

A Halakhic-Philosophic Account of Justified Self-Defense

What is the rationale within Jewish law for the permission to act, and particularly to kill, in self-defense? What are the parameters of this permission? A fair amount of relevant material exists in traditional halakhic sources,¹ but the exact scope of the law and its philosophical justification are far from clear. This issue has been dealt with in several scholarly articles, most prominently by Aharon Enker and Dov Frimer in a book chapter titled “The Boundary Between Necessity and Self-Defense in *Mishpat Ivri*.”²

This paper works with the general thrust of the Enker-Frimer essay and the halakhic sources they cite as support, but it both expands one of the approaches they present and diverges from their account of that approach at certain points. Apart from examining Jewish legal materials to introduce possible new halakhic ramifications of the thesis, I will engage secular philosophical and legal literature that presents justifications for

1. The relevant halakhic sources will be treated below.

2. Enker, *Hekhreaḥ ve-Zorekh be-Dinei Onashim* (Ramat Gan, 1977), 212-34; this chapter was co-authored. Frimer later published an article titled “The Right of Self-Defense and Abortion,” in *Rambam as Codifier of Jewish Law*, ed. Nahum Rakover (Jerusalem, 1987), 195-216. See also Eliahu Ben-Zimra’s dissertation, *Zorekh ve-Hekhreaḥ be-Dinei Onashim ba-Mishpat ha-Ivri: Perek be-Dinei Onashim* (Hebrew University, 1975); Marilyn Finkelman, “Self-Defense and Defense of Others in Jewish Law: The Rodef Defense,” *Wayne Law Review* 33 (1986): 1257-87; George Fletcher, “Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory,” *Israel Law Review* 8 (1973): 367-90; Itamar Warhaftig, “Haganah Azmit ba-Aveirot Rezaḥ ve-Ḥabbalah: le-Mahuto shel Din ‘Rodef,’” *Sinai* 81 (1977): 48-78; Noam Zohar, “Killing a Rodef,” *S’vara* 1 (1990): 55-58, and idem, “Collective War and Individualistic Ethics: Against the Conscriptio of ‘Self-Defense,’” *Political Theory* 21 (1993): 606-22.

SHLOMO ZUCKIER is studying for ordination at the Rabbi Isaac Elchanan Theological Seminary as well as a master’s degree at the Bernard Revel Graduate School for Jewish Studies of Yeshiva University. He is a Wexner Fellow, a graduate of the Tikvah Fellowship Program, and the Editorial Assistant at *Tradition*.

self-defense and utilize that literature to delineate more extensively which cases do and do not qualify as justified self-defense.³ I do not claim that my approach is free of difficulty, and I will raise and respond to certain complications, primarily in footnotes. But insofar as some sources suggest the perspective I will advance, and, furthermore, given its intuitive appeal, it is worth seeking to understand what lies behind the position and what its ramifications could be.

I will note at the outset that the approach of this article is jurisprudential rather than historical. In other words, I am trying to construct a Jewish legal-philosophical perspective on self-defense, rather than discern any particular trend or position in historical context.

I.

Why killing in self-defense is justified ranks among the more complicated questions in the philosophy of law, yet it is often taken for granted.⁴ Whereas one might generally be wary of actions taken that detrimentally affect others, especially those committed for the purpose of personal gain, it appears overwhelmingly intuitive that one may kill in defense of one's own life. What distinction justifies this divergence from our usual moral thinking? The answer to this question, which is by no means clear, will determine to what range of cases this justification of self-defense can be applied.

Indeed, the principle that most precisely justifies self-defense would be difficult enough to determine on its own, but the complications are compounded when we take into account the array of different cases in which this question rears its head. There is the classic case of a murderer lucidly and with full intention attempting to carry out his dastardly deed, but also cases in which innocent people are thrust into scenarios in which they are threatening a fellow innocent's life. At times, furthermore, the "attacker" is not fully within his capacities; or, the "threat" may be passive, such as a large man who is stuck and blocking the exit from a cave rapidly filling with water. May the others in the group kill him to save themselves?⁵ Should we say that each of these circumstances yields a similar moral conclusion? The clarity with which the attacked party

3. This article will not enter the related and equally complex issue of killing the few to save the many (including cases where the few themselves will die in either case), sometimes referred to as the subfield of "trolleyology." For analysis of this topic in Jewish law, see Enker, 195-210, and Michael J. Harris, "Consequentialism, Deontology, and the Case of Sheva Ben Bikhri," *Torah u-Madda Journal* 15 (2008-2009): 68-94.

4. See David Rodin, *War and Self-Defense* (New York, 2003), 2.

5. The Case of the Cave was first formulated by Philippa Foot in her "The Problem of Abortion and the Doctrine of the Double Effect," *Oxford Review* 5 (1967): 5-15.

sees the situation can also range from absolute certainty that he is being attacked to a case of uncertainty to a mere suspicion that his life may be targeted; does that distinction make a difference? Finally, can an act of killing in self-defense be equated to a third party's intervention in an attack by one person on another, or are there different standards for these two types of scenarios?⁶

Numerous and varying approaches have been offered in response to the fundamental question of justifying self-defense and attendant questions about the scope of that justification.⁷ Some approach this issue from a consequentialist perspective, arguing that, given a situation in which A is pursuing B to kill him, the result of B in turn killing A is superior to one in which A allows B to kill him.⁸ There are several variations to this approach,⁹ but all fall prey to a common pitfall: a system that judges the value of the actors' relative deaths can be complicated and logically yield results that are intuitively immoral. What if the pursuer is an essential asset to society, working to solve world hunger—would his survival trump that of the attacked party, and does that override his victim's self-defense? Or what about the case of an innocent aggressor—is it clear that killing such a person would be beneficial?¹⁰

6. A question related to the one I discuss concerns the possible justification of killing innocent bystanders as collateral damage when undertaken as part of a self-defensive maneuver. This issue has spawned a significant literature. See Thomas Aquinas, *Summa Theologiae* (1266-73 in 1975 Lefebure edition), II-II qu 64, art 7, and Suzanne Uniacke, "The Doctrine of Double Effect," *The Thomist* 48,2 (1984): 188-218, for examples of treatment of the material. See also J. David Bleich, "Nuclear War Through the Prism of Jewish Law," in *Confronting Omnicide: Jewish Reflections of Weapons of Mass Destruction*, ed. Daniel Landes (Northvale, 1991), 209-23, and Richard Weiss, "Pain Management at the End of Life and Principle of Double Effect: A Jewish Perspective," *Cancer Investigation* 25, 4 (2007): 274-77, for Jewish approaches to the doctrine of double effect.

7. In compiling the survey of approaches in the forthcoming paragraphs, I have been aided by the presentation of Fiona Leverick, *Killing in Self-Defence* (New York, 2006), esp. chapter 3.

8. See, for example, Phillip Montague, "Self-Defense and Choosing Between Lives," *Philosophical Studies* 40 (1981): 207-19, Paul Robinson, *Criminal Law Defenses* (St. Paul, 1984), §131(a), and Laurence Alexander, "Justification and Innocent Aggressors," *Wayne Law Review* 33 (1987): 1177-89.

9. The primary distinction to be made here is between act consequentialism, where the results of a particular situation are weighed, and rule consequentialism, where the results of a legal system incorporating such a law are placed under scrutiny. See Richard Brandt, "Conscience (Rule) Utilitarianism and the Criminal Law," *Law and Philosophy* 14 (1995): 65-89 for the latter approach. On different forms of utilitarianism, including rule utilitarianism, see David Lyons, *Forms and Limits of Utilitarianism* (Oxford, 1965).

10. Some of these objections have been considered by David Wasserman, "Justifying Self-Defense," *Philosophy and Public Affairs* 16 (1987): 356-78. Mine is an incomplete summary of the consequentialist approach to self-defense, but it will have to suffice for the purposes of this article.

Another school focuses on the perspective of rights, rather than utility, in responding to the challenge of justifying killing in self-defense.¹¹ This understanding sees a basic, fundamental right of each human to his life, whether stemming from a religious or secular source.¹² Thus, the attacked party may kill his attacker because the former has a right to life.¹³ Of course, this approach still must explain how the right to life of the *attacker* has been compromised, such that the attacked party is justified in killing him. The primary response to this challenge is to assert that the attacker, by dint of his actions, or at least the position in which he finds himself, has forfeited his right to life and therefore may be killed.¹⁴ A problem that this approach encounters is that it is forced to choose between two unsavory approaches—it must either claim that passive threats, such as a person slipping and falling off a roof onto a bystander, may not be killed in self-defense,¹⁵ or argue that somehow the “action” of falling off of one’s roof causes the “threat” to forfeit its right to life. Most people’s intuitions probably disagree with the former option, while the latter appears to restate the moral dilemma rather than explain or resolve it. Furthermore, supporters of this approach are forced to say that third parties would be equally morally justified in killing the falling man, a position exceedingly difficult to sustain, if not outright untenable. Another problem with this approach is that, following the forfeiture of the attacker’s life, it is a complicated task to determine at what point killing the attacker is no longer justified (including scenarios in which the attacker is incapacitated).¹⁶ We will return to the rights-based approach, as well as some of its ramifications, at a later point in this article.

