

## The Prevent Defense: In Search of a Clean Shoot

Was the Rayshard Brooks shooting justified?

*Adapted from the writings of Dayan Yitzhak Grossman*

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Last week's article on the fatal shooting of Rayshard Brooks by Atlanta police officer Garrett Rolfe discussed the self-defense defense—the law of *rodef*, which allows the killing of one who is endangering another's life. Here we consider some other possible defenses of the killing.

### Self-defense against nonlethal assault

We pointed out last week that being struck by a Taser is rarely lethal. It is, however, widely reported to be extremely painful. Nevertheless, this would not seem to justify killing to thwart a Taser attack. While it is not entirely clear whether the permissibility of killing a *rodef* extends to someone threatening nonlethal injury or pain,[1] the Rambam's language is virtually explicit that lethality is the sine qua non of a *rodef*,[2] and there are various indirect indications that *poskim* generally take this for granted:

- There is great controversy over whether abortion is permitted where the pregnancy does not threaten the life of the mother but does cause her severe suffering; many *poskim* forbid it, and even those who permit it do not simply apply the law of *rodef* but cite other considerations.[3] (This argument can be countered with the observation that a fetus is not considered a typical *rodef*, which is clear from the fact that it may not be killed once it has crowned, even to save the mother's life.[4])
- The Minchas Chinuch is unsure whether someone attempting a form of murder not punishable by death (such as homicide by indirect means[5]) may be killed as a *rodef*,[6] and the infliction of injury or pain is certainly not punishable by death. The Minchas Chinuch does entertain the possibility that the law of *rodef* extends to any situation involving the level of danger to life for which we would desecrate Shabbos, even in the absence of a crime punishable by death.[7] But even this position would not be grounds for extending the category of *rodef* to someone threatening nonlethal injury or pain, since normative halacha prohibits the desecration of Shabbos (at least with respect to a Biblical prohibition) for the purpose of avoiding nonlethal harm.[8]
- The status of *rodef* does not generally apply to a rapist (as long as there is no *ervah* involved),[9] and so, a fortiori, it should not apply to someone threatening ordinary assault.

### Law-enforcement latitude

The halacha grants the state and its agents very broad latitude to punish criminals, due to the critical need to preserve law and order; they may impose draconian (at least by modern standards) punishments going far beyond the Torah's, and they are not bound by the Torah's strict requirements of due process.[10] It can therefore perhaps be argued that if

the law allows police officers to use lethal force in a given situation, even if this permission is an expanded right of self-defense rather than a form of punishment, it is permitted for them to do so regardless of whether this would otherwise be allowed by the Torah.

Some have argued that police doctrine would consider Brooks's shooting "lawful but awful" since "officers are trained that they have the right to escalate their use of force if they believe someone is threatening to incapacitate them." Others have gone even further and argued that the shooting was completely justified on the grounds that Brooks's use of the Taser "could have immobilized the officer for several seconds, possibly allowing Brooks to steal the officer's gun or seriously injure him." If these assertions are correct as a matter of law (a question that is beyond the scope of this article), the shooting might consequently be legitimate according to halacha as well, even if the possibility of incapacitation would not be sufficient to give Brooks the status of *rodef* from a purely halachic perspective.

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[1]R' Moshe Yaakov Klein, *She'eilas Hachaim* ("first draft"), *siman* 38 *osios* 31-34, pp. 802-03.

[2]*Hilchos Rotzeiach* 1:6-8.

[3]See the sources cited in *Nishmas Avraham* (Second Expanded Edition) *Choshen Mishpat* pp. 153-54.

[4]See Rambam *ibid.* 1:9 and the sources cited in the *Sefer Hamafteiach* of the Frankel edition; *Shu"t Koach Shor siman* 20 pp. 33a-b; *Shu"t Imrei Shefer* (Kalatzkin) *siman* 11 p. 9b; *Shu"t Binyan Shlomo cheilek* 2 C.M. *siman* 7 *osios* 1-5 pp. 419-24; *Shu"t Tzitz Eliezer cheilek* 9 *siman* 51 *sha'ar* 3 *perek* 1 and *Shu"t Yabia Omer cheilek* 4 E.H. *siman* 1.

[5]See Rambam *ibid.* 2:2.

[6]*Minchas Chinuch mitzvah* 600.

[7]The *Or Sameiach* *ibid.* 1:8 considers this broader interpretation of *rodef* to be obviously correct. He does not stipulate that the level of danger be sufficient to permit the desecration of Shabbos, but his argument hinges on the fact that the *rodef* is being killed "to save a Jewish life."

A compelling argument for this broader interpretation of *rodef* can be made from the halacha that a *moser* may be preemptively killed to prevent *mesirah*, but not after the fact as punishment (see *Shulchan Aruch C.M.* 388:10-11), as explained by the Gra that the justification for killing a *moser* is that he is considered a *rodef*, but he is nevertheless not liable for the death penalty for murder after the fact, since his act is mere *grama*. (*Biur HaGra* *ibid.* s.k. 69, and cf. s.k. 74)

[8]*Shulchan Aruch O.C.* 328:17, and cf. *Nishmas Avraham O.C. ibid. os* 49 p. 455; *Peninei Halacha Perek* 28 (*Choleh She'aino Mesukan*) *Siman* 1 (*Kelalei Hilchos Choleh*) *os* 1 (*Sakanas Eiver*).

[9]This is strongly implied by the language of the Rambam *ibid.* 1:10-11. Cf. *Chevel Nachalaso* 16:55.

[10]See *Bava Metzia* 83b; *Shu"t HaRashba* cheilek 3 siman 393, cheilek 5 siman 238, and (most significantly) the responsum cited by *Beis Yosef C.M.* end of siman 388; *Shu"t Maharam Shik C.M.* siman 50; *Shu"t Sheivet HaLevi* cheilek 2 siman 58; R' Asher Weiss, *Mesirah Lashiltonos Shel Mi Shechashud Behisolelus Biladim*, *Yeshurun* Vol. 15 pp. 656-58.