

## His Money or Her Life? Heinz's Dilemma in Jewish Law

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Living by ethical principles in an imperfect world tests a person's character. How do we resolve the tensions created when moral principles conflict? Moral development theorist Lawrence Kohlberg presented the following dilemma in order to measure the sophistication of a person's moral thinking:

In Europe, a woman was near death from a special kind of cancer. There was one drug that the doctors thought might save her. It was a form of radium that a druggist in the same town had recently discovered. The drug was expensive to make, but the druggist was charging ten times what it cost him to make. He paid \$400 for the radium and charged \$4000 for a small dose of the drug. The sick woman's husband, Heinz, went to everyone he knew to borrow the money and to try every legal means, but he could only get together about \$2000, which is half of what it cost. He asked him to sell it cheaper or let him pay later. But the druggist said, "No, I discovered the drug and I'm going to make money from it." So, having tried every legal means, Heinz gets desperate and considers breaking into the man's store to steal the drug for his wife. Should Heinz steal the drug?<sup>1</sup>

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1. Lawrence Kohlberg, *The Psychology of Moral Development: The Nature and Validity of Moral Stages*, (San Francisco: Harper and Row, 1984), p. 640.

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By rating responses to this and other stories on a six stage scale, Kohlberg measured the way respondents resolved issues that arose from the conflicts between respect for rules and society on the one hand and the demands of human rights and values on the other. The more a person felt bound by the absolute dictates of law the less sophisticated his moral development; the more he valued the rights and attitudes of all parties involved, the more advanced his moral thinking.

Another dilemma: In order to save his life during the Nazi occupation of Warsaw, a man, under pressure from the SS, revealed the location of his brother's hidden wealth. Should he have done so? Both brothers survived the war and live in Israel. Must the man now compensate his brother for the losses he caused?

May a person steal medication or money or food in order to save his life? Although interests of self preservation dictate an immediate affirmative response, the issue must be addressed from both ethical and legal perspectives. Are moral dictates inviolate? If not, under what circumstances may they be breached? How does the American legal system respond to Heinz's dilemma? How does the halacha, the Jewish legal system, guide a husband who, in order to save his wife's life, has no alternative but to break the law?

American jurisprudence recognizes that laws ought to promote the achievement of positive values, and that sometimes law must be violated in order to protect the greater good of society. Thus, the *necessity defense*, based on this principle of the greater good, vindicates the violation of a law if necessary to prevent a greater harm from occurring. Philosophers such as Lord Francis Bacon took this principle to its extreme, stating, "If a man steals viands [food] to satisfy his present hunger, there is no felony or larceny."<sup>2</sup> Jurists, however, are leery of a liberal application of this defense. The Washington State Court maintained that "economic necessity has never been accepted as a defense to a criminal charge"<sup>3</sup> and the California Appellate held that "even in such dire circumstances [as

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2. Bacon's Maxims, Reg. 5.

3. *State v. Moe* 174 Wash. 303, 24 P2d 638 (1933); *Rex v. Holden* 168 Eng. Rep 607 (Cr. Cas. Res. 1809).

stealing bread to feed starving babies], so far as the particular defense is concerned, the law itself is powerless to accept the excuse."<sup>4</sup>

Most jurisdictions do accept such a defense, although the extent to which they allow it differs. The New York statute is typical of what some refer to as "choice of evils" or "competing harms" legislation:

[C]onduct which would otherwise constitute an offense is justifiable and not criminal when: . . . such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the injury sought to be prevented by the statute defining the offense in issue.<sup>5</sup>

Under what circumstances in Jewish law may the biblical prohibition "Ye shall not steal"<sup>6</sup> be breached? Is it permissible to appropriate another's property in order to save a life?

At first glance the answer appears obvious. "Thou shalt not stand by the blood of thy neighbor"<sup>7</sup> is the biblical admonition for saving life. Furthermore, the Talmud posits that all biblical precepts may be violated in order to save a life except for three prohibitions: idolatry, murder, and illicit sexual activity.<sup>8</sup> Since stealing is not one of these three cardinal sins which require martyrdom instead of transgression, it appears that one may steal in order to save a life.

