in a situation where they could not walk away.

If his situation met those criteria, we must still investigate four issues.

A) How certain must one be that a mortal threat exists in order to use deadly force?

B) How certain must one be that deadly force is the only effective means of dissipating the mortal threat?

C) Is there an "unclean hands" doctrine that estops the right of self-defense? For example, does the furtive thief have a right of self-defense if the houseowner confronts him or her and does not leave them the options of surrender or escape?

D) If the person posing the mortal threat is acting on the reasonable but mistaken belief that you pose a mortal threat to them or others, do you still have a right to use deadly force in self-defense?

The first two issues are not conclusively settled in the tradition, although there are some extensive theoretical discussions in the Talmud and thereafter. My best estimate is that if asked in advance, we would permit deadly force only with near-certainty that the threat is mortal and that deadly force will stop it, but that we would not punish the use of deadly force if even a lower standard were met, possibly as low as reasonable belief that one was endangered and that deadly force was necessary to avert the threat.

The weight of the tradition is firmly on the side of allowing self-defense regardless of the innocence of the attacker. This can be derived from the Talmud's willingness on Sanhedrin 73a to apply the category to minors and (at least tentatively) to the case of therapeutic abortion.

I also think that the weight of the tradition grants people a right of self-defense even while they are committing sins that are capital crimes. This can be derived from Rabbi Yochanan's statement on Sanhedrin 82a that Zimri would not have been executed for killing Pinchas in self-defense, even though Pinchas was acting legitimately in seeking to kill Zimri. However, this right probably does not extend to convicted capital criminals, especially when the threat is posed by an authorized executioner, unless they know themselves to be innocent. (Or in practice, unless they can subsequently prove to a court that they were innocent of the original crime).

Here's a big caveat: Nothing in standard halakhah addresses societies which have delegated the prevention and detection of crime to standing police forces, or conversely, to actions taken out of societal rather than personal interest. For example, I am unaware of halakhic discussion about whether one can confront a furtive trespasser when, if one walks away, the police will almost certainly recover all the stolen property in a reasonable timeframe, and apprehend the thief to boot. Similarly, it would make little sense in a unpoliced context to say that one cannot use potentially deadly force in self-defense if someone else could do so for you. But in a police context, it seems fairly obvious that one should leave the use of deadly force to the police if possible. By the same token, one can see the argument for giving police more latitude than private parties about initiating potentially life-or-death confrontations; one can also see the argument against.

Since halakhah does not (yet) address the police context in sufficient depth (although the contributions of figures such as Rav Shaul Yisraeli and Rav Eliezer Waldenberg should not be ignored), we can say even less about halakhah in a context where police are <u>temporarily</u> failing to maintain civil order. Does the law revert to the halakhah for a non-police context, or is there an added obligation specifically to avoid contributing to the chaos and do everything possible to restore the police's monopoly on deadly force?

Applying halakhah to analyze the Rittenhouse trial therefore requires deciding among conflicting presentations of the facts, and on developing areas of Jewish law that are still inchoate. Please be deeply suspicious of anyone who claims that Judaism has a clear opinion of what the jury should have done. I hope that this outline nonetheless allows for serious conversations about the case within a Jewish framework.

POSTSCRIPT

*A reader on the CMTL email list correctly pointed out that while I assumed that Rittenhouse had "*autonomously chosen to protect someone else's property*", there are claims that the owners at some point asked him to come or stay. I responded:*

"Thank you. I think it would affect the analysis only if

1. the owner were present and

2.the attackers displayed a specific intent to attack their property and

3. there was reason to believe that the owners would personally confront them if they did

4. there was reason to believe that they would kill if confronted.

In general, the halakhic right to engage in preemptive self-defense applies only to furtive thieves (ganavim), not to open thieves or rioters (gazlanim). The rationale offered by Rava muddies the waters significantly, but I think that distinction remains a very strong default.

Noting again that this is an underdeveloped area of halakhah, and so anything resembling "psak" should be in scare quotes."

B. **Rav Shlomo Zalman and Kyle Rittenhouse**

My essay on Halakhah and the Kyle Rittenhouse trial (see immediately preceding essay in this Reader) briefly and shallowly addressed a position of Rav Shlomo Zalman Auerbach (Minchat Shlomo 1:7:2). Rabbi David Fried (SBM alum and a wonderfully truth-focused *talmid chakham*) properly challenged me to address it in more depth. I was and remain nervous about doing so, for reasons that will become clear. But I think Rabbi Fried is correct that it must be done. I hope that my analysis below successfully illustrates a key point of last week's essay: that it is irresponsible and hubristic to move directly from textual interpretation to practical application without the mediation of a live tradition of practice.

(Note: This essay also integrates challenges posed by Miriam Smirnov and other alums. As noted above, a correspondent also pointed out that the previous essay incorrectly takes it as given that Rittenhouse was not invited by a property owner to stand guard.)

The first paragraph of Rav Shlomo Zalman's essay ends with a section that that according to an NCSY sourcesheet based on the Headlines podcast "formulates the halachic principle of "stand your ground":

אך אם אחד כופה את חבירו למונעו מאכילת היתר
נראה
דאף שיכול להמנע מאכילה זו ולהציל בבך את עצמו,
אשר לבאורה עדיף טפי מהצלה ע״י אחד מאבריו של הרודף,
מ״מ נלענ״ד
דלאו כל כמיניה של הרודף
להכריח הנרדף לעשות דוקא ברצונו,
ואם מתעשק דוקא להרגו משום כך –
הרי הוא נקרא רודף ומותר להרגו,
ולא חשיב כלל כיכול להציל עצמו
ע״י זה שיבטל רצונו מפני רצונו של הרודף.

But if A coerces B (by threatening deadly force) to deter B from a permitted act of eating –
it seems correct
that even though B could abstain from this eating, and thereby save himself –
which seems preferable to saving himself by damaging a limb of (=maiming) A
(and halakhah forbids killing a "pursuer/*rodef*" where maiming is sufficient) –
nevertheless, in my humble opinion,
a pursuer doesn't have the (halakhic) power (via the obligation to self-preserve)
to compel a pursued to act only he (the pursuer) wills,
and if A insists that he will kill B for that reason (= to make him submit) -
A is legally categorized as a "rodef/pursuer", and it is permitted to kill A,
and we do not at all consider B "able to save himself by merely maiming the pursuer"
because he could save himself by nullifying his will in favor of the pursuer's will.

(Note: The above applies equally to males and females on both sides of the equation. The same is true throughout this essay.)

This formulation plainly endorses a broad right to "stand your ground". But Rav Shlomo Zalman actually goes further. While his opening sentence concedes that that having the option

of avoiding a FORBIDDEN act MIGHT be considered "able to save by maiming", his argument is incompatible with that concession. All his evidence is drawn from a case in which the pursued is engaged in a forbidden act, namely: Rabbi Yochanan's ruling on Sanhedrin 82a that Zimri would not have been executed had he killed Pinchas.

To understand Rav Shlomo Zalman's argument, we must review Rabbi Yochanan's ruling and its halakhic reception history.

אמר רבה בר בר חנה אמר רבי יוחנן:
הבא לימלך - אין מורין לו.
ולא עוד, אלא, שאם פירש זמרי והרגו פנחס - נהרג עליו;
נהפך זמרי והרגו לפנחס - אין נהרג עליו,
שהרי רודף הוא.
Said Rabbah bar Bar Channah said Rabbi Yochanan:
If a zealot comes to ask (whether to kill) – we do not rule for him.
Moreover, if Zimri withdrew and Pinchas then killed him – he is executed for killing him;
But if Zimri reversed and killed Pinchas – he is not executed for killing him,
because he (Pinchas) is a pursuer.

Each element of Rabbi Yochanan's statement reflects deep ambivalence about the Mishnah's rule that "kannaim pog'in bo" (=zealots may kill those who act like Zimri).

- A beit din will not rule in advance that the zealot may kill;
- the zealot may kill only in defined circumstances that can change in an instant, transforming a legitimate target into a person whom it is murder to kill, and
- the zealot and his intended victim are treated by the law as mutual aggressors with equal right to use lethal force against the other.

Rabbi Yochanan's statement relates directly only to zealots. But because he presents these limitations without any Biblical source, and presumably therefore as the products of reason, (there is no basis for claiming that they are halakhot leMoshe miSinai), they inevitably ramify to other cases.

The rishonim wondered: to which transgressors does Rabbi Yochanan grant this right of self-defense? They assumed, based on Talmudic evidence, that a capital criminal would not be exempted for killing a court-authorized executioner. So why were Zimri and Pinchas different? Perhaps because of Rabbi Yochanan's ruling that courts must refuse to authorize zealots (and therefore Pinchas was not court-authorized); or perhaps because the zealot is permitted to kill but fulfills no mitzvah by doing so. Regardless, the upshot is that non-capital criminals, for example thieves, may use deadly force against those who seek to stop them via deadly force.

