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Self-Defense as a Justification for Punishment

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SELF-DEFENSE AS A JUSTIFICATION FOR PUNISHMENT

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There are few legal ideas as basic as the principle of legitimate self-defense. Every individual, it is said, has the right to defend his or her person, property or living space against wrongful aggression and, if necessary, to kill the aggressor. This principle is so deeply ingrained in our legal thinking that it is difficult to imagine a legal system that did not acknowledge it. The concept of having rights would be virtually toothless unless we could use force to vindicate our rights against aggression.

The notion of having rights is less well-accepted in Jewish law than are the ideas of self-defense and defense of others. The Talmud presents us with a legal system based not on rights but on duties to others and ultimately duties to God.[1] Yet, self-defense and defense of others emerge in the Talmud as central and unquestioned aspects of legal life in a Jewish community.

The foundations for the Jewish analogue to the *right* of self-defense lie in neighboring black letter provisions or *Mishnayot* in the Tractate *Sanhedrin*.[2] The first builds on the passage in *Exodus* 22:1 that permits a homeowner to kill someone breaking into his home.[3] The ostensible problem in this *Mishna* is whether, if permissibly killed in the break-in, the thief is liable for property damage that he might cause. In the accompanying *Gemara*, the deeper problem is whether this form of self-defense should be considered punishment for the crime of breaking-in. The sages struggle with the question and side, finally, with the view that later came to be seen as obvious: whatever the similarities of self-defense and punishment, the two ways of using force against criminals—one private and the other official—must be kept conceptually and legally distinct.[4]

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1 In the current outpouring of secular writings about Jewish law, Robert Cover stands out as an eloquent voice on the centrality of duty in Jewish law. See Cover, Obligation: A Jewish Jurisprudence of the Social Order, 5 J. L. & Religion 65 (1987).

2 For other efforts to till these materials, see Finkelman, Self-Defense and the Defense of Others in Jewish Law: The Rodef Defense, 33 Wayne St. L. Rev. 1257 (1987); Comment, Justification and Excuse in the Judaic and Common Law: The Exculpation of Defendant Charged with Homicide, 52 N.Y.U. L. Rev. 599 (1977).

3 Babylonian Talmud, Sanhedrin 72a.

4 I have developed this theme elsewhere. See Fletcher, Punishment and Self-Defense, 8 Law and Phil. 201 (1989).

The second provision on the legitimate use of deadly force is more properly addressed to the defense of others rather than of self. The black letter rule of this *Mishna* is that one must kill aggressors who seek to kill or who, for licentious purposes, are after married women and other men.[5] Significantly, where the would-be criminal is about to engage in an assault against a non-human interest, the use of deadly force is not allowed. Thus, explicitly, the *Mishna* rejects the use of private force to prevent someone from engaging in the capital offenses of bestiality, desecrating the Sabbath, and idolatry.[6] These negative teachings of the *Mishna* are important, for they emphasize that under Jewish law, individuals have no general authority to use force to enforce God's commandments, even central commandments, such as those prohibiting the desecration of the Sabbath and idolatry.

The obligation to use force to prevent aggression to human interests rests on the principle that every citizen must intervene and rescue others in distress; one form of distress, it turns out, is being the victim of a criminal attack. This general duty to rescue is grounded in the passage: "Do not stand idly by while mischief befalls thy neighbor."[7] The obligation to use force in these cases is known, generally, as the law of the *rodef*—literally, the law of one who "chases after." The most appropriate term in English would probably be "aggressor," but since I intend to criticize Rabbi Bleich's analysis of this body of law,[8] I will concur with his calling this the law of the "pursuer."

Note that these two modes of legitimate private force under Jewish law have little in common.[9] The first is based on the defense of self; the paradigm is resisting aggression from an intruder. The sec-

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[5] Babylonian Talmud, Sanhedrin 73a. The assumption of everyone who works in these materials is that although the text is silent on the point, the aggressor's purpose is to rape and not merely to convince his intended victim to engage in voluntary intercourse.

[6] Id.

