

The Division of Scarce Resources and Triage in Halacha

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Despite the great leaps that modern medicine has taken as far as development and implementation of cures to countless human diseases, there are still quite a great many limitations present when trying to deliver these treatments. Clinicians are quite adept at matching and delivering a pint of donated blood or a donated organ to a patient in need, but are often limited by its availability. Likewise, a physician may be able to attend to a trauma victim rushed into the emergency room, but here too he is limited in the situation of a tragic catastrophe that fills the emergency rooms of an entire city. Even with the constant growth of the field of palliative care, physicians in other fields often find themselves caring for terminally ill patients and are forced to decide how much of their time and effort should be spent with this terminal patient as opposed to another patient, one with a far greater prognosis for recovery. In an ideal world there would be no shortage of transplantable kidneys, intensive care unit beds, or medically trained professionals to deal with each of these clinical scenarios. However, this is obviously not the case. These situations are commonplace to all in the medical field, and these decisions are constantly being made in order to allocate the resources that a doctor or medical facility has at its disposal at any given time. These determinations may be life-and-death issues of who is to live and who is to die, or they may present as a more subtle question as to who will receive a flu vaccine this year and who will not. It is worthwhile to delve into the ethical background that Halacha (Jewish law) puts forth in dealing with these situations in order to better under-

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stand what the Halacha would call on each of us to do when making decisions of the division of scarce resources.

The traditional Biblical and talmudic texts do not address this issue directly, as these scenarios obviously are, to some degree, an invention of modern science and the infrastructure we have in place for its distribution. There are, however, two key sources and countless opinions in their interpretation that will be crucial to the development of the applicable Halacha in the cases we are to discuss. The first is recorded in the Talmud:

Two people were traveling on the road, and one of them has a flask of water. If both drink, they will both die; if one drinks, he will arrive at the [next] town. Ben Peturah expounded: It is better that they both drink and die, and neither of them witness the death of his fellow man. Until Rabbi Akiva came and taught, “and your brother shall live with you” (Leviticus 25:36)—your life takes precedence over the life of your brother.¹

A second source is one found in the context of *tzedaka* (charity) and *pidyon shvuyim* (rescuing of captives). Here the Mishna states:

A man takes precedence over a woman regarding saving life and to return his lost objects. A woman takes precedence with regard to providing her with clothes and to be redeemed from captivity. When they are both at equal risk of being [sexually] degraded, then the man takes precedence over the woman. A *kohen* takes precedence over a *levi*; a *levi* to a *yisroel*; a *yisroel* to a *mamzer*; a *mamzer* to a *nesin*; a *nesin* to a convert; a convert to a free slave. When do we say this? When they are all equal, but if there was a *mamzer* who was a *talmid chacham* [Torah scholar] and a *kohen gadol* who was an *am ha'aretz*, then the *mamzer talmid chacham* would take precedence.²

¹ Talmud Bavli, Baba Metzia 62a.

² Mishna Horayot 3:7–8.

The absence of any definitive details in these cases is what leads to the various discussions and disagreements among the commentators who grapple with the application of these two very important sources. One question that needs to be addressed within each of the various opinions is the seemingly independent nature that these two sources seem to have in relation to each other. What I mean is that there is no mention of the *yichus* (lineage) of the travelers, nor is there any mention of their relative degrees of *talmid chacham* status. In his essay on the topic, Dr. Moshe Sokol suggests that the reason for this is that the travelers' case is clearly dealing with divisible resources, whereas the case from Horayot clearly is not. That being the case, it would make no difference what the *yichus* or *chachma* level of the traveler might be, because the question may not be that of who but how many will be saved.³ Sokol maintains that only when dealing with indivisible resources do we consider the *yichus* of those in question. We will see from further discussion that this presumptive difference may, in fact, be irrelevant according to some of the most basic commentaries.

