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JUSTICE OF THE PEACE: EXTERNALITIES IN JURISPRUDENCE

Adapted from the writings of Dayan Yitzhak Grossman

On Apr. 20, 2021, former Minneapolis police officer Derek Chauvin was convicted of second-degree unintentional murder, third-degree murder and second-degree manslaughter of George Floyd during an arrest nearly a year earlier. The episode, captured on video, sparked protests against police brutality and racism that soon spread nationwide, and the guilty verdict was endorsed by national political leaders¹ (albeit more enthusiastically by Democrats than Republicans²), as well as Minneapolis Police Chief Medaria Arradondo, who said in a statement that he “respect[s] the process and the decision,”³ and who had given, along with other members of his department, “dramatic,”⁴ “exceedingly rare,”⁵ and “damning”⁶ testi-

mony against Chauvin.

Although race was never mentioned at trial, public figures declared that Chauvin was motivated by racial bias and looked forward to a guilty verdict as a strike against racism.⁷ We will not consider here the details of the legal case but the broader question of whether considerations beyond actual personal guilt may legitimately be taken into account in deciding to impose punishment on an individual.

SHAUL HAMELECH'S SONS AND THE KILLING OF THE GIV'ONIM

The classic precedent for the execution of innocent men due to a social imperative is the Biblical narrative, as interpreted by the Talmud, of David Hamelch's execution of seven of Shaul Hamelech's sons in order to appease the Giv'onim by avenging some of their number who had earlier been killed by Shaul himself.⁸

While Rav Sa'adia Gaon maintains that the executed sons of Shaul had indeed been among the killers of

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¹ Juana Summers. Looming Chauvin Verdict Will Test Biden's Leadership on Race. NPR. <https://www.npr.org/2021/04/20/988725335/looming-chauvin-verdict-will-test-bidens-leadership-on-race>

⁸ Shmuel II 21:1-9. The details of this killing are unclear; the Tanach contains no account of it. This difficulty was already raised by the Talmud (Yevamos 78b). See the Talmud's explanation, and cf. the various commentaries (including Radak and Metzudas David) to the Biblical text.

¹ Marty Johnson and Brett Samuels. Chauvin found guilty as nation exhales. The Hill. <https://thehill.com/homenews/state-watch/549347-chauvin-found-guilty-as-nation-exhales>.

² Kerry Picket. Republican reaction muted over Derek Chauvin guilty verdict. Washington Examiner. <https://www.washingtonexaminer.com/news/republican-derek-chauvin-guilty-verdict>.

³ Minneapolis Police Chief Medaria Arradondo releases statement following Derek Chauvin found guilty. WKOV. <https://wkov.com/2021/04/20/minneapolis-police-chief-medaria-arradondo-releases-statement-following-derek-chauvin-found-guilty/>.

⁴ Marty Johnson. Minneapolis police chief gives dramatic testimony on Chauvin trial. The Hill. <https://thehill.com/homenews/state-watch/546552-minneapolis-police-chief-gives-dramatic-testimony-on-chauvin-trial>.

⁵ Nicholas Bogel-Burroughs, Shaile Dewan and John Eligon. In Rare Testimony, Chief Says Chauvin 'Should Have Stopped' Pinning Floyd. The New York Times. <https://www.nytimes.com/2021/04/05/us/george-floyd-murder-trial.html>.

⁶ Robin Givhan. In trial testimony, Chauvin is cast beyond the blue wall. The Washington Post. <https://www.washingtonpost.com/nation/2021/04/06/trial-testimony-chauvin-is-cast-beyond-blue-wall/>.

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PARSHAS EMOR

FAR AND AWAY

Excerpted and adapted from a shiur by
Dayan Yosef Greenwald

These are the holidays of Hashem...

Vayikra 23:37

The Gemara (Pesachim 3b) tells how R' Yehudah ben Beseira, who was in Netzivin, was able to help the Chachamim in Yerushalayim catch a gentile masquerading as a Jew and illicitly eating from the korban Pesach. Tosafos wonders why R' Yehudah ben Beseira had not gone to Yerushalayim himself to fulfill the mitzvah of *aliyah l'regel* (pilgrimage to Yerushalayim for the Festivals) and offers multiple answers.

