

Jewish Law and Priorities in the Saving of Life

The Freehof Institute of Progressive Halakhah, 2020

We write this in the spring of 2020 (תש"פ), during the Covid-19 pandemic. The spread of this disease poses tremendous challenges to our medical system and our healthcare resources, which many fear will not be adequate to provide care for all who will need it.

The harsh question inevitably rises: in the event that those resources prove to be insufficient, how shall societies, governments, and medical institutions determine their allocation? On what grounds shall they make the fateful decision: who lives, who dies?

Does Jewish law (*halakhah*) offer guidance on this question? Yes it does, but this guidance comes not in the form of a clear, one-size-fits-all answer (*p'sak*) but of resources which we, the community, might use to make decisions or to evaluate the decisions made by public authorities. Specifically, Jewish law presents us with three separate criteria for making these decisions. Each of these expresses important values which we cannot ignore, and none of them can work in isolation from the others.

Criterion 1. The Equality of All Life.

We begin by looking at two Talmudic passages that seem to convey the idea that, since each and every life is of equal value in the sight of God, we are forbidden from making life-or-death decisions that require a choice as to which person or persons are more worthy of survival.

Talmud, Bava Metzi`a 62a

שנים שהיו מהלכין בדרך, וביד אחד מהן קיתון של מים, אם שותין שניהם - מתים, חבירו. עד שבא רבי עקיבא ולימד: וחי אחיך עמך - חייד קודמים ואם שותה אחד לחיי חבירך.

Two men are wandering in the desert. One of them holds a container of water. If both of them drink it, they will both die [Rashi: there is not enough water for both]. If the one who holds the water drinks it all, he will survive to reach civilization. Ben Petura said: it is better that both of them share the water, so that the one not look upon the death of his fellow (*cf.* Gen. 21:16: ואל אראה במות הילד). But Rabbi Akiva taught: “that your brother may live with you” (Lev.25:36: *if your kinsman, being in straits, cannot support himself, you shall assist him...and your brother shall live with you*); that is, your own life takes precedence over the life of your fellow.

רוצח גופיה מנא לן? - סברא הוא. דההוא דאתא לקמיה דרבה, ואמר ליה: אמר לי מרי דוראי זיל קטליה לפלניא, ואי לא - קטלינא לך. - אמר ליה: לקטלוך ולא תיקטול. מי יימר דדמא דידך סומק טפי דילמא דמא דהוא גברא סומק טפי.

And how do we know (that one may not commit a murder, even in order to save one's own life?) — **It is a matter of common sense,**

As in the case of a certain person who came before Rava and said to him, "The governor of my town has ordered me, "Go and kill *Ploni*; if not, I will slay you."

Rava answered him, "Let him kill you than that you should commit murder; who knows that your blood is redder (than that of *Ploni*)? Perhaps his blood is redder (than yours)."

Each of these cases requires that a person make a life-or-death decision for him- or herself. The outcome apparently differs in each. In the Bava Metzi`a scenario, the traveler keeps the water and saves his life, while in Sanhedrin, the person in question must submit to execution. In fact, though, a common principle motivates each decision: that of *שב ואל תעשה*, "take no action." The traveler holds on to the water that he already possesses; the individual in the Sanhedrin case may not kill *Ploni*. To do anything else would be tantamount to making a decision that we are not empowered to make. As Rashi explains in his comment to the Sanhedrin passage:

סברא הוא - שלא תדחה נפש חבירו, דאיכא תרתי, אבוד נשמה ועבירה, מפני נפשו דליכא אלא חדא אבוד נשמה והוא לא יעבור, דכי אמר רחמנא לעבור על המצות משום וחי בהם משום דיקרה בעיניו נשמה של ישראל, והכא גבי רוצח כיון דסוף סוף איכא איבוד נשמה למה יהא מותר לעבור - מי יודע שנפשו חביבה ליוצרו יותר מנפש חבירו - הלכך דבר המקום לא ניתן לדחות.

It is common sense – that one's own life does not take precedence, for to say that would involve two evils: the death of an innocent person and a transgression (the act of murder). To accept death, on the other hand, involves only one evil, namely the death of an innocent person.

