

Rodef vs. Ba Ba-Mahteret: The Pursuer and the Tunneler

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Consider once again the various types of killing in self-defense

1. Fiona Leverick, *Killing in Self-Defence* (New York: Oxford University Press, 2006), p. 45

Consequentialist approaches are based on the notion that the consequences of killing an aggressor in self-defence are preferable to the consequences of allowing the victim of aggression to be killed. That is, when faced with a choice between the death of the aggressor and the death of the victim, the aggressor's death is the preferable consequence.

2. Fiona Leverick, *Killing in Self-Defence* (New York: Oxford University Press, 2006), p. 54

The right to life is possessed by all human beings and a victim whose life is threatened by an aggressor is therefore permitted to use lethal force to defend her life... The question of why the aggressor does not have a right to life has to be addressed. One way to proceed is to hold that an aggressor, by virtue of her conduct, forfeits her right to life.

3. Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (1994), p. 268

People are entitled, at least with regard to certain types of choice, to give priority to their own interests and values over those of other people. Virtually all of us accept some view of this sort. We do not believe that we are always morally required to give the interests of all other people the same weight that we give our own.

Consider one theory on the relationship between self-defense and defense of a third party:

4. Judith Jarvis Thomson, "Self-Defense," *Philosophy and Public Affairs* 20 (1991): 283-310, at 306

Self- and other-defense are not exactly two sides of one coin, but they are nevertheless close to it. . . . Considerations of autonomy apart, however, I think it very plausible to suppose that the permissibility of X's killing Y in self-defense goes hand in hand with the permissibility of Z's killing Y in defense of X, and that both phenomena have a common source.

Consider the case of the pursuer, presented here. What principles might you posit for which cases are lethally actionable and which are not?

5. תלמוד בבלי מסכת סנהדרין דף עג עמוד א

משנה. ואלו הן שמצילין אותן בנפשן: הרודף אחר חבירו להרגו, ואחר הזכר, ואחר הנערה המאורסה. אבל הרודף אחר בהמה, והמחלל את השבת, ועובד עבודה זרה אין מצילין אותן בנפשן.

גמרא. תנו רבנן: מניין לרודף אחר חבירו להרגו שניתן להצילו בנפשו - תלמוד לומר לא תעמד על דם רעך. והא להכי הוא דאתא? האי מיבעי ליה לכדתניא: מניין לרואה את חבירו שהוא טובע בנהר, או חיה גוררתו, או לסטין באין עליו, שהוא חייב להצילו - תלמוד לומר

לא תעמד על דם רעך. - אין הכי נמי. ואלא ניתן להצילו בנפשו מנלן? - אתיא בקל וחומר מנערה המאורסה, מה נערה המאורסה, שלא בא אלא לפוגמה - אמרה תורה ניתן להצילה בנפשו, רודף אחר חבירו להרגו - על אחת כמה וכמה. - וכי עונשין מן הדין? - דבי רבי תנא: הקישא הוא, כי כאשר יקום איש על רעהו ורצחו נפש, וכי מה למדנו מרוצח? מעתה, הרי זה בא ללמד ונמצא למד, מקיש רוצח לנערה המאורסה: מה נערה המאורסה ניתן להצילה בנפשו - אף רוצח ניתן להצילו בנפשו. ונערה מאורסה גופה מנלן - כדתנא דבי רבי ישמעאל. דתנא דבי רבי ישמעאל: ואין מושיע לה, הא יש מושיע לה - בכל דבר שיכול להושיע.

5. BT Sanhedrin 73a

Mishnah. These are those whom we save with [the taking of] their lives: One who pursues his fellow to kill him, or a male [to sodomize him], or a betrothed *na'arah* [to violate her]. But one who pursues a beast [for bestiality], or one who is desecrating the Sabbath, or engaging in idol worship, we may not save them with [the taking of] their lives.