A third approach justifies killing in defense of one’s life based on personal partiality. In other words, in many cases where one is under attack, the justification for killing the attacker is based not on the superiority of one projected result over the other or on one side acting within a right to life his opponent fails to possess, but on the simple fact that, in cases in which there is no argument from justice to prefer one life over another, an

11. Jeff McMahan, “Self-Defense and the Problem of the Innocent Attacker,” *Ethics* 104 (1994): 252-90, refers to this position as the “Orthodox View,” 257 ff.

12. See A. J. Ashworth, “Self-Defence and the Right to Life,” *Cambridge Law Journal* (1975): 282-307.

13. See Suzanne Uniacke, *Permissible Killing: The Self-Defense Justification of Homicide* (Cambridge, 1994), and Rodin’s *War and Self-Defense*, which are representative of this approach.

14. For this approach, see Rodin, *War and Self-Defense*, 79, Thomson’s *Rights, Restitution and Risk* (Cambridge, MA, 1986), 36, and *Permissible Killing*, 213.

15. See Tziporah Kasachkoff, “Killing in Self-Defence,” *Law and Philosophy* 17, 5 (1998): 509-31 who uses this entailment to argue against the reasonableness of the rights approach.

16. See *ibid.*

actor is justified in preferring his own life over that of the other party. (If, in this case, there is no moral reason to favor one person over the other, each is justified in acting to preserve his own life.) This understanding is helpful in justifying lethal force to save one's life in the more murky cases of innocent or passive aggressors. Jeff McMahan has formulated the basic thesis of this approach as follows:

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.¹⁷

This approach is very powerful in justifying killing in self-defense in some of the more complicated situations, but it too raises questions. This argument could be used to justify A's killing B in order to take B's kidney and save A's life—the "kidney recipient" knows that only one of the two people will live, and chooses his own life over the eventual "kidney donor."¹⁸ This *reductio ad absurdum* may be sufficient to undermine this approach, and it could, at the very least, demote this approach from one that provides a justification to one that provides an excusing condition, with no justificatory basis at all.¹⁹ We will return to this understanding later in the paper, as well.

In sum, we have three philosophical approaches to justifying killing in self-defense: utility, right to life, and personal partiality. All, we have seen, are problematic.

There is a further question, alluded to earlier. In the philosophical literature on self-defense, many writers downplay any distinction between cases of killing in self-defense and cases of a third party's intervention to kill an attacker. One such thinker is Judith Jarvis Thomson, who, in her seminal article "Self-Defense,"²⁰ lumps these two categories together. She writes:

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.²¹

17. "Self-Defense and the Problem of the Innocent Attacker," 268.

18. See Kasachkoff, "Killing in Self-Defense," 526. Later I will discuss one way of avoiding this problem.

19. Indeed, Leverick (52) argues that this argument is best presented as an excuse rather than as a justification.

20. Judith Jarvis Thomson, *Philosophy and Public Affairs* 20 (1991): 283-310. This principle plays an important role in her oft-reprinted article, "A Defense of Abortion," *Philosophy and Public Affairs* 1, 1 (Fall 1971): 47-66.

21. Thomson, "Self-Defense," 306.

This essay will argue that, at least from one halakhic perspective, self- and other-defense (to use Thomson's language) are distinct in their bases and therefore differ in their application. The sections that follow will turn to an analysis of the *sugyot* of *rodef* (the "pursuer") and *ba ba-maḥteret* (the "tunneler"). Upon analysis, these talmudic discussions will yield an approach to justified killing in self-defense that utilizes aspects of both the rights and the personal partiality approaches to mount a formidable presentation of the Jewish view on these matters.

II.

The Babylonian Talmud's discussion in the eighth chapter of Tractate *Sanhedrin* holds some very pertinent material for the topic of self-defense. In fact, two distinct pericopae (*sugyot*) appearing on adjacent folio pages relate to defending against an attacker. *Sanhedrin* 72a presents the case of the *ba ba-maḥteret*, whom the homeowner is justified in killing (Ex. 22:1-3), and *Sanhedrin* 73a discusses the case of the *rodef*, who may be killed by any onlooker. I will present each in turn, with an eye toward their account(s) of justified self-defense.

The discussion on 72a:

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.

ההא מימר אמר: אי אזילנא קאי לאפאי ולא שביק לי, ואי קאי לאפאי קטלינא ליה. התורה אמרה: אם בא להורגך השכם להורגו.

Mishnah: A burglar who enters a house by tunneling (*ha-ba ba-maḥteret*) 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 (*im ba lehorgekha hashkem lehorgo*)."²²

The Talmud explains the *mishnah*'s rule that one who tunnels into a house may be killed. The explanation invokes a psychological analysis of the tunneler who breaks into an inhabited house. The robber-to-be

22. This and other talmudic translations in the article are adapted, with some variation, from Artscroll's Schottenstein translation.

knows that this homeowner will likely protect his property and face the robber, and the robber is willing to kill him in that scenario. Given this reality, we apply the rule of *im ba lehorgekha hashkem lehorgo*—if one is coming to kill you, arise first and kill him.²³

Before fully analyzing this principle, let us set it in opposition to that which emerges from the discussion on 73a:

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.²⁴

גמרא: תנו רבנן: מניין לרודף אחר חבירו להרגו שניתן להצילו בנפשו—תלמוד לומר "לא תעמד על דם רעד". והא להכי הוא דאתא? האי מיבעי ליה לכדתניא: מניין לרואה את חבירו שהוא טובע בנהר, או חיה גוררתו, או לסטיין באין עליו, שהוא חייב להצילו—תלמוד לומר לא תעמד על דם רעד. 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 נמצא למד, מקיש לנערה המאורסה: מה הנערה 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.

Mishnah: These are those whom we save with [at the cost of] their lives: One who pursues his fellow to kill him (*ha-rodef aḥar ḥavero lehorgo*), 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 [at the cost 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 at the cost of his life? Scripture teaches: "Do not stand [idly] by the blood of your fellow (Lev. 19:16)." But does the verse really come to teach this? We need this verse to teach that which was taught in a Baraita: "From where do we know that if one sees his fellow drowning in a river, or a wild beast ravaging or bandits coming upon him, that he is obligated to save him? Scripture teaches: 'Do not

23. It is true that the Talmud (*Sanhedrin* 72b) says that there are cases of tunnelers that fall under the category of *rodef*, but the category of *ba ba-maḥteret* itself is a distinct one that applies even if the criteria of *rodef* are not met. This may be inferred from the *gemara* in *Sanhedrin* 72b, which learns from the verse *yimmazei ha-gannav* that this law may be applied in any place (which could be read as limited to the attacked party's *gag*, *ḥazer*, and *karpef* [roof, courtyard, and yard]). See n. 41 below. In other words, I argue that there are two independent justifications, though some cases fall under both, in which case either justification may be invoked to justify the self-defensive action taken.

24. Admittedly, the minority positions of R. Simeon and R. Eliezer ben Simeon argue that a would-be idol worshiper and Sabbath desecrator, respectively, also are killed before carrying out their deed. However, we are focusing on the positions that are accepted by Jewish law, while these two positions are rejected.

stand [idly] by the blood of your fellow.” Indeed it is so. But from where do we derive that he should be saved at the cost of his [the attacker’s] life? It may be derived through an *a fortiori* argument from [the case of] the betrothed *na’arah*. If in the case of a betrothed *na’arah*, whose pursuer comes only to blemish her, the Torah states that she should be saved at the cost of his life, when one pursues his fellow in order to kill him, how much more so! But can we derive a punishment on the basis of a logical inference? 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 at the cost of his life, so, too, a murderer should be saved at the cost 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.”

The *mishnah* lists *rodef* as one of several categories where we “save them with their lives,” by killing an attempted murderer or rapist;²⁵ in other words, third parties (as well as the attacked parties, clearly) may kill the attempted violator. The Talmud offers two potential sources to justify killing a pursuing murderer—the verse “do not stand idly by your friend’s blood”²⁶ and an *a fortiori* argument from the provision of killing one who is raping a betrothed maiden—but rejects them as being technically hermeneutically unsound. It then settles on a *hekkesh*—an analogy, drawn by the Torah itself (Deut. 22:26) between the case of the murderer and one chasing the engaged maiden. The justification for killing the (attempted) rapist stems from the verse “and there is no one to save her,”²⁷ implying that a potential savior may use whatever means necessary to rescue her. The law is thus extended from a case of attempted rape to a case of attempted murder. It appears, based on the range of cases to which this extends in the *mishnah*, that the justification for killing the pursuer is that killing will save the attacked party from some outside threat.

If there is a difference between the two principles of *ba ba-maḥteret* and *rodef*, what might that difference be? For Enker and

25. It is not clear if this ruling would apply to a consensual sexual liaison as well. This may depend on the analysis below.

26. Lev. 19:16. This appears to indicate that such saving is a requirement rather than an option. See Tosafot, *Sanhedrin* 73a, s.v. *af* and Rambam, *Hilkhot Rozeah* 1:14, who conclude thus.