Our analysis begins with the travelers' case and the debate between R. Akiva and Ben Peturah. We must first understand what their argument is, and only then can we apply it to our current dilemmas. There are two major schools of thought among the commentators regarding how we are to understand the R. Akiva/Ben Peturah dispute and we will address each individually. The first understanding is that which is found in the writings of Rabbi Naftali Tzvi Yehuda Berlin, the Netziv (1817–1893).⁴ The Netziv understands the dispute as revolving around the central issue of whether or not the saving of one life is greater than the temporary saving of two lives. In other words, the dispute can be framed as: Are we equally concerned for *chayei*

³ M. Sokol, "The Allocation of Scarce Medical Resources: A Philosophical Analysis of the Halakhic Sources," *AJS Review* 15, no. 1 (Spring 1990) p. 69.

⁴ *Ha'amek She'ela*, Sheilta 147:3. This approach is also implied in the writings of R. Avrohom Yeshaya Karelitz, the Chazon Ish. See Chazon Ish: Choshen Mishpat, Likutim Baba Metzia, chap. 20.

sha'ah (temporary relief) in respect to *chayai olam* (a more permanent relief)? Therefore, the disagreement is as follows: Ben Peturah maintains that *chayei sha'ah* is considered equally with respect to the *chayai olam*, and therefore here we should do what we can to maintain both lives. The Netziv explains that Ben Peturah's insistence upon dividing the water is based on the logic that we should provide temporary relief to each and hope that they will chance upon a previously unknown resource. R. Akiva maintains that the verse is to be understood as putting a higher degree of emphasis on one's life precisely because a *chayei olam* is more valuable. Therefore only one life, a *chayei olam*, should be saved. It is important to note that the issue of who gets the water, according to R. Akiva, is entirely secondary to the real issue at hand. For R. Akiva the Halacha emphasizes that in this case only one life is to be saved. Secondly, regarding the decision of who it is that will drink the water, R. Akiva maintains that the owner of the water is the preferred one.⁵ Not only is the issue of who drinks a secondary matter to R. Akiva, so too is the ownership of the flask. According to his view, R. Akiva would maintain that even in a case of third-party allocation of the same water, saving one life would still be preferred, and the decision of who will be the recipient is to be decided some alternative way. Because the Talmud seems to concur with the opinion of R. Akiva,⁶ this will be very important when dealing with the majority of hospital settings where the patients at hand do not have any ownership rights to the services, medication, or organs that will be used in their treatment. According to this view, although the Halacha does demand that the

⁵ This too is learned from the verse.

⁶ Although there does not seem to be any direct codification of this law in any of the classical *p'sak* texts, the fact that the Talmud itself seems to stress that Ben Peturah's opinion was only proposed "until R. Akiva came and taught" is an apparent support of R. Akiva's principle. There is even a possibility that the opinion of Ben Peturah was never meant as authoritative *p'sak* in the first place. See Aaron Enker's *Hekhrekh ve-Tzorech Binei Onshin* (Ramat Gan: Bar-Ilan University Press, 1977).

treatment be given entirely to one patient, the decision of who will receive the treatment will need to be clarified.

The second major school of understanding in the case of the travelers is found in the works of Rabbi Chaim Ozer Grodzinski, the *Achiezer* (1863–1940).⁷ This also would be the logical conclusion based on the commentary of the *Maharsha*.⁸ The central issue here is that the water is owned by one of the travelers. In this case, the Talmud is dealing with a specific case where A and B are traveling and A has with him a flask of his own water. In this scenario, the dispute of Ben Peturah and R. Akiva plays out as follows. Ben Peturah maintains that the ownership of the water is not relevant to this issue because it is a life-or-death situation.⁹ Therefore the law requires that they share the water. R. Akiva's response to this claim is that since the verse says "with you," it is clear that the Torah insists that ownership of the water makes A entitled to its use. According to this approach, if the water were owned by both travelers, as in a partnership, or were owned by an independent third party, R. Akiva's verse would not be applied at all and he too would insist that the water be divided. This conclusion would need to be applied in practical cases as well, as it is the shared view of both Ben Peturah and R. Akiva. Therefore the hospital or clinician, being a third party in possession of the treatment, would be required to divide the available treatment despite the fact that there will only be temporary relief by its distribution.¹⁰ This novel and striking understanding is in fact

⁷ *Achiezer*, Yoreh Deah 16:3.

⁸ *Chidushai Agadot*, Baba Metzia 62a.

