

Parshat Mishpatim  
The Thief Who Breaks and Enters  
Melton Gesher at Shearith Israel, February 27, 2012  
JSI at Akiba Acadmey, February 28, 2012

A) Sefer Shmot, chapter 22, verses 1 – 2

If the thief be found breaking in, and be smitten such that he dies, he has no blood. If the sun has risen upon him, he has blood...

- 1) There are many questions and difficulties with these two verses, exegetical, legal and moral, and many of them were asked throughout the generations by our rabbis. We will find multiple possible answers within the tradition.
  - a) Who is the 'he' who has blood or has no blood?
  - b) What is the meaning of 'has no blood' or 'has blood'?
  - c) What is the meaning of 'the sun has risen upon him'?
  - d) What is the relationship between the two clauses beginning with the word 'if'?
    - (I) Does the scenario of "if the thief be found breaking in" apply to the second clause as well as the first, meaning that the law of the first clause is only when 'the sun has not risen upon him'?
    - (II) Or does the clause that says 'if the sun has risen upon him' stand in opposition to the scenario of 'if the thief be found breaking in'?
  - e) Why is there 'no blood' in the first case?
  - f) Why is it that 'he has blood' in the second case?

B) Pashtanim (Literal Level Interpretation) - Medieval Commentaries and Aramaic Translation

- 1) The meaning of the phrases 'he has no blood' / 'he has blood'

**Rashi's Commentary on the Torah, Exodus chapter 22**

'He has no blood' – It is not murder to kill the thief, since he is for all intents and purposes, a dead man.

**Rashbam's Commentary on the Torah, Exodus chapter 22**

'He has no blood' – One who kills him has no bloodguilt and is not liable.

- 2) The meaning of the phrase 'if the sun has risen upon him' and its relationship to the previous verse

**Rashbam Commentary on the Torah, Book of Exodus, chapter 22**

'Breaking in' – At night

'If the sun has risen upon him' – Meaning that he was stealing during the day.

**The Translation of Onkelos of the Torah, Exodus, chapter 22**

"If the sun has risen upon him" - If WITNESSES saw him then he has blood.

**Rabbi Yosef Bechor Shor, Commentary on the Torah, Exodus chapter 22**

"If the sun has risen upon him" – That he left his breaking in and went outside, to the place of the shining of the sun.

C) Talmud

### **Babylonian Talmud, Tractate Sanhedrin page 72a**

MISHNA: He who comes and breaks in is judged on account of his end.

GEMARA: Rava said: what is the reason for the law of breaking in? Because it is certain that no man is inactive where his property is concerned; therefore this one [the thief] must have reasoned, If I go there, he [the owner] will oppose me and won't let me go and if he does I will kill him. And the Torah prescribes, 'If he comes to slay thee, arise and slay him first'.

### **Babylonian Talmud, Tractate Sanhedrin page 72a – 72b**

Our Rabbis taught: 'If a thief be found breaking in, and be smitten such that he die], he has no blood, if the sun has risen upon him'.<sup>20</sup> Now, did the sun rise upon him only? But [this is the meaning: If it is as clear to thee as the sun that his intentions are not peaceable, slay him; if not, do not slay him. Another [Baraitha] taught: 'If the sun has risen upon him, he has blood'. Now, did the sun rise upon him alone? But if it is as clear to thee as the sun that his intentions are peaceable, do not slay him; otherwise, slay him. These two unnamed [Baraithas] contradict each other.<sup>21</sup> This is no difficulty: the first [Baraitha] refers to a father [robbing] his son, the second to a son [robbing] his father.<sup>1</sup>

*(20) Ex. XXII, 1ff. The clauses are thus coupled in this Baraitha, the Massoretic punctuation being disregarded.*

*(21) The first implying that in doubt thou mayest not slay him; the second, that in doubt thou mayest.*

*(1) A father has more compassion for his son than a son for his father. Hence, if a father robs his son, the latter must assume that he will not go to extremes if he defends his property. Consequently, he may kill him only if he is certain thereof. But if a son robs his father (and even more so, when he robs a stranger), he may assume that he is prepared to kill him, unless certain that he will not. Therefore, if he has any doubt, he may take his life.*

### **Babylonian Talmud, Tractate Sanhedrin page 72b**

Rav said: Any man that broke into my house, I would kill, excepting R. Hanina b. Shila. Why? Shall we say because he is righteous? Surely he has broken in!<sup>2</sup> But because I am assured that he would have pity upon me, like a father for his son.