In the 20th century, an apparent contradiction to this understanding was raised. Sanhedrin 74a reports Rabbi Yonatan ben Shaul's ruling that using deadly force against a pursuer is illegal when the pursued can be saved by merely maiming the pursuer. It therefore seems obvious that using deadly force is illegal when the pursued can be saved simply be refraining from a specific act of sin. If so, why wasn't Zimri obligated to save himself by ceasing coitus with Kozbi, rather than by killing Pinchas?

Many resolutions have been provided. Perhaps Rabbi Yochanan meant only that Zimri would not be executed for killing Pinchas, but the killing was still a forbidden act of

manslaughter; or perhaps Zimri might reasonably believe that Pinchas would kill him anyway; or perhaps Zimri could not have ceased coitus in time; and so forth. All of these resolutions assume that in fact Zimri was permitted to kill Pinchas only if his life would remain at risk even if he ceased his sinning.

Rav Shlomo Zalman adopts what seems to me an original approach. He contends that "Zimri reverses" means that Zimri disengages and THEN kills Pinchas, meaning that Zimri has a right to use deadly force IN ORDER TO CONTINUE performing the forbidden act, in other words to prevent Pinchas from preventing him from resuming coitus with Kozbi. Under this approach, criminals have the right to use deadly force not only to preserve their lives, but even to preserve their autonomy to commit crimes.

Let me repeat: this argument, if accepted, demonstrates that criminals have the right to use deadly force to resist vigilantes even when they have the option of ceasing to commit crimes.

Actually, Rav Shlomo Zalman goes further.

The underlying question he is addressing is when (if ever) must one give in to someone threatening deadly force when one could instead kill the threatener. Rav Shlomo Zalman derives from Zimri that one is always entitled to kill an intimidator who is not court-authorized rather than submit, even if the threat is intended to prevent you from doing something wrong/forbidden (all the more so if it is intended to stop you from doing something neutral.)

However, what if trying to kill the intimidator increases your own risk of death? Even according to Tosafot's position that one may risk death rather than violate prohibitions that are *yaavor v'al yehareg*, it does not follow that one may risk death in order to protect one's capacity to engage in forbidden or neutral activities. In other words: Zimri should have been obligated to submit, rather than trying to kill Pinchas, because of the risk that he would fail. Why then does Rabbi Yochanan allow him to resist?

Rav Shlomo Zalman responds that reactive self-defense, meaning that you allow the aggressor to make the first move, almost inevitably increases both the risk of killing and of being killed. But preemptive self-defense can increase the risk of killing without increasing the risk of being killed (or at least without increasing it to the extent that halakhah forbids assuming it).

In other words: Zimri did not have to wait for Pinchas to raise his spear. Once it was clear to him that Pinchas would try to kill him if he slept with Kazbi, then, knowing that he would sleep with Kazbi regardless, he was entitled to kill Pinchas preemptively.

As always, the rule for Zimri applies to all criminals, certainly to all those who are not committing crimes for which they can be judicially executed. It follows that criminals can preemptively kill anyone who would use lethal force to stop their crime.

Let's apply this in practice. X intends to burn down an auto parts shop owned by Y. X knows that Y does not have the capacity to resist with deadly force, and therefore has no intention of killing Y. However, X knows that Z will likely choose to intervene with deadly force, as evidenced by Z standing outside the auto parts shop holding a loaded rifle. A is therefore LEGALLY ENTITLED to kill Z preemptively.

Now you understand why I was nervous about presenting Rav Shlomo Zalman's position. He essentially allows criminals to reverse the logic offered by Rava on Sanhedrin 72b to explain the

Biblical law of the *ba bamachteret* (furtively trespassing thief): "The thief says to himself: I will go rob; and when I go rob, B will confront me with deadly force; and the Torah says: He who comes to kill you – arise and kill him first!"

In response, you might say that Rav Shlomo Zalman begins by tentatively refusing to extend the argument to criminals, as opposed to people engaged in merely neutral activities:

נראה
שאם אחד מונע את חבירו מלאכול חזיר ומאיים עליו להרגו,
אף שהמאיים נקרא רודף –
מ"מ הרי יש לנרדף עצה להציל עצמו ע"י זה שיהא סור מרע ולא יאכל חזיר,
וא"כ –
אפשר דחשיב משום כך כיכול להציל עצמו באחד מאבריו
ע"י זה שימנע עצמו מעבירה
It seems correct
that if A prevents B from eating pig by threatening to kill B
that even though A is called a pursuer/*rodef* –
nonetheless, behold B has a method of saving himself by 'avoiding evil' and not eating pig
and if so –
POSSIBLY B is therefore considered like one able to save himself by maiming A,
in that B could refrain from committing the transgression.

I suggest that Rav Shlomo Zalman begins with this qualification precisely because he recognized the dangerous implications of his argument.

But I cannot pretend that Rav Shlomo Zalman's argument is purely theoretical. He seems very convinced that preserving autonomy against unauthorized force is a moral good, perhaps parallel to the Talmudic principle *shelo yehei chotei niskar*, meaning that we do not allow people to gain halakhic advantage from halakhically forbidden actions. He also (parenthetically) makes a pragmatic argument for his position:

[אפשר דכדי שלא יתרבו גנבים ופורצים
כמו שמותר לצבור להסתכן במלחמת רשות
כך רשאי כל יחיד לעמוד על ממונו אף אם מכניס עצמו בכך לספק סכנה,
וגם כיון שדרך העולם בכך
אפשר דהרי זה דומה למ"ש חז"ל בכמה מקומות על ספק סכנה
"והאידנא *שומר פתאים ה'*".
וצ"ע]

[Possibly
in order that thieves and thugs not multiply
just as a community may put itself at risk in an optional war
so too individuals may protect their property even by putting their lives at risk
especially since that is the way of the world
so possibly this is similar to Chazal's statement in several places about risk that
"Nowadays *Hashem is the guardian of the simple-minded".*
This requires investigation.]

This is roughly consonant with secular arguments for "stand your ground" laws.

The question is whether Rav Shlomo Zalman's argument be "tamed" so that his commitment to autonomy does not lead inevitably to a Hobbesian "war of all against all", and so that he does not allow criminals to preemptively kill those who would interfere with them. This kind of "taming" is the purpose of a practical tradition. In actual cases, for example, we might

- Find grounds for Rav Shlomo Zalman's tentative limitation of autonomy to legal acts
- Limit autonomy to actions that don't harm anyone else (although it seems to me that Rav Shlomo Zalman clearly rejects this distinction)
- distinguish between one-time threats and ongoing efforts to limit autonomy; and/or
- consider the availability of judicial or police action as "able to save himself by maiming A"; and/or
- require an extremely high degree of certainty before acting preemptively, including but not limited to a specific threatening action, or a prior history of using legal force; and/or
- (following Yad Ramah) rule that whoever first introduces lethal force to a situation is responsible for any resulting death;
- and/or rule that an attempt by A to grab B's weapon is presumptively an attempt to prevent the use of lethal force rather than attempt to use it;
- and/or require special training to allow the use of lethal force in any circumstance
- and/or require advance consultation with a beit din before using lethal force preemptively in any circumstances

and so on and so forth.

Rav Shlomo Zalman himself explicitly forbids third parties to intervene preemptively in any case other than the *ba bamachteret*, on the grounds that without the specific presumption mentioned by Rava, third parties cannot be confident that B will resist A's threat, and therefore A is not legally a pursuer. He cites no evidence for this limitation; I suggest that he introduces it because, as in his (tentative) opening exclusion of criminal actors, he wants to emphasize that his theoretical arguments cannot be applied directly to practice. This is a lesson we need to take deeply to heart.

C. **Rav Shlomo Zalman's Position in Context**

By Rabbi Elli Fischer SBM'97
Rabbi Fischer is Founding Editor of Lehrhaus, and a noted translator, editor, and historian.

R. Shlomo Zalman takes a fairly expansive "stand your ground" view in other areas as well, and it may be worth exploring those applications to get a fuller view. For example:

- *Ha-tzava Ke-halakha* 3:35 cites a ruling from RSZA that an observant soldier may leave the light on in the bathroom before Shabbat, even if he knows that at some point his non-observant bunkmate will turn it off. That is, the observant soldier need not waive his right to have a light on so keep his non-observant friend from transgressing by turning the light off;
- In *Shemirat Shabbat Ke-hilkheta* 32, n. 106, RSZA is reported as saying (against *Igrot Moshe*) that an observant doctor whose shift will begin on Shabbat need not arrive at the hospital before Shabbat, thus foregoing family time. He applies the same rationale (though is stringent in practice) in a case where a soldier knows that s/he will be called up on Shabbat for an operation; it is not necessary to spend Shabbat on the base.
- In *Shemirat Shabbat Ke-hilkheta* 32, n. 174, RSZA is reported as saying that if one's neighbor's home is unheated on a particularly frigid Shabbat, placing the neighbor's life in danger, it is permissible to turn on the heat in the neighbor's home, as one is not required to offer one's home to the freezing neighbor. Rav Melamed lists 4-5 similar rulings in *Peninei Halakha:Shabbat* 27:15
- A soldier on guard duty need not volunteer to do an extra shift in order to prevent his replacement from traveling on Shabbat.
- In *Shemirat Shabbat Ke-hilkheta* 40, n. 32, RSZA rules that one need not forego medical treatment (on a non-life-threatening illness) on Shabbat even if it is certain that the non-observant doctor will write, as the patient has a right to treatment and need not forfeit that right to prevent the doctor from violating Torah prohibitions.