The Minchas Chinuch asks why Tosafos didn't question the fact that R' Yehuda didn't bring a korban Pesach, though it too is obligatory. He answers that a person who was far from the *Bais Hamikdash* (*bederech rechokah*) on the fourteenth of Nisan (and for Pesach Sheini) does not incur *kareis* (excision) for not bringing the korban Pesach. In his opinion, *kareis* is only incurred for not bringing the korban Pesach if one is close to the *Bais Hamikdash* on Erev Pesach and does not bring the korban, but there is no transgression in not traveling there beforehand.

Perhaps the logic is as (continued on page 2)

Asleep at the Switch

Q We inadvertently left the light in the children's bedroom on for Shabbos, and they will not sleep through the night if it stays that way. May we ask a gentile to turn it off?

A There is a general rule that *shvus dishvus* (an act that is, for two different reasons, not prohibited Biblically and forbidden only Rabbinically) is permitted when there is risk of getting slightly sick or there is great necessity (see parameters in Shulchan Aruch O.C. 307:5). *Amirah l'akum* (asking a gentile to do a forbidden act) is permitted *mid'Oraisa* and forbidden *mid'Rabanan*. Is turning off a light also permitted *mid'Oraisa* and forbidden (continued on page 2)

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the Giv'onim,⁹ the Radak argues that they had not, as they would have been too young during the brief period of Shaul's reign to have participated in the killing. *Chazal*, as well, seem to have taken for granted that they were innocent of any crime, as they raise an objection to the execution from the verse "Fathers shall not be put to death because of sons [and sons shall not be put to death because of fathers],"¹⁰ to which they give the answer

It is better that one letter and one mitzvah be uprooted from the Torah in this manner and thereby the name of Heaven not be desecrated in public.¹¹

So a man may be executed for a crime he did not commit, when necessary to avoid chillul Hashem.¹² Of course, from a certain perspective chillul Hashem is the most terrible thing conceivable,¹³ so we cannot infer from this that a concern less dire than chillul Hashem could ever justify the execution of an innocent man (although as we shall see below, the sages of Lunel extend this principle to other heinous sins, such as certain forms of idolatry).

EXECUTING A DEFENDANT DESPITE WITNESS RECANTATION

During the Esing Bakery incident in 1857, the British colonial Attorney General of Hong Kong Thomas Chisholm Anstey apparently argued that Cheong Ah-lum, suspected of poisoning numerous customers of his bakery by adulterating the bread with arsenic, should be hanged despite the uncertainty of his guilt, because

Better hang the wrong men than confess that British sagacity and activity have failed to discover the real criminals.¹⁴

This provocative position is not entirely alien to the Torah. The Talmud rules that a defendant convicted of a capital crime based on witness testimony is executed even if the witnesses retract their testimony, and even if they explain why they lied in their initial statement.¹⁵ R' Yitzchak Arama wonders why the recantation is not accepted when accompanied by a credible explanation, and he

explains that this is in order to preserve the honor of the court. Were the court forced to admit that its sagacity and Divine support had not been sufficient to prevent it from sentencing an innocent man to death, it would lose the reverence of the public and its authority would be diminished, which would result in "great damage to the Torah and mitzvos in general, compliance with which the court is commanded to enforce." We therefore deliberately execute a man we believe to be innocent of the crime of which he was convicted, in order to preserve social order.¹⁶

THE WAYWARD CITY

A final case in which, at least according to some authorities, innocent individuals are executed for the crimes of others is that of the Wayward City (*ir hanidachas*), where most or all the inhabitants have worshiped idols. The Rambam rules that although those who have not sinned are not executed, the wives and children of those who have sinned are executed.¹⁷

