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CAN THERE BE A HALAKHIC DUTY TO PREVENT THE FULFILLMENT OF A HALAKHIC DUTY?

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Dr. Benjamin Freedman z"l's wonderful Duty and Healing presents the advantage of duty-based versus rights-based systems in medical ethics as follows: In a rights-based model, the parties have conflicting interests. The question is who "gets" to make the decision. In a duty-based model, everyone's interest is that the best decision be made. Opinions may conflict but not interests.

Freedman adopts the conventional tack of identifying the halakhic system as duty-based and Western ethics as rights-based. But the strongest formulation of the advantage he claims for duty-based systems is Ayn Rand's dictum that "**There is no conflict of interests among men**, neither in business nor in trade nor in their most personal desires—if they omit the irrational from their view of the possible and destruction from their view of the practical".

Of course, the irrational is rarely if ever successfully banished (and perhaps it should not be), and destruction is often seen as a viable option. In practice, the most rational of people often believe their interests to be opposed. But the underlying premise is sound within halakhah. Every person's best or true interest in every situation is to do their duty, to serve G-d and act in accordance with His will.

Does it make sense to say that two people genuinely acting in accordance with His will can find themselves in conflict? It seems worth asking to what extent halakhic reasoning tolerates the claim that the moral interests of halakhic people are genuinely opposed.

As an illustration: Halakhic people can mistake their true interests. I can believe that I grabbed an ownerless toga first, and you can believe that you did. Our economic interests are certainly in conflict. But we share the moral interest of ensuring that the property is given to its true owner, and if that is unknowable, we share the moral interest of upholding the ruling of the court that it be split.

It is true that in some extreme cases the court simply withdraws and declares *kol d'alim gyar* = whoever is stronger, i.e. whoever successfully seizes the property as a matter of fact, will be recognized as the owner by law. But this does not affect my argument. In such cases, either there simply are no moral interests – if one can religiously accept that some human decisions are a matter of entire indifference to G-d - or else the moral interests are unrelated to ownership, but rather to questions such as who has greater need of the property, or would use it best. (Deborah Klapper asks why the court allows a contest of force rather than directly granting the property to one part on moral grounds, which

is a possible understanding of *shuda dedaini*, another mechanism used in such cases. But determining which mechanism is used when, and why, is beyond the scope of this essay.)

A more challenging case may arise out of the narrative that concludes Parshat Balak. Explicating the challenge will require an extended halakhic excursus.

Pinchas is outraged by the action of Zimri, *nasi* of the tribe of Shim'on, in publicly flaunting his dalliance with Kozbi bat Tzur, daughter of the *nasi* of Midyan. He steps forward and fatally skewers the two sinners. Mishnah Sanhedrin justifies his action under the rubric *kannoin pog'in bo* = zealots execute people committing this sin. Vigilante justice is legitimate in such cases even though the sin is not a capital crime under the Torah's formal regime of criminal law. (Note: The very existence of such a category is profoundly dangerous, and there is absolute halakhic consensus that it has no contemporary relevance. The legal analysis below is engaged in solely to address the philosophic question above.)

Talmud Sanhedrin 82a provides the following analysis:

אמר רב חסדא:

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 Rav Chisda:

If someone comes to ask (whether they may play the vigilante) – they may not rule for him ...

Not only this, but

if Zimri had separated from Kazbi, and Pinchas had nonetheless killed him –

Pinchas would be executed for killing him;

if Zimri had turned about and killed Pinchas –

Zimri would not be executed for killing him,

because after all Pinchas is a *rodef*=pursuer.

(Note: The Talmud does not address Kazbi's rights and obligations. That discussion is beyond the scope of this essay.)

The law of the *rodef* generates a right and duty of self-defense against deadly attackers, and a duty of intervention for all bystanders. This ruling makes clear that the legitimate vigilante, the

kannoi, exists in an odd halakhic twilight zone. He or she is acting in accordance with the Torah, but halakhists may not affirm this to them if they ask – what does that mean? Regardless, their target is entitled to fight back in self-defense, with deadly force if necessary.