It seems that RSZA had a broader "stand your ground" doctrine according to which one could insist on exercising rights even with the knowledge that it would cause others to transgress.

Below I am including responses to R. Shlomo Zalman by R. Eliezer Waldenburg and R. Asher Weiss. R. Waldenburg disagreed explicitly with R. Shlomo Zalman's extension of Zimri's right of self-defense to other sinners. R. Weiss expresses some of the reservations and elicits some of the absurdities that would result from taking RSZA's view to the extreme:

D. Rav Shlomo Zalman: Text followed by Translation

שו"ת מנחת שלמה חלק א סימן ז:ב

1. נראה
שאם אחד מונע את חבירו מלאכול חזיר ומאיים עליו להרגו,
אף שהמאיים נקרא רודף –
מ"מ, הרי יש לנרדף עצה להציל עצמו ע"י זה שיהא סור מרע ולא יאכל חזיר,
וא"כ, *אפשר דחשיב משום כך כיכול להציל עצמו באחד מאבריו ע"י זה שימנע עצמו מעבירה.
2. ומיהו
אם אחד כופה את חבירו למונעו מאכילת היתר –
נראה
דאף שיכול להמנע מאכילה זו ולהציל בכך את עצמו,
אשר לכאורה עדיף טפי מהצלה ע"י אחד מאבריו של הרודף –
*מ"מ נלענ"ד
דלאו כל כמיניה של הרודף להכריח את הנרדף לעשות דוקא כרצונו,
ואם מתעקש דוקא להרגו משום כך - הרי הוא נקרא רודף ומותר להרגו,
ולא חשיב כלל כיכול להציל עצמו ע"י זה שיבטל רצונו מפני רצונו של הרודף.
ועפ"י הנחה זו מבואר מ"ש בגמ' סנהדרין פ"ב ע"א: "אילו נהפך זמרי והרג לפנחס אין נהרג עליו",
3. ואף על גב דמבואר דלא שרי לפגוע בו אלא בשעת מעשה בעודו עליה, אבל אם פירש - אין הורגין אותו,
ונמצא שיכול זמרי להציל עצמו ע"י זה שיפרוש ממנה,
ולכן רבים תמהו ע"ז דלמה אמרו שאינו נהרג עליו,
אבל נראה דהוא משום דלאחר שכבר נדבק בה וכבר עשה העבירה - אין הורגין אותו כדי למונעו מעבירה,כי אם משום נקמה וקנאת ה',
ולפיכך נקרא בשם נרדף אף על גב שיכול להציל עצמו ע"י פרישה מעבירה, כיון דלא בגלל זה פוגעין בו.
4. ואין לומר
דלפיכך אינו נהרג, משום דלאחר שנדבק בה יצרו אונסו ורואין אותו כאנוס,
דנראה שברור הדבר דלאחר שהאבר מת אינו אנוס, ואף גם אז אמרינן שאם נהפך והרג אינו נהרג.
ותמיהני על שר התורה בעל צפנת פענח שכתב בהל' איסורי ביאה פי"ב ה"ה, אהא דכתב שם הרמב"ם שאם נשמט הבועל והרג את הקנאי אין הבועל נהרג עליו, וז"ל:
"דוקא נשמט, אבל אם הוא בועל - אז חייב אם הרג להקנאי, משום דהוה כמו יכול להצילו באחד מאבריו, דיכול לפרוש ושוב לא יהרגהו הקנאי",
רק מסתפק אח"כ וכתב: "אך י"ל דעכשיו אנוס הוא דיצרו אנסו",
וצ"ע, הרי הדין הזה נאמר גם במי שיודע שאין רשאין לפגוע בו אלא בשעת מעשה, וכיון שכן, מיד כשנשמט ממנה - הרי יודע הוא שפסקה ממנו הרדיפה והקנאי כבר לא יהרגהו, ולמה רשאי להרוג את הקנאי?! ועל זה ששינה הרמב"ם מלשון הגמ' שאמרו אילו "נהפך" ולא "נשמט" –
עיין בפרישה אבה"ע סי' ט"ז אות ו' שכתב דלאו דוקא נשמט, דהא כשנשמט אסור להרגו,
אך גם הוסיף לומר "דלשון נשמט משמע שנשמט כדי להורגו ולחזור ולבוא על העבירה, משא"כ כשכבר נגמר המעשה ופירש מהעבירה", ולענ"ד צ"ע,
דמ"מ מיד כשפירש - אין זה חשיב כשעת מעשה.
ומיהו בעיקר דברינו בכוונת הגמרא בסנהדרין שמח לבי כאשר ראיתי בכלי חמדה סוף פר' בלק שפירש כדברינו.
5. ולהדיא מבואר כן במל"מ הל' רוצח פ"א הט"ו שכתב ברודף אחר חבירו להרגו שניתן להצילו בנפשו
אם נתאמץ הרודף והרג את המציל - הרי הוא נהרג, כיון שהמציל הבא להרגו מחויב להציל הנרדף,
ומ"ש אם נהפך זמרי והרג לפנחס אין נהרג עליו –
היינו משום דהא דקנאים פוגעין בו אינו מצוה אלא רשות,
ומבואר שסובר שגם הרודף אחר חבירו להרגו כדי למונעו מאכילת חזיר ג"כ פטור הנרדף אם התאמץ כנגדו והרגו, כיון דשלא כדין הוא בא להרגו,
אבל עכ"פ חזינן שהמל"מ סובר דלא חשיב כיכול להצילו באחד מאבריו במה שיכול הנרדף להמנע מרציחה או אכילת חזיר, כיון שהוא כן רוצה בכך, ודוקא אם הרודף מחויב או יש עליו מצוה להרוג את

הנרדף - רק אז אין הלה יכול להשכים עליו ולהרגו, אבל לא כשזה רק רשות, וכ"ש כשהרדיפה להרגו היא למונעו מחזיר שהיא עבירה.

6. אולם בחדושי הר"ן שם בסנהדרין פ"ב ע"א כתב באופן אחר, וז"ל:
"והטעם בזה הוא שזה שהוא רודף אחר חברו להרגו –
כשאחד בא להרגו - אין לו שיהפך להרוג את הבא להרגו כדי שיציל הנרדף,
ולמה יפטור עליו יותר ממה שהרג את הנרדף?! אין לו אלא שישב ולא יעבור עבירה.
אבל זה שהוא בא על הכותית אין הקנאין פוגעין בו כדי להצילו מן העבירה שכבר נדבק בה אלא לעשות בו נקמה והבא להרגך השכם והרגו כל שאינו מחויב מיתת בי"ד בדבר" עכ"ל,
ויתכן שאין כוונתו דוקא מפני שרציחה היא חיוב מיתה, אלא כל שיכול להציל עצמו ע"י זה שישב ולא יעבור עבירה אינו קרוי כלל נרדף, וה"ה נמי כשהוא נרדף מפני שרוצים למונעו מאכילת חזיר,
אך יותר נראה מדבריו דעיקר כוונתו דאף שאין רשאין לפגוע בו אלא בשעת מעשה, אבל מ"מ, הואיל וההיתר לפגוע בו הוא לא כדי למונעו מעבירה בעתיד – לכן, אף שיכול להציל את עצמו ע"י פרישה, מ"מ אם עומד במרדו ואינו רוצה לפרוש - אין זה חשיב כיכול להציל עצמו באחד מאבריו וכדאמרן,
וא"כ אפשר דה"ה נמי כשרצונו דוקא לאכול חזיר, אבל עכ"פ כשבא למונעו מדבר המותר ומאיים עליו להרגו - ודאי שמעינן מהר"ן שסובר דיכול להשכים ולהרגו.

