Shlomo Zuckier's "*A Halakhic-Philosophic Account of Justified Self-Defense*": A Rejoinder

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It was Prof. Haym Soloveitchik who, in the early 1970's, first introduced me to the field of *Mishpat Ivri.* It was also Prof. Soloveitchik who first introduced me to Prof. Aharon (Arnold) Enker, founding dean of Bar-Ilan Law School and later the person with whom I would co-author the article under discussion. Shortly before commencing my law studies at Bar-Ilan, I met Prof. Soloveitchik for dinner. We were both in Israel at the time and he suggested that we meet at the old Marvad Ha-Kesamim restaurant, then on King George Street in Jerusalem. During dinner, he said that he wanted to share with me an important piece of academic advice. He explained that during my studies, I would be exposed to various jurisprudential ideas and theories. I will, undoubtedly, find many of these very convincing and enlightening. I would, therefore, be tempted to adopt these new concepts and superimpose them upon Jewish Law texts. He advised me to do my utmost to resist such temptation. While comparative law is enriching when it comes to sensitizing one to fundamental issues, essential questions and appropriate terminology, the answers must emanate from the halakhic sources themselves. Jewish Law must be allowed to speak in its own voice.

Despite the obvious erudition and intriguing presentation found in Rabbi Shlomo Zuckier's very fine piece, it is this precise methodological flaw which, to my mind, undermines the very foundation of Rabbi Zuckier's work. He has allowed himself to superimpose general jurisprudential theory on Jewish Law texts, while stifling the voice of the halakhic sources themselves. It is not surprising, therefore, that Rabbi Zuckier consciously chooses to ignore the flow of Jewish Law scholarship over the past one-thousand or so years – citing *rishonim* and a*haronim* only sparingly and selectively. Instead, Rabbi Zuckier prefers to base himself upon his reading of the original Tannaitic texts, a reading that would, in his view, best correspond to contemporary jurisprudential thought.

Rabbi Zuckier, in fact, begins his well-written presentation with a survey of three different understandings of the fundamental underpinning to Justified Self-Defense. It is not at all clear to me, however, why Rabbi Zuckier chose these three

views and not others. One of the theories of self-defense not presented by Rabbi Zuckier is that predicated upon "The Principle of Lesser Evils". According to this model, as described by Prof. George P. Fletcher in his classic work, **Rethinking Criminal Law** (Boston-Toronto: Little, Brown and Company, 1978), pp. 857-858 :"… it is right and proper to use force, even deadly force, in certain situations. The source of the right is a comparison of the competing interests of the aggressor and the defender, as modified by the important fact that the aggressor is the one party responsible for the fight… The factor that skews the balancing in favor of the defender is the aggressor's culpability in starting the fight. As the party morally at fault for threatening the defender's interests, the aggressor is entitled to lesser consideration in the balancing process…The underlying premise is that if someone culpably endangers the interests of another, his interests are less worthy of protection." The absence of this model from Rabbi Zuckier's presentation is rather surprising, as it is the dominant theory of defensive force in Anglo-American law. Moreover, if one needs to compare a contemporary legal theory to that of Jewish Law, it is this model of lesser evils which appears closest to the approach articulated by the majority of Jewish Law scholars throughout the period of the *rishonim* and *aharonim* (although some deviation can sometimes be found in the responsa literature of the Holocaust and post-Holocaust period).