For when the Torah permits us to violate the *mitzvot* in order that we may "live by them," it does so because human life is precious in God's sight.

But here, when in any case one person will end up dying, on what grounds can we say that it is permitted to transgress the commandment against murder?

In other words, we are not entitled to decide that one human life is more worthy of saving than another. Sometimes, as in the Bava Metzi`a case, this works to one's advantage: if I already possess the lifesaving resource (the container of water), I am not required to surrender or to distribute that resource in such a manner as to bring my own life into danger. At other times, as in the Sanhedrin case, this equality principle forbids me from taking an action that saves my own life at the expense of another's. The safest thing to do in either situation is to do nothing, i.e., not to change the situation for the benefit of myself or for any other person.

In a medical context, this principle would suggest that we are not ever permitted to decide who lives and who dies. Allocation of hospital beds, ventilators, and other resources would have to be made on a first-come, first-served basis or determined by a lottery. In this way, the decision would be made by chance and *not* by a person or a committee of persons who are not morally entitled to decide that one person is more or less deserving of rescue (healing) than another.

Criterion 2. Priorities Based Upon Social Value.

Our sources, however, contain a second principle concerning lifesaving priorities that is the direct opposite of the first. According to this criterion, we *are* able to distinguish among persons and to decide that, as George Orwell might have said, some are more equal than others. This criterion emerges from a famous – or, from our progressive viewpoint, “infamous” is more fitting – *mishnah*:

כֹּהֵן קוֹדֵם לְלוֹי, לְוי לְיִשְׂרָאֵל, יִשְׂרָאֵל לְמַמְזֵר, וּמַמְזֵר לְנֹתִין, וְנֹתִין לְגֵר, וְגֵר לְעֶבֶד מִשְׁחָרֵר.
אֵימְתִי, בְּזַמַּן שֶׁכָּלָן שׁוֹוִין. אֲבָל אִם הָיָה מַמְזֵר תַּלְמִיד חֲכָם וְכֹהֵן גְּדוֹל עִם הָאֲרֶז, מַמְזֵר תַּלְמִיד
חֲכָם קוֹדֵם לְכֹהֵן גְּדוֹל עִם הָאֲרֶז:

M. Horayot 3:8

(In the saving of life): The *kohen* takes precedence over the *levi*, who precedes the *yisrael*, followed by the *mamzer*, the *natin*, the convert, and the freed slave.

When do these rules apply? When they are all of equal status. But if the *mamzer* is a Torah scholar (*talmid chakham*) and the High Priest (*Kohen Gadol*) is an ignoramus (*am ha'aretz*), the *mamzer* who is a scholar takes precedence over the ignorant High Priest.

Obviously, this text reflects the caste system of a world that presumed the existence of the Temple in Jerusalem. But even though that world has disappeared, the lesson seems to be that if a society is organized around a set of social and cultural ideals, then it may be able to determine that, when some of its members embody those ideals better than others, those persons take precedence over the others. Note how the Rabbis, in the second paragraph of the *mishnah*, give voice to the central ideal of their own culture: תַּלְמוּד תּוֹרָה כַּגְּדוֹל כּוֹלָם, “the study of Torah is equal to all the other *mitzvot* combined.”

Could we make such decisions in our own time? These to be sure would not be based upon Mishnah Horayot, but perhaps our society (or societies) can determine that some individuals possess qualities or skills or knowledge that is essential to the survival of the community and its culture so that *those* individuals should have priority in accessing limited lifesaving resources. We find such a suggestion in the medieval text *Sefer Hasidim*, ch. 698:

שנים שיושבים ובקשו אויבים להרוג אחד מהם אם אחד תלמיד חכם והשני הדיוט מצוה להדיוט לומר הרגוני ולא חבירי כר' ראובן בן איצטרובלי שבקש שיהרגוהו ולא לר' עקיבא כי רבים היו צריכים לר' עקיבא.