7. וכן מבואר במאירי שם שכתב:
"שאף בשעת מעשה אם נהפך בועל והרג את הקנאי להציל עצמו - אין נהרג עליו, שהרי רודף הוא,
ואעפ"י שבשאר רודפים להציל, אם נהפך רודף והרג - ודאי חייב,
אינו דומה, שברודף כדי להציל - הוא מתרה באחר והוא מתכוין לעשות דבר שהוא בו בר מיתה, אבל זה - אינן בן מיתה" עכ"ל,
ואף דמסתבר שגם הרודף אחר חבירו להרגו ע"י גרמא [ומבואר באחרונים דה"ה נמי ברודף להרוג טרפה] דפטור ממיתה ג"כ נהרג אם נהפך הרודף והרג את המציל –
היינו משום דסו"ס הוא עון של רציחה דשייך בו חיוב מיתה, משא"כ בבא לאכול חזיר דלאו בר מיתה הוא כלל שפיר משמע מדבריו שאינו נהרג, וכ"ש כשהוא רודף אחריו למונעו מאכילת היתר שאם הנרדף מתעקש ואינו רוצה לבטל רצונו והשכים והרגו אינו נהרג,

8. אך פשוט הוא שאחר ודאי אינו רשאי להרגו,
*כי דוקא בממון יש חזקה דאין אדם מעמיד על ממונו,
משא"כ בבא למונעו מאיסור, או אפילו מדבר המותר, *מהיכ"ת נימא שהנרדף יעמוד כנגדו?

9. ויפה העיר לי בזה חכ"א דלדברינו יש לחקור באחד שאמר לחבירו קטע את ידי ואי לאו קטלינא לך דאף שיכול ודאי להציל עצמו באחד מאבריו של הרודף ע"י זה שיעשה כרצונו לקטוע לו את היד –
מ"מ אפשר דלאו כל כמיניה של הרודף להכריח אחרים לעשות כרצונו, ואם אין הלה רוצה לקטוע את ידו - שפיר רשאי להשכים עליו ולהרגו,
והדבר צריך הכרע כי סוף סוף מעשהו הוא בגופו של הרודף למען הצל את עצמו, וכי מפני שגם הרודף רוצה בכך מיגרע גרע וצ"ע.
אך ראיתי להגאון בעל חלקת יואב שכתב במאסף דגל התורה סי' י"ג לתרץ קושיא זו דמ"ט לא חשיב זמרי כיכול להציל באחד מאבריו ע"י זה שיפרוש מעבירה, וז"ל:
"ולפענ"ד נראה פשוט דלא היה רשאי זמרי לפרוש תיכף כמו בנדה דיציאתו הנאה לו כביאתו, ומה שהי' רשאי פינחס להרגו בעודו עליה היינו מכח מה שכבר עבר מקודם כדמצינן בכהן ששימש בטומאה דמוציאין אותו ופוצעין את מוחו, אלא דכאן גזיה"כ דאף דנהרג בשביל העבר מ"מ אינו רשאי להרגו רק בעודו עליה אעפ"י שאז אין בידו לפרוש דיהרג ולא יעבור בזה" עכ"ל,
וכן כתב גם הגאון ר' אלעזר משה הורוויץ ז"ל באהל משה ח"א בסנהדרין פ"ב דאין לומר מפני שנעשה נס שלא היה יכול לפרוש שהרי הפוסקים הביאו גם להלכה דין זה, ולכן כתב: "ונ"ל הטעם דמדינא אסור לפרוש באבר חי כמ"ש הרמב"ם הל' שגגות ספ"ה ואפילו במקום פקו"נ דהבועל נכרית בפרהסיה הוי בכלל ג"ע" עכ"ל.
והנה מ"ש שההריגה היא על העבר כן מבואר גם בחדושי הר"ן הנ"ל,
אבל מ"מ צ"ע דנראה פשוט דמ"ש דפוגעין בו בשעת מעשה הוא גם כשהוא באבר מת ומשמע שגם אז אמרו שאם נהפך זמרי והרג את הקנאי שאינו נהרג אף על גב שאז מצוה עליו לפרוש,
גם צ"ע איך פסק כן הרמב"ם להלכה, והא תפ"ל שיכול להציל עצמו ע"י זה שיקרא בקול לקנאי שהוא חוזר בתשובה אלא שנועץ צפרניו ושוהה מפני שעכשיו אסור לו לפרוש ורוצה להמתין עד שימות האבר דתו לא חשיב בכה"ג "בשעת מעשה" כיון שצועק בקול שעושה תשובה אלא שמן הדין אסור לו עכשיו לפרוש.
ועיין במס' שבת דף ד' ע"א בתוד"ה קודם שאף אם הדביק במזיד בשבת פת בתנור אם מה שאינו מרדה אח"כ לפני קרימת פנים הוא משום דמדרבנן אסור לרדות מיקרי אנוס ופטור וכ"ש הכא שמדאורייתא אסור לפרוש,
ואם הבועל אינו יודע מזה - הרי לפי טעותו כ"ש שיכול להציל עצמו ע"י זה שיפרוש ומ"ט אינו נהרג,

וגם מסתמא מיירי הרמב"ם בכל ענין גם במי שיודע את הדין.
גם צ"ע דבכה"ג שצועק שהוא מתחרט ועושה תשובה, אלא שמפני האיסור הוא נמנע מלפרוש באבר חי – מסתבר דתו לא חשיב בפרהסיא
אך אף אם נאמר דכיון שהכניס עצמו לכך חשיב גם עכשיו כבפרהסיא ובשעת מעשה,
מ"מ מה שבבא על העכו"ם דינו דיהרג ואל יעבור כמו בשאר עריות מבואר בשו"ע אבה"ע סי' טז סעיף ב' ברמ"א דהיינו דוקא בפרהסיא, ואפילו לדעת הב"ש שם ובש"ך יו"ד סי' קנז ס"ק יב דגם בצינעא - הכי נראה דכיון שהמקור הוא מהנמ"י סופ"ח דסנהדרין ומשם משמע דעיקר הטעם הוא דכיון שבפרהסיא קנאים פוגעין בו, לכן מסתבר שגם בצינעא יהרג ואל יעבור,
וחושבני דמה שקנאים פוגעין בו - הוא רק בגלל ההתקרבות אל הנכרית,
אבל מי שנכשל ובא על עכו"ם בשוגג ועומד לפרוש באבר חי - מסתבר דבגלל זה אין קנאים פוגעין בו אפילו בפרהסיא,
וכיון שכן - אפשר דעל פרישה באבר חי לא אמרינן שיהרג ולא יפרוש.
גם נראה דאף שבכל עריות אמרו בסנהדרין ע"ח ע"א דהוא משום הנאה,
מ"מ ממה שחילקו במס' שבועות י"ח ע"א לענין פרישה באבר חי בין הנאה מרובה למועטת
[גם כתבו הרבה אחרונים דאשה אפי' אם שמטה עצמה ופירשה - פטורה מחטאת משום דלית לה הנאה ואין זה איסור]
משמע דבפרישה שהחיוב הוא משום דיציאתו הנאה לו אית לן למינקט דההנאה הוא יותר עיקר מסתם ביאה,
וא"כ בכה"ג שפורש באבר חי להציל עצמו ממיתה - הו"ל כלא אפשר ולא קמכוין, דלכו"ע שרי,
והתינח להתוס' בפסחים כ"ה ע"ב דלא שרי אלא בכה"ג דלא הוי פסיק רישא ניחא,
אולם להר"ן בפ"ז דחולין שלענין איסור הנאה כל היכי דלא מכוין ליהנות - חשיב כאינו מתכוין ושרי אפילו בפסיק רישא, ועיין בחדושי ר"ח הלוי פ"י משבת שכתב דגם הרמב"ם סובר כהר"ן – צ"ע,
דאף אם נאמר דגם כשיש לו אימת מות וממהר לפרוש בכדי להציל עצמו ממיתה ג"כ היכא הנאה וחשיב פסיק רישא,
אבל מ"מ להרמב"ם והר"ן מסתבר דחשיב בכה"ג כהנאה הבאה לאדם בע"כ וכלא אפשר ואינו מכוין דשרי,
וכיון שכן - אפשר דאע"ג דבחלבים ועריות דלית בהו דין מתעסק גם הר"ן סובר שם דחשיב פסיק רישא,
מ"מ לענין פרישה באבר חי - אפשר דלא חשיב פסיק רישא, ולא אמרינן שהבא על אשת איש בשוגג ורוצים להרגו שיהרג ולא יפרוש באבר חי.
גם צ"ע דלדבריהם איך מותר לפגוע במי שבא על עכו"ם, והרי יש לחוש שבגלל הפחד יפרוש באבר חי?!
ולכן נלענ"ד דבכוונת הגמ' צריכים שפיר לומר כדאמרן, וכמו שנראה גם מהמאירי והר"ן.
וגם היה נלענ"ד דאף שגם על אביזרייהו דעריות יהרג ואל יעבור - מ"מ על פרישה מעריות אין נהרגין אפילו באבר חי,
[וכן לענין קדושי ביאה מסופקני אם מתקדשת רק ע"י פרישה בלבד].
אבל בטלה דעתי העניה מפני דעת תורה של הגאונים הנ"ל.

