Is it a Mitzvah to Administer Medical Therapy?

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When a physician prescribes a course of therapy and treats a patient, does he thereby perform a *mitzvah?*

At first blush, the answer is self-evident. We already know from the Mishna in *Nedarim* 38b that the medical treatment of a patient is considered a *mitzvah.* The Mishna teaches that if someone takes a vow *(neder)* not to bestow any benefit upon his friend, he is permitted to heal him *refuat nefesh* but not *refuat mamon.* The terms are unclear, and the Gemara *(ib., 41b)* explains that *refuat nefesh* means healing the friend's body while *refuat mamon* refers to treating his animals. If you can take a vow not to benefit your friend, you may not act as a veterinarian for his livestock, but you may act as a physician for him. Why so? The Rosh and the Ran, citing the Jerusalem Talmud, maintain that human therapy is permissible because *mitzvah ka avid* — in the course of healing a human being you perform a *mitzvah,* and this *mitzvah* overrides the vow. Therefore, despite the *neder,* you are allowed to treat him medically. This does not hold for treating animals, because this does not entail the performance of a *mitzvah.*

What *mitzvah* is it that is performed in the course of treating a patient? The Rambam (Commentary to Mishnayot, *ad loc.)* and the Ran (to *Ned., ad loc.)* identify it as *hashavat avedah,* the return of a lost article to its rightful owner. On the verse *ve'hashevoto lo*

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("thou shalt return it to him" — Dt. 22:2), the Sifre comments: *af et atzmo atah meshiv lo* — You must return to him not only what he possesses, but what he *is*, his very self. Hence, if you restore health to one who is dangerously ill, you have "returned" to him his own life, and thus have technically fulfilled the commandment of "Thou shalt return it to him." The Baraita *(B.K. 81b)* notes, concerning this return of self, that *ve'ein lekha hashavat avedah gedolah mi-zu* — there is no greater return of a lost article than the restoration of health that has been lost. Clearly, then, the medical treatment of a patient constitutes a *kiyyum ha-mitzvah* — that of returning a lost article. (There are even commentaries that conclude therefrom that the prohibition of *lo tukhal le'hitalem* — one may not ignore the lost item but must return it — applies to medical therapy, thus *obligating* the physician to administer treatment to any patient who requests it. See Maharsha to *Sanh. 73a; Ha'amek She'elah* to *She'ilot* 38:a.)

The author of *She'ilot (ibid.)* and Ramban (to Lev. 28:36) identify the *mitzvah* of healing as *ve'chei achikha imakh,* "thy brother shall live with thee" (Lev. 25:36) — and treating one's fellow medically is a way of keeping him alive. Other *Rishonim* (see *Tos. Rid* and *Tos. ha-Rash* to *Ber.* 60a) locate the *mitzvah* in the general rubric of *lo taamod al dam reiakha* — "thou shalt not stand by while thy brother's blood is being shed (Lev. 19:16)." A physician who has the means to revive his fellow man from disease is in the same category as one who knows how to swim and thus must save one who is drowning.

Despite the fact that we have posited three different *mitzvot* to which we can technically ascribe the *mitzvah* of the therapeutic process, our opening question remains a valid question. In order to explain the question more clearly, let us turn to a problem that is raised by a number of *Acharonim.*

In the *Shulchan Aruch* (which codifies only very few laws concerning medicine and physicians), we read the following about medical malpractice: *im ripa bi'reshut bet din,* if a physician licensed by the courts undertook treatment of a patient, and by error caused damage to the patient, then *patur mi-dinei adam ve'chayyav be'dinei shamayim:* he is morally culpable, but the tort

is not legally actionable. However, if he unwittingly caused the patient to die, he must go into exile *(Y.D.* 336:1). (This is in keeping with the general law of manslaughter, according to which one is neither executed not exonerated, but must flee to one of the "cities of refuge" where he must remain until the death of the High Priest.)