27. Deut. 22:27.

Frimer, as well as several others who have written on this topic, the key to understanding the second rule (*rodef*) can be found by closely interrogating the phrase *mazzlin otan be-nafshan*, that “we save them” with [the taking of] their lives.”²⁸ On a simple, grammatical reading, these two terms (*otan* and *be-nafshan*) refer to the same person, namely the attacker.²⁹ If so, killing the attacker is done to assist him (by averting him from sin), and thus it does not entail the usual moral guilt (and certainly not the punishment) of murder, in a scenario where the attacker attempts to sin. If this is the case, however, why do we limit this “vigilante justice” to cases in which there is a (human) victim? Why shouldn’t idolatry and violation of Shabbat justify a similar reaction? Presumably, a certain sense of urgency enters the calculation when a potential victim stands before us. In such cases, and in such cases only, we take preemptive action, killing, and thereby saving, the attacker. If so, the “them” whom we save refers, in some sense, to both the attacker and the victim (a conclusion which is buttressed by the great ambiguity of the *mishnah*’s formulation). Frimer and Enker conclude, based on this reading, that “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 plot.”³⁰ They view these two factors as relating to the categories of “saving the attacked party” (*hazzalat ha-nirdaf*) and “punishment” (*onesh*). However, it appears to me that the reading of this source squares best with a different approach to self-defense, one based on rights and forfeiture.³¹ In other words, the justification for killing the attacker in cases in which one unrightfully mortally attacks another is based on defending the right to life of the attacked party against the attacker, who has forfeited his own right to

28. See R. Shalom Carmy, “He’arot be-Nogea le-Hazzalat ha-Rodef mi-Ma’aseh ha-Aveirah,” in *Zikhron ha-Rav*, ed. Jeremy Wieder and Avraham Shmidman (New York, 1994), 156-59, where he makes a similar argument, also entering into the question of the textual variants. Noam Zohar, “Killing a Rodef,” 55-58, and Finkelman, 1267, offer a similar analysis.

29. See Rashi, s.v. *le-hazzilo*, who explains similarly, against Tosafot ad. loc., who argue that the person being saved is the victim.

30. Enker, 217 (my translation and my italics).

31. See above, section I. Enker and Frimer (215-18), as well as Frimer, “The Right of Self-Defense and Abortion,” 203, present an argument, based on Rambam, *Guide of the Perplexed* 3:40, that the *rodef* may be killed only in cases in which the attacker has intent to commit his act. This supports an application of the concept of punishment *per se*, more than the claim we are presenting, that attempting to commit acts (i.e., certain *ma’asei averah*) leads to a forfeiture of one’s life, regardless of culpability.

life. Given the relative rights and lack thereof of, respectively, the attacked and attacker, this act of killing is objectively morally justified, in the sense that it is clearly justified (at the very least) for any person to commit this killing.³² (Note that this comparison between rights- and forfeiture-based justifications for self-defense in Judaism does not exactly correspond to its counterpart in secular philosophical literature. In Jewish law, the *rodef* forfeits his life by committing certain acts that are generally punishable [albeit only such acts that infringe upon another's basic rights], and in this case condemn him to death,³³ while in secular law and philosophy the justification is based on the immorality of the act itself. This discrepancy serves Jewish law well in justifying killing to prevent rape, which is very difficult to justify on a rights- and-forfeiture-based account [especially given that rape often does not entail the death penalty].)³⁴

Later in their essay, Enker and Frimer analyze and provide a rationale supporting an additional justification for self-defense found in some authorities.³⁵ The relevant sources argue that the attacked party is justified in killing his attacker *even in cases where there is no justification for uninvolved parties to come to his aid*. (I will analyze some of these sources in more detail below.) This is seen not as an argument made on objective grounds, but as a *special allowance* accorded to the attacked party to act in the interests of self-preservation. For Enker and Frimer, though this alternate track, if allowed, would apply in a broad range of cases, including those of

32. One might compare this to the objective justification one has to kill an animal, also without a robust right to life, in order to save a person.

33. This does not mean that only regarding sins deserving the death penalty may the category of *rodef* be invoked; this is not the case. There is no one-to-one correlation between the punishment generally deserved by a sinner and the death he receives when he is pursuing a *nirdaf*, but it is still the case that the impetus for punishment stems from his sin (as well as from an interest in protecting the pursued party) and the fact that it is generally punished harshly (and here it may be punished in a modified form) rather than from the immorality of the act itself, detached from any legal system.

34. Cf. Leverick, 143, who notes that, despite the intuitive justness of this act of self-defense, it is difficult to square with the philosophical categories of self-defense generally used.

35. The primary sources are Ran, *Sanhedrin* 82a; R. David, *Sanhedrin* 82a; Meiri, *Beit ha-Beḥirah* 73b; Neziḅ, *Meromei Sadeh. Sanhedrin* 73a, R. Yizḥak Ze'ev Soloveichik, *Grizal ha-Rambam*, *Rozeah* 1:13. Some of these sources formulate the position but do not endorse it.

passive threats and innocent attackers,³⁶ its application within those scenarios would be limited. For one thing, it applies only to the attacked party. Additionally, they explain that, on this approach, the threatening party himself may be justified in fighting back against his self-preserving fellow.³⁷

Enker and Frimer explicate this view within the words of the relevant medieval and modern authorities. We can, however, ground it in the talmudic material in *Sanhedrin*. More precisely, if one finds a rationale for regarding self-defense and *rodef* as distinct explanations, several facets of the talmudic texts appear in a new light and could be cited to augment this line of reasoning.³⁸ For one, the principle of *ba ba-maḥteret* speaks specifically to the one under attack (the homeowner), and not to any observer, and it grants the homeowner the legal ability to utilize lethal force in defense of his life, while the *rodef* case speaks specifically to a third party (though it clearly would also extend to the attacked party). *Ba ba-maḥteret* is not a charge to defend oneself based on ethical principles or the objective nature of the scenario; rather, it is the (independent) right of the individual to defend himself: *im ba lehorgekha hashkem lehorgo*—if one is coming to kill you, arise first and kill him. In fact, Ran and R. David,³⁹ whom Enker and Frimer cite,⁴⁰ quote this very phrase, which notably appears in the Talmud in the context of *maḥteret* rather than *rodef*, and possibly view the phrase as suggesting a principle independent from that of *rodef*. Finally, reading this second category of self-defense as based on the category of

36. They include in this category small children, who lack intention. As explained below, I consider these cases to fall under *rodef*.

37. Enker and Frimer, 229-34.

38. One alternative answer to the question of redundancy that we will not pursue is provided by R. Shaul Yisraeli (“Pe‘ulot Zeva’iyyot le-Haganat ha-Medinah,” *Amud ha-Yemini*, pp. 142-199, esp. part 3). For him, the case of the *rodef* informs us that, in order to save the life of a hunted party, one may kill a pursuer. Distinct from that, the case of *ba ba-maḥteret* teaches that one who goes to mortally attack his neighbor has forfeited his right to life and should, by right, be killed. In other words, the former source justifies the killing as a necessary step of defense, while the latter sanctions it as a punitive measure, detached from questions of necessity. Interestingly, this imputes more blame to the tunneler in the *ba ba-maḥteret* case and less to the pursuer in the *rodef* one, while the opposite distinction is suggested in this article.

39. *Sanhedrin* 82a, in the context of Zimri’s permission to kill Pineḥas. As they presumably would not sanction third parties to kill Pineḥas, this usage demonstrates that they saw the phrase as denoting a similar principle.

40. Enker and Frimer, 229.

maḥteret explains the apparent redundancy of the two passages on the topic.⁴¹

41. One might challenge the existence of a separate category teaching a rule of *im ba lehorgekha hashkem lehorgo*, and claim instead that there is only one principle of *rodef*, applied to *ba ba-maḥteret* as well. The primary support for this would be the Talmud's learning from the word *ve-hukkah* that anyone may kill the tunneler, as he is considered a *rodef* (BT *Sanhedrin* 72b). However, I find this explanation problematic, as it does not explain the major differences between the two cases, and it appears that at least Ran and R. David read the two cases as distinct from one another. Given this, I would understand the discussion there as pertaining only to a case in which the tunneler is a clear *rodef*. In cases in which there is no clear attack, or in cases of passive threats, there would be no *rodef* and hence third parties would not be justified in killing the threat (if we were to follow only the laws of *rodef* and not introduce a separate category).

This reading also allows for broader application of the rule of *im ba lehorgekha* than the *Minḥat Hinnukh* allows for; he argues (296:5) that the fact that a verse is used to extend to third parties means that this law is true only for Jews and not non-Jews. (See R. J. D. Bleich, who accepts this argument in *Contemporary Halakhic Problems* vol. II [Hoboken, NJ, 1983], 161-62.) Given the reading that has the word *ve-hukkah* apply to a marginal factor alone, the basic principle of *ba ba-maḥteret* could indeed apply to non-Jews as well.

One also might argue that if the tunneler is exempt from making restitution for breaking items on his way out (a possibility raised in *Sanhedrin* 72a and disputed in *rishonim*), we see that the tunneler forfeits his right to life. However, here again I would respond that the forfeiture and ensuing exemption for damages takes place only in scenarios in which there is clear danger and in which the *rodef* category is triggered. However, when no such clear danger takes place and the homeowner is acting out of personal partiality, the owner would not be exempt from liability for barrels broken, since it would not truly be a situation of "*ein lo damim*."

It is also possible to adduce talmudic texts that might appear to group *ba ba-maḥteret* with *rodef* more generally (as was noted by an anonymous referee). *Berakhot* 62b uses the phrase *ba lehorgekha hashkem lehorgo* (usually associated with *ba ba-maḥteret*) as well as *rodef* in the context of David catching Shaul in the cave and not killing him. However, the usage of both terms, the way they are interpreted by this paper, is accurate: Shaul could be killed on either *rodef* or *maḥteret* categories. Furthermore, it is not at all clear that this aggadic story should be read halakhically; note that the cave here is one inhabited by Shaul, not David. Ironically, David is the literal *ba ba-maḥteret*, though Shaul is the one pursuing David. Given this, the usage of *ba lehorgekha hashkem lehorgo* is applied primarily if not exclusively for its powerful ironic literary value, not its precise halakhic application.