10. וסעד גדול לדברינו מהבא במחתרת שכתב הרמב"ם בהל' גניבה פ"ט ה"ט:
"ומפני מה התירה התורה דמו של גנב אף על פי שבא על עסקי ממון?
לפי שחזקתו שאם עמד בעה"ב לפניו ומנעו - יהרגנו
ונמצא זה הנכנס לבית חבירו לגנוב כרודף אחר חבירו להרגו" עכ"ל,
ואף על גב שיש להבעה"ב עצה להציל עצמו ע"י זה שלא יעמוד על ממונו ולא ירדוף כלל הגנב להרגו –
*אפי"ה משמע דאף מי ששולט ברוחו ואינו בהול הרבה על ממונו אפי"ה מותר לו לעמוד על ממונו ולהתקומם נגד הגנב
ולא לחוש כלל לזה שע"י התנגדותו הוא עושה את הגנב לרודף והוא רשאי להשכים עליו ולהרגו,
ומשמע דאין זה דוקא מפני שהנרדף עצמו פטור בכל ענין גם כשיכול להציל עצמו באחד מאבריו של הרודף, שהרי לפני שעומד כנגדו לאו רודף הוא כלל,
וע"כ דכמו שמותר להשביע את חבירו וא"צ לחוש לזה שמכשיל אותו בלאו דלא תשא –
כך מותר גם להתקומם נגד הגנב ולא לחוש לזה שהוא עושהו בכך לרודף ומתיר את דמו.

11. והנה בשו"ע או"ח סי' שכט ס"ז מבואר
דבזה"ז, אף אם באו נכרים על עסקי ממון - מותר לחלל שבת,
מפני שאם לא יניחנו ישראל לשלול ולבוז ממונו – יהרגנו, ולכן הוי כעסקי נפשות,
וכתב ע"ז המג"א בס"ק ה וז"ל:
"וצ"ע, דיניחנו ליקח הממון ולא יחלל שבת?!

ואפשר כיון דאין אדם מעמיד עצמו על ממונו חיישינן שמא יעמוד אחר נגדם ויהרג לכן מחללין, אבל באדם יחיד יניח ליקח ממונו ולא יחלל שבת" עכ"ל,

וכן פסקו בשו"ע הרב ובמשנ"ב לדינא:

"יחיד שבאו עליו ליקח ממונו יניח להם ליטול כל אשר לו ולא יחלל שבת אפי' באיסור דברי סופרים",

וראיתי במנחת פתים להגאון ר"מ אריק ז"ל שהעיר ע"ז מגמ' סנהדרין דף ע"ב ע"ב שאמרו על הבא במחתרת "אין לו דמים בין בחול בין בשבת" ונשאר בצ"ע,

[גם האור גדול בדף ח ע"ב העיר על המג"א מהגמ' הנ"ל ונשאר קשה],

ועיין גם ברמב"ם הל' גניבה פ"ט ה"ג שכתב:

"הבא במחתרת - אין לו דמים - ורשות יש לכל להרגו בין בחול בין בשבת",

וממה שכתב ורשות יש "לכל" - משמע דלא רק אחרים מותרין בכך בגלל החזקה שא"א מעמיד על ממונו, אלא גם הבעה"ב עצמו רשאי לחלל שבת ולהרגו אף אם יכול לשלוט ברוחו ולא לעמוד על ממונו,

והן אמנם מסתבר דבכה"ג שהבעה"ב מסופק אם יצליח להתגבר ולהרוג את הגנב - שפיר צריך גם בימות החול ליתן כל אשר לו בעד נפשו ולא להכניס עצמו בספק סכנה

12. [אפשר

דכדי שלא יתרבו גנבים ופורצים

כמו שמותר לצבור להסתכן במלחמת רשות,

כך רשאי כל יחיד לעמוד על ממונו אף אם מכניס עצמו בכך לספק סכנה,

וגם כיון שדרך העולם בכך –

אפשר דהרי זה דומה למ"ש חז"ל בכמה מקומות על ספק סכנה "והאידנא שומר פתאים ה', וצ"ע]

11B. אבל מ"מ בכה"ג שיודע - ברור שיוכל ודאי להשכים עליו ולהרגו, משמע דשפיר מותר גם בשבת.

1. It seems
   that if X is restraining Y from eating pig, and threatening to kill him
   that even though the threatener is called a *rodef*/pursuer –
   nonetheless, Y the *nirdaf*/pursued has a means of self-preservation by avoiding evil and not eating pig,
   and if so, it is possible that Y is therefore considered "able to self-preserve via a limb" (i.e., by maiming rather than killing X) by means of self-restraining from transgressing.
2. However,
   if X forcefully restrains Y from a permitted act of eating,
   it seems
   that even though he is able to self-restrain from this eating and thereby self-preserve,
   which would seem preferable to self-preserving my maiming X –
   nonetheless, it seems to my humble intellect,
   that X is not given authority by halakhah to compel Y to act only in accordance with X's will,
   so if X stubbornly insists on killing Y for this – X is called a *rodef* and may be killed
   and the ability to submit to the will of a *rodef* does not make Y "able to self-preserve" by doing so (rather than killing X).
   On this assumption, Sanhedrin 82a: "Had Zimri reversed and killed Pinchas – he would not have been executed for killing Pinchas" is well explained:
3. Even though it is clear that Pinchas was permitted to kill Zimri only in the act, while was still having intercourse with Kazbi, but if Zimri separated – he could not be killed,
   so it turns out that Zimri could save himself by separating from her,
   and therefore many have expressed astonishment about this, wondering why they said Zimri would not be executed for killing Pinchas,
   but it seems that this is because after he already had intercourse with her and transgressed – Pinchas would not be killing him to restrain him from sin, but rather out of vengeance and zealotry for Hashem,
   and that is why Zimri is called a *nirdaf* even though he could self-preserve by separating from transgression, since preventing the transgression was not the purpose for which he was attacked.
4. . . .
5. This point is explicit in Mishneh L'Melekh to Laws of the Murderer 1:15, who wrote regarding the *rodef* who may be "saved by taking his life"
   If the *rodef* overpowered and killed the attempted rescuer – he is executed, since the rescuer who came to kill him was obligated to save the *nirdaf*,
   and that which he wrote that "If Zimri reversed and killed Pinchas – he is not executed" –
   that's because "Zealots attack him" is not a mitzvah but rather a permission",
   so it's clear that he holds that in the case of X pursuing Y to kill him so as to prevent Y from eating pig, that Y would also be exempt for overpowering and killing X, since X did not act according to law in trying to kill Y.
   Regardless, we see that Mishneh L'Melekh holds that one is not considered 'able to self-preserve via maiming" because of the ability to refrain from murdering or from eating pig, since he in fact wants to do these things, and it is only if X has an obligation or a mitzvah to kill Y that Y may not kill X first, but not in a situation such as this where X has mere permission, and all the more so where X is pursuing him to restrain him from the sin of eating pig . . .
6. However, Chiddushei HaRan Sanhedrin 82a writes differently, saying:
   The reason for this is that X, who is pursuing Y to kill Y –
   if Z comes to kill X, X may not reverse and kill Z, who is coming to save Y –

why should he be more exempt for killing Z than for killing X?! He may do nothing but stop and not transgress.
But this one who has intercourse with a Kutit – zealots do not attack him in order to save him from the transgression, which he is already enmeshed in, but rather to exact vengeance on him, and "one who comes to kill you – kill them first" so long as one is not liable to execution by the courts in the matter.
Plausibly his intent is not that the reason X may not reverse is not that murder is a capital crime, but rather that in any case where X can self-preserve by being passive and not transgressing – X is not at all called a *nirdaf*, and then the same would be true if X is being pursued by Y in order to prevent X from eating pig.
But it seems more likely in his words that his core intent is that even though the zealots could not touch Zimri except during his deed, nonetheless, since the permission to attack him is not to prevent a future transgression – therefore, even if Zimri could self-preserve by withdrawing, nonetheless, if he stood firm in his rebellion and refused to withdraw – certainly we learn from RAN that he may kill Pinchas first

7. . . .
8. However, it is obvious that a third party may not kill Pinchas,
because it is specifically with regard to property that there is a legal presumption/*chazokoh* that a person cannot restrain themselves with regard to their money (and so will confront a furtive thief),
but this is not so with regard to someone who comes to restrain them from transgressing, or even from something permitted – on what basis would we claim (to know in advance) that the pursued will confront the threatener?!
9. . . .
10. Great support can be brought for our words from the case of *ba bamachteret*, regarding which Rambam wrote in Laws of Theft 9:9:
Why did the Torah permit the blood of the (furtive) thief even though he came for money?
Because the legal presumption/*chazokoh* is that if the householder confronted and restrained him – he will kill him
So it turns out that this one who entered his fellow's house to steal is like one pursuing him to kill him.
Even though the householder has a means of self-preserving by not confronting the thief, as the thief will not all pursues the householder to kill him –
Nonetheless, the implication is that even one who controls their temper and is not terribly disconcerted about their money - even so, he may stand up for his money and confront the thief,
and he need not worry at all that by his opposition he is making the thief a *rodef* and allowing the thief to be killed.
11. . . .
12. [Possibly
in order that thieves and thugs not multiply
just as a community may put itself at risk in an optional war
so too individuals may protect their property even by putting their lives at risk.
Also. since this is the way of the world -
possibly this is similar to Chazal's statement in several places about risk that
"Nowadays *Hashem is the guardian of the simple-minded".*
This requires investigation.]