Now, the question posed by the *Acharonim* (*Maaseh Roke'ach, Tashbatz,* and others) is this: Why should the halacha prescribe *galut* (exile) for this case of medical manslaughter? Why not compare it to three other instances in which the manslaughterer goes free, namely, the bailiff who applied excessive force in summoning one to court and so caused his death, and the father and the teacher who caused the son or pupil, respectively, to die by administering excessive punishment? In these cases, Rambam *(Hil. Rotzeiach* 5:5,6) rules that the bailiff, the parent, and the teacher are not condemned to exile, because their misdeeds were perpetrated *be'shaat asot ha-mitzvah,* "in the course of performing a *mitzvah.*" Why does the *Shulchan Aŭuch* rule that the physician who unintentionally caused a patient's death be treated differently?

The author of *Yad Aŭraham* (to *Y.D., loc. cit.)* proposes the following solution: In the case of the first three — the bailiff, the father, and the teacher — the manslaughterers are involved in acts of *mitzvah.* They are teaching a child Torah or "wisdom" or a trade, or carrying out the instructions of the court, albeit they are doing it in the wrong way and with disastrous results. However, this does not hold true for the physician. If the doctor lost his patient, then by definition he did not heal him. If there was no healing, there was no *mitzvah.* In other words, the *mitzvah* quality of medical treatment is contingent upon the success of the therapy. If he succeeded in healing the patient, the physician performed a *mitzvah.* If he did not succeed, he accomplished no *mitzvah.* This is in contradistinction to the other three cases which are not result-oriented. This explains why in the three cases mentioned there is no punishment, whereas the physician is condemned to exile. The ruling of the *Shulchan Aruch,* therefore, is not contradicted by the Rambam.

This indeed is the substance of our question: is *Yad Aŭraham*

right, that a course of therapy does not entail a *kiyyum ha-mitzvah* unless it succeeds, or is it to be considered a *mitzvah* irrespective of the results?

In order to elucidate this important point, let us focus on the question of the *Acharonim*. It would seem that their argument with the *Shulchan Aruch* is misaddressed. While it is true that Rambam ordains exile as punishement for the first three cases, this decision is not unanimous. Indeed, Ramban *(Torat ha-Adam, Shaar ha-Sakanah)* holds that these three *are* punished by exile. Ramban adds to these three the case of a court-approved abortion in which the mother died. Hence, the halachic decision of *Shulchan Aruch* requiring exile for medical malpractice, while not according with the opinion of Rambam, does follow the view of Ramban. (See too *Bi'ur ha-Gera* to *Y.D., ad loc.*, and *Or Sameiach, Hil. Rotzeiach* 5:6.)

However, while *Yad Avraham's* strictures may not apply to *Shulchan Aruch*, they seemingly do hold with regard to Rambam himself. Whereas the latter does not say so specifically, he does imply that the physician is exiled. This we infer from Rambam's enumeration of only three cases in which a *mitzvah* was performed and hence no exile is ordained. Thus we may conclude that he considers all other such cases of manslaughter, including the malpracticing physician, as deserving of the punishment of exile. This would lead us to deduce that the Rambam (himself a physician!) did not subscribe to the thesis that medical treatment *per se* constitutes a *mitzvah* but rather that only *successful* therapy can be considered a *kiyyum hamitzvah*.

To summarize: both according to Rambam and Ramban, a physician who unwittingly caused a patient to die is to be penalized with exile. Their controversy concerns the other three cases: the bailiff, the father, and the teacher. Ramban holds that the performance of a *mitzvah* is no excuse, while Rambam disagrees. In addition, they differ with regard to the act of the physician: According to Rambam there is no *kiyyum mitzvah* in the course of treatment, while the Ramban may well hold that medical therapy in itself, successful or not, is to be regarded as an act of *mitzvah*.

Actually, this first controversy (regarding the three cases)

between Rambam and Ramban has an earlier source. The Mishna (*Mak.* 8a) discusses the *locus classicus* of manslaughter in the halacha — the Torah's description of a man who wields an ax, and in the course of lifting the ax it flies off its handle and kills someone. Exile is the prescribed punishment. Abba Saul is cited in the Mishna as declaring that every case of exile for manslaughter must be analagous to the act of chopping a tree: *Mah chativat etzim reshut* — just as the act of chopping a tree is *reshut*, i.e., neither a virtue nor a vice, neither a *mitzvah* nor an *issur*, so every case of manslaughter for which exile is prescribed must arise out of an act that is halachically indifferent or neutral. However, if it was an act of *mitzvah*, the perpetrator is not condemned to exile. Thus, the Mishna continues, the cases of the father, teacher, and bailiff who used excessive force and killed are excused from exile, because they were involved in acts of *mitzvah*. The Gemara says so clearly; the exemption arises because there was no *kiyyum mitzvah*.