Yoma 85a-b uses *ba lehorgekha hashkem lehorgo* in an attempt at a *kol va-homer* teaching that it is permitted to violate Shabbat to save a life. Though one might think that this source is applicable only if we view the principle of *im ba lehorgekha hashkem lehorgo* as based on justice, this would not be the case. Indeed, the right of the attacked party to defend his or her life is based on the value of his or her life, in the same way that violating Shabbat to save a life is based on the value of the life of the person in danger. Of course, a person may have a right (as this paper argues) to weigh his life more heavily than that of his fellow, but the principle still establishes that one can go to great lengths to save a life. In fact, I believe that the reason a case of self-defense is used rather than third party intervention against a *rodef* is that the proof is stronger this way. If we want to establish that even Shabbat can be violated in order to save a life, it is a greater *kal va-*

Enker and Frimer view this category as based on *kol de-allim gevar*,⁴² a scenario in which neither party is more justified than the other, and the law throws up its hands and allows the two sides to do as they may.⁴³ I see this case as more of a license or right, and believe it to be an independent principle authorizing the use of force (up to and including lethal force) within, rather than outside of, the law, in serving the interest of self-preservation in the face of a threat,⁴⁴ similar to the concept of personal partiality discussed above.⁴⁵ This does not mean that no cases

homer to establish this from a case in which what is permitted is killing someone who has *not* sacrificed his or her right to life rather than one who has (such as a *rodef*). The former can more readily be described as “spilling blood, which defiles the land and causes the Divine presence to leave Israel” (the Talmud’s phrase) than the latter.

There are several possibilities that the Gemara in *Sanhedrin* 72b advances wherein *maḥteret* is compared to either *rodef* or others who have clear guilt. This includes the possibility that he cannot be killed on Shabbat (the same way the courts do not execute on Shabbat), the potential carrying over from *rodef* of the possibility that the *ba ba-maḥteret* can be killed using any method, and a connection between *maḥteret* and *rodef* for the purposes of establishing that *rodef*, like the *ba ba-maḥteret*, must be warned in order to be killed (for the latter, the tunnel itself is considered the warning). In response, I note that the first two are *hava aminas* that were rejected by the *gemara*, and the third is an alternative argument (*i ba’it eima*) where the competing alternative has a wildly unlikely assumption about the case (*ukimta*). The fact that the *Amora'im* are so reluctant to actually connect these two cases (not to mention the fact that they were seen as two distinct cases that needed to be connected in the first place) further underscores the distinction between them first provided by their presentation in separate *mishnayyot*. In addition, even the opinion that demonstrates a requirement to warn a *rodef* based on *ba ba-maḥteret* need not assume the two categories are the same; the argument could be one of *a fortiori*: if even a *ba ba-maḥteret*, whose killing is justified based on personal partiality rather than justice (see below), needs a warning, all the more so a *rodef*, whose killing is justified on the basis of justice, requires a warning.

In sum, I maintain that various texts which *prima facie* subsume self-defense under *rodef* are in truth compatible with viewing self-defense as a separate category.

42. Enker and Frimer, 233-34.

43. This is admittedly a simplified understanding of *kol de-allim gevar*, but it seems to reflect the sense in which Enker and Frimer use the expression.

44. Responsa *Afikei Yam* (R. Yizḥak Haver) 2:40, offers this reading and claims that the question of *rodef* is asked only with regard to third parties, since it is obvious for one defending himself.

45. This understanding of the second form of self-defense as a right fits very well with the language of R. Yizḥak Ze’ev ha-Levi Soloveichik (*Griz al ha-Rambam, Rozeah* 1:13), whom Enker and Frimer cite (p. 232) but do not analyze in detail. He writes (translation mine):

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

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

of apparent *ba ba-maḥteret* end up rising to a level of *rodef*; in fact, we encountered such a case on *Sanhedrin* 72b. And yet, on a fundamental level, the two principles can be regarded as distinct.⁴⁶ The extent of the self-defense justification, furthermore, is not boundless. Obviously we cannot derive from this source that one can kill innocent bystanders to preserve one's own life.⁴⁷ (This distinction may be easier to establish and justify if we adopt the license approach than the *kol de-allim* one.⁴⁸) This is not a *carte blanche* for a philosophy of egoism, but a justification limited to particular types of scenarios. Later in this article, we will delineate the parameters in which the principle allowing the preservation of one's life at the expense of another may be invoked.

How exactly should we categorize this halakhic justification for one to defend his life in the face of an attack? As was implied in the description of philosophical approaches earlier in this paper, philosophers who write on self-defense tend to view personal partiality as distinct from a justification based on rights.⁴⁹ I believe it possible to argue that an approach justifying self-defense based on personal partiality is, at least within Jewish law, itself

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 for 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 absence 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.

Note here his language of *ke-ein heteira*, a sort of license, and the fact that it is not based on forfeiture at all (as a subjective forfeiture would be untenable) but is an overriding right (of the trump variety; see n. 52 below). Griz prefers another approach in explaining the Rambam (based on the moral guilt of the pursuer), but he does not provide any insurmountable reasons to reject the priority-of-self position cited here. See also *Iggerot Mosheh, Even ha-Ezer* 1:39.

46. One might argue that it is hard to sustain an understanding that the justified killing of the *ba ba-maḥteret* is based on personal partiality rather than justice since the tunneler must be warned. This argument would work but for the fact that the actual existence of a warning in the *maḥteret* case is far from clear, as above (n. 41). *Sanhedrin* 72b says that *maḥtarto zo hi hatra'ato*, the tunnel (itself) is his warning. In other words, (and see Rashi *ad. loc.*), the very form of a case where someone ends up threatening his fellow's life is sufficient to justify his killing with no further warning. The result of this very line in the *gemara*, in Rashi's interpretation, is not legislating a need for warning in the case of *maḥteret* but rather obviating such a need.

47. Note the rules for applying *mai hazit* ("How do you know whose blood is redder") and the case of the two people in the desert, discussed below (section VII).

48. I thank my friend Jake Friedman for noting this.

49. See, e.g., Leverick, 50-53, who sees personal partiality as an independent explanation or as possibly based on a form of consequentialism.

a right, conferred by God, that allows a threatened person to use lethal measures against the person threatening his life, even if that person's right to life is not forfeited.⁵⁰ Admittedly this is a right of the sort that does not correspond to a correlative obligation,⁵¹ but it follows Ronald Dworkin's categorization of rights as "trump cards"⁵² that require no correlative obligation on another, and the language *im ba lehorgekha hashkem lehorgo* definitely sounds like it is the conferral of a right upon the attacked party.⁵³ Viewing this version of personal partiality as a "Divine right of attacked parties" will assist the argument below.

III.

If there are two distinct principles of self-defense at play—a right, for both the attacked party and third parties, to kill the attacker, who has forfeited his own right to life, and a right, for the attacked party alone, to act in his self-defense, even without establishing such forfeiture—there may be significant distinctions between the scopes of these principles. What *nafka minas* (legal differences) can we point to between these principles that reflect their distinct justifications? Three different types of cases, one discussed by Enker and Frimer and two I would like to introduce, can broaden the scope of this discussion.⁵⁴

50. The assumption that the attacker has not forfeited his right to life will hold in cases such as that of doubt, an innocent attacker, or a passive threat, to be discussed later. Of course, if the attacker qualifies as a full *rodef*, and the justification then works on the plane of justice through that category, all attendant ramifications apply.

51. See, e.g. Judith Jarvis Thomson, *The Realm of Rights*, (Cambridge, 1992), 77, who argues for this understanding of rights.

52. See Ronald Dworkin, "Rights as Trumps," in *Theories of Rights*, ed. Jeremy Waldron (USA, 1984), 53, and his expanded version of the presentation in his *Taking Rights Seriously* (Cambridge, 1977). See also the discussion of this issue in chapter 1 of Rodin's *War and Self-Defense*.

53. Some have contended that Judaism does not have a concept of rights, while others argue to the contrary. See Milton Konvitz (ed.), *Judaism and Human Rights* (New York, 1972), Lenn Goodman, *Judaism, Human Rights, and Human Values*, (Oxford, 1998), and Michael J. Broyde and John Witte (eds.), *Human Rights in Judaism: Cultural, Religious, and Political Perspectives* (Northvale, 1998), which discuss the issue. For our purposes, as David Shatz pointed out, it appears that the analysis could also be reframed without the "rights talk." For example, the right to one's life can be framed as that person's counterpart's prohibition to take his life, and the forfeiture thereof can be seen as the undoing (*hafka'ah*) of that prohibition. The right to kill a fellow person who is a threat to one's life can be reframed as a license (*hetter*). That being said, it is definitely convenient to use the rights talk, and use thereof allows for a sharper discussion that can more easily be put in dialogue with the philosophical literature on the topic.

54. There is an additional distinction between *rodef* and self-defense, namely that pro-

One difference between the two categories regards the degree of certainty of the existence of a threat that is required before one may proceed with lethal action. The paradigmatic case of the tunneler is by definition based on a decision made in a dark underground excavation into one's home, a scenario in which certainty is rarely achievable. The Talmud (*Sanhedrin* 72a) states:

אם ברור לך כשמש שיש לו שלום עמך—אל תהרגהו, ואם לאו—הרגהו.⁵⁵

If it is as clear to you as the sun that he is at peace with you, do not kill him; if not [and you are unsure], kill him.