*(2) Which disposes of his righteousness.*

### **Babylonian Talmud, Tractate Sanhedrin page 72b**

Our Rabbis taught: '[If a thief be found breaking in,] and be smitten' - by any man; 'such that he die' - by any death wherewith you can slay him. Now, [the exegesis] 'And be smitten - by any man' is rightly necessary; for I might think that only the owner may be assumed not to remain passive whilst his money is being stolen, but not a stranger:<sup>7</sup> it is therefore taught that he is regarded as a pursuer, whom even a stranger may kill [in defense of the owner].

*(7) For it is only because of that assumption that his death is regarded as self-defense. But a stranger might not be assumed (by the thief) actively to interfere; therefore the thief is not likely to slay him, and hence his death at the hands of a stranger is not in self-defense.*

### **Babylonian Talmud, Tractate Sanhedrin page 72b**

Our Rabbis taught: 'If a thief be found breaking in':<sup>12</sup> from this I know that law only for breaking in; whence do we know it if he be found on the roof, in the court, or in an enclosure [attached to the house]? From the verse, 'If the thief be found', implying, wherever he is [found as thief].<sup>13</sup> If so, why state 'breaking in'? Because most thieves enter by breaking in. Another [Baraita] taught: 'If a thief be found breaking in': from this I know the law only for breaking in: whence do I know it if he be found on the roof, in the court, or an enclosure? From the verse, 'If the thief be found', implying. Wherever he is found as thief. If so, why state 'breaking in'? Because his breaking in constitutes a formal warning.<sup>14</sup>

*(12) Ex. XXII, 1.*

*(13) Since the writ does not state, If he be found, etc., but if the thief be found, which is superfluous, being understood from the context, it shows that if he is at all seen to be a thief, no matter what his position, the law applies.*

*(14) I.e., the owner need not warn him before killing him if he was found breaking in to the house, whereas under these other circumstances he must be warned first.*

D) Rambam and commentary on the Rambam

### **Rambam, Mishne Torah, The Book of Damages, Laws of Thievery, chapter 9**

#### **Halacha 7**

When a person breaks into a home - whether at night or during the day - license is granted to kill him. If either the homeowner or another person kills him, they are not liable...

#### **Halacha 8**

The license mentioned above applies to a thief caught breaking in or one caught on a person's roof, courtyard or enclosed area, whether during the day or during the night. Why does the Torah mention "breaking in," because it is the general practice for thieves to break in at night.

#### **Halacha 9**

Why did the Torah permit the blood of such a thief to be shed, although he is only attempting to steal money? Because it is an accepted presumption that if the house-owner arises and attempts to prevent the thief from stealing, the thief will slay him. And thus the thief entering his fellow's house to steal is in effect a pursuer seeking to kill his colleague. Therefore, he should be killed, whether he is an adult or a minor, or a man or a woman.

#### **Halacha 10**

If it is clear to the house-owner that the thief who breaks in will not kill him and instead is only seeking financial gain, it is forbidden to kill the thief. If the house-owner kills him, the house-owner is considered to be a murderer.

This is alluded to by Exodus 22:2, which states: "If the sun shines upon him..." - i.e., if it is as clear to you as the sun that he is at peace with you, do not kill him. Therefore, a father who breaks into his son's home should not be killed. But a son who breaks into his father's home may be killed.

#### **Halacha 11**

Different rules apply with regard to a thief who stole and departed, or one who did not steal, but was caught leaving the tunnel through which he entered the home. Since he turned his back on the house and is no longer intent on killing its owner, he may not be slain.

Similarly, if he is surrounded by other people, or by witnesses, he may not be killed, even if he is still located within the domain which he broke into. Needless to say, if he is brought to the court he may not be killed.

### **Ravad, Strictures on the Mishne Torah**

I cannot forbear to record my opinion. It seems to me that though the Sages interpreted the phrase "if the sun has risen upon him" metaphorically... this does invalidate its plain sense: By day you are not permitted to slay him; only if he steals by night; since the thief knows the owner is at home and comes to kill or be killed. But when the thief comes by day, the owner is not usually at home, and it is a hit and run affair with him - he will not stay to fight it out if surprised but will rather leave the money and run.

### **Ralbag, Commentary on the Torah, Exodus**

You should know that burglary is usually committed at night when the thief is sure he will go unobserved. ...thieves and murderers fear the approach of morning as the shadow of death. To this the Torah refers in its statement "if the sun has risen upon him". The additional words upon him indicated that he was floodlit by the sun, was seen entering. In such a situation when he thinks men can see him he will be afraid to break in, and if he is indeed observed, then he will be careful not to kill, since he imagines he has been identified. Similarly, if it is crystal clear to us that he harbored no homicidal intentions, as a father to his son, the owner is guilty of murder if he kills him and it does not matter whether it happens in the daytime or at night... The Torah did not simply say "if the sun has risen..." but "if the sun has risen upon him..."

