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Center for Modern Torah Leadership



חזרה ואחריות

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"Taking Responsibility for Torah"

## RAV SHLOMO ZALMAN AUERBACH AND KYLE RITTENHOUSE

### Rabbi Aryeh Klapper, Dean

The first paragraph of Minchat Shlomo 1:7: 2 (R. Shlomo Zalman Auerbach) ends with a section that according to a Headlines/NCSY sourcesheet “formulates the halachic principle of “stand your ground”:

But if A coerces B (via the threat of deadly force) in order to prevent B from a permitted act of eating –

it seems correct that even though B could abstain from this eating, and thereby save himself –

which presumptively takes precedence over saving himself by maiming A

(and halakhah forbids killing a “pursuer/rodef” to save oneself when maiming would be sufficient)

–

nevertheless, in my humble opinion,

A (the pursuer) does not have the (halakhic) power (via the obligation to preserve one’s own life)

to compel B (the pursued) to act only as A 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 R. 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: R. Yochanan’s ruling on Sanhedrin 82a that Zimri would not have been executed had he killed Pinchas.

To understand RSZ’s argument, we must review R. Yochanan’s ruling and its halakhic reception history.

Said Rabbah bar Bar Channah said R. Yochanan:

If a zealot comes to ask (whether to kill) – we do not rule for him.

Not only that, but 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 R. Yochanan’s statement reflects deep ambivalence about the rule that “kannaim pog’in bo” (=zealots may kill those who act like Zimri). A beit din mustn’t 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 mutual aggressors with equal right to use lethal force against the other.

Rishonim wondered: to which other transgressors does R. Yochanan grant this right of self-defense? They assume that a capital criminal would not be exempted for killing a court-authorized executioner. So why were Zimri and Pinchas different? Perhaps because R. Yochanan’s ruling meant that Pinchas was not court-authorized); or perhaps because the zealot fulfills no mitzvah by killing. 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 20<sup>th</sup> century, an apparent contradiction was raised. R. Yonatan ben Shaul ruled that using deadly force against a pursuer is forbidden when merely maiming the pursuer would suffice (Sanhedrin 74a). It therefore seems obvious that using deadly force is forbidden when the pursued can be saved merely by refraining from a sinful action. If so, why wouldn’t Zimri be obligated to save himself by ceasing coitus, rather than by killing Pinchas?

Many resolutions have been provided. Perhaps R. Yochanan meant only that Zimri would not be executed for killing Pinchas; 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.

RSZ adopts an original approach. He contends that “Zimri reverses” means that Zimri disengages and THEN kills Pinchas, meaning that Zimri uses deadly force IN ORDER TO CONTINUE sinning. This proves that criminals are entitled to use deadly force not only to preserve their lives, but even to preserve their autonomy to commit crimes.

What if resisting increases your own risk of death? Tosafot hold that one may risk death to avoid prohibitions that are *yaavor v’al*

*yehareg*, but this doesn't extend to 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 does R. Yochanan allow Zimri to resist?

RSZ responds as follows. Reactive self-defense usually increases the risk of being killed. But preemptive self-defense can increase the risk of killing without increasing the risk of being killed (or at least not to the extent that halakhah forbids assuming it). Therefore, Zimri did not have to wait for Pinchas to raise his spear. Once it was clear that Pinchas would kill him if he slept with Kazbi, then, knowing that he would resist, he was entitled to kill Pinchas preemptively.

The rule for Zimri applies to all criminals, certainly to all those not committing capital crimes.

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

Now you understand why I was nervous about presenting RSZ's position. He essentially allows criminals to reverse the logic offered by Rava (Sanhedrin 72b) to explain the Biblical law of the 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!"

Recall that RSZ begins by tentatively refusing to extend the argument to criminals, as opposed to people engaged in merely neutral activities:

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 that 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 RSZ begins with this qualification precisely because he recognized the dangerous implications of his argument.

But RSZ's argument is not purely theoretical. He believes that defending sinful autonomy against unauthorized force is a moral good, perhaps parallel to the Talmudic principle *shelo yebei chotei niskar*, meaning that we don't allow people to gain halakhic advantages from halakhically forbidden actions. He also (parenthetically) makes a pragmatic argument for his position:

[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 RSZ'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

- a) Find grounds for RSZ's tentative limitation of autonomy to legal acts
- b) Limit autonomy to actions that don't harm anyone else (although it seems to me that RSZ clearly rejects this distinction)
- c) distinguish between one-time threats and ongoing efforts to limit autonomy; and/or
- d) consider the availability of judicial or police action as "able to save himself by maiming A"; and/or
- e) 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
- f) (following Yad Ramah) rule that whoever first introduces lethal force to a situation is responsible for any resulting death;
- g) 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;
- h) and/or require special training to allow the use of lethal force in any circumstance
- i) and/or require advance consultation with a *beit din* before using lethal force preemptively in any circumstances

and so on and so forth.

RSZ himself explicitly forbids third parties to intervene preemptively in any case other than the furtive thief, 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; perhaps 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.

Shabbat shalom!

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