[7] Leviticus 19:16 (*Lo taamod al dam reecha*). Although Jewish translations stress the element of "standing by" or "standing on" the misfortune of one's neighbor, a good deal of controversy surrounds the exact translation of this passage. The 1917 translation by the Jewish Publication Society reads: "neither shalt thou stand idly by the blood of thy neighbor." In contrast, however, the Vulgate, the first translation into Latin at the end of the fourth century of the common era, rendered the Hebrew as: "*Non stabis contra sanguinem proximi tui.*" The emphasis here is on standing against the blood of one's neighbor, which is picked up in new French translation in *La Sainte Bible* (1972) as: "*et tu ne mettras pas en cause le sang de ton prochain.*" Luther rendered this passage as: "*Du sollst auch nicht auftreten gegen deines Nächsten Leben.*" Perhaps the French and the German accurately capture the active force of the Hebrew injunction *lo taamod*, but they miss the sense of the passage captured in the Jewish translations, namely that one is required to intervene to rescue one's neighbor rather than let him die.

[8] Bleich, Jewish Law and the State's Authority to Punish Crime, 12 Cardozo L. Rev. 829 (1991).

[9] R. Bleich treats them both as aspects of the law of pursuer. See Bleich, supra note 8, at

ond focuses on the defense of others; the defense against aggression is treated as analogous to rescuing someone drowning in a river. The first presupposes a threat to life that can be inferred from the typical incident of breaking-in. With Oedipal insight, the sages of the Talmud reasoned that the inference is required if a son breaks in against his father, but not if a father breaks in against his son. The second stresses the defense of the intended victim against a pursuer and does not require an additional inference of danger. The danger is implicit in the pursuit; it follows from the overt attack. As in the case of someone drowning in a river or set upon by wild beasts, the need for intervention is obvious.

These two diverse sources of self-defense in Jewish law leave some gaps. Take the case of a woman being raped in the park. It seems obvious that she should have the right to defend herself. But does she have the duty to resist, even if she thinks that a show of force will only trigger a greater risk of death? This case falls at the intersection of two lines of thought in the Talmud, yet neither precisely covers it. It is neither a case of resisting an intruder into one's home nor a case of rescuing a third party.

One could argue by analogy to either line of thought. Fighting off an aggressor in the park could be seen as analogous to warding off a burglar intruding in one's home. But this move requires a leap of reason that has little support in the biblical sources. There are no examples in the narratives of women resisting rape. And the Talmud generalizes the right of self-defense in the following well-known maxim: "If someone comes to kill you, rise up and kill him first."[10] The general right is to resist deadly force, not to resist all forms of aggression.

The more convincing analogy builds on a chain of inferences from the premise that there is a duty to rescue women from rape to the conclusion that every woman has a right to defend herself. The first step in the argument comes easily: there is no doubt that everyone in the community is duty-bound to rescue a threatened woman from an impending rape. The duty follows from the general injunction not "to stand idly by while mischief befalls [one's] neighbor."[11] It is implied as well in *Deuteronomy* 22: 26-27, which holds that a woman raped in a deserted area should not be held accountable for participation in the act: "for he found her in the field, and the be-

849-52. This is a minor inaccuracy, in view of the limited amount of space given in his article to the talmudic materials.

[10] Babylonian Talmud, Sanhedrin 72a.

[11] Leviticus 19:16.

trothed [i.e. married] maiden cried out, but there was none there to save her." The last line provides at least literary recognition of the shared assumption that if others had been there to rescue her, they would have had the duty, and therefore the right to do so.

If there is a duty to use force, presumably the person who is duty-bound has what we would now call a right to use it. This would be the second step on the way to the conclusion that the threatened woman herself has a right of defense. To repeat, the Talmud itself did not recognize the notion of rights as we know them. Yet, the imperative of duty implies that there would be nothing untoward about acting to fulfill one's duty; the assumption is that "must implies may."

Thus, there is no problem in recognizing both the duty and right of third parties to prevent a rape. Problems arise, however, in trying to make the inference from either of these positions to the conclusion that the woman herself has either the right or the duty to defend herself against rape. Given the logic of Jewish law, the right could exist only if there were a duty to defend herself.

The sages consider a hypothetical case in which the threatened woman does not wish third parties to intervene for fear that they might exacerbate the situation and provoke the aggressor into more violent conduct. Rabbi Yehudah argued that her will should prevail; without her consent the others should not intervene and expose her to heightened risk.[12] The majority prevailed against Rabbi Jehudah and the law became that one must intervene regardless of the victim's will.[13] The danger of contamination by the rape was seen as so great that prevention justified the increased risk to the woman's life.