Gemara. The Rabbis taught: "From where do we know that, if someone pursues his fellow to kill him, that he should be saved with [the taking of] his life? The verse says "do not stand by the blood of your friend." But does it come to teach this? It comes to teach that which was learned: How do we know that one who sees his fellow drowning in a river, or a wild animal dragging him, or a robber coming upon him, that he is obligated to save [his fellow]? The verse says "do not stand by your fellow's blood." This is true [that the verse is needed for that other teaching]. So how do we know that one can save [a pursuer] with his life [by killing him]? It is derivable by an *a fortiori* argument from a betrothed maiden [that one who attempts to rape her may be killed]. Regarding a betrothed maiden where he comes only to damage her [and not to kill her] the Torah says she can be saved with his life, one who is chasing after his friend to kill him, all the more so! But do we issue punishments based on logical argumentation [as opposed to an explicit source]? [Rather,] a Baraita of the academy of Rabbi taught: "It is derived from a Scriptural analogy: 'For like a man who rises up against his fellow and murders him, [so is this thing, the rape of a betrothed *na'arah*]' (Deut. 22:26). Just as a betrothed *na'arah* should be saved from rape with [the taking] of his life, so, too, a murderer should be saved with [the taking] of his life." And from where do we know this very law about the betrothed *na'arah*? As the Baraita of the academy of R. Yishmael taught, for a Baraita of the academy of R. Yishmael taught: "'But she had no rescuer' (Deut. 22: 27)" The implication is that if there was someone to rescue her, [he could rescue her] in whatever way possible."

6. אהרן אנקר ודוב פרימר, "הגבול בין צורך והגנה ישית במשפט עברי," (1977), 217

דין רודף מבוסס על צירוף שני היסודות גם יחד. מותר להרוג את הרודף כשברדיפתו הוא מבצע עבירה חמורה שדינה מיתה והריגתו תציל את הנרדף ממזימתו.

6. Aharon Enker and Dov Frimer, "The Boundary between Necessity and Self-Defense in Mishpat Ivri," (Hebrew, 1977), p. 217

The law of the pursuer is based on the combination of these two principles: It is permitted to kill the pursuer when, in his pursuit, he is carrying out a severe sin whose punishment is death, *and* his being killed will save the pursued party from his scheme.

Compare the topic of the tunneler, Ba Bamachteret, that we studied yesterday (and which is reproduced below) with the topic of the pursuer. What is the ruling in each case? Is there a need for both cases to be taught? What differences might exist between the cases? Does one have a broader scope? Is there greater license afforded in one case or the other?

7. תלמוד בבלי מסכת סנהדרין דף עב עמוד א עמוד ב

משנה. הבא במחתרת נידון על שם סופו. היה בא במחתרת ושבר את החבית, אם יש לו דמים - חייב, אם אין לו דמים פטור. גמרא. אמר רבא: מאי טעמא דמחתרת - חזקה אין אדם מעמיד עצמו על ממונו. והאי מימר אמר: אי אזילנא - קאי לאפאי ולא שביק לי, ואי קאי לאפאי - קטלינא ליה. והתורה אמרה: אם בא להורגך - השכם להורגו ...

7. Babylonian Talmud, Tractate Sanhedrin 72a

Mishnah. A burglar who enters a house by tunneling (*ha-ba ba-mahteret*) is judged on account of his ultimate end. If a burglar was entering a house by tunneling and broke a barrel, then if his [the burglar's] blood is accountable, he is liable for the damage. But if his [the burglar's] blood is not accountable, he is exempt.

Gemara. Rava said: What is the reason for the [license to kill the] tunneler? There is a presumption that a person does not hold himself back from defending his property, and the burglar will surely tell himself, "If I go [and enter], he [the homeowner] will confront me and not allow me [to rob him], and if he confronts me I will kill him." And the Torah says: "If one is coming to kill you, arise first and kill him."

8. גרי"ז על הרמב"ם רוצח א:יג

אין זה משום דלגבי הנרדף אשתני דינו של הרודף מלגבי כל אדם, דלא מצינו חילוקא בחיובא דרודף בין נרדף לכל אדם. אלא דהוא דין בפני עצמו על הנרדף שמותר להרגו משום דהבא להרגך השכם להרגו והוא כעין היתרה לנרדף, אך אין זה חלות דין בגופו של רודף שיחול ביה דין חיובא לנרדף, דבגופו של רודף ליכא חילוקא בין אחר לנרדף.