Only if it is clear as day that the tunneler is no threat need the homeowner desist. Implicit in this statement is that the homeowner may kill the intruder even if it is not fully clear at the time that the intruder plans to kill him.⁵⁶ A parallel *gemara* in *Yoma* 85a regarding *ba ba-maḥteret* is similar but sharper in its formulation:

R. Yishmael responded and said: "If the robber is found in a tunnel." And if in this case [of *maḥteret*], it is doubtful whether the burglar enters for the purposes of money or for the purposes of killing (*safek al mamon ba safek al nefashot ba*). . . .

R. Yishmael views the case of *ba ba-maḥteret* as one of doubt as to whether one's life is in danger, and still killing the intruder is allowed.⁵⁷

tecting someone who is pursued out of a sense of justice, is mandatory (see n. 23), while the self-preservation approach gleaned from *ba ba-maḥteret* is not (see Tosafot, *Sanhedrin* 73a, s.v. *af*). I will not delve into this distinction beyond noting it.

55. The opposite statement is also made, that one must make sure the intruder wants to kill him, but the Talmud (*Sanhedrin* 72b, according to most commentators) explains that that scenario applies only to the case of an intruding father, and that all other scenarios provide the allowance to kill from a situation of doubt.

56. See Rashi, *Sanhedrin* 72a, s.v. *hakhi garsinan*, who explains the *gemara* this way. The following folio has a formulation somewhat at odds with this one. In rejecting several of the proofs, it argues that we have only shown cases of definite threats to someone's life (*vaddai*) and not those of doubt (*safek*). The best way, in my view, to reconcile this line with both *Yoma* 85a and *Sanhedrin* 72a is to say that this rejection of the proof is operating at a very high standard, as the *gemara* attempts to discern the best of six proposed arguments. Thus, though *maḥteret* may be a case of *safek*, the fact that it is *arguably* a case of *vaddai* is sufficient for the *gemara* to prefer another proof (specifically Shmuel's argument from *va-ḥai bahem*.)

57. Of course, it is also possible to understand the law of *ba ba-maḥteret* as defining these cases as ones in which a threat exists, despite a lack of clear evidence to that effect. However, I believe the term *safek* and the alternative of *barur ka-shemesh*, as explained by Rashi in the note above, indicate that the scenario is still treated as one of doubt, and yet it is within the rights of the possibly attacked party to act within that scenario. Furthermore, even for those (like Rambam, *Hilkhot Geneivah* 9:9) who see *maḥteret* as providing a *ḥazakah* that the (presumed) attacker is threatening the life of the (presumed)

No such formulation appears regarding the case of the pursuer. One would presume that the level of certainty needed is as high as it would be in most matters of Halakhah;⁵⁸ one must be fairly certain that one is dealing with a situation of a *rodef* before that justification of self-defense can be invoked. (Of course, in the absence of clarity the *ba ba-maḥteret* category may still be invoked, at least by the attacked party, but its extent may be narrower in scope.) This distinction is explained very well if the above understanding of *ba ba-maḥteret* as personal partiality and *rodef* as a justice-based killing is adopted. In order to assert the desired forfeiture of rights by the attacker, one would need a relatively high standard of certainty in order to ensure that he was killing a truly deserving party. If an observer lacks sufficient evidence to properly understand the situation, how could he possibly invoke justice to kill a possible attacker?⁵⁹ Shouldn't he have to weigh the detrimental effect of mistakenly killing a non-threat (for the consequentialist) or the unjustified infringement of his right to life of the misidentified non-aggressor (for the right-based thinker)? However, if we consider the situation of *ba ba-maḥteret* as one of personal partiality, then the attacked party has a right to favor his own life over that of his fellow in certain circumstances—and this right to self-defense need not depend upon a particular degree of certainty. As long as the person reasonably feels that he may be under

attacked party, it is necessary to ask why this *ḥazakah* has been put in place by the Torah. Either way, it appears likely that a distinction between the classic *ba ba-maḥteret* and *rodef* case exists regarding the degree of certainty required. (Even Rambam, who says that, due to this *ḥazakah*, the *maḥteret* attacker is considered “*ke-rodef*,” need not be saying that the standards for killing in the former case are the same as those for killing in the latter case. He may be saying only that the presumed attacker may be killed—this, even if the likelihood of him actually being an attacker is lower than it would need to be to qualify as a *rodef*. This understanding would see *ke-rodef* as connoting only an inexact parallel to *rodef*.)

58. To be sure, the degree of certainty one needs to act in halakhic matters in general is itself not fully clear, but let us assume it falls somewhere between majority and a “super-majority,” where there is no competing significant minority (*mi'ut ha-nikkar*), which is generally assumed in literature of the *aḥaronim* to fall somewhere around 90% and up. R. Yizḥak Shor (*Koah Shor* 1:20) says that if there is doubt as to whether the potentially offending party is a *rodef*, he cannot be killed on the grounds of *rodef*. R. Moshe Feinstein (*Hoshen Mishpat* 2:69) has a standard of *karov le-vaddai*, which would fit with the earlier discussion. *Minḥat Ḥinnukh* (296) does not accept this distinction, and argues that, even in cases of third party intervention, the potentially offending party may be killed despite doubts as to his status as a *rodef*. It is hard to understand *rodef* as based on principles of justice within this last approach.

59. It is alternatively possible that this distinction is between different scenarios, of defending one's own turf versus the open terrain, but we favor a fundamental distinction between self-defense and third-party intervention.

attack, the Torah affords him the right of acting to preserve his life, as the principle of *im ba lehorgekha hashkem lehorgo* states (within limitations to be discussed below). Since this self-preservation approach aims for a lower standard—favoring the attacked over the supposed attacker not based on concerns of justice but on a subjective right to defend one’s life—it applies in a broader range of cases, including those of uncertainty. However, it is limited to the constraints of *ba ba-maḥteret* and may be applied only by the attacked party himself.

IV.

We may also point to the following, second distinction between the two justifications of self-defense—those based on *ba ba-maḥteret* and *rodef*, respectively. What is the law in a case where one can disable the attacker by injuring his limb instead of by taking his life—must the intervening party choose to target the limb? Rambam appears to make inconsistent statements concerning this question. In the case of the *rodef*, he says (*Hil. Rozeah* 1:13):

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

If one can save the pursued party by injuring the *rodef* instead of killing him, one must do so.⁶⁰ If instead he kills the *rodef*, then the intervening party himself deserves the death penalty in some theoretical sense, though it is not carried out in practice. On the other hand, in the case of *ba ba-maḥteret*, Rambam writes that the tunneler can be killed in any manner.⁶¹ The fact that Rambam does not mention the distinction between injuring a limb and killing the person implies that there is no need to attempt to injure or disarm the tunneler as a first priority. Thus, there appears to be a discrepancy between the two cases in terms of this issue.⁶²

60. *Sanhedrin* 57.

61. *Hilkhot Geneivah* 9:7.

62. See *Mishneh la-Melekh*, *Hovel u-Mazzik* 8:10, who argues that the requirement to injure the attacker rather than kill him does not apply to the person under attack:

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.

The fact that it says [if] they can save with one of the limbs of the pursuer that they may not kill him—this ruling is only said in a case where a[n unrelated] person is coming to save [the pursued party]; but the pursued party [himself] need not be careful about this.

This apparent contradiction might further be explained based on the discrepancy between *ba ba-maḥteret* (or self-preservation) as justified by personal partiality, and *rodef* (or third party intervention) as justified based on rights and the forfeiture thereof. Following the rights approach, the attacker forfeits his right to life only insofar as it is necessary for the saving of the attacked party. Were this not the case, it would be justified to kill an attacker who tripped, fell, and is no longer a risk—something intuition, as well as the implication of *Sanhedrin* 73a, would clearly militate against. Thus, as Leverick puts it,

Two conditions must be satisfied before forfeiture takes place: the aggressor must pose an unjust immediate threat to the life of the victim . . . and there must be no other way in which the threat can be avoided.⁶³

This is all true for the case of *rodef*, where one must ascertain that the pursuer has vacated his right to life. However, for a personal partiality approach, where the focus is on the attacked individual rather than on the attacker, once the attacked party qualifies as being within a situation of mortal danger, he is entitled to exercise his right to kill the attacker. In the homeowner's exercising this very basic and fundamental human right, we do not weigh upon him the constricting need to consider what the status of the pursuer may be; these extra considerations would themselves impinge upon his right to self-preservation.⁶⁴ One defending his own life has no obligation to take extra measures and ensure that the intruder on his property is definitely a threat, and he is similarly not required to take actions to minimize the damage to his attacker. He acts

See the discussion on the matter in *Griz al ha-Rambam, Rozeah* 1:13, which adduces a proof-text from Rambam's discussion of the *go'el ha-dam's* permission to kill the unintentional killer in *Rozeah* 5:10, and the discussion in R. Eliezer Waldenberg, *Ziz Eliezer*, 4:24. The fact that Rambam includes in *Geneivah* 9:7 the permission "*la-kol*" for anyone, including a third party, to kill the intruder presents a problem for this explanation. However, it may be, as suggested by *Shevut Ya'akov* 2:187, that he is speaking only about those who are in the house and are threatened by the intruder, and the use of "*la-kol*" is merely intended to extend the permission to kill beyond the homeowner. With regard to those not within the invaded house, one would invoke Rambam's ruling in *Rozeah* 1:13 and expect measures to be taken to protect the life of the intruder, if possible. Whether or not one sees this proof as viable, the *Mishneh la-Melekh's* position stands as an important view.