While this position is supported by the talmudic record of an

4. *People v. Whipple*, 100 Cal. App. 261, 279 p. 1008 (1929).

5. New York Penal Code, par. 35.05 (2).

6. Leviticus 19:11. The prohibition of stealing found in the Decalogue refers to kidnapping. See *Sanhedrin* 86a.

7. Leviticus 19:16. See *Sanhedrina* 73a.

8. *Sanhedrin* 74a. Transgression of these prohibitions violates the minimal moral conditions of a worthwhile life.

enactment by Joshua which allows a person to trespass, and even to destroy, another's property in order to save his life,<sup>9</sup> it is contradicted by a number of other talmudic sources. *Baba Kamma* 60b records that King David consulted the Sanhedrin as to whether his army was permitted to destroy private property that the Philistines were using as camouflage in order to attack it.

The answer they dispatched to him was: [Generally speaking] it is forbidden to rescue oneself through the destruction of another's property; you, however, are King, and a king may break [through fields belonging to private persons] to make a way [for his army], and nobody is entitled to prevent him [from doing so].

Rashi explains the Sanhedrin's response to David: the King's army, for reasons of security and by right of eminent domain, is permitted to confiscate property in life-threatening situations; individuals are not.<sup>10</sup> According to one authority, Rashi understands the normative halachic ruling to be that stealing, regardless of motivation<sup>11</sup> — even to save a life — is forbidden.<sup>12</sup> Indeed, Rashi understands this to be the normative halachic ruling.<sup>13</sup>

Support for this position can be found in many sources. Rambam holds that the talmudic sage R. Meir maintains that rather than signing a document which would assign funds to the wrong party, witnesses should accept martyrdom.<sup>14</sup> Meiri quotes the talmudic account of a certain pious person who, because of a heart ailment, was required to drink fresh milk daily. A goat was brought into his house and tied to the legs of his bed despite the rabbinic

9. *Baba Kamma* 81a.

10. *Baba Kamma* 60b, s.v. *vayatsilah*.

11. See *Baba Metsiah* 61b which proscribes theft even if the thief's intent is to pay the aggrieved victim double the value of the property he stole.

12. *Responsa Binyan Tsiyyon*, no 167.

13. *Baba Kamma* 60b, s.v. *vayatsilah*.

14. *Shittah Mekubetset* to *Ketubot* 19a. See *Nachal Eshkol*, 1868, II, p. 118; *Teshuvot Maharam Shik, Yoreh Deah*, nos. 347-348; *Sedei Chemed*, I, pp. 17-19; Glosses of Maharatz on *Baba Kamma* 60b.

injunction against raising such animals in the Land of Israel — they generally graze unrestrictedly, robbing the pasture lands of others. Despite the fact that owning the goat was a medical necessity, his colleagues, upon visiting their sick friend, commented, “An armed robber is in the house of this man, how can we come in to see him?”<sup>15</sup> R. Yaakov Ettlinger, author of *Responsa Binyan Tsiyyon*, finds that the talmudic sage R. Yose concurs with this absolute stand.<sup>16</sup>

R. Yehuda and R. Yose were walking together when a ravenous hunger seized R. Yehuda. He seized a shepherd and devoured his bread. R. Yose said to him, “You have robbed the shepherd.”<sup>17</sup>

R. Yose admonished his colleague for thievery even though such an act was necessary to save his life.

Why are these authorities so strict with regard to the theft prohibition? Commentators offer a number of explanations. Some consider theft a fourth cardinal sin to be added to the list of idolatry, murder, and illicit sexual relations.<sup>18</sup> Others opine that theft, although an independent injunction, may nevertheless be considered a derivative and complementary prohibition (*abizrayhu*) of murder and thus share the stringency of required martyrdom.<sup>19</sup> This close relationship between property and life can be seen in the Torah’s assumption that a person will not passively allow his property to be stolen and may even at times kill a thief in order to protect himself and his possessions. Indeed, it is in the case of the intruder who enters a house in order to steal that the Talmud,

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15. *Baba Kamma* 80a.