However the Tosefta (*B.K.* 9:3 and *Mak.* 2:5 — see *hashmatot* from Ms. versions) says that in all these cases — the three mentioned in the Mishna, plus that of legal abortion in which the mother died and that of the malpracticing physician — all are required to undergo exile. Thus, the Tosefta disagrees with Abba Saul of the Mishna. Therefore, the controversy between Rambam and Ramban turns into a question of whether we follow the Mishna or the Tosefta. Rambam decides in favor of Abba Saul in the Mishna, while Ramban declares for the Tosefta.

It would seem, therefore, that while both Rambam and Ramban hold that the malpracticing physician is exiled, they differ as to whether medical treatment as such constitutes a *kiyyum ha-mitzvah* (Ramban) or not (Rambam). Yet, the matter requires further elucidation and the discovering of a source for their respective theories.

The source, I believe, is the famous baraita (*B.K.* 85a, *Ber.*60a): "In the school of R. Ishmael it was taught: 'he shall cause him to be healed' (Ex. 21:19 — in the case of battery and assault the offender must pay for the victim's medical bills); from this (redundance of the verb רפא) we learn that the Torah permits the physician to practice his healing arts." Rashi (*B.K., ad loc.*) comments: "and we

do not say that the Merciful One made sick, let the Merciful One heal" without human interference. Tosafot *(ib.,* s.v. *she'nitnah)* likewise explains that without this Scriptural dispensation we might prohibit medical treatment on the grounds that it contravenes the divine decree of illness. Most *Rishonim* similarly explain this baraita as negating the presupposition that man must not interfere in the natural process.

I believe that this is also the view of the Rambam. The baraita teaches that it is *permitted* to heal. The verse, previously mentioned, "thou shalt return it (the lost article) to him" adds the *requirement* or *mitzvah* to effect a medical cure (see Rambam, Commentary to the Mishnah, *ib.*).

Now, if indeed Rambam assigns medical care to the commandment of return of lost articles, then certain halachic consequences must flow from this particular rubric. Thus, if the finder takes the article with the intention of returning it to its owner, but for some reason the object disintegrates and the return is never consummated, certainly no *mitzvah* was performed despite the finder's best intentions and efforts. "Thou shalt return it to him" has not been achieved, and hence (on the technical halachic level, if not on the moral plane), no *mitzvah* was done. Similarly, for Rambam, if the patient died in the course of therapy, the "return of his body" (*hashavat gufo*) to the patient was not accomplished, and the physician cannot be accredited with a *kiyyum mitzvah.*

However, Ramban (in *Torat ha-Adam, Shaar ha-Sakanah)* has a completely different interpretation of this baraita (even though he is not always consistent, neither in *Torat ha-Adam* nor in his Commentary to the Torah). Thus, Ramban (*Torat ha-Adam,* ed. Chavel, p. 41) clearly implies that the Scriptural dispensation to heal is a psychological one:

> "From here we learn that the physician is permitted to practice." The explanation is: lest the physician say, "why do I need all this trouble of (practicing medicine)? Perhaps I will err and thus unwittingly cause someone's death." Therefore the Torah permitted him to practice medicine, and the physician like the judge is *commanded* to practice

> his profession. The judge too may say, "why do I need all this trouble?"... (Yet the Torah rules that) "the judge can rely only upon what his eyes see" (and, having performed to the best of his ability, should have no moral scruples or psychological distress about possible errors in judgment).

While Ramban also maintains the interpretations of the baraita by Rashi and Tosafot (that is, the dispensation to intrude into the natural process by effecting a cure for the malady), his major contribution is the interpretation of *reshut* as permission to enter a situation in which one might take a life unwittingly. Ramban's exegesis requires the assumption that medical treatment per se constitutes a *mitzvah*. Thus, in Ramban's words, the "dispensation" is a *reshut de'mitzvah* — in itself an obligation to heal (in contrast to *Perishah* to *Y.D* 336:4, who sees here a two-step process: once permission is granted to heal, thereafter the *mitzvah* arises to convert it into an obligation).