Even a cursory examination of the writings of the *rishonim* clearly reveals the centrality of the element of illegality ("*aveirah*") in their justification of the right of self-defense – a point which Rabbi Zuckier chooses to disregard with no apparent explanation. As presented by Prof. Enker and myself, at the heart of the right of self-defence is, of course, the rescue factor. By slaying the aggressor we save the life of the victim. However, that element alone is insufficient. In order for us to make the determination that the blood of the victim is indeed redder than the blood of the aggressor, so that in turn, we are willing to trade off the life of the aggressor for that of the victim, we must demand that the conduct of the pursuer be wrongful and illegal. It is the wrongfulness quality – the *aveirah* – which tips the scale in favor of the pursued. In the balance of interests between the illegal aggressor and the innocent victim, Torah law unhesitatingly opts for protecting the life of the latter. Both elements – the rescue and the wrongfulness quality – are essential. In the absence of either aspect, the right of self-defense fails to become operative. See also: Dov I. Frimer, *Self-Defense and Abortion*, **Maimonides as Codifier of Jewish Law**, ed. Nahum Rakover, Jerusalem: The Library of Jewish Law, 1987, 195 at 202; reprinted in ***Nediv Lev* – A Collection of Articles by Rabbi Prof. Dov I. Frimer,** Jerusalem, 2010, 121 at 128* - 129*; *Defining the Right of Self-Defense*, ***Or Hamizrah***, 31 (1983), 325-337 (Hebrew) reprinted in

Nediv Lev, 177 - 192. See as well and cf.: Prof. Arnold Enker, **Fundamentals of Jewish Criminal Law** (Ramat Gan: Bar-Ilan Unversity Press, 2007), 311 – 388.

It, therefore, comes as no surprise that Jewish Law (other than those Holocaust and post- Holocaust sources referred to above) also places critical importance on the presence of *mens rea* – criminal intent – accompanying the *actus reus* – the wrongful actions - of the aggressor, as underscored by Maimonides in his *Mishneh Torah* code (*Hilkhot Rotze'ach* 1,8). See at length: Dov I. Frimer, *The Mens Rea of an Aggressor*, ***Or Hamizrach*****,** 32 (1984), 309-326 (Hebrew), reprinted in ***Nediv Lev,*** 193 – 211, and the sources cited therein. Nonetheless, criminal intent seems to play little or no role in Rabbi Zukier's analysis.

Indeed, an understanding of the right of self-defense which is predicated on illegality and criminal intent must contend with the challenging case of the Guiltless Aggressor. As Rabbi Zuckier writes, Prof. Enker and I present and attempt to explain the various views of Jewish Law scholars on this fascinating topic. In a subsequent article, I revisit the question and treat the issue once again, in even greater depth. See: *The Guiltless Aggressor*, ***Or Hamizrach***, 34 (1986), 94 -112 (Hebrew), reprinted in ***Nediv Lev***, 213 – 232. See also: Enker, **Fundamentals of Jewish Criminal Law,** 373 – 386**.** What R. Zuckier fails to indicate in his review is that the majority of Halakhic authorities – including the Jerusalem Talmud – reject the idea that there is a second theory of self-defense at play. Accordingly, there may in fact be no right of self-defense against an innocent "aggressor". But even for those scholars who are prepared to entertain a second theory, it is a theory which is limited only to the victim himself and does not allow the intervention of a third party – even on behalf of the victim.

The idea that the right of self-defense is "based on defending the right to life of the attacked party against an attacker, who has forfeited his own right to life", as Rabbi Zuckier suggests (pp.29-30), would seem to run contrary to normative Halakha. The very notion that a person can willingly and consciously forfeit his life, while very appealing to the contemporary mind, is foreign to most of Jewish thought. Such an approach was suggested by certain scholars with regards to the question: to what extent is one obligated to save a fellow Jew from suicide? These scholars argued that if a person willingly attempts to commit suicide, the Halakha does not require that he be save him; after all, he deliberately forfeited his life. Yet this position was roundly rejected by the weight of authority. A person is not master of his life; man, therefore, cannot autonomously forfeit that which is not his. See: Prof. Avraham Steinberg, *Ibud Atzmo LaDa'at,*

Encyclopedia of Medicine and Jewish Law (Jerusalem, 2006), II, 42 – 43, and sources cited therein. See also: Enker, **Fundamentals of Jewish Criminal Law,** 387**.**

So I conclude as I opened: Jewish Law must be afforded freedom of speech, to speak in its own authentic voice. It must not be compelled to mimic other legal systems, no matter how contemporary or appealing these other legal theories may appear to be. Only through honesty and integrity can we truly benefit from a legal tradition of centuries as expressed in the teachings of the Masters of Halakha down through the generations.