



# MISHNAS CHAYIM

# משנת חיים

## MISHNAH ON THE PARSHAH

### פרשת משפטים תש"ע 5770 *Parschas Mishpatim 5770*

#### LICENSE TO KILL

The taking of human life, obviously, is something upon which the Torah frowns – to say the least. Human life is paramount, and the prohibition of murder is basically inviolate.

#### RODEIF AND BA BAMACHERES

That is, with certain notable exceptions. A well-known example is the *rodeif* (pursuer), a would-be murderer. When one person chases another in an attempt to commit murder, a bystander may dispatch the *rodeif* to save the life of the pursued.

Our *parshah* adds a related case to the list: the *ba bamachteres* (literally, one who enters through a tunnel), referring to a thief undertaking a home invasion (such as by burrowing into the home). According to the Torah, a home-invader is considered to be a real danger; as such, his life is forfeit.

אם במחֶתֶרֶת יִמְצָא הַגֵּבֵב... אִין לוֹ דָּמִים.

“If a thief should be encountered in a tunnel... he has no blood (and may be killed),” (*Shemos 22:1*).

As opposed to a regular *rodeif*, though, the *ba bamachteres* does not seem to pose an *immediate* threat to the homeowner’s life; after all, his main plan is to commit robbery, not murder. This idea is mentioned in the Mishnah in Sanhedrin (8:6,7), which juxtaposes these two miscreants:

הָבָא בַּמְחֶתֶרֶת נִדוֹן עַל שֵׁם סוּפוֹ... וְאֵלוֹ הוּא שְׂמִיֵּצִילֵין אוֹתוֹ בְּנִפְשׁוֹ: הַרוֹדֵף אַחֵר חִבְרוֹ לְהַרְגוֹ...

“A *ba bamachteres* is punished on account of his future actions... In the following situations, one can

effect a rescue by dispatching the threatening party: a pursuer attempting to take the life of his victim...”

A *rodeif* constitutes an immediate threat, as he is actively pursuing his victim in an attempt to kill him. The bystander is authorized to act as a vigilante in order to diffuse the immediate danger.

The *ba bamachteres*, as the Mishnah states, does not really pose a *present* threat, but rather, a *future* one.

As he enters the home, he is looking for loot, not a victim. However, as the Gemara explains, the *ba bamachteres* is prepared for any eventuality. Should he be confronted by the homeowner, he is prepared to do battle (and quite likely emerge the victor). And so, the Torah authorizes one who detects this home invader to “take care of him” in the same manner as one may do with a *rodeif*. Instead of waiting for the danger to actually materialize, the *ba bamachteres* is “judged for his future deeds,” and one may take

pre-emptive action to prevent the spilling of innocent blood. “If one comes to kill you, hasten and kill him first,” (*Sanhedrin 72a*).

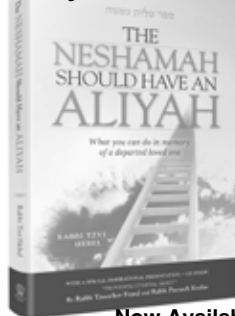
The emerging picture can seemingly be summed up as follows: a *rodeif* can be killed to save his intended victim. Our *parshah* takes this idea one step farther by introducing the case of *ba bamachteres*, who can be killed preemptively as a *future rodeif*.

However, this characterization may not be so accurate – as we shall soon discover.

#### LENDING A HAND

The laws governing the *rodeif* and *ba bamachteres* are

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# משנת חיים

codified in the Rambam's work *Yad Hachazakah*. Yet here is where we begin to detect a difference emerging between the two. While the Rambam includes the *halachos* of *rodeif* in the section entitled "Laws of the Murderer" (*Hilchos Rotzeach U'shemiras Hanefesh*), he deals with the *ba bamachteres* in a separate section altogether: "Laws of Theft" (*Hilchos Geneivah*).

The difference becomes more pronounced when examining the *halachah* of *yachol lehatzilo be'echad mei'avarav* (the ability to effect a rescue through a limb). The Rambam in *Hilchos Rotzeach* (ch. 1), when discussing the permissibility of killing a *rodeif*, adds a caveat. Dispatching a *rodeif* – even to save the life of the pursued – is a last resort. If it is possible to disrupt the chase by merely wounding the *rodeif* (e.g., disabling the *rodeif* by breaking an arm or a leg), then one may not slay him.

Such a condition, however, appears to be absent in *Hilchos Geneivah*. In discussing the *ba bamachteres* there, the Rambam makes no mention that it is

preferable to merely disable the invader. The implication seems to be that he may be slain in all situations, and the dispatcher need not trouble himself to keep the harm to a minimum.

How, then, are we to understand this license to kill a *ba bamachteres*? If he is seen merely as a would-be *rodeif* – someone who would not hesitate to use lethal force if confronted by the homeowner – then why should he be treated differently? Why, in the case of the *rodeif*, would the Rambam require the rescuer to "shoot for the legs," while in handling the *ba bamachteres* he can (for all intents and purposes) just fire away?

R' Moshe Chevroni (*Masas Moshe, Kiddushin, sec. 40*) concludes that the law sanctioning the death of the *ba bamachteres* is fundamentally different from the law governing a *rodeif*. The permissibility of killing a *rodeif* is based upon the notion of *hatzalah* (rescue), an attempt to save the life of the innocent. Consequently, where it is possible to save the life of the pursued *without* taking the *rodeif's* life (such as by merely wounding the pursuer), this course is much preferred.

The slaying of a *ba bamachteres*, on the other hand, is *not* (primarily) a *hatzalah*-based effort. Rather, the authorization to kill him is considered a form of *punishment* – similar, in essence, to the death sentence meted out to an idolater or Shabbos desecrator. True, the latter instances are carried out by the Jewish Court (*beis din*), while a *ba bamachteres* can be liquidated on the spot by a regular civilian. But the fundamental basis is the same: a death sentence (as opposed to a mere life-saving measure).

This formulation would account for the fact that one may kill the *ba bamachteres* even if he could have been stopped through lesser measures. If the sole factor in his death would be the rescue of his intended victim, then we would have preserved his life once the victim's safety was assured (as is the case with the *rodeif*). However, since, in effect, a *ba bamachteres* has been issued a death warrant, the sentence is to be carried out in all circumstances.

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