⁹ It would seem that the argument of Ben Peturah that "and not one of them witness the death of his fellow-man" is stressing the point that each has an obligation in the saving of the other's life as he would in any other situation. As such, the only solution would be for each to fulfill his obligation of saving while at the same time being saved himself.

¹⁰ As pointed out by M. Sokol (p.77), if the result of the division produced *no* result at all, the resource would be considered indivisible. Here we speak of some type of limited response.

found among many of the contemporary *poskim*.¹¹ It is important to point out that according to the understanding put forth by Sokol for understanding the interplay between the two Talmudic sources, subscribing to the approach of the *Achiezer* would render the hierarchies set forth in Horayot as applicable only in cases of indivisible and neutrally owned resources. All other cases would be addressed by the travelers' case and its application.

Although these two approaches initiate some major differences, they both present certain real situations where decisions have to be made as to who will receive the treatment at hand. For the approach of the *Netziv*, this will arise in all cases where one life, a *chayei olam*, can be saved and neither party owns the resources, even if the resources are considered divisible. For the *Achiezer*, this will come up whenever there is a third-party allocation of indivisible resources, irrespective of the relative prognoses of the patients at hand. The question that will arise for each pertains to what to do in each of these respective situations. For the answer to this dilemma, I believe that all major *poskim* enlist the framework and the extensions of these notions based on the Mishna in Horayot. My goal here is to show and elaborate on the many different criteria that may be consulted. It is, however, very noteworthy that at many junctures, the prioritization and degree to which these various categories relate to one another is not addressed. As a result, application of these hierarchies is limited to an "all other things being equal" scenario. At the same time, there is yet another limitation that this framework faces in that, very often, these schema carry no weight in an American hospital setting and would be difficult to apply. Not only is it unlikely to find on hospital admission questionnaires the question of "*kohen, levi, or yisroel*" but also it is also unlikely that presentation of this fact at grand rounds would produce anything other than a chorus of laughter. As a result, they will usually only represent a

¹¹ See Rabbi Eliezer Waldenberg in *Shut Tziz Eliezer*, vol. 9 responsum 28:3, and Rabbi Moshe Shternbuch in *Tshuvot Vehanhagot*, Choshen Mishpat, responsum 858.

theoretical or ideal order of prioritization. Let us now examine each of these categories.

YICHUS

Yichus is the major theme of the Mishna in Horayot. Here we see that a *kohen* precedes a *levi*, a *levi* before a *yisroel*, and so on. Of the categories we will soon see, this is one which would, at least theoretically, be the easiest to employ. We would not need much effort to ascertain the status of this individual in his community. Even the possibility of the patient's being a *mamzer* should be relatively easy to find out. However, this is not as simple as it looks. In a work that we will cite often on these issues, R. Ya'akov Emden writes that he "questions whether this is enough in order to cause the detriment of others."¹² In these words, R. Emden casts doubt on all assumptions of *yichus* that we use today, especially in cases like ours, where the result will be some loss to others.¹³ Although he has no direct proof that we would question these lineages, he finds support for this idea in the silence of the major works of *p'sak* (rabbinic ruling) in regard to even mentioning these hierarchies.

SOCIAL NEED

Although not explicit in directly relevant sources, we do find that there are instances where a greater social need for a particular individual will heighten his or her right to life-saving interventions. Here I am referring to the Talmud in Horayot, which extends the list from the Mishna and says that a *mashuach milchama* comes before a *s'gan*.¹⁴ Unlike the *s'gan*, who serves as the back-up to the

¹² Rabbi Ya'akov Emden's *Birat Migdal Oz*, Perek Even Bohen, pinah aleph, chap. 89.

¹³ This he contrasts with other rights afforded to different family *yichus* situations, where there is no actual loss to others.

¹⁴ Talmud Bavli, Horayot 13a

kohen gadol (high priest), the *mashuach milchama* leads the people in war. Rashi explains that this is because “the nation needs him, the *mishuach milchama*, more than the *s’gan*.”¹⁵ This is based on the Talmud in Nazir which explains this law as a result of the fact that many more people are reliant on the *mishuach milchama*.¹⁶ Here we find that the impact of an individual on the nation as a whole or, by extension, on the community at hand, is a very important factor that needs to be considered. As a result, a pillar of a community, a public leader or a person of social prominence would be favored over a lay commoner.