16. *Responsa Binyan Tsiyyon*, no. 169 quoting *Yoma* 83a.

17. *Baba Kamma* 79b-801.

18. See Jerusalem Talmud *Avodah Zarah* 2:11 and *Mareh Panim* which equates the Talmud’s statement with that of R. Meir in *Ketubot* 19a.

19. Martyrdom is required for an *abizrayhu* of a cardinal sin even though it is not intrinsically a capital offense. See Ran to *Pesachim*, beginning of chap. 2; *Nemukey Yosef*, *Maor* and *Milchamot* to *Sanhedrin*, end of chap. 8; Ramban, *Torat Ha’adam*, *Sha’ar Hasakanah*; *Shach* to *Yoreh Deah* 157, no. 10; *Responsa Chavot Yair* no. 182.

*Sanhedrin* 82a, says, "If he comes to kill you, forestall by slaying him [first]."<sup>20</sup>

R. Ettlinger maintains that the talmudic sage Rabbah b. Bar Chana's explanation of the permissibility of violating the Sabbath laws in order to save human life sheds light on our discussion. Rabbah's reasoning is based on two assumptions: 1) that the Sabbath may be violated in order to perform the Temple rite; and 2) that the Temple ritual may be interrupted so that an officiating priest may offer testimony which might save a life. He reasons *a fortiori*: If it is permissible to violate the Sabbath in order to perform the sacrificial rite, which itself is suspended in order to save human life, then certainly the Sabbath may be violated for the sake of saving human life. However, while the prohibition of Sabbath work is suspended because of the requirements of the Temple ritual, the injunction against stealing is not, as the prophet Malachi admonished, "And you have brought that which is stolen . . . Thus you bring the offering; shall I accept this of your hand? says the Lord" (*Malachi* 1:13). R. Ettlinger continues his discussion: Since the Sabbath laws are overridden in order to save a life only because they are waived with regard to the sacrificial requirements, the proscription of theft, which is not waived for the Temple ritual, may not be suspended even in life-threatening circumstances.<sup>21</sup>

Most authorities advocate more permissive approaches in the resolution of the tension between the lifesaving obligation and the stealing prohibition, the most lenient of which removes from any such deed any hint of stealing. Raavad maintains that since the prohibition of stealing is lifted (*hutra*, abolished, as opposed to merely *dechuyah*, suspended) in a life-threatening situation, no

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20. *Yad Mosheh*, no. 7 in the name of *Or Zarua*. See *Semachot* 2:10 which calls a thief a murderer and an idolator. See also *Choshen Mishpat* 358:3.

21. *Responsa Binyan Tsiyyon*, no. 167. One should not distinguish between ritual and moral obligations, maintaining that it is the former, and not the latter, that may be suspended in life-threatening situations. See the encounter between David and Achimelech in I Samuel 21 in which the laws of levitical purity are not suspended. See, however, *Teshuvot Bet Yehudah, Yoreh Deah*, no. 47 which makes such a distinction.

criminal act has been performed and, hence, no compensation is required.<sup>22</sup> *Teshuvot Maimuniyyot* elaborates that since the theft prohibition is waived, the appropriator is not considered a transgressor (*rasha*) and, hence, there is no obligation to compensate. This is true only when money is stolen to save life. If, however, money is stolen in order to protect one's personal property, such an act is forbidden and the thief is *rasha*.<sup>23</sup>

There may be a further limitation on Raavad's duress-generated exemption from liability, one which takes into account the source of that duress. In *Hilchot Yesodei HaTorah* 5:4 and 6, Rambam distinguishes between a case where the money is the direct cause of the threat to life and the case when another's money is used to remove the life-threatening circumstances:

... If one is obligated to die rather than transgress, and he transgresses instead, he has desecrated the Name of God... Nevertheless, since the transgression was done under duress, he is not flogged and it is unnecessary to say that he is not put to death, even if he murdered under duress. One is flogged or executed only if he violated [these prohibitions] willingly.

The rules applied to duress are likewise applied to illness. What is the case? One who is deathly ill... may be treated by violating every prohibition in the Torah, except for idolatry, illicit sexual activities, and murder which may not be violated even in cases of danger. If [these prohibitions are violated], the court administers the punishment that is appropriate for him.