The implication of these sources seems to be that the woman is also duty-bound to incur any risk to prevent her contamination by the rape. It follows that she would have the duty and, therefore, the right to defend herself (recalling that "must" implies "may"). It does seem odd that the woman's right runs only in one direction; she has no right to choose rape rather than run a heightened risk of death. Indeed, she does not even have the right to consent to the sexual act and thereby convert the rape into voluntary intercourse. As a betrothed woman, she would be subject to the death penalty for voluntarily participating in the act.[14]

Admittedly, the focus in Jewish law on duties rather than rights generates some differences between the Jewish and Western secular approaches to self-defense. For talmudic Jews, the legitimate use of

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12 Babylonian Talmud, Sanhedrin 73b.

13 Maimonides, Mishne Torah, Sefer Nezikim, *Hilkhot Rotzeah* 1:12.

14 See Deuteronomy 22:26-27.

force expresses a communitarian responsibility; for secular Westerners, the rightful use of force vindicates individual autonomy. Yet, the legal contours of the defense in the two systems are remarkably similar. In both systems, the permissible use of force presupposes an actual attack against the interest of an individual. In both systems, the defender can use no more force than is necessary to ward off the attack. And more controversially, in both systems, the notion of an attack presupposes human initiative—not necessarily a culpable human act, but at least an act directed by a human agent. The latter point is brought home by the conclusion in the Talmud that a fetus threatening the mother should not be considered a "pursuer"; there is, therefore, no duty to abort the fetus under the law of self-defense.

In Jewish law, however, the law of self-defense is subject to special strains, for its architectonic ideas of aggression and defense are invoked to justify conclusions that are addressed in other ways under modern secular systems. The most common of these alternative modes of thinking is the defense of necessity. The notion that necessity—or the choice of the lesser evil in a situation of conflict—can justify some uses of force has become a staple of twentieth-century systems of criminal jurisprudence.[15] Yet apart from the limited application of the principle *pikuach nefesh* (safeguarding life), Jewish law recognizes no general principle that permits one, in a situation of conflicting interests, to damage the less-valuable interest, such as the fetus in a case of conflict with the interests of the mother.

Absent a general theory of necessity, Jewish law has revealed certain tendencies to expand the law of "pursuit" well beyond the core cases of aggression analyzed in the Talmud. Though the Talmud holds that the fetus is not an aggressor, Maimonides concludes that the fetus is like an aggressor (*k-rodef*) and that, therefore, the principle of resisting aggression should apply.[16] Of course, it is not clear that this analogical extension of the talmudic principle should apply only if the fetus endangers the life of the mother. With a little bit of rhetorical finesse, as brought to bear by Judith Jarvis Thomson,[17] one can picture every fetus as an uninvited intruder and thus treat every desired abortion as an instance of resisting aggression.

In a more recent example of this tendency to expand the notions

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[15] See Judgment of the German *Reichsgericht*, March 11, 1927, 61 RGSt. 242 (recognizing necessity as implied in the notion of rightful conduct); Rex v. Bourne, [1938] 3 All E. R. 615 (Cent. Crim. Ct.). The principle is now recognized by statute in Strafgesetzbuen Germany [StGB] § 34, and in many U.S. jurisdictions following Model Penal Code § 3.02 (Proposed Official Draft 1962).

[16] Mishne Torah, Hilkhot Rotzeah 1:9.

[17] J. Thomson, A Defense of Abortion, 1 Phil. & Pub. Affairs 47 (1971).

of pursuit and defense, in an inquiry made after the Second World War, the principle of killing a pursuer extended to the suffocation of a child who, amidst a group of Jews hiding from the Gestapo, began to cry and thus exposed the entire group to detection and deportation.[18] This is surely a borderline instance of aggression. It would be hard to imagine a secular legal system today treating the suffocating of the child as an act of self-defense. In one sense the danger emanates from the crying child, but the child has no awareness of endangering the group and acting alone, obviously posed no threat. If any theory could justify killing the child, it would have to be a theory of necessity based on the claim that it was right to sacrifice one innocent child so that the group might survive.