11B. . . .

E. R. Eliezer Waldenburg's Response to R. Shlomo Zalman: Text followed by Translation

שו"ת ציץ אליעזר חלק ט סימן יז - קונ' רפואה בשבת פרק ב

1. פרק ב' ב"ה, כ"ז ניסן תשכ"ה. ירושלים עיה"ק תובב"א.
אל הוד כבוד ידי"נ הרב הגאון הגדול הנודע בשערים המצויינים בהלכה בספריו הנעלים וכו' כש"ת מוהר"ר שלמה זלמן אויערבאך שליט"א, ראש ישיבת קול תורה.
אחדשכתר"ה באהבה וכבוד.
הפתעה נעימה היתה לי באור לארבעה עשר בניסן דנא כאשר קבלתי מכתר"ה קונטרס יקר בחדו"ת הכולל הערות והארות על ספרי משיבת נפש שנדפס בספרי החדש שו"ת ציץ אליעזר חלק שמיני. התענגתי לקרוא בו במשך ימי החג, אך לא עניתי לו על אתר באשר היו ימים שאין הלבלר יוצא בהם בקולמסו. אני מודה לו על שייחד מזמנו לעיון מעמיק בספרי, ובזה הנני מתכבד לענות לו על דבריו היקרים כפי שעלתה בע"ה במצודתי מדי עייני בקונטרסו, וכדרכה של תורה.
. . .
אם אחד מכריח את חבירו לעבור עבירה קלה או אפילו לעשות מצוה בגוונא שאם לא ישמע לו יהרגנו – אם דין רודף עליו ויהא מותר להרגו אפילו בשבת . . .
2. ובזה אני בא לדבר החידוש שכתר"ה בדבריו כותב בזה, וז"ל:
נראה דאם אחד אונס את חבירו לעשות עבירה קלה בכה"ג שאם לא ישמע לו יהרגנו – חשיב ודאי כרודף ומותר להרגו,
שהרי אפי' אם מכריח אותו לעשות מצוה או להמנע מעבירה - ג"כ חשיב רודף וכמו"ש אילו נהפך זמרי והרג את פנחס וכו',
וכיון שכן אף גם בשבת מסתבר שאין הנרדף צריך לשמוע לו ולעשות עבירה ואם האנס ירצה להרגו משום כך הו"ל כרודף דמותר שפיר להרגו אפי' בשבת, ואינו חייב כלל לעשות אתו חסד ולעבור עבירה כדי שלא יגיע למצב כזה שיהא מותר אח"כ להרגו כדין, ומ"מ כל זמן דליכא עדיין אונס נפשות - לא ניתנה שבת לדחות בשביל הצלת עבירה עכ"ל.
3. ***ולפענ"ד אין ראיתו מההיא דאילו נהפך זמרי עולה בד בבד עם דמיונו למי שמכריח אותו לעשות מצוה וכו',**
מפני דבשם לא בא פנחס להצילו מעבירה, שכבר עבר עליה, אלא בא לעשות עמו נקמה בלבד,
ולכן הדין בשם דאילו נהפך זמרי והרג את פינחס - לא נהרג עליו,
ומשא"כ בהיכא שתחילת ביאתו אליו הוא שיעשה מצוה או שימנע מעבירה - בכל כה"ג שפיר י"ל דנהרג עליו.
4. וכדברי האמורים כתוב מפורש בחידושי הר"ן לסנהדרין ד' פ"ב ע"א דכותב שם דבההיא דזמרי
לכך אילו הרגו לפינחס לא היה נהרג עליו, מפני שאין הקנאין פוגעין בו כדי להצילו מן העבירה שכבר נדבק בה, אלא לעשות בו נקמה, והבא להרגך השכם להרגו בכל שאינו מחויב מיתת בי"ד לדבר" ע"ש.
וא"כ דון מינה דהא כשפוגעין בו בכדי להצילו מן העבירה ולא עוד אלא שתחילת ביאתם אליו מלכתחילה הוא לשם כך לאלצו לקיים המצוה או לפרוש מן העבירה - אזי שפיר נהרג העבריין אם היה פוגע בהמכריחו, ודלא כדברי כתר"ה.
*והרי דינא הוא דבמ"ע =דבמצות עשה= כגון שאומרין לו עשה סוכה ואינו עושה לולב ואינו עושה מכין אותו עד שתצא נפשו עיין כתובות ד' פ"ו ע"א וחולין ד' קל"ב ע"ב.
5. . . .
6. ופה אומר לקולמסי שבות, ואסיים מעין הפתיחה בהוקרה מרובה לכתר"ה על אשר טרח לעיין בספרי ולשאת ולתת בדברי, וד' יאריך ימיו ושנותיו בטוב ובנעימים בבריות גופא ונהורא מעליא ואך טוב וחסד ירדפוהו כל ימי חייו.
ידידו מוקירו ומכבדו כרו"ע ודוש"ת באה"ר ונאמנה אליעזר יהודא וולדינברג.

1. To: The glorious etc. Rav Shlomo Zalman Auerbach, Rosh Yeshivat Kol Torah . . .
   If X coerces Y to violate a minor transgression, or even to do a mitzvah, such that if Y does not obey X, X will kill him –
   whether X is subject to the laws of *rodef*, such that it would be permitted to kill him even on Shabbat
   …
2. This brings me to the original position that Your Honor writes, saying:
   It seems that if X forces Y to violate a minor transgression in such a manner that if Y does not obey X, X will kill him –
   X is certainly considered a *rodef* and it is permitted to kill him,
   as even if X coerces Y to do a mitzvah or to refrain from a transgression – X is also considered a *rodef*
   as they say: "Had Zimri reversed and killed Pinchas etc."
   . . .
3. But in my humble opinion, your proof from "Had Zimri reversed" does not match perfectly with your analogy to someone who coerces someone else to do a mitzvah etc.,
   because there, Pinchas did not come to save him from transgressing, as he had already transgressed, but rather only to exact revenge from him,
   therefore the law is that if Zimri had reversed and killed Pinchas – he would not be executed for this,
   but the same is not true where X enters the picture for the sake of having Y do a mitzvah or refrain from a transgression – in all such cases we can properly say that Y would be executed for killing X.
4. Chiddushei HaRan to Sanhedrin 82a explicitly accords with what I've said, writing in regard to Zimri that
   "This is why, had he killed Pinchas, he would not have been executed, because "zealots attack him" not to save him from a transgression which they are already enmeshed in, but rather to exact revenge upon him, and 'who comes to kill you – kill him first' regarding all who are not liable to execution by the courts for the matter."
   and if so, learn from there that when X is attacked in order to save them from transgressing, and further, when the attacker first enters the picture for the sake of compelling X to fulfill a mitzvah or to separate from a transgression – then X the transgressor is properly executed for attacking-and-killing the one forcing them, as opposed to Your Honor's position,
   and behold the law regarding time-caused commandments, as for example if they say to him "Make a sukkah" and he does not, "Make a lulav" and he does not – they beat him until his soul departs – see Ketubot 86a and Chullin 132b.
5. . . .
6. . . .

F. Rav Asher Weiss's Position: Introduction, Text, and Translation

Rav Weiss shlita begins by offering the same resolution as Rav Shlomo Zalman does to the apparent contradiction between Zimri's permission to kill Pinchas, and the obligation to use deadly force against a pursuer only when no non-deadly option is available. Zimri can kill Pinchas rather than saving himself by ceasing-to-sin because halakhah does not require submission to illegitimate threats.

However, there is one essential difference (although I would be happy if someone convincingly read Rav Shlomo Zalman as agreeing with Rav Weiss). Rav Weiss distinguishes between the general use of the principle "One who comes to kill you, arise and kill him first) as authorizing the use of deadly force in self-defense, and it's use in Rava's justification of the law of the ba bamachteret *as permitting preemptive killing even before the violent confrontation is initiated. There is no indication in Rav Weiss's essay that he would extend the logic "He will try to stop me, and I will resist, therefore I can kill him preemptively to save my life" to give criminals a right to pre-emptively kill those they believe will interfere with their crimes.*

Rabbi Weiss also provides a reduction ad absurdum against the overall claim that ceasing-to-sin is not considered a relevant option of self-preservation using less-than-deadly-force. He leaves that challenge open.