63. *Killing in Self-Defense*, 66.

64. One might argue that, in cases of *yakhol le-hazzil*, the self-preservation right should not hold up. However, the principle seems to be triggered at an early stage: once one finds himself in a situation of *im ba lehorgekha*, he may do anything to avert the threat. It is also possible that part of the reason we do not require *yakhol le-hazzil* for the attacked part is that it is unrealistic to expect a person under threat to calculate the precise degree of force necessary and act accordingly.

from a position of (justified and sanctioned) self-interest, not a selfless, objective standpoint of justice.

V.

Let us analyze a third and especially intriguing distinction between third party intervention and self-defense, one raised by some commentators. Can an aggressor, once counterattacks are leveled against him, possibly be justified in responding to them with force, even lethal force, of his own? Thomson dismisses this possibility out of hand, saying that, while the basis of self-defense is that every person has a right not to be killed, an aggressor has forfeited this right, and therefore this is not a valid argument but a “bad joke,” in her opinion.⁶⁵ Furthermore, certain philosophers hold that, in any scenario in which one party is justified in killing another, it is impossible for the other side to be justified in fighting back.⁶⁶ While this logic may be compelling to some, Jewish sources present a more complicated picture in which this argument may not hold.

This alternate approach, which begins with an argument advanced by *Dina de-Ḥayyei* (R. Ḥayyim ben Yisrael Benvenisti)⁶⁷ and is further developed by Enker and Frimer, stems from a distinction made in *Sanhedrin* 82a. In the *gemara*’s analysis of the story of Pineḥas, who zealously killed Zimri for having relations with a Midianite, it avers that, “*nehpakh Zimri va-harago le-Pineḥas, ein neherag alav, she-harei rodef hu*—had Zimri turned around and killed Pineḥas, he would not have been executed for that, as he (Pineḥas) was a pursuer.”⁶⁸ The explanation given for this in *Yad Ramah* (R. Meir Abulafia, ad loc.) is that Pineḥas was not obligated to kill Zimri, though he had license to do so, given Zimri’s transgression.⁶⁹ Therefore, though Pineḥas was justified in killing Zimri, the latter still

65. “Self-Defense,” 304.

66. See Leverick, 60-1. This correlates with the approach, cited above in n. 51, that rights must correspond with obligations, and, thus, a right to kill an attacker must correlate to his obligation not to resist being killed.

67. *Dina de-Ḥayyei*, *Asin* 77.

68. Enker and Frimer, 228-233. It is not clear from the Talmud whether this act would have been justified or merely excused. I believe that it is fair to read this as saying either that Zimri would be a killer but would not be prosecuted due to the extenuating circumstances (*anus*) or that he is morally justified in defending his own life in this circumstance. We will work with the former option, which is *prima facie* more reasonable.

69. Ran, ad loc., may even go a step further and say that there *was* a *mizvah* to kill Zimri, but Zimri could still have killed Pineḥas, though Ran does distinguish this case from most others as being based on vengeance (*nekamah*) rather than some pressing need that does exist in other scenarios (such as that of *rodef*).

would have been exculpated had he fought back. It is hard to sustain this line of argument if Zimri had, in fact, forfeited his right to life by committing the sin,⁷⁰ but if Zimri had not forfeited his right to life, in what way was Pineḥas justified in killing him? *Dina de-Ḥayyei* considers the possibility of carrying this paradigm over to the classic case of *rodef*, asking whether, if A attacks B and C steps in and tries to kill A, A would be justified in killing C. He argues that the situations are not comparable, for two reasons:

- a.) Pineḥas was acting as a zealot (*kanna'in poge'in bo*), taking actions that would not have enjoyed the court's stamp of approval, while a *nirdaf's* actions are sanctioned by the Talmud.
- b.) In a case of *rodef*, the life of the attacker is forfeited, so he would have no basis to kill the attacker, while here Zimri's life was not forfeited.

It follows from this explanation that there are different levels of license provided to one who undertakes vigilante action:

1. A scenario in which the vigilante is justified (or at least licensed to act) on the basis of justice, related to his target's forfeiture of his right to life. (We can compare this vigilante to an executioner, who, by any moral system, [hopefully] does not carry the guilt of his rightfully convicted targets, and against whom no rightly convicted targets can morally act.) In such cases, the vigilante's target is not justified in responding.
2. A scenario in which the vigilante is licensed to act based on his outrage, or for some other reason, but that license is not based on an assessment of what constitutes justice in the circumstances. In these cases, which are classified as *halakhah ve-ein morin ken*, the law dictates that the act may be undertaken but nonetheless this ruling is not promulgated to the public. One has a license to act based on personal response,⁷¹ but one is not entitled to amnesty against the attacked party.⁷²

70. Note that, although we discussed previously the fact that one who has relations with a betrothed maiden does forfeit his life, having relations with a non-Jew falls under a different category and does not entail forfeiture of life, though it does legitimate vigilante action.

71. See Enker and Frimer, 227, who formulate this slightly differently. They see this act as an extra-legal, political act, which is nevertheless justified.

72. See Shai Wozner's article, "Conduct Rules and Decision Rules in Jewish Law," in *Jewish Law Annual* 19 (2011), 165-79, where he argues that *halakhah ve-ein morin kein* refers to a rule that is justified conduct but is not promulgated as a decision. This dovetails

Mishneh la-Melekh on *Hilkhot Rozeah* 1:15 raises a similar possibility to that of *Dina de-Hayyei* with regard to an unintentional killer. The *go'el ha-dam* (blood avenger), a relative of the victim, is licensed to kill the one who unintentionally shed blood,⁷³ but what would happen if the unintentional murderer were to turn around and kill the blood avenger? *Mishneh la-Melekh* is of two minds on this issue.⁷⁴ This again shows that there can be a case in which someone is justified in killing a specific person, but if the person whose death is sanctioned kills his endorsed pursuer, he cannot be prosecuted for it. The position that would exempt the retaliating unintentional killer supports the second category propounded above: the avenger may act, despite the unintentional killer's right to life not being forfeited, out of a personal position of avenging his relative.

Pursuant to this discussion above, Enker and Frimer argue that these two categories map very nicely onto our two scenarios of self-defense (which we based on *rodef* and *ba ba-mahteret* earlier). In the former case, the justification is that the life of the attacker is forfeited, and therefore it is not justified for the attacker to "turn around" and kill the defender. However, in a case that does not rise to the level of *rodef*, including passive threats (such as one who falls off a cliff and will crush someone below),⁷⁵ the justification for that action is based only on personal partiality, and therefore the person who poses the threat would be justified in killing his now-attacker. To provide a somewhat sensational example of this, suppose that person A is falling off a building and will land on bystander B, such that B will die and not A. Bystander B, noticing this and utilizing the category of *ba ba-mahteret* and personal partiality, picks up a gun to shoot A and save himself. In that case, A would be justified by himself taking preemptive action to kill B. Allowing innocent attackers to kill those who try to "defend" against them is argued for by McMahan, who sees it as a real strength of the personal partiality approach.⁷⁶

well with our claim that the vigilante acts not out of a sense of justice.

73. Num. 35.

74. See n. 62 above and *Mishneh la-Melekh*, *Hovel u-Mazzik* 8:10, which may be related to his comment in *Hilkhot Rozeah* based on this analysis.

75. Note that this does not apply to innocent attackers, such as an intent-less three-year-old with a gun, who is considered a *rodef* on my approach; see n. 81 below.

76. "Self-Defense and the Problem of the Innocent Attacker," 269 (all brackets mine): "It [an approach of personal partiality] also has the further advantage that it supports another intuitively plausible claim: namely, that the moral reason that the Victim has to resist the IA [Innocent Attacker] is also available to the IA as a justification for resisting the Victim's counter-attack."

This justification for the attacker to kill someone trying to kill him also fits in a case of an unclear threat—in this case, if the homeowner (for example) is justified in killing the intruder on the basis of *ba ba-maḥteret*, the intruder himself would be justified in killing the homeowner.⁷⁷ Nonetheless, if he had forfeited his life by falling into a *rodef* scenario by clearly being an attacker, he would not be allowed to respond.⁷⁸

VI.

We now move to the question of scope: which scenarios qualify for the Talmud's category of *rodef*, which for *ba ba-maḥteret*, and which for neither? Interestingly, in the context of the Talmud's discussion of *rodef* we find a significant expansion of the rule (*Sanhedrin* 72b):

אמר רב הונא: קטן הרודף ניתן להצילו בנפשו.

R. Huna said: [In the case of] a minor [*katan*] pursuing his fellow [to kill him], he may be saved with [at the cost of] his life.

A minor who is pursuing a person to kill him may be killed (even) by a third party. This is somewhat surprising, since minors are usually considered to lack intent by Jewish law and are therefore excused for their actions, and yet in this case the minor is killed. However, given that this is not a punishment but (at least partially) a preventive action taken to stop the killing from taking place,⁷⁹ the Talmud says that killing this child can be justified within the rule of *rodef*; in other words, the minor's right to life is forfeited based on his actions in this situation. We can explain this as

77. *Afikei Yam* (*Teshuvot*, 2:40) argues for something similar: he says that if a third party attacks a tunneler, the tunneler would be justified in fighting back. Presumably, he sees the third party as having license to kill but lacking an objective sense of justice to do so, and therefore the tunneler could turn around and kill him. We can take this a step further and apply this same logic to a case in which the tunneler shoots the homeowner, as well. (*Afikei Yam* may disagree; since the tunneler was the cause of the danger, it would not be sincere to invoke his own self-defense.)