PERFORMANCE OF MITZVOT

The Mishna tells us that “a man comes before a woman” and does not give any explanation. The commentaries on this Mishna point out that this prioritization is based on the fact that men are obligated in more mitzvot, since women are exempt from time-restrained mitzvot (commandments).¹⁷ As a result, men are considered “more holy.” It is important to note that here the commentaries and, by extension, the Mishna, are not concerned with the performance of the mitzvot in order to create this hierarchy; it is merely being obligated by the commandment that is the issue at hand. This rigid interpretation implies that a woman will always be obligated in fewer mitzvot than a male counterpart and therefore, no matter how righteous she is, and no matter how unrighteous he may be, the man will always be treated first. On this note, R. Emden stresses that even were the female to be one who engages and excels in all mitzvot, she would still only be evaluated in relation to those mitzvot that she is, in fact, obligated to keep.¹⁸ However, R. Emden does extend this rationale

¹⁵ Ad loc. *lehachayoso*.

¹⁶ Talmud Bavli, Nazir 47b.

¹⁷ See Rambam, *Peirush Hamishnayos*, as well as R. Ovadia M’Bartenura ad loc.

¹⁸ Ibid., chap. 95. This strict interpretation of the Rambam and Bartenura yields the conclusion that there is no novelty in her observance of optional commandments in relation to a male’s parallel obligation.

to a new degree in that he says within one subset of prioritization, a closer adherence to the observance of the mitzvot will certainly be of merit.¹⁹ This nuance is one which would be almost impossible to implement, but it warrants mentioning in that it is the first time we see that observance levels, and not only obligation levels, are being considered in these discussions. R. Emden extends this idea even further and considers the capacity and ability to fulfill mitzvot as relevant standards.²⁰ If, after all, the holiness that is a result of mitzvot is a relevant factor, so too must the prospect of the fulfillment of the same mitzvot be considered. Here he prioritizes those capable of producing offspring to those incapable, and even a person with arms, who has the ability to don *tefillin*, to an armless person who cannot. This novel approach will produce major difficulties for any who wish to adhere to them, as assessment of these values would be near impossible.

Another instance where this comes up is the closing clause of the Mishna, which prioritizes a *mamzer talmid chacham* before a *kohen gadol am ha' aretz*. One possibility for this criterion of prioritization can be that it is not a new clause but simply an extension and example of two categories already mentioned. Certainly, one who is a *talmid chacham* carries with him a great deal of social need as well as the fact that he most probably exhibits a greater degree of observance of mitzvot. Sokol maintains that this concept, that of *talmid chacham*, is to be considered as a separate criterion.²¹ He supports his claim with several proofs from various Talmudic sources. True as it may be, this distinction yields few differences at the end of the discussion.

¹⁹ Although he only compares a righteous and pious woman to a nonpious woman, I see no reason to interpret this nuance to only female-female comparisons. Rather, it implies that observance of mitzvot is a virtue that is to be considered in these situations.

²⁰ *Ibid.*, chaps. 91–92.

²¹ *Ibid.*, pp. 79–80.

DEGREE OF NEED

When presented in a manner in which there may be equal demand upon a physician's talents, there is precedence in Halacha that would require the physician to treat the patient who is most in need. This would be true not only in the most obvious cases, where one would be required to tend to the critically ill before those with minor injuries, but also in cases of relative degrees of pain and anguish. The source for this is the previously quoted Mishna which states, "When they [a man and a woman who are captives] are both at equal risk of being degraded, then the man takes precedence over the woman." The commentators explain that the reason for this is that with regard to being ravaged by their respective captors, a male's pain would be far greater than a female's.²² This being the case, the Mishna tells us that a man's rescue takes precedence over a female's.²³ Although it is somewhat obvious that a critically wounded patient would be treated before those with minor injuries, this Mishna, when applied, would dictate that the patient who is experiencing more pain and would benefit from the doctor's attention is to be given the treatment above a similar patient not in pain.

RELATION

The concept of relation to the caregiver is not a unique one to the medical field. The law actually originated regarding the laws of charity, as the Talmud states, "Between your poor [relatives] and the poor of your city—your poor come first."²⁴ Thus we find that there is a right that exists among those closest to the caregiver to pro-

²² See Bartenura ad loc.