Rambam here distinguishes between the situation in which the prohibited activities of murder, idolatry or illicit sex themselves create the duress and force the violation of these prohibitions, as opposed to the case in which the duress is due to another cause, for example illness, from which the person wants to save himself by

22. Gloss to *Mishneh Torah*, *Hil. Chovel uMazik* 8:4. See also *Even haAzel*.

23. *Teshuvot Maimuniyyot*, *Hilchot Chovel uMazik*, no. 20. See R. Yehoshua Baumol, *Responsa Emek Halacha* 1:27 and 11:56. See *Baba Kamma* 117b.

violating one of these restrictions. In the former case, the violater is exempt from punishment; in the latter he is not. Although many authorities disagree, *Sifteï Kohen* maintains that this distinction is held by Raavad as well.<sup>24</sup>

So far we have outlined two approaches to Heinz's dilemma: 1) Stealing is forbidden under all circumstances and Heinz is morally and legally barred from doing so, even to save his wife's life in this manner; and 2) since the medication is necessary to save a life, taking it is not considered stealing and, if taken, there is no liability to compensate the original owner. A third approach, the halachically normative one, allows for the appropriation of another's property — with the condition that restitution be made. Thus, *Sanhedrin* 74a,

For Rava said: If a man was pursuing after his fellow [to slay him], and broke some utensils, whether of the pursued or of some other person, he [the pursuer] is free from liability. Why so? He is liable to be killed.

The pursuer's exemption is in accord with the talmudic principle *kim lei bederabbah minei*, i.e., he who has committed two offenses simultaneously, one of which is a capital crime, receives only the more severe punishment. The Talmud then continues,

If the pursued broke some articles: if they belonged to the pursuer, he is not liable for them; if to someone else, he is. If they belonged to the pursuer he is not liable — because [the pursuer's] property is not more precious than [the pursuer's] life [which the pursued is allowed to take in self defense]. If they belonged to someone else he is liable — because he saved himself at his neighbor's expense.

Thus, the pursued may appropriate another's property in order to save his life, but he must compensate the owner. The Talmud then discusses the obligation of a third party who is saving not his life, but that of another:

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24. *Shach* to *Choshen Mishpat* 388, no. 24. See also *Even haAzel*; *Yam She. Shlomo*, *Baba Kamma*, ch. 10, no. 52; *Ralbag* to II Samuel 21:7.



But if one pursuer (a third party) was pursuing a pursuer to save [the latter's victim] and broke some utensils, whether of the pursuer or of the pursued or of any other person, he is not liable for them. According to strict law this should not be so, but if you will not rule thus, no man will save his neighbor from a pursuer.

In essence, the third party should be liable for the damages he caused and for the money he appropriated. However, in order to assure that a Good Samaritan, an uninvolved third party, will become involved and not refrain from helping someone in distress, he is relieved of liability.<sup>25</sup>

This approach, permitting theft and calling for compensation, was posited by Tosafot in their explanation of the Sanhedrin's ruling to King David<sup>26</sup> and it is this approach that has been codified by Rambam<sup>27</sup> and *Shulchan Aruch*.<sup>28</sup>

A similar attitude is recorded by Rashba in his consideration of the dispute between ben Peturah and R. Akiva narrated in *Baba Metsia* 62a:

If two are travelling on a journey [far from civilization], and one has a pitcher of water such that if both drink, they will [both] die, but if only one drinks, he can reach civilization — ben Peturah taught, "It is better that both should drink and die, rather than one should behold his companion's death." But R. Akiva came and taught, "That your brother may live with you," (Leviticus 25:36) your life takes precedence over his life."

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25. See Aaron Kirschenbaum, "The 'Good Samaritan' and Jewish Law," *Dine Israel* 7, 1976.

26. *Baba Kamma* 60b, s.v. *mahu lehatsil*.

27. *Hil. Chovel uMazik* 8:12-14.

