

Self defense and its limits

א

The fundamental human law of self-defense finds its articulation in the Bible in Exodus:

אִם בְּמַחְתָּרֵת יִמָּצָא הַגֵּנֵב וְהָכָה וּמָת אִין לֹ דָמִים: אִם זָרְחָה הַשֶּׁמֶשׁ עָלָיו דָּמִים לֹ שְׁלָם יְשָׁלָם אִם אִין לֹ וְנִמְכָּר בְּגִנְבָתוֹ: (שמות פרק כבא-ב)

“If the robber is found while tunneling and is beaten and dies, there is no bloodguilt for his death. But if daylight shines on him there is bloodguilt in this case. The robber shall pay for the goods, and if he can not afford to do so, he is sold to pay for his robbery.” (Exodus 22:1-2)

Rashi¹ commenting on this verse, and basing himself on the talmudic discussion, makes the connection to self-defense explicit:

רש"י שמות פרק כב פסוק א

כאן למדתך תורה אם בא להרגך, השכם להרגו, וזה להרגך בא שהרי יודע הוא, שאין אדם מעמיד עצמו וראה שנוטלין ממונו בפניו ושוקק, לפיכך על מנת כן בא, שאם יעמוד בעל הממון כנגדו יהרגנו

Here the Torah has taught: if someone comes to kill you, rise up and kill him. This person came to kill you, for he knows that a person will not simply stand aside, watch himself be robbed and keep quiet; therefore he comes with the intent that if the owner resists giving up his possessions, he will kill him.

What allows us to take the law into our own hands?

What limits does the Torah itself place on the justification of self-defense?

What difference does daylight make?

Is there a broader principle at work here?

What limits would you place on self-defense?

The talmud argues about the limits of the argument of self defense. Thus it quotes a tanaitic teaching interpreting the biblical verses we have just quoted:

תלמוד בבלי מסכת סנהדרין דף עב עמוד א

תנו רבנן: "אין לו דמים, אם זרחה השמש עליו" וכי השמש עליו בלבד זרחה אלא אם ברור לך הדבר כשמש שאין לו שלום עמך הרגהו ואם לאו אל תהרגהו

Our Rabbis taught: “There is no bloodguilt, but if the daylight shines on him...” does the sun shine on him alone, rather the verse is to be understood metaphorically: if the matter is as clear to you as the sun that he has not come in peace but rather intends to kill you then you may kill him, but if not, do not kill him.

What is the import of this teaching?

How does it limit the argument of self-defense?

1. Rashi: Acronym of Rabbi Solomon the son of Isaac (Shlomo Yitzchaqi), 1040-1105, France. The most frequently consulted Jewish medieval Bible and Talmud commentator.

The Talmud also quotes an opposite tannaitic teaching:

תלמוד בבלי מסכת סנהדרין דף עב עמוד א
תניא אידך "אם זרחה השמש עליו דמים לו" וכי השמש עליו בלבד זרחה אלא אם ברור לך כשמש שיש לו שלום
עמך אל תהרגו ואם לאו הרגו

Another tannaitic source teaches: "If the sun shines on him, there is bloodguilt in this case."
Does the sun shine only on him? Rather, if it is as clear to you as daylight that he comes in
peace, then don't kill him, but if not, kill him.

Note how these two positions play off different readings of the biblical verse.

What is the presumption here?

Which of the two positions do you think we should follow?

(In typical fashion the later talmudic exposition attempts to minimize the disagreement among the sources and resolves the difference by arguing that they ultimately maintain the same position, and are talking about two different circumstances. Thus the former mishnah concerns the case of someone you know well and are fairly sure won't kill you -- in such a case you have permission to kill the person only when you are sure that your assumption is wrong, but the latter teaching concerns the more usual case where we can presume the robber will kill you if you resist.)

Maimonides in his codification of Jewish law, the Mishnah Torah follows the conclusion of the the talmud and writes (הלכות גניבה פרק ט):

הבא במחתרת בין ביום בין בלילה אין לו דמים אלא אם הרגו בעל הבית או שאר האדם פטורין, ורשות יש לכל
להרגו בין בחול בין בשבת בכל מיתה שיכולין להמיתו, שנ' + שמות כ"ב א' + אין לו דמים. הלכה ז
Someone who tunnels into a house, whether by day or night, there is no blood guilt, rather if the
owner or someone else kills the robber they are innocent. Indeed everyone has permission to kill
the person, whether on Shabbat or weekday, in whatever manner at their disposal by which they
can kill him, as it is written, "there is no bloodguilt."