²³ Although it is puzzling that the Bartenura and others feel the need to use this as the explanation of this clause in the Mishna rather than explaining that when a male and female are in equivalent situations we revert back to the original concept that prioritizes men based on their obligation in mitzvot.

²⁴ Talmud Bavli, Baba Metzia 71a.

ceed others in receiving this care. Since, at its most basic core, care for the sick is a form of care-giving, it would make no difference whether this care was being allocated by a hospital or an individual physician. As such, the closeness of relationship would most certainly come into play. This would require a hospital, physician, or a donated organ to be directed to those within its immediate vicinity before being transported elsewhere.

ABILITY TO MAXIMIZE LIFE

This category includes not only the prioritization of those who project to respond better to the particular treatment but also those who will be able to be more fruitful in the future and produce offspring.²⁵ This is based on the scheme of R. Emden, where he states that a “young man before a healthy old man, a healthy old man before a sick one, a sick man before a castrated male, a castrated male before a critically ill patient, a critically ill patient before a *treifah*.”^{26,27} This extension is not entirely original, as we see earlier that there is prioritization given to those who would definitively benefit from a treatment before those who may or may not.²⁸ What is unique here is that it is not only the degree of illness and future prognosis are factors, but even outside issues impact how we view the results of healing this patient. It is this point that makes this assessment quite remarkable. According to R. Emden, the perspective that we must take when evaluating the success of a certain treatment does not end merely with the end of a surgery, the successful recovery from that

²⁵ The concept of producing offspring falls under two categories in the scheme of R. Emden, both as a commandment to be fulfilled and also as a measure of maximization of life. See *Ibid.*, chap. 92.

²⁶ A *treifah* is one who is terminally ill and will not live a full twelve months. See *Shulchan Aruch*, Yoreh De’ah, chap. 29. This category of *treifah* is to be considered more ill than a critically ill patient.

²⁷ R. Emden, chap. 92.

²⁸ See *Pri Megadim–Mishbetzos Zahav*, Orach Chaim 328:1.

surgery, or even the absence of recurrence of the illness; rather, we are required to evaluate the cumulative length, quality, and productivity that the treatment produces. Perhaps this idea may be most obvious in cases where we are to consider giving a donated organ to either a twenty-year-old healthy male or a ninety-year-old post-op cancer patient with a history of malignancies and congestive heart failure, but not all cases will be this drastic. This evaluation does create a very broad and challenging dilemma in many situations.

INITIATION OF TREATMENT

On the issue of initiating treatment there is a very compelling responsum found in the writings of Rabbi Moshe Feinstein.²⁹ Here R. Feinstein delineates that all of the methods and schemes that may be discussed in regard to the Mishna in Horayot can only be applied in situations where both patients were to enter into the physician's care simultaneously. Only in cases such as these would the physician be in a situation where he has to choose which of the lives demands his attention. R. Feinstein continues to explain that if one patient were to come under the physician's care first, provided that they are both life-threatening situations, we are not concerned at all for anything that the second patient has favoring his being treated. He could be a *kohen*, a pillar of the community, a *talmid chacham* who is in more severe pain with a far better prognosis and it would not make a difference. R. Feinstein bases this on two points. He maintains as his first point that as soon as a patient enters a doctor's care he is entitled to that care until it is delivered. R. Feinstein does not give any source for this concept, but its inclusion among many other contemporary *poskim* seems to indicate some uniformity in the acceptance of this moral obligation.³⁰ The second argument made by R. Feinstein is that if the doctor were to leave the care of the first patient and tend

²⁹ *Igros Moshe*, Choshen Mishpat, vol. 2, responsum 73.

³⁰ See R. Shmuel Vosner in *Shut Sheivet Halevi*, vol. 6 responsum 242, and also R. Shlomo Zalman Auerbach, quoted in *Nishmat Avraham*, Yoreh De'ah, p.156.

to the second, this would be a clear sign that the prognosis of the first is not as good as the second's, if not more ominous. This being so, the patient will certainly suffer great emotional strain that will inevitably contribute to the hastening of his demise. This, of course, would be considered an act of manslaughter in Jewish law.