28. *Choshen Mishpat* 358:4 and 380:3. *Responsa Maharam ben Beruch*, no. 39 maintains that even if one is rescued against his will, he must, nevertheless, compensate the rescuer. See also Ramo to *Yoreh Deah* chap. 252, no. 12. See, however, *Responsa Rashbash*, no. 509, who questions Maharam's reasoning, although he defers to his decision.

While R. Akiva maintains that a person may not sacrifice his own life in order to save that of another, he does agree with ben Peturah, in the case when his life was not in danger, that he must share his water with his friend. Elaborating upon R. Akiva's position, Rashba posits that appropriation of another's property in order to save life is not considered theft at all. He reasons that since one is obligated to save someone either through personal involvement or through financial outlay, "stealing" the money is merely helping someone fulfill his fraternal obligation; compensation, however, is required.<sup>29</sup> Similarly, *Chatam Sofer* suggests that the Torah actually assigned another's money to an endangered individual. Hence, he is not stealing — he is taking money to which has legal title, but which he must repay.<sup>30</sup>

This third approach is difficult to understand. Unlike the first approach which absolutely forbids stealing in all cases, it maintains that stealing, at times, is permissible. And unlike the second which waives liability when the motivation for stealing is the biblical obligation of saving of a life, it holds the thief responsible for his deeds. If it is stealing, why is it permissible? If it is permissible, why is there liability?

Let us consider three resolutions to these questions:

One resolution may be suggested in line with the exposition of *Teshuvot Maimuniyyot* cited above. Sin results in the transformation not only of the sinner's moral standing, but of his legal status as well. A sinner is classified as a *rasha* (wicked person),

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29. *Responsa Rashba* 4:17. See also Gloss of Rashba to *Baba Kamma* 81b. *Piskei haRosh* to *Sanhedrin*, chap. 8, no. 2, maintains that the financial obligation on the lifesaver holds only when the endangered himself lacks the financial resources to hire others to save his own life. See also *Responsa haRosh*, *kelal* 85, no. 2 and *Choshen Mishpat*, 426. A similar obligation is codified in the case of hostages by Ramo, *Yoreh Deah*, chap. 252, no. 12. See *Shach* to *Choshen Mishpat*, chap. 426, no. 1 and *Responsa Bet Yaakov*, no. 148. *Responsa Rashba*, vol. III, no. 426, however, maintains that compensation by hostages is unnecessary since their redeemers expended money in the fulfillment of a religious obligation.

30. *Responsa Chatam Sofer*, *Yoreh Deah* 319. See also *Responsa Achiezer*, *Yoreh Deah* 16; *Minchat Chinuch* 296.

a consequence of which is his disqualification from being accepted as a valid witness in a Jewish court. Now, while the extenuating circumstances of saving a life remove the status of *rasha* from the thief, he remains a thief. Because he is not a *rasha*, the appropriation of money does not disqualify him from serving as a valid witness in a Jewish court. Because he did steal, however, he is a thief who is responsible for financial compensation of the loss he caused.

A second resolution is offered by *Yad Ramah*.<sup>31</sup> Saving oneself with another's property is permissible because of the *ones*, the duress caused at the time that the individual does not have access to his own resources to save his life. There being no alternatives by which this person can save his life, the duress permits violation of the biblical prohibition. However, following one's successful rescue the saved does have access to his personal financial resources and the duress no longer endures. At such time repayment of the property appropriated or damaged is possible. No longer barred by any duress, the original exemption no longer applies.

A third resolution may be posited in light of an understanding of the relationships between one's right of self preservation and duties such a right may impose upon others.

A right is a claim an individual (the right-holder) can make on another to either act, or refrain from acting, in such a manner that protects the interests of that individual. Should the claim be exercised and the duty not be done, it would be justifiable, other things being equal, to coerce fulfillment of the duty bearer's responsibility.

Although the Jewish tradition does not recognize the concept of rights per se, its system of commandments and obligations does create duties which are comparable to those considered by modern society to be the demands of human rights. For example, a duty not to steal implies another's right to private property. An obligation to save one's life at almost any cost implies a right to life. The matter

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31. Gloss to *Sanhedrin* 73b.

we must consider, then, is the nature of another's duty entailed by one's right to life.