#### Sources:

Studies in Shmot, Nechama Lebowitz

JPS Miqra'ot Gedolot

Virtual Beit Midrash shiur on Mishpatim by Tzvi Shimon, Introduction to Parshat HaShavua, "The Sun of a Thief"

Wikipedia – Castle Doctrine

S.B. No. 378

#### AN ACT

relating to the use of force or deadly force in defense of a person.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 9.01, Penal Code, is amended by adding Subdivisions (4) and (5) to read as follows:

(4) "Habitation" has the meaning assigned by Section 30.01.

(5) "Vehicle" has the meaning assigned by Section 30.01.

SECTION 2. Section 9.31, Penal Code, is amended by amending Subsection (a) and adding Subsections (e) and (f) to read as follows:

(a) Except as provided in Subsection (b), a person is justified in using force against another when and to the degree the actor [he] reasonably believes the force is immediately necessary to protect the actor [himself] against the other's use or attempted use of unlawful force. The actor's belief that the force was

immediately necessary as described by this subsection is presumed to be reasonable if the actor:

(1) knew or had reason to believe that the person against whom the force was used:

(A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;

(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or

(C) was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery;

(2) did not provoke the person against whom the force was used; and

(3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

(e) A person who has a right to be present at the location where the force is used, who has not provoked the person against whom the force is used, and who is not engaged in criminal activity at the time the force is used is not required to retreat before using force as described by this section.

(f) For purposes of Subsection (a), in determining whether an actor described by Subsection (e) reasonably believed that the use of force was necessary, a finder of fact may not consider whether the actor failed to retreat.

SECTION 3. Section 9.32, Penal Code, is amended to read as follows:

Sec. 9.32. DEADLY FORCE IN DEFENSE OF PERSON. (a) A person is justified in using deadly force against another:

(1) if the actor [~~he~~] would be justified in using force against the other under Section 9.31; and

~~(2) [if a reasonable person in the actor's situation would not have retreated; and~~

~~[(3)]~~ when and to the degree the actor [~~he~~] reasonably believes the deadly force is immediately necessary:

(A) to protect the actor [~~himself~~] against the other's use or attempted use of unlawful deadly force; or

(B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

(b) The actor's belief under Subsection (a)(2) that the deadly force was immediately necessary as described by that subdivision is presumed to be reasonable if the actor:

(1) knew or had reason to believe that the person against whom the deadly force was used:

(A) unlawfully and with force entered, or was

attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;

(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or

(C) was committing or attempting to commit an offense described by Subsection (a) (2) (B);

(2) did not provoke the person against whom the force was used; and

(3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used [~~requirement imposed by Subsection (a) (2) does not apply to an actor who uses force against a person who is at the time of the use of force committing an offense of unlawful entry in the habitation of the actor~~].

(c) A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section.

(d) For purposes of Subsection (a) (2), in determining whether an actor described by Subsection (c) reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat.

SECTION 4. Section 83.001, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 83.001. CIVIL IMMUNITY [~~AFFIRMATIVE DEFENSE~~]. A [~~It is an affirmative defense to a civil action for damages for personal injury or death that the~~] defendant who uses force or [~~, at the time the cause of action arose, was justified in using~~] deadly force that is justified under Chapter 9 [~~Section 9.32~~], Penal Code, is immune from civil liability for personal injury or death that results from the defendant's [~~against a person who at the time of the~~] use of force or deadly force, as applicable [~~was committing an offense of unlawful entry in the habitation of the defendant~~].

SECTION 5. (a) Sections 9.31 and 9.32, Penal Code, as amended by this Act, apply only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose. For the purposes of this subsection, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

(b) Section 83.001, Civil Practice and Remedies Code, as amended by this Act, applies only to a cause of action that accrues on or after the effective date of this Act. An action that accrued

before the effective date of this Act is governed by the law in effect at the time the action accrued, and that law is continued in effect for that purpose.

SECTION 6. This Act takes effect September 1, 2007.

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President of the Senate

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Speaker of the House

I hereby certify that S.B. No. 378 passed the Senate on March 13, 2007, by the following vote: Yeas 30, Nays 0.

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Secretary of the Senate

I hereby certify that S.B. No. 378 passed the House on March 20, 2007, by the following vote: Yeas 133, Nays 13, one present not voting.