Two men are captured by enemies who wish to kill one of them.
If one is a Torah scholar, it is a *mitzvah* for the other to say: “Kill me rather than him.”
Thus it happened that R. Reuven ben Istrobli volunteered to die in place of Rabbi Akiva, for the community had great need of Rabbi Akiva.

Some might argue that in a time of true crisis (*b'sha`at hadaḥak*) a society must be empowered to make *intelligent* decisions, however painful these must be, concerning life-or-death choices. The welfare of the community as a whole could hinge upon making the right choice. And whether we wish to admit it or not, most of us can imagine a scenario in which we would have to decide between two patients - say, a saintly fighter for human rights and a racist/homophobic serial killer – and in which we would be uncomfortable concluding that these individuals are equally entitled to the one ventilator at our disposal. The scenario is admittedly extreme, but it does put our ethical reasoning through its paces.

Still, even though we would want our allocation decisions to aim at what is best for the community as a whole, the suggestion that we choose between individuals on the basis of their perceived social value offends our commitment to egalitarianism. It is also dangerous almost beyond imagination, the mother of all slippery slopes. Progressive *halakhah*, as an approach to the understanding of our legal tradition, must argue against this option. Determining who lives and who dies on the basis of their utility to society is, indeed, supported by *some* halakhic texts. But it is not how a modern, liberal community should understand the message of Torah.

Criterion 3. Medical Efficacy.

The third principle of lifesaving priorities that emerges from our sources resembles that of “triage,” the determination that medical care should be provided first to those who most need it or who can most benefit from it. It is based upon the fact that the practice of medicine (רפואה) is a *mitzvah* and indeed a *hovah*, an obligation, derived from (among other places) Leviticus 19:16:

לֹא תֵעָמֵד עַל־דַּם רֵעֶךָ אֲנִי ה'.

Do not stand *idly* by the blood of your neighbor.

The word “idly” is italicized because it does not appear explicitly in the Hebrew text. Even though this is a common translation of the verse, its *p'shat* (literal) sense does not indicate a duty of rescue. That duty emerges from the halakhic understanding of the *pasuk*:

Talmud, Sanhedrin 73a

תנו רבנן : מניין לרודף אחר חבירו להרגו שניתן להצילו בנפשו - תלמוד לומר לא תעמד על דם רעך.
והא להכי הוא דאתא? האי מיבעי ליה לכדתניא : מניין לרואה את חבירו שהוא טובע בנהר, או חיה גוררתו, או לסטין באין עליו, שהוא חייב להצילו - תלמוד לומר לא תעמד על דם רעך.

How do we know that, should a pursuer threaten an intended victim, one is permitted to kill the pursuer if necessary to save the victim? Scripture says: Do not stand *idly* by the blood of your neighbor.

Does the verse in fact come to teach us that lesson? The verse is actually the basis of the following: if one sees his fellow drowning, or attacked by wild beasts, or menaced by robbers that one is obligated to come to his rescue? Scripture says: Do not stand *idly* by the blood of your neighbor.

Another derivation of the duty to rescue speaks directly to the medical context:

Tur (R. Yaakov b. Asher, 14th century Spain), Yore De`ah 336

In the Talmud we read the following: Scripture says, “he shall surely cause him to be healed” (Ex. 21:19). From here we learn that the physician is permitted to practice medicine.

(He needs such permission) so that he does not say: “why should I subject myself to this trouble, running the risk that I might accidentally cause harm and even death?”

(He also needs this permission) so that he not say: “if God smites a person with disease, who am I that I should heal that person?” The verse comes therefore to give him permission to heal. Indeed, this “permission” is a commandment, part of the duty to save life (*pikuah nefesh*).

The physician who refrains from practicing medicine is therefore guilty of bloodshed.

If it is a *mitzvah* to rescue those in danger, and if can be achieved by way of the practice of medicine, then it stands to reason that we are to practice medicine in such a way as to best fulfill its objective: to save life. Accordingly, physicians may allocate medical care on the basis of its *efficacy*, its prospects for the successful treatment of the most persons.

But does quantity truly matter when making fateful ethical decisions of this sort? Are we ever permitted to sacrifice the life of one individual – and remember, that one individual, created in the divine image, contains worlds – in order to save the lives of the many?