A right may entail another's duty to behave or refrain from behaving in a certain way, even providing for use of coercive means to assure compliance. Thus, strangers have a duty not to trespass on the private property of another. But there are rights that people may claim which may place no specific duty on anyone in particular. For example, a person may have a right to proper health care. It may be, however, that no duty is imposed on any particular medical professional to provide such care.

What duties may a person in a life-threatening situation expect from others? As discussed above, the Torah articulates both positive and negative commandments which obligate a person to save another's life: "And thou shalt restore him to himself" (Deuteronomy 22:2) and "Thou shalt not stand by the blood of thy brother" (Leviticus 19:16). From these verses, the Talmud, *Sanhedrin* 73a, derives responsibility for both personal as well as financial involvement of the life saver. But what type of duty is this? Is it one which dictates coercive measures should the potential lifesaver hesitate in performing his duty? Or is it a duty which cannot be forced upon him unwillingly or unknowingly? Does "Thou shalt not stand by the blood of thy brother" automatically entitle a person to the benefit of another's services or the use of his resources?

In general, the halacha provides coercive means for enforcing the dictates of the Torah.<sup>32</sup> Thus, the Talmud *Chullin* 132b records:

It has been taught: [The limit of thirty-nine lashes] applies to negative precepts, but in the case of positive precepts as, for instance, when a man is told, "Make a *sukkah*," and he does not make it, or "Perform the commandment of the *lulav*," and he does not perform, he is flogged until his soul departs!

It is clear that the Sages are empowered to assure the fulfillment of positive obligations. Their role in the enforcement of

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32. See *Arachin* 26a and *Kiddushin* 50a.

prohibitions and the meaning of the phrase, “this applies only to negative precepts,” are subject to dispute.

According to Rashi, this talmudic selection is contrasting the punitive nature of lashes for negative precepts to the coercive quality of lashes for positive ones. Thus, while flogging may be used to coerce the fulfillment of positive commandments, the mechanism of coercion is not available to prevent the violation of negative ones. Floggings in the case of negative precepts are limited to thirty-nine and are purely punitive in nature. He adds that coercion is not mandated in cases which involve financial loss to the person. Rambam joins Rashi in this distinction between positive and negative commandments. In describing the guidelines he used to codify his list of the 613 commandments, Rambam writes,

When I shall mention a commandment, positive or negative, which entails some punishment [for violation], I shall mention that punishment by saying, “He who violates it is liable to death [by the hands of Heaven], or extinction, or a certain sacrifice, or flogging, or one of the death penalties inflicted by the Court, or payment.” And wherever no punishment is mentioned . . . it is not for us to punish them. But as regards all positive commandments, if the time of the performance is still applicable, we are to flog him who refuses to do it until he dies or performs [the commandment], or until such time as the obligation passes, for he who violates the [positive] commandment of dwelling in a Tabernacle is not to be flogged for his sin after [the passing of the holiday of] Tabernacles.<sup>33</sup>

Others maintain, however, that coercion is applicable to negative precepts and that lashes were used to prevent their violation. The Talmud here contrasts the extent to which lashes are meted out in each case.<sup>34</sup> However, such coercion for Torah

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33. *Sefer haMitzvot, Shores 14.*

34. *Chiddushei haRan to Chullin 132b; Hafla'ah to Ketubot 49b; Peri Megadim, Sefer Shoshanat haAmakim, kelal 9; Minchat Chinuch, mitzvah 9.*

prohibitions is subject to limitations. *Minchat Chinuch* holds that coercion is the sole prerogative of the Court. Individuals may not exert force upon others in order to prevent violation of the Torah.<sup>35</sup> Another authority maintains that coercion may be implemented only for the fulfillment of the essential aspects of a commandment; ancillary duties are not subject to enforcement.<sup>36</sup> For example, the essential obligation of circumcision is the act of circumcision itself, but the father's personal participation in the act is ancillary; properly slaughtering an animal is the essential obligation, but for the slaughterer to personally cover its blood is ancillary.