8. Griz (Rabbi Yitzhak Zeev Soloveitchik) on Rambam, Rotzeach 1:13

This is not because, relative to the pursued party, the status of the pursuer is different than it is toward other people (in terms of killing the pursuer being allowed), as we do not find a distinction in the guilt of the pursuer between the pursued party and any other person. Rather, this is an independent law regarding the pursued party, that he is allowed to kill him (the pursuer), because 'one who comes to kill you, arise first and kill him.' And it is like an allowance to the pursued party, but this is not a change of status in the body of the pursuer that would effectuate a ruling of guilt (and therefore lack of guilt for one who kills him) from the perspective of the pursued party, as in the body of the pursuer there is no distinction between an other (third party) and the pursued party.

We now consider potential distinctions between the two categories:

9. רמב"ם הלכות רוצח ושמירת הנפש פרק א הלכה יג

כל היכול להציל באבר מאיבריו ולא טרח בכך אלא הציל בנפשו של רודף והרגו הרי זה שופך דמים וחייב מיתה אבל אין בית דין ממיתין אותו.

9. Maimonides, Mishneh Torah, Hilchot Rotzeach, 1:13

Anyone who can save [the attacked party] with [the taking of] a limb among his limbs and did not make an effort to do so, but saved [the attacked party] with [the taking of] the life of the pursuer, killing him, this is a murderer and he is deserving of death, although the court does not kill him.

10. רמב"ם הלכות גניבה פרק ט הלכה ז

הבא במחתרת בין ביום בין בלילה אין לו דמים אלא אם הרגו בעל הבית או שאר האדם פטורין, ורשות יש לכל להרגו בין בחול בין בשבת בכל מיתה שיכולין להמיתו, שנ' +שמות כ"ב א' + אין לו דמים.

10. Maimonides, Mishneh Torah, Hilchot Geneivah 9:7

One who enters a tunnel, whether by day or by night, has no blood; rather, if the homeowner or someone else kills him they are exempt, and permission exists for anyone to kill him, whether on weekday or Shabbat, with any death that they can kill, as it says "he has no blood."

11. משנה למלך, חובל ומזיק ח:י

דהא דאמר ואם יכולין להציל באחד מאבריו של רודף שאין הורגין אותו שדין זה לא נאמר אלא באיש אחד הבא להציל אבל הנרדף אינו מדקדק בזה.

11. Mishneh La-Melekh to Hovel U-Mazzik 8:10

That which it says "and if anyone can save him [by damaging] one of his limbs [without killing him] cannot kill him [and does not do so is as if they killed him] is not said here, because this rule is only said in a case of one person who comes to save, but the pursued party need not be scrupulous in this [but rather can kill the pursuer even if he could simply maim him].

What are the limits of Rodef according to these sources?

12. תלמוד בבלי מסכת סנהדרין דף עב עמוד ב

אמר רב הונא: קטן הרודף ניתן להצילו בנפשו. איתביה רב חסדא לרב הונא: יצא ראשו - אין נוגעין בו, לפי שאין דוחין נפש מפני נפש. ואמאי? רודף הוא - !שאני התם, דמשמיה קא רדפי לה.

12. BT Sanhedrin 72b

R. Huna said: [In the case of] a minor pursuing his fellow [to kill him], he may be saved with [the taking of] his life. R. Hisda challenged R. Huna [from a Mishnah]: if the baby's head has left [the mother's body] we may not touch [i.e. kill] the baby, as we do not push aside one life on account of another. But why? He is a pursuer? It is different there, because the mother is being pursued by Heaven.

13. בית הבחירה למאירי מסכת סנהדרין דף עב עמוד ב

חכמי הדורות שלפנינו כתבו כן ר"ל שהאשה עצמה יכולה לחתכו שנרדף היא. ונרדף מיהא במקום שאין אחרים מחזיקין את הרודפו ברודף הוא עצמו שרי.

13. Beit Habehirah of Meiri, Sanhedrin 72b

The wise men of earlier generations wrote like this: it means that the woman herself can cut [the baby] up, since she is being pursued. And a pursued party, while it is a case where others do not consider the party pursuing him as a pursuer, for him [i.e. the pursued party] himself it is allowed [to kill the pursuer].