Since Rav Weiss open his comments by associating the position of Rav Shlomo Zalman and Rav Shmuel Rozofksy, I have included and translated Rav Rozofsky's treatment here as well. He too makes no mention of the sort of preemptive killing permitted with regard to a ba bamachteret.

https://www.torahbase.org/%D7%91%D7%A2%D7%A0%D7%99%D7%A0%D7%99-%D7%A8%D7%95%D7%93%D7%A3-%D7%95%D7%94%D7%9E%D7%A1%D7%AA%D7%A2%D7%A3-%D7%AA%D7%A9%D7%A2%D7%97/

1. ומריש הוה אמינא,
וכן כתבתי במכתב לת"ח אחד והוא נדפס במנחת אשר לפסחים סי' ג',
וזכיתי לכוין לדעת גדולים - מרן הגרש"ז אוירבך במנחת שלמה סימן ז', ומרן הגר"ש רוזובסקי בספר זכרון שמואל סי' פ"ג אות ב' -
לחלק בין הא דיכול להציל באחד מאבריו להא דזמרי שנהפך והרג את פנחס ולא פירש מן הארמית,
דהנה זה נראה ברור
דאם אחד מאיים על חבירו להרגו נפש אם לא ישמשנו ויעשה רצונו בכל דבר –
שאין חבירו חייב להכנע לו ולקבל עול עבדותו ושימושו,
אלא יכול לומר לו "איני חפץ בשימושך, ואם בא אתה להרגני - התורה אמרה הבא להרגך השכם להרגו",
ואינו נידון כרוצח משום שיכול היה להציל את עצמו ע"י שישמשנו ויעשה רצונו,
דמסתבר דרק במה שקשור באופן טבעי להצלה ולהסרת הרדיפה - חייב להמנע מאיבוד נפש הרודפו, וכגון שיכול להכותו במכה מועטת באחד מאבריו דאסור לו להכותו במכה רבה ולהרגו,
אבל במה שאינו קשור בהצלתו באופן טבעי אלא באופן מלאכותי ושרירותי ע"י דרישת חבירו לשעבדו ולנצלו באיום הריגה - אינו מחוייב לעשות רצונו ע"מ להמנע מהריגתו,
דאל"כ - אין לדבר סוף, וכי כל ימי חייו יוכל לשעבדו ולנצלו באיום הריגה?!

2. ויתירה מזו נראה,
דאף במי שעובר על איסור תורה, כגון האוכל ביום הכיפורים או מחלל את השבת,
ובא עליו קנאי ואומר להרגו אם לא יבטל מעשיו המקולקלים,
ואמר החוטא לקנאי 'אין דיני מסור בידך אלא ביד בי"ד (במחלל שבת) וביד שמים (באוכל ביוה"כ, דחייב כרת), ואם מתעקש אתה להרגני - אשכים להרגך', וכך עשה –
דפטור עליו, דאף שמחוייב הוא להמנע מחטאו –
מ"מ אין זה ענין לרדיפת הקנאי, ולא ניתנה לו רשות לרצוח נפש, וכרודף הוא, ואם הנרדף הרגו - פטור עליו, ואף שיכול היה להציל עצמו ע"י שיפרוש מן החטא - אין הוא נידון כיכול היה להצילו באחד מאבריו, דאין הפרישה מן החטא קשור בעצם לאיום ההריגה,
3. (ולכאורה דינו כרודף ממש בזה באופן אף לגבי האחרים, ולא רק לגבי הנרדף, דאין היתר לקנאי להרוג את המחלל שבת וכדו', וכל הרואהו רודף - מצווה להציל את הנרדף בנפש רודפו,
אלא שיש לדון דהחוטא דינו כמומר ואין מצוה להחיותו, וכיון שאין מצוה להצילו - בודאי אסור להצילו בנפש רודפו,
ומ"מ לגבי הנרדף עצמו - הוי כרודף מדין הבא להרגך השכם להרגו, כמבואר לעיל באות א' ודו"ק)
4. והוא הדין בהא דזמרי ופנחס, אף דזמרי חוטא וניתנה רשות לקנאי להרגו –
כיון דאין הקנאי מחויב לעשות כן, אלא רשות היא בידו, ונחשב כרודף,
אומר זמרי לפנחס: "אף שמצווה אני לפרוש מן החטא ולא להיות מכעיס לפני המקום - אין זה ענין לגביך", ואם הרגו - פטור עליו, דהבא להרגך השכם להרגו, ואין הפרישה מן החטא הצלה כעין הכאה באחד מאברי הרודף.
5. אך באמת לבי נוקפי במהלך זה
דלכאורה נטיית השכל
לחלק בין כל הני, שבהם אין רשות כלל לרודף לפגוע בנרדף,

משא"כ בפנחס וזמרי, דכך ניתנה הלכה, וזה דין הבועל ארמית, שהקנאי רשאי להרגו, ואף יש בזה מצוה, אף שאין בו חובה,
וא"כ, מסתבר דהבועל מצווה לפרוש מן החטא ולא להרוג את הרודפו,
דאין הקשר בין חטאו לאיום הקנאי קשר שרירותי ומלאכותי אלא קשר עצמי ומהותי לפי משפט התורה, דכך ניתנה הלכה לממ"ס דהקנאי רשאי להרוג את הבועל ארמית,
ולכאורה אין הדעת סובלת שמותר לבועל להמשיך בחטאו ולהרוג את הקנאי,

6. ובגוף הענין
יש לעיין מה הדין באחד האומר לחבירו 'קטע ידי ואם לא אהרגך',
וחבירו טוען לעומתו שאין רצונו לקטוע ידו, וכשבא עליו להרגו - קם עליו והשכים להרגו,
ולפי הסברא הנ"ל - פטור הוא עליו, דאינו חייב לקטוע ידו, כמו שאינו חייב להשתעבד לרצונות הרודף ולעשות רצונו במה שאינו קשור לעצם ההצלה,
אך מאידך גיסא - תמוה מאוד שיפטר אם הרגו,
דהלא יכול היה להצילו באחד מאבריו ממש, וכיצד יותר לו להרגו אם יכול להציל את עצמו באחד מאבריו,
הגע בעצמך:
פלוני מחזיק ביד ימינו כלי הריגה ומאיים על אלמוני לקטוע את יד שמאלו,
ולכאורה שורת הדין שאם יכול לקטוע את יד ימינו, ולא עשה כן אלא הרגו - נהרג עליו, שהרי יכול היה להצילו באחד מאבריו,
אבל אם יכול לקטוע יד שמאלו ולא עשה כן אלא הרגו - פטור עליו,
כיון שאין קטיעת היד הזו מונעת את יכולת הרודף להרגו בדרך הטבע, אלא מסירה את איום ההריגה בדרך מלאכותי, ואת זה אינו מחוייב לעשות,
ואעפ"י שאפשר שבאמת כן הוא שורת הדין, ויקוב הדין את ההר –
מ"מ חוכך אני בדבר, ולכאורה אין הדעת סובלתו.

7. והנראה עיקר לענ"ד
דאם הבועל חושש שמא יהרגנו הקנאי אף אם יפרוש מן הארמית
מתוך חוסר שימת לב, או מתוך רוב קנאותו, או שמא לא ידע הלכה זו דאם יפרוש שוב אסור לו להרגו, ומשו"כ הרג את הקנאי –
פטור עליו, דהו"ל כנרדף שמסופק אם יוכל להציל עצמו באחד מאבריו,
ודו"ק בזה.

1. Originally, I thought,
   and I wrote this to a scholar, and it is published in Minchat Asher Pesachim #3,
   and in this I merited paralleling the thoughts of the great – our master Rabbi Shlomo Zalman Auerbach in Minchat Shlomoh #7, and Rabbi S. Rozofsky in the book Zikhron Shmuel #83.2 –
   to distinguish between the case of one who can save by maiming the pursuer, and that of Zimri reversing and killing Pinchas rather than separating himself from Kozbi –
   because this seems clear
   that if someone was threatening their fellow that they will kill them if they don't agree to serve them and do their will in every matter –
   that their fellow is not obligated to submit to them and accept the yoke of their service,
   rather he can say to them: "I do not wish to serve you, and if you come to kill me – the Torah says "One who comes to kill you, rise early to kill them",
   and he is not adjudged a murderer even though he was able to save himself by serving the threatener and doing his will,
   because it makes sense that it is only with regard to things that are connected in a natural way to saving and removing the pursuit that one is obligated to avoid killing the pursuer, as for example if he were able to strike him a slight blow on one if his limbs, that it is forbidden to strike him a great blow and kill him,
   but with regard to what is not connected in a natural manner, but rather in an artificial and capricious manner via his fellow seeking to enslave him and abuse him by threatening to kill him – he is not obligated to do his will in order to refrain from killing him.
   Because if we were not to say this – there would be no end to the matter, and should he be able to enslave and abuse him all his days via the threat of killing him?