This discussion of the coercive element in positive and negative commandments is useful in our analysis of the obligation to repay money appropriated from another while saving one's life. Although the specific mechanism of lashes as means of coercion is not relevant to our deliberations, appropriation of another's property in order to coerce him unwillingly or unknowingly<sup>37</sup> to fulfill his life-saving obligation is a form of coercion and is, therefore, analagous. Although coercion is the prerogative of the court and not of the individual, the halacha does permit a person to take the law into his own hands and to appropriate another's property when the process of resorting to proper legal channels will result in inequitable financial loss.<sup>38</sup> According to the Talmud, the life-saving obligation is defined by both positive and negative precepts. Thus, *Sanhedrin* 73a,

Whence do we know that if a man sees his neighbor drowning, mauled by beasts, or attacked by robbers, he is bound to save him? From the verse, "Thou shalt not stand by the blood of thy neighbor." But is it derived from this verse? Is it not rather from

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35. *Minchat Chinuch*, mitzvah 8.

36. *Binat Adam to Chayyei Adam, Issur veHeter*, no. 7.

37. See Raavad to *Baba Kamma*, Atlas edition, *Miluim* p. 358, who maintains that a person incurs financial liability only when he is present at the lifesaving scene. See also R. Chayyim Palagi, *Nishmat Kol Chai*, vol. II, *Choshen Mishpat*, no. 48.

38. *Baba Kamma* 27a; *Choshen Mishpat* 4:1; *Hilchot Sanhedrin* 2:12.

elsewhere? Viz., Whence do we know [that one must save his neighbor from] the loss of himself? From the verse, "And thou shalt restore him to himself." From that verse I might think that it is only a personal obligation, but that he is not bound to take the trouble of hiring men [if he cannot deliver him himself]; therefore, this verse teaches that he must do so.

The positive commandment of restoration, a verse which speaks in the first instance of returning lost property and which is extended to requiring the restoration of a person's health and life, necessitates only personal involvement. It is the negative precept, "Thou shalt not stand by the blood of thy neighbor," which dictates financial involvement as well. Can a person be coerced to fulfill these obligations?

According to the authorities who permit enforcement only with regard to positive commandments, coercion is relevant only to the positive obligation of "Thou shalt restore him to himself," and not to the negatively phrased prohibition, "Thou shalt not stand by the blood of thy neighbor." Hence, a person can be compelled to fulfill the positive obligation of participating personally in a life-saving operation. He cannot, however, be forced to spend any money, an obligation which falls under the purview of the prohibition. His property is not subject to any claim entailed by the endangered's right of self preservation.

In addition, the essential component of the life-saving commandment is just that — saving a life. The Talmud posits that the essential obligation derives from the verse, "Thou shalt restore him to himself," and this verse teaches that this duty is, first and foremost, a personal one. An ancillary requirement necessitates that one must even expend his financial resources to do so. Thus, coercion may be applied to assure the fulfillment of the essential obligation which prescribes a person's physical involvement; it may not be applied to his ancillary financial responsibility. Furthermore, Rashi maintains that coercion is not applicable when financial loss is involved.<sup>39</sup>

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39. *Chullin* 132b, s.v., *kegon omrim leih asej sukkah*.

While the exigencies of mortal danger convince most authorities to permit a person to save his life by appropriating another's property, the legal inability to force another to comply with his financial responsibility to save a life obligates the individual to compensate the other for the money he used.

The obligation upon the lifesaver to expend his financial resources, as well as the permission of the endangered to save his life with another's money, is dependent upon the subsequent repayment of the appropriation. What if the lifesaver knows that the endangered cannot repay him; must he, nevertheless, hire others to save his life? What if the endangered knows that he can never repay the money he appropriated; may he, nevertheless, take the other's property? *Yad Ramah* maintains that there is no obligation upon the lifesaver, and no permission granted to the endangered, if compensation is impossible.<sup>40</sup> Others hold that the financial obligation, as well as permission to appropriate financial resources, maintains even when compensation is impossible.<sup>41</sup>

Let us briefly consider Rambam's formulation of the lifesaving obligation. In *Hilchot Rotseiach* 1:14 he writes,

Anyone who can save [someone's life] and does not do so transgresses, "Thou shalt not stand by the