Support for this view comes from a Tosafist exegetical work on the Torah, *Moshav Zekenim* (to Ex. 21:19), which quotes Rashi on "he shall surely heal" only to disagree with him:

> We already know from the verse, "thou shalt not stand idly by the blood of thy neighbor" (Lev. 19:16), that if one witnesses his fellow drowning or beset by robbers etc., that he must help him, and we do not say, "The Merciful One made sick, left the Merciful One heal." Rabbi Hayyim interprets (the baraita), "From this we learn that the Torah permits the physician to practice his healing arts", to mean that there should be no (excessive) apprehenesion lest the patient die because of (the wrong) medication.

Clearly, this supports our understanding of Ramban, and this source too would support the thesis that medical treatment *per se* constitutes a *mitzvah*.

Further support for Ramban may be garnered from the following fascinating Midrash. It is a tale cited in *Midrash Shmuel* (ed. S. Buber):

> R. Ishmael and R. Akiva were once walking in the streets of Jerusalem together with a third person. A sick man met them and said, "Rabbis, tell me how I can be healed." They

replied, "Take such and such (portions) until you are healthy." Whereupon their companion said to them, "Who afflicted him with his illness?" They said, "the Holy One, blessed be He." Said he to them, "Then you have intruded in a matter which is none of your concern. (The Holy One) afflicted and you will heal?!" Said they to him, "What is your occupation?" He answered, "I am a farmer, and the scythe is in my hand." They asked, "Who created the soil? Who created the vineyard?" He replied, "The Holy One, blessed be He."

They continued,"And you intrude in a matter which is none of your concern? He created (the soil as is) and you by working it) eat of its fruits?" "But," he rejoindered, "do you not see the scythe in my hand? If not for the fact that I work and plow and turn the earth over and fertilize and prune, nothing would grow." Whereupon they said to him, "Fool! Have you not learned from your occupation that 'man's days are as grass (Ps. 103:15)?' Just as a tree offers nothing if it is not fertilized, pruned, and planted, and if it grows (fruit) but gets no water it dies, so is the (human) body like a tree, the medicine is like the fertilizer, and the physician is the farmer."

It is obvious from this Midrash that R. Ishmael and R. Akiva were not prepared to accept even the hypothesis of the quietistic view, according to which man has no right to interfere in the processes of nature by means of which illness afflicts people. Interestingly, it is the same R. Ishmael in whose school our baraita originated! This would lend further support to our interpretation of Ramban that the baraita's assertion of a Scriptural dispensation was not meant to answer the quietistic hypothesis ("the Merciful One made sick, let the Merciful One heal"), but rather is an assurance offered to calm the apprehensiveness of the physician who is concerned lest his error make his patient worse, by declaring the very process of medical treatment a *mitzvah*, independent of its success or failure.

Having begun this essay by citing views of the *Acharonim*, let us conclude in a similar manner. The law codified in *Shulchan Aruch* that the malpracticing physician must undergo exile is explained by the author of *Aruch ha-Shulchan* differently from the

way it was expounded in *Yad Avraham*. The former maintains that this punishment is ordained only when the physician himself knows that he has been negligent, such as not having studied the matter adequately. Otherwise, there is no reason to impose exile upon him. "For if he did study the matter properly, he has committed no sin, for it is a *mitzvah* to practice medicine. The sage once said, 'the physician's mistake is the Creator's intuition'... Without this element (of neglect), I believe (the physician) is not to be exiled, for he is no worse than the father, teacher, or bailiff — all of whom are exonerated from exile." Clearly, his view is that medical therapy is in itself a *kiyyum ha-mitzvah*, and we need not resort to the solution proposed by the author of *Yad Avraham* .

In summary, the question of whether medical treatment as such constitutes a *mitzvah*, independent of its results, is in dispute from the Tannaitic period — R. Ishmael and R. Akiva, through the Mishna and Tosefta — to the medieval period of Rambam and Ramban, and down to the latest period, that of the *Acharonim*, especially *Yad Avraham* and *Aruch ha-Shulchan*.