Commentators ask the logical next question: If the *kannoi* is a pursuer, do third parties have the right or obligation to intervene against them? The consensus answer is no. But that answer begs the question. Since the vigilante is not acting on the basis of a ruling, how are third parties to know that he or she is anything other than an ordinary murderer?

A possible answer is that third parties can act only on the basis of certainty. Where the apparent victim is actively engaged in a relevant transgression, such certainty is impossible, since the apparent pursuer might be a legitimate zealot. But the right of self-defense does not require the same degree of certainty. This approach can be formally justified by distinguishing the law of the *rodef*, or active pursuer, from the law of the *ba bamachteret* = furtive trespasser = presumptive pursuer. The latter is framed in the Torah as a right rather than an obligation. Under this reasoning, Zimri had a right to defend himself with deadly force against *Pinchas*, but no obligation to do so.

Mishneh l'Melekh challenges the Talmud's ruling as self-contradictory. "If Zimri had separated from Kazbi, and Pinchas had nonetheless killed him – Pinchas would be executed for killing him" means that the *kannoi's* action is legitimate only while the transgression is ongoing. But the law of the *rodef* authorizes deadly force only **when necessary** to remove the threat. Why may Zimri kill Pinchas as a *rodef* when he can remove the threat simply by ceasing to sin?!

This question can be resolved formally in at least three ways.

1. One can argue that the Talmud does not justify Zimri's self-defense, but merely exempts Zimri from capital punishment, and the use of unnecessarily deadly force against pursuers is not a capitally punishable crime. (This approach itself generates literature about whether it is inherently not a capital crime, or rather that there are insurmountable evidentiary barriers to capital prosecution.)
2. One can argue that the proper formulation of the law of *rodef* is not "use deadly force only when necessary", but rather "use only the degree of force necessary". This formulation means that the threat of violence cannot compel a person to hide, or to cease their otherwise chosen activities, even if those activities are illegal. (This raises the question of whether an ordinary murderer retains the right of self-defense against interveners. Again, the consensus answer is no. The simplest formal response is that the right of self-defense does not apply against officers of the courts acting in the legitimate course of their duties, and that halakhah automatically deputizes third parties in such cases.)
3. One can argue that halakhah defines withdrawal-while-erect as a sexual act, so that in the precise moment Zimri had no practical

way of ceasing to sin (Chelkat Yoav, in the anthology Degel HaTorah, end of Siman 13.)

Under Chelkat Yoav's approach, it seems to me that Zimri was not only permitted but actually obligated to kill Pinchas.

Chelkat Yoav generalizes his argument to other cases in which the Torah permits but does not obligate killing. Thus the Talmud records a dispute whether the *goeil hadam* = blood-avenger (another case with no contemporary relevance) is permitted or obligated to kill the *rotzeiach b'shogeg* = accidental murderer. Under the position that the blood-avenger is only permitted, Chelkat Yoav argues that the accidental murderer has a right – I contend duty – of self-defense against the *goeil hadam*.

Now this does not yet generate a conflict of moral interests, because one can argue that the *goeil hadam* is permitted but **ought not** to kill the *rotzeiach b'shogeg*. This may follow from the Torah's description of the *goeil hadam* as in the grip of overwhelming emotion. So everyone's moral interest is that the *rotzeiach b'shogeg* not be killed.

However, Rambam (Issurei Biah 12:4-5) states clearly that the *kannoi* is praiseworthy, just before recording Zimri's right of self-defense.

It follows that Pinchas **ought to** try his best to kill Zimri, and Zimri **ought to** try his best to prevent Pinchas from killing him. This is an opposition not merely of practical but of moral interests.

One can escape this conclusion by rejecting the implication I drew from Chelkat Yoav; by rejecting Chelkat Yoav's approach; by rejecting Rambam's praise of the *kannoi*; and in many other ways. The question I am asking is whether it is religiously necessary to escape this conclusion because halakhic Judaism cannot countenance having moral interests conflict.

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