Of course, one might be reluctant to concede that the end of saving lives justifies the killing of an innocent child. That position reflects a utilitarian calculus of costs and benefits that is more likely to appeal to secular economists than to rabbis trying to fathom divine revelation. It is tempting, therefore, to portray the child as an aggressor, as a pursuer, and invoke the idea of self-defense to justify the killing. The principle of self-defense is compatible with the injunction against killing the innocent; an unjust aggressor is by definition not among the innocent.

Yet, it hardly rings true to say that the child, by virtue of her crying, had put herself outside the circle of the innocent and that killing her raised no moral problems. It is surely more forthright to treat the case as one of necessity, a theory of justification that requires one to confront the evil of killing the child and to justify the act as the tragic means necessary to save the others. The difficulty with the theory of necessity, admittedly, is that once accepted, it would seem to justify the killing of an arbitrarily chosen individual if necessary to save lives. Significantly, the person who held his hand on the child's mouth too long did not select her as a potential victim. This crucial fact (though of uncertain significance) remains invisible in an analysis based on necessity.

Far more radical than these examples, however, is the attempt to ground a general theory of criminal punishment in the principle mandating resistance against a pursuer. Rabbi Bleich cites one commentator in the eighteenth century, Rabbi Moses Isserles (*Rema*), who reasons that a counterfeiter—presumably someone who has long plied the trade—may be treated as analogous to a pursuer and therefore turned over to civil authorities for punishment.[19] The argument

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[18] See E. Schochet, A Responsum of Surrender 54-55 (1973).

[19] See Bleich, supra note 8, at 849.

seems to be that from prior acts one may infer a risk of repetition and that this risk warrants treating the counterfeiter as someone engaged in attacking the common welfare. Rabbi Bleich continues the argument by applying this extension of self-defense as a principle for interpreting a talmudic parable about the king's weeding out thieves as though they were thorns in the garden. The tone of the argument is that the *Rema* had devised a sensible and plausible rationale, based on the theory of self-defense, for cooperating with a host state's practice of punishing criminals. If the theory of killing a pursuer justifies Jews in turning over criminals for punishment, then the same argument should justify the use of punishment against them.

The duty to kill the pursuer hardly provides a sound basis for explaining Jewish collaboration with Gentile authorities or, in more general terms, for justifying punishment in a secular state. My critique of the analogy between self-defense and punishment develops along many fronts. First, note the curious quality of the commentator's example. Why, after all, should one pick a counterfeiter as the paradigmatic criminal for justifying collaboration with the king's use of criminal punishment? Murderers, rapists and robbers go more to the heart of the matter. And further, if the counterfeiter is indeed like a *rodef*, why should the citizenry turn him over to the king for trial? If a counterfeiter is like a pursuer, he should be killed on the spot. Building a theory of punishment on self-defense seems to go too far, for it also justifies vigilante action against suspected criminals.

Zeroing in on counterfeiters does make a point, however, for those who dilute the value of the currency pose a direct attack to the king and his rule. It is no accident that under the first English treason statute, enacted in 1351, counterfeiting is treated as disloyalty to the king.[20] Thus, there is some sense to the claim that counterfeiters are like pursuers, but it does not follow that murderers and rapists are pursuers of the king in the same sense. Ordinary violent criminals neither betray the king nor attack him directly. And, therefore, it would be odd to view them as pursuers of the king or of the kings' peace.

The more significant distortion in the argument from self-defense to state punishment consists in blurring the requirement of an actual attack. A quasi-scientific prediction of future dangerousness takes the place of the traditional requirement, expressed clearly in the Talmud, that a "pursuer," i.e. an aggressor, is someone who is actually pursuing an innocent victim. The danger is visible. It is not inferred from

[20] See 25 Edw. III, ch. 2, § 5 (1351).

past conduct. Even in the case of the thief breaking in, the inference of a homicidal risk derives not from the burglar's past behavior, but from the apparent danger inherent in all cases of burglary.

Of course one could try to ground the state's punishing criminals in a utilitarian calculus for promoting the public welfare. But Rabbi Bleich's argument is hardly so modern. Rather, the claim is that an acceptable extension of the principle of killing pursuers justifies the state's punishment of offenders. And this, as we have seen, goes far beyond either the Jewish texts or any sound theory of self-defense.