R' Meir Halevi Abulafia objects to the execution of women who have not sinned, and to the execution of children at all ("far be it from G-d that He should do wickedness"¹⁸).¹⁹ The sages of Lunel respond with the suggestion that the women who are executed are those who did indeed sin, but they are executed even if the normal criteria for execution (e.g., eyewitness testimony to the sin and the receipt of a warning prior to the act) have not been met, because they aid and abet the (male) sinners and enable their society. Regarding children, they note the existence of other historical cases in which children were killed for the sins of their fathers (including the aforementioned episode of the execution of Shaul's children), and they explain that this is

a stringency that the Holy One, blessed is He, imposed regarding idolatry, oaths, and chillul Hashem, to destroy and obliterate everything, so that the remaining ones will hear and see, because some people love their young sons more than themselves.²⁰

9 Radak ibid.

10 Devarim 24:16.

11 Yevamos 79a.

12 See Radak ibid. for a different answer to the question.

13 See Yoma 86a.

14 Prof. Alexander Volokh, n. Guilty Men, 146 University of Pennsylvania Law Review 173 (1997).

15 Sanhedrin 44b.

16 Akeidas Yitzchak, end of Parashas Shoftim (end of *sha'ar* 96).

17 *Hilchos Avodas Kochavim Vechukoseihem* 6:4.

18 *Iyov* 34:10.

19 *Igros HaRamah* (Paris 5631) p. 17.

20 *Ibid.* pp. 45-46, cited (with significant variation) by Migdal Oz *ibid.* The *Kesef Mishneh* *ibid.* cites the arguments of the sages of Lunel (including some portions we have omitted) and comments: "Some of these points do not appear to me to be correct." Cf. *Ma'asei Rokeach* *ibid.*; R' Yehoshua Pfeffer, *Collective Punishment in Halacha*.

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follows: A standard case of *bitul ase'i* (failure to fulfill a positive mitzvah) does not

involve doing something wrong; it is simply a missed opportunity. One who could have traveled to the *Bais Hamikdash* prior to

Erev Pesach has been a *mevate'l an ase'i* and missed the opportunity to perform the mitzvah properly. However, he does not receive *kareis* unless he is in close proximity to the *Bais Hamikdash* on the fourteenth of Nisan and does not bring the korban, in which case he has actively broken a covenant with Hashem and is treated more severely than other cases of *bitul mitzvas ase'i*.

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mid'Rabanan, making our case, which combines the two elements, a case of *shvus dishvus*?



DAYAN YEHOSHUA GRUNWALD

We must first consider what prohibition is involved. Turning off the switch breaks an electrical circuit. The Chazon Ish considered this an act of *soseir* and thus a Biblical violation of Shabbos. R' Shlomo Zalman Auerbach disagreed. The general consensus of contemporary *poskim* appears to be that one should be concerned for the Chazon Ish's view, but only with regard to a Jew breaking a circuit, and not in the case of *amirah l'akum*, where one may rely on R' Shlomo Zalman. So the breaking of the circuit in our case would indeed be considered a *shvus dishvus*.

Another consideration is that, depending on the type of light bulb, it might be considered fire, so turning it on or off could be considered lighting or extinguishing a flame. Nonetheless, because extinguishing the light is only *melacha she'ein tzricha legufah*—it doesn't have an intrinsic beneficial purpose, rather it is done to eliminate something—it is only forbidden *mi'deRabanan*. So again, we have a *shvus dishvus*.

It emerges that if there is no other solution, *amirah le'akum* would be permitted. Often, however, there are other solutions, like a change of sleeping location. (See *Me'or HaShabbos* 13:1.)

Another approach would be to ask the gentile in the form of *remez shelo bederech tzivui*—hinting without mentioning the act of turning off the light. For example, "My children can't sleep because there is too much light in the room," rather than "My children can't sleep because the light wasn't turned off." There is great debate among the *poskim* whether *remez shelo bederech tzivui* may be done in a Jew's home, but many allow it where the activity in question is only forbidden *mid'Rabanan*. (See *Amira Lenachri*, end of ch. 37.)

Note that in a case where there is a need to turn a light on, the halacha is considerably more stringent.



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