78. One might raise the question of a case of an attacking party coming with all intent to kill but does not clearly appear to be an attacker, who qualifies for *maḥteret* but not *rodef*. Can the attacker kill the attacked party if the latter resists with lethal force? We might respond that, if such a case could be constructed, the attacker is a bad person and is responsible at some level for the death by dint of the fact that he created this situation, but not as a direct murderer. Alternatively, we might argue that if the intruder's intent is to kill, he automatically qualifies as a *rodef*, even if the homeowner's "epistemic radar" might only identify him as a *ba ba-maḥteret*.

79. In other words, though minors are not punished for their actions, there is still a sufficient degree of culpability that, combined with their representing a threat to another individual, they can be killed using the category of *rodef*.

Uniacke analyzes a similar case⁸⁰—that the forfeiture is not based on any fault of the (innocent) aggressor (and it is not based on his guilt *per se*), but on his very conduct itself and the resulting guilt it incurs.⁸¹

The next line in the *gemara* raises an objection that the Talmud resolves while at the same time limiting the extent of the *rodef* principle:⁸²

איתיביה רב חסדא לרב הונא: יצא ראשו—אין נוגעין בו, לפי שאין דוחין נפש מפני נפש. ואמאי? רודף הוא!—שאני התם, דמשמיה קא רדפי לה.

R. Ḥisda 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.

In the case of a newborn baby, the fetus can be terminated prior to birth if it poses a threat to the mother's life.⁸³ Once its head emerges, though, it cannot be killed, since it is a life, like its mother, and we do not kill one life to save another. But isn't this a case of *rodef*, as the baby is threatening the mother's life? The *gemara* explains that it is not, given that *mi-Shamaya ka radfi lah*—Heaven (or, one might say, nature),⁸⁴ not the baby, is pursuing her. In other words, a case in which the baby is indirectly threatening the mother's life does not qualify as a scenario of *rodef*, wherein a third party is allowed to intervene. Given that this is not a case of an attack (not even an innocent one in which the “attacker” does not understand the consequences of his actions), but is merely a threat that the baby poses, the category of *rodef*, with its attendant forfeiture of the newborn baby's life, is not in place. The doctors, then, may not touch this baby, and the mother is left to die.

Upon reading this passage, a practically unfeasible but philosophically pertinent question arises: what if the mother herself would kill the

80. See Suzanne Uniacke's *Permissible Killing* (Cambridge, 1996), esp. chapter 6.

81. An alternate understanding and explanation of this source is presented by Enker and Frimer (223-24). They believe (based on their arguments presented above in n. 75 regarding intent) that this *mishnah* is speaking only about a child who has intent and therefore culpability for his actions. (In order to make this move, they provide a secondary argument for minors only being exempted from punishment rather than lacking culpability for their actions.) However, a younger child (such as a three-year-old), who does not understand what it means to kill, would not fall under the category of *rodef* (though one might be able to kill him in an act of self-preservation). See also “Killing a Rodef,” 58, where Zohar suggests that one might maintain that a toddler would not be considered a *rodef*, though a child would.

82. This is a citation of the Mishnah *Ohalot* 7:6, which has several minor variations from the version the Talmud quotes, none of which bear on our issue.

83. This may be because the baby is not considered to be alive at this early stage, or that it is alive but there is some other explanation to justify killing it to save the mother. See *Hiddushei R. Ḥayyim ha-Levi, Yesodei Ha-Torah* for the latter.

84. See Rambam, *Rozeah* 1:9, who refers to this as *tiv'o shel olam*, the nature of the world.

newborn baby threatening her life, in an act of self-preservation? Meiri cites an opinion that the mother herself could kill the baby:

חכמי הדורות שלפנינו כתבוהו כן ר"ל שהאשה עצמה יכולה לחתכו שנרדף היא.
ונרדף מיהא במקום שאין אחרים מחזיקין את הרודפו ברודף הוא עצמו שרי.⁸⁵

The wise men of earlier generations wrote it as follows: it means that the woman herself can cut it [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].

Given the lack of explicit counterevidence, and given that it squares with the source of *im ba lehorgekha hashkem lehorgo*, this opinion holds that the mother is allowed to kill the partially born baby in an act of self-defense in this case, even while doctors and other third-party groups would not be allowed to do so.⁸⁶ The baby may not have forfeited its right to life, but that does not mean that the mother must sit back idly as this threat to her life brings about her death.⁸⁷ If this is true, then when the *gemara* says *ein noge'in bo*, limiting the agency of the public at large, that would apply only to third parties and would not restrict the actions of the mother *per se*. The philosophical justification for this position would go as follows. The rule of *im ba lehorgekha hashkem lehorgo* provides for not just self-defense, but self-preservation, the right to take extreme measures to continue one's life in the face of a threat,⁸⁸ and this stems from one's

85. See Enker and Frimer's discussion of this source on 230-331.

86. Once this conclusion has been reached in theory, one might raise the question of how to view those working on behalf of the mother, but I do not see how anyone other than the attacked party can use the partiality necessary to invoke *ba ba-mahteret*; he should have as much responsibility for the baby's life as he does for the mother's.

87. Of course, the mere fact that the mother would be justified in killing the baby out of a right of self-preservation based on personal partiality does not mean that she *must* kill the baby, or even that this would be the most laudable approach for her to take. As noted above, *ba ba-mahteret* self-defense is always an option rather than an obligation, and the mother's sense of responsibility for her child may (or, possibly, should) cause her to spurn her right to self-preservation.

88. Note that the root of the word used in the Talmud is *h.r.g.*, to kill, rather than *r.z.h.*, to murder. Though Gerald Blidstein has argued ("Capital Punishment—The Classic Jewish Discussion," *Judaism* 14 (1965):159-171) that in Biblical Hebrew the distinction between *rozeah* as murderer and *horeg* as killer does not hold up, it appears that in the Rabbinic Hebrew of the Talmud it does. (Blidstein himself claims it does not.) The Talmud is much more likely to refer to unintentional (*shogeg*) killings as *hareigah* rather than *reziḥah*, in a clear shift from the biblical cases, and when *shogeg* cases are called *reziḥah*, it is primarily in cases in which the biblical language carries over to the Talmud. For example, see *Makkot* 12a, where the Talmud assumes that the word *rozeah* means a murderer as opposed to an unintentional killer.

personal partiality.⁸⁹ Meiri himself rejects the opinion of the *hakhmei hadorot*, but it is possible that those who, like the Meiri, reject this opinion nevertheless accept in general the position that the mother could defend herself against a threat to her life, but considered the baby in this case to not rise to the level of a threat. If the real *rodef* is nature, as the Talmud's formulation has it, that may mean that our scenario does not even qualify as an *im ba lehorgekha* case. If this argument holds, there may very well be room for a category of self-preservation even for *rishonim* who do not apply it here.

Of course, there are limitations on what is allowed in the interests of self-preservation. Completely innocent bystanders cannot be killed, as will be seen from sources below, but anyone who poses a threat to the mother's life—even if that threat comprises simply the natural process of emerging from the birth canal—may be disposed of by the threatened party (in this case the mother), despite the dire consequences for the threatening party (in this case the baby).⁹⁰ Note that there is no requirement for the offending party to qualify as a *rodef* or to forfeit its right to life; the fact that this threatening party constitutes a threat is sufficient to allow the attacked party to kill, in an effort to secure his own safety. This is a broad application of the right of self-preservation and personal partiality, as distinct from an approach that limits the permission of self-defense to cases in which one defends against an attacker who has forfeited his or her right to life. It is by no means a simple move, but I believe it justified by the sources under discussion.

VII.

Beyond the cases of intentional attackers, innocent attackers, and unintentional threats, there is yet another category in which two people are involved in a situation where each one's existence presents a challenge to the other's life—competition for resources. The Talmud addresses one such situation in *Bava Mezi'a* 62a:

שנים שהיו מהלכין בדרך, וביד אחד מהן קיתון של מים, אם שותין שניהם—מתים,
ואם שותה אחד מהן—מגיע לישוב. דרש בן פטורא: מוטב שישתו שניהם וימותו,

89. The response to this question in the Jerusalem Talmud, *Shabbat* 1:4, is that it is not clear who the *rodef* is in this case. Such a line also fits with the position of the “Wise Men of earlier generations” cited in the Meiri that neither side is objectively justified, and therefore both (which, in this case, only feasibly applies to the mother) are entitled to act in the interests of their self-preservation.

90. This formulation is not complete, and will be built upon in the analysis below.

ואל יראה אחד מהם במיתתו של חבירו. עד שבא רבי עקיבא ולימד: "וחי אחיך עמך"—חייך קודמים לחיי חבירך.

Two people who were traveling along the way, and one of them has in his possession a flask of water. If both drink from it, they will both die; however, if one of them drinks, he will reach a settlement. Ben Petura taught, it is better that both should drink and die than that one should see the death of his fellow. Whereupon R. Akiva came along and taught: "That your brother may live with you" (Lev. 25:36)—your own life takes precedence over your fellow's life.

