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A JEWISH PERSPECTIVE ON THE KYLE RITTENHOUSE TRIAL

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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 hamachteret*

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 the Talmud does not introduce a Biblical quote, but rather an implication.)

Rava's multistep rationale raises the question of why the homeowner would be 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 adds piquantly that otherwise assassins would be able to sneak in with impunity to kill, and if confronted, disengage without risk until their next attempt. Chiddushei HaRan (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) 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) 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 appear 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 (Minchat Shlomo ?:?) 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.

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.

Shabbat shalom!