היה הדבר ברור לבעל הבית שזה הגנב בא עליו אינו הורגו ולא בא אלא על עסקי ממון אסור להרגו, ואם הרגו
הרי זה הורג נפש, שנ' + שמות כ"ב ב' + אם זרחה השמש עליו, אם ברור לך הדבר כשמש שיש לו שלום עמך אל
תהרגו, בין בלילה. הלכה י
But if it was clear to the owner that the robber did not come with the intention to kill him but
only came for money then it is not permitted to kill the person, as it is written, "If the sun rises
on him," that is if it is as clear to you as daylight that this person intends you no harm then do not
kill him, even if it is at night.

Note that Maimonides, following the talmudic argument, has entirely turned the image used in the biblical verse into a metaphor.

Do you think that this reading of Maimonides is the intent of the biblical verse?

Other medieval authorities want to limit the use of force more than Maimonides does. Rabbi Abraham Ibn Daud (1125-1198, known by the acronym Ravad), an older contemporary of Maimonides living in Provence, immediately comments on this passage of Maimonides:

א"א איני נמנע מלכתוב את דעתי שנ"ל אע"פ שדרשו חכמים אם זרחה השמש עליו דרך משל אם ברור לך הדבר כשמש שלא בא על עסקי נפשות וכו' אעפ"כ אין מקרא יוצא מידי פשוטו ביום אינו רשאי להרגו שאין גנב בא ביום אלא להשמטה שומט ובורח מיד ואינו מתעכב לגנוב ממון גדול ולעמוד על בעליו להרגו אלא גנב בלילה מפני שגנב לילה יודע שבעל הבית בבית או בא להרוג או ליהרג אבל גנב יום אין בעל הבית מצוי בביתו ושמוטה בעלמא הוא וחיי ראשי כל מבין די לו בזה.

Abraham says: I can not resist writing my own opinion for it seems to me that even though the sages of the talmud interpreted the verse, "If the sun rises on him," metaphorically i.e. if you are certain that the person has not come to kill you, nevertheless, the biblical verse can not be separated from its simple meaning for there is a presumption that a robber would only come during the day to grab something and immediately run away but would not linger to engage in a major robbery, staying to kill the owners. It is only at night, when the robber comes knowing that the owner is at home that the robber comes with the intent to kill or be killed. But one who comes during the day assumes that the owner is not at home only comes to grab something. By my life, anyone who has understanding should find this explanation sufficient.

What is the presumption the Ravad makes?

How would you formulate the difference between Maimonides and Ravad?

Similarly the Shulchan Aruch² addresses the problem of the amount of force that one can use in self-defense.

אם התחיל האחד, השני פטור שיש לו רשות לשני לחבול בו כדי להציל עצמו, ומיהו צריך אומדן אם היה יכול להציל עצמו בחבלה מועטת וחבל בו הרבה חייב. [ש"ע ח"מ תכ"א יג]

If someone attacks another, the second is innocent of any responsibility for injury caused to the first, since he has a right to defend himself, but if he was able to use less force but caused greater injury then he is guilty.

Which opinion(s) seems closest to this last code?

How might these texts apply to a situation of war?

2. Shulchan Aruch is the authoritative code of law written by Rabbi Joseph Caro, Safed, Israel, 1488-1575.

ב

The Talmud extends the law of self-defense to the case of defending others who are being pursued.

The talmud quotes a tanaitic teaching which allows others to kill a robber who is presumed to be willing to resort to violence:

והוכה--בכל אדם, ומת--בכל מיתה שאתה יכול להמיתו
“And is beaten”-- anyone can do so; “And he dies”-- any means you can employ to kill him is permissible.

*How much force is permitted to be used here?
Are there any limits?*

דתניא, רבי יונתן בן שאול אומר: רודף שהיה רודף אחר חבירו להורגו, ויכול להצילו באחד מאבריו ולא הציל - נהרג עליו.

There is a tanaitic teaching: Rabbi Jonathan ben Saul says: If someone was pursuing another attempting to kill him, and were it possible to stop him by injuring one of his extremities but instead killed him, that person is subject to a capital case.

*How does this teaching differ with the first?
Which ought to be followed?*