If two people are stranded on a deserted path with a single jug of water between them that can sustain only one person, what are they to do? Ben Petura suggests that they share the jug and both die, such that one should not "see"⁹¹ the death of the other. The authoritative opinion, however, that of R. Akiva, is that the one in possession of the jug (if we are to assume that holding a jug in one's hand reflects possession) should drink it and save his own life, at the expense of his fellow's. What no one suggests in this case is that the person without the jug of water should steal it from his companion; this appears patently immoral and prohibited.⁹² In fact, such an action would appear to be prohibited based on the Talmud's rule, in *Pesaḥim* 25b, of *mai ḥazit de-dama di-dakh sumak tefei; dilma dama de-hahu gavra sumak tefei*, that one cannot assume that his blood is "redder" than that of his fellow for the purposes of killing his fellow to save his own life.⁹³ These sources

91. The word *yir'eh* literally means "will see," but here it may have the implication of "seeing the other die as a result of having caused his death." It is otherwise difficult to explain how the prospect of "seeing" the other's death militates against drinking the water. 92. See R. Mosheh of Coucy (Ramakh), quoted in *Shittah Mekubbezet*, *Bava Me'zia* 62a, s.v. *shenayim she-hayu*, who says that one who takes the jug is *ḥayyav bi-dinei shamayim* for the death of his companion. (That is, he is held culpable in the heavenly court but not in human court.)

93. The context in that case is that one person is told to kill someone else, and is told that he will be killed unless he complies. He must let himself be killed rather than kill the other. There are two basic understandings of this line, one taken by Tosafot (*Pesaḥim* 25b, s.v. *af*; *Yoma* 82b, s.v. *mah*; *Yevamot* 53b, s.v. *ein ones*; *Sanhedrin* 74b, s.v. *ve-ha Ester*) and the other by R. Ḥayyim Soloveitchik, *Yesodei ha-Torah*, (based on Ramban's commentary on *Yevamot* 53b; see R. Elhanan Wasserman's *Kovez He'arot* 48). For Tosafot, this rule states that one may not privilege one's life over that of his fellow by *actively* killing him, but one need not submit to being killed by the evil conspirator, and he may allow himself to be thrown onto a baby to kill it. For R. Ḥayyim Soloveitchik, however, the prohibition against killing the other is based on an obligation to ensure that this person dies and his fellow lives, so the potential human projectile must resist and lose his life. This paper assumes the reading of Tosafot (keeping in mind that the principle of *im ba lehorgekha hashkem lehorgo* is a trump that overrides this usual rule). See Enker's discussion of the topic on 193-94.

prohibit the killing of innocent bystanders to save one's own life.⁹⁴ For our purposes, then, we can say that self-preservation extends to cases of killing (even directly) someone who poses a threat to one's existence, but does not justify killing (even indirectly, by diverting the resources of) one who only presents a problem by being a competitor, or one who is a mere bystander.

As we discussed above, any approach that uses personal partiality to justify self-defense faces the problem of how to distinguish that from killing completely innocent people for the purpose of personal gain. Or, as McMahan put it, "It is unclear how it [personal partiality] can justify killing an IA [innocent attacker] in self-defense without also justifying killing an IB [innocent bystander] in self-preservation,"⁹⁵ when one's intuitions affirm the morality of the former but not the latter. Understanding *ba ba-maḥteret* as a divinely granted right, but so granted only in cases of *im ba lehorgekha*, where one is attacked, solves this problem. The right of self-preservation, while similar to a personal partiality approach, is in fact a right that may only be applied in the cases where it is granted. Actions taken by "Person A" in pursuit of his self-preservation are justified, but only when they are taken against a participant ("Person B") who is by his actions a lethal threat to the actor. However, if Person B is not a threat, but circumstances are such that Person A will die unless Person B is removed, Person B's incidental juxtaposition to a danger to Person A's life does not trigger the right of *im ba lehorgekha hashkem lehorgo* and, hence, does not justify Person B's actions as self-preservation in the face of a threat. In such a situation, we apply the rule of *mai hazit de-dama di-dakh sumak tefei*, and the bystander may not be killed.

94. In another chapter ("*Rezaḥ mi-Tokh Hekhreaḥ ve-Zorekh be-Mishpat ha-Ivri*," 188-211), Enker points out that it is possible to provide an impartialist account of R. Akiva's position that stresses, in prioritizing lives, changing the status quo as little as possible, so that the owner drinks rather than give the water to the other fellow. This approach reconciles R. Akiva's ruling with Rabbah's argument that one may not actively kill another to save one's own life because we do not know whose blood is redder (*Pesaḥim* 25a, *Sanhedrin* 74a). In the latter case, killing the other is a greater change; in the other, saving him is the greater change. For further discussion of the impartialist reading and its implications, see David Shatz, "As Thyself": The Limits of Altruism in Jewish Ethics," in idem, *Jewish Thought in Dialogue: Essays on Thinkers, Theologies and Moral Theories* (Boston, MA, 2009), 326-54.

95. "Self-Defense and the Problem of the Innocent Attacker," 271; brackets mine.

VIII.

At this point, I would like to review the four categories discussed, note the conclusions reached, and contrast them with certain positions in contemporary philosophical literature:

1) A man is chasing after his fellow with clear intent to kill him. This is the classic case of *rodef*, and in this case both the attacked person and a third party are allowed to kill the pursuer, based on both talmudic sources and widespread philosophic agreement (leaving aside pacifist approaches). We took this to be based on a theory of rights—that the attacked party holds a right to life which he may exercise by killing the attacker, who himself has forfeited his own right to life by attempting murder.

2) A person is threatening another person, presenting a clear threat to his life, but an unintentional one (e.g., he is about to pull an apparently innocuous lever, unaware that it will trigger a bomb that will kill his friend). This case squares with the Talmud's case of a minor *rodef*,⁹⁶ who is not considered to have *da'at* or be legally responsible for his actions, which, given the Talmud's broad and indiscriminating formulation, should apply to toddlers as well. The Talmud states that both the attacked party and third parties may kill this *rodef*, and, though Thomson seems convinced such a response is justified,⁹⁷ that position is not without opposition.⁹⁸ It is important to note that, as the Talmud classifies this under the category of *rodef*, the attacker forfeits his right to life, which may be somewhat surprising.

3) A person presents an active threat to another person's life, not through a lethal act of violence he is about to carry out but by some other means. This category includes an "Innocent Threat" case of

96. It would be possible to argue that the minor is even more innocent than a usual innocent aggressor, either because of his limited intelligence or due to some formal removal from a legal system, but the Talmud makes no such distinction.

97. "Self-Defense," 284.

98. Noam Zohar ("Collective War and Individualistic Ethics," 610) claims that whether killing the "Innocent Aggressor" is justified or not depends on the exact details of the case under discussion: a person having a seizure who will pull a lever that, indirectly, connects to some killing mechanism, may not be killed, while a psychotic person who will arbitrarily kill the first person in his path may be lethally stopped. Zohar does not provide a justification for this distinction other than that the latter killer "is not totally innocent," in contrast to the former.

the cave-blocking large man as well as the talmudic case of a baby whose impending birth will kill his mother. The Talmud distinguishes this case from the previous ones (of unintentional murder acts) by saying that this baby is not a *rodef*, and we have noted that, if we accept a separate principle of partiality, the mother, by dint of her right to self-preservation in the face of attack (based on the category of *ba ba-maḥteret*), and following the *ḥakhmei ha-dorot*, may herself take action and kill the baby.⁹⁹ What is needed here is not “moral guilt,” but for the situation to be labeled as one of *im ba lehorgekha*, where the attacked party has a right to kill threats to his life in self-preservation.

4) The final category is a case in which neither person is directly threatening the life of the other, but the situation is such that one will likely die due to the presence of the other (or, in an even more obvious case, due to his lack of utilization of the other’s resources). One example of this is a case in which there is a shortage of resources such that only one of two people can survive. This reflects the Talmud’s case of two people stranded, where one person has just enough water to allow either him or his fellow to survive, and where stealing the jug is not allowed; how can the proposed purloiner know that his life is worth more than that of his fellow? There seems to be a fairly strong consensus not to take action in this case.

IX.

The talmudic account provides a rich understanding of two related but distinct tracks to justify lethal intervention against an attacker. The case of *rodef* teaches the principle of intervention against a clear attacker which may be carried out by anyone, as it is based on justice and the attacker’s forfeiting his life, and it has higher standards and therefore often enjoys narrower application. The case of *ba ba-maḥteret* teaches the principle of

99. This category makes up the bulk of a dispute between Zohar and Thomson. Thomson claims that, since the Innocent Threat would still be killing the protagonist, the same way that a falling piano would, the protagonist has a right to kill this human projectile by deflecting him to his death. Zohar responds that “we must conclude that self-defense cannot serve as the grounds for permitting the deflection, unless we are prepared to broaden the notion of self-defense to permit any destruction of another to buy one’s own life.” Rather, “something more is required to tip the scales: a minimal measure of moral guilt (on the part of the aggressor), which distinguishes self-defense from mere substitution” (“Collective War and Individualistic Ethics,” 608-09).

self-preservation in the face of an attack, where the person partial to the situation may invoke a Divinely granted right and kill his (possible) attacker. This presentation of a double-headed justification for self-defense found within Halakhah, and particularly the *sugyot* in *Sanhedrin* chapter 8, is similar to but distinct from several approaches to self-defense that have been promulgated in philosophical literature, and it provides a consistent account of the halakhic material.

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