Consider the following comment of R. Avraham Karelitz, the Ḥazon Ish (*Yoreh De`ah, Hilkhot Avodat Kokhavim 69:1*):

ויש לעיין באחד רואה חץ הולך להרוג אנשים רבים ויכול להטותו לצד אחר וייהרג רק אחד שבצד אחר, ואלו שבצד זה יצולו. ואם לא יעשה כלום ייהרגו הרבים והאחד יישאר בחיים.

ואפשר דלא דמי למוסרים אחד להריגה, דהתם המסירה היא פעולה האכזרית של הריגת נפש ובפעולת זה ליכא הצלת אחרים בטבע של הפעולה אלא המקרה גרם עכשיו הצלה לאחרים גם הצלת האחרים קשור במה שמוסרין להריגה נפש מישראל.

אבל הטיית החץ מצד זה לצד אחר היא בעיקר פעולת הצלה, ואינה קשורה כלל בהריגת היחיד.

A person sees a projectile heading to kill many people. He is able to divert the projectile to another direction. If he does so, it will kill one person, but those in its present path will be saved. If he does nothing, the many will die and the one will survive.

It is possible to say that this case is *not* like that of those who hand over a person for execution. In that case, the act is one of cruelty; it is the direct causation of death. That others may be saved by this is pure coincidence and not part of the nature of the action, which is inextricably bound up with handing a person over to death.

But diverting a projectile is in its essence (*b'ikar*) an act of rescue, and it is not inextricably bound to the killing of an individual.

Unlike the cases we discussed under Criterion 1, the individual here is not obliged to “sit and do nothing.” One may take action to save the many, even though as a direct consequence of that action an innocent person will die. The reason, says Hazon Ish, is that we can define the nature of this action as *hatzalah*, rescue or saving of life, rather than one of *harigah*, “killing.” Yet suppose this case did not involve a choice between saving the one and the many. Suppose the projectile was headed to kill one person (Ploni), and you could divert it so that it would kill another person (Almoni) instead. Couldn't we say that your action was justified because your intention was to save Almoni and not to kill Ploni? No! We'd conclude that your act was *not* justified, because it reflected an evaluation that Almoni's life was more worth saving than Ploni's. And that, as we saw in our discussion of Criterion 1, is a decision that one is not morally entitled to make. It makes more sense to say that, in Hazon Ish's hypothetical, the act is justified for *two* reasons: first, because the intention is to save life rather than to kill, and second, because it results in the saving of the many, even though it takes the life of the one.

To translate this into the medical situation, we may direct our resources in such a way as to save *more* rather than fewer lives. In doing so we are fulfilling the *mitzvah* of medicine (*pikuaḥ nefesh*). We are *not* responsible for the deaths of those to whom we deny those resources, because our intention is to save life and not to destroy it *and* because it is a *mitzvah* to save more lives rather than fewer. Unlike Criterion 1, this principle allows us to decide who lives and who dies. And unlike Criterion 2, that decision is not based upon an evaluation of the relative social worth of the patients.

At the same time, the criterion of medical efficacy is by no means free of difficulty. It could easily be abused as a justification for withholding medical treatment from the elderly merely because they are aged or from those compromised by underlying conditions merely because they are not “healthy” and because treatment is expensive. It could also serve as a smokescreen for decisions based upon social factors masquerading as medical ones. For example, we could justify denying treatment to certain individuals because their “unhealthy lifestyle” makes it unlikely that they will benefit from that treatment in the long run. Are we certain that our decision has not been affected by racial or class bias?

All of this suggests that the answer to the question of the allocation of limited medical resources (if any answer can be regarded as *the* answer) should be founded upon a combination of criteria 1 and 3. That is, while medical efficacy is the most ethically persuasive basis for determining “who lives and who dies,” in our desire to save the many we ought not to forget that every individual person, no matter how old, infirm, or otherwise disadvantaged, is equal in God’s sight and therefore *deserves* medical treatment. Limited supply may force us to make painful choices, but let it not blind us to the indelible humanity of each and every person in our care.