2. Beyond this it seems to me
   that even someone who is violating a Torah prohibition, such as one who is eating on Yom Kippur or desecrating Shabbat,
   and a zealot comes and says that he will kill him if he does not stop his twisted deeds,
   and the sinner says to the zealot: "My verdict is not in your hands, rather in the hands of beit din (regarding Shabbat desecration) or heaven (regarding eating on Yom Kippur, which makes one liable to karet), and if you insist on trying to kill me – I will kill you first", and did so –
   that he is exempt for that, and even though he is obligated to refrain from his sin - nonetheless this is not connected to the pursuit of the zealot, and he was not given permission to murder, and he is like a pursuer, and if the pursued killed him – he is exempt for this, and even though he could have saved himself by ceasing to sin – he is not judged as-if he could have saved himself by maiming, because separation from sin is not essentially connected to the threat of killing,

3. (and it seems that he is judged as an actual pursuer in this, even for others, and not just with regard to the pursued, because there is no permission for a zealot to kill the Shabbat desecrator, and everyone who sees him pursue – they have a mitzvah to save the pursued at the expense of the life of the pursued,
   Unless we judge the sinner as a *mumar*, whom there is no mitzvah to save, and since there is no mitzvah to save him – certainly it is forbidden to save him by killing the pursuer,
   But regardless, with respect to the pursued himself, he is like a rodef with regard to the rule "One who comes to kill you – preemptively kill him", as explained above in section a.)
4. The same is true in that case of Zimri and Pinchas, even though Zimri was a sinner and zealots were permitted to kill him,
   since the zealot is not commanded to do this, rather only has permission to do so, and is considered a pursuer,
   Zimri can say to Pinchas: "Even though I am commanded to separate myself from sin and not cause anger before G-d – this is irrelevant to you",
   and if Zimri kills him – he is exempt for this, because "One who comes to kill you – preemptively kill him", and separation from sin is not considered 'saving' in the manner of maiming

5. But the truth is that my heart troubles me about taking this approach,
   because it seems the tendency of the intellect
   is to distinguish between all those, because in them the pursuer has no permission at all to injure the pursued,
   which is not the case regarding Pinchas and Zimri, because the halakhah was so given, and this is the law of the *boeil aramit*, that a zealot is permitted to atttack him, and there is even a mitzvah in this regard, even though there is no obligation, and if so, it seems reasonable that the one having sex is obligated to separate from sin and not to kill his pursuer,
   because the connection between his sin and the threat of the zealot is not capricious and artificial, rather a connection that is intrinsic and substantive according to the law of the Torah,
   because the halakhah l'Mosheh miSinai was given like this, that the zealot is permitted to kill the *boeil aramit*,
   and prima facie the mind cannot tolerate that it's permitted for the *boeil* to continue his sin and kill the zealot.

6. On the main issue
   we must investigate what the law is when one person says to another "Cut off my arm, and if not, I will kill you".
   while his fellow responds to him that he does not wish to cut off his hand, and when he tries to kill him – he stands against him and kills him,

and according to the reasoning above – he is exempt, as he is not obligated to cut off his hand, just as he is not obligated to enslave himself to the wishes of the rodef and to do his will in something that is not connected to the substance of the saving.
But on the other side, it is astonishing that he should be exempt if he kills him, because he could have saved him LITERALLY with one of his limbs, and how can it be permitted for him to kill him if he could save him with one of this limbs!
Ask yourself:
X is holding a deadly weapon in his right hand and threatening Y to make him cut off X'a left hand,
and it seems that the line of the law is
that if he's able to cut off his right hand, and did not do this but instead killed him – he is executed for this, because he could have saved him with one of his limbs,
but if he could have cut off his left hand and did not do this but instead killed him – he is exempt for this, since cutting off this hand does not prevent his ability to kill him in a natural manner, rather it removes the threat of death in an artificial manner, and this he is not obligated to do,
but even though it may truly be that this is the line of the law, and 'let the law pierce the mountain" –
nonetheless, I am uncertain of the matter, and it seems that the mind can't tolerate this.

7. So what seems the bottom line in my opinion,
that if the *boeil* is concerned that the zealot will kill him even if he separates from the Aramit, because of inattention, or because of his great zeal, or perhaps because he did not know this halakhah that if he separates it is forbidden to kill him,
and he therefore killed the zealot –
he is exempt for this, as he is like a pursued, because he is unsure whether he can save himself with one of the pursuer's limbs.
Investigate this.

G. Rav Shmuel Rozofsky: Introduction, Text, Translation

Rav Rozofsky (1913-1979), a student of Rav Shimon Shkop, was head of Yeshivat Ponovezh in Bnei Brak. The passage Rav Weiss cites is very much in the language of lomdus, and so any philosophic interpretation must be offered with caution.

For example, Rav Rozofsky does not relate directly to the issue of autonomy. Rather, his starting point is Rav Chaim Brisker's *lomdishe* insight that within the law of *rodef*, one can treat the liabilities of the pursuer and the rights of the pursued semi-independently. Specifically, there can be circumstances in which the pursued can kill a pursuer even though the pursuer has done nothing culpable. Rabbi Rozofsky suggests that one feature of such cases is that the right to kill in self-defense applies exclusively to the pursued, whereas everyone is obligated to kill a guilty pursuer to save the pursued. Thus Zimri had the right to kill Pinchas in self-defense, but no one else was entitled to use deadly force against Pinchas to save Zimri.

This raises the question, however, of how far the persona right of self-defense extends. It seems to me that Rav Rozofsky understands the phrase "He who comes to kill you – arise and kill him first" as not halakhically limited to the specific contexts of *ba bamachteret* and *rodef*, but rather is a kind of natural law principle. As such, it allows **any** person whose life is in danger a right of self-defense.

However, because Rabbi Rozofsky does not address the apparent contradiction between the ZImri case and the principle that one cannot use deadly force unnecessarily, we cannot know his position as to whether people engaged in non-capital crimes who can save their lives by ceasing their criminal actions have a right to use deadly force in self-defense.

זכרון שמואל פג:ב

1. והנה מש"כ הגר"ח ביצא ראשו דאף דהוה רודף - מ"מ ליכא ביה חיובא דרדיפה
נראה דזו היא ג"כ שיטת חכמי הדורות המובאים במאירי דביצא ראשו, אף דאין דוחין נפש מפני נפש - מ"מ האשה עצמה יכולה לחתכו, שנרדף היא
2. ולבאר דבריהם נראה
דהנה איתא בדף עב. לגבי בא במחתרת "והתורה אמרה הבא להרגך השכם להורגו", ובע"ב שם ילפינן מקרא *דהוכה* דכל אדם יכולים להרגו
3. ולכאורה גם הא דאמרינן כאן הבא להירגך וכו' - אינו דין מיוחד בנרדף,
אלא דזהו דינא דרודף, דניתן להצילו בנפשי, והשכם להורגו - לכל אדם נאמר וכדילפינן מ*הוכה*
4. אולם לקמן דף פב. בהא דאמרינן אילו נהפך זמרי והרגו לפנחס אין נהרג עליו שהרי רודף הוא – כתב שם הרא"ש
דרק זמרי אינו נהרג עליו, אבל איניש אחרינא - נהרג עליו, דלאו רודף גמור הוא, כיון דברשות קעביד, דלכל אינש איתיהיב רשותא להרוג את זמרי
הלכך לית להו רשות להצילו בנפשו של פנחס
וכן פסק הטור, וכן כתב המאירי
הרי מבואר דאף דחיובא דרדיפה אין עליו כיון דברשות קעביד, ומשו"ה אחר נהרג עליו - מ"מ זמרי הנרדף עצמו יכול להורגו, והיינו לכאורה מדין מיוחד דהבא להורגך השכם להורגו, דהיא היתר לנרדף להרוג הרודף, ואינו מדין חיובא דרדיפה.

1. Chiddushei Rabbeinu Chayyim Halevi wrote that once a fetus' head emerges, It cannot be killed to save the life of the mother because even though it is categorized as a rodef, nonetheless it is not subject to the liabilities of being a rodef,
   It seems correct that this is also the position of the "Sages of the Generations" cited by Meiri that even though the rule once the head emerges is "we do not push aside one nefesh for another nefesh", nonetheless the woman herself can "cut it up" (=abort), because she is a *nirdaf*
2. This is what seems correct to explain their position
   On Sanhedrin 72a, regarding the furtive trespasser, the gemara says "One who comes to kill you – preemptively kill them", and on 72b we derive from the verse "and he is struck down" that all people are permitted to kill him,
3. and apparently that which we say here "one who comes to kill you etc." is not a rule specific to the pursued, rather this is the law of the pursuer, that he can be killed in order to save the pursued, but "one who comes to kill you" – that is said to everyone, as we derive from "and he is struck".
4. However, below on 82a, regarding that which we say "had Zimri reversed and killed Pinchas – he is not executed for this, because Pinchas was a rodef", the ROSH wrote that only Zimri is not executed for this, but another person would be executed, because he is not a complete pursuer, since he is acting with authorization, because every person has permission to kill Zimri – therefore they have no permission to save Zimri by killing Pinchas.
   The Tur also paskens this way, and Meiri also wrote this way
   So it is clear that even though Pinchas did not have the liability of pursuit, since he was acting with permission, and therefore someone else is executed for killing him – nonetheless Zimri the pursued is personally able to kill him, and that is apparently based on a separate law of "One who comes to kill you – preemptively kill him", which is a permission for a pursued to kill a pursuer, and is not part of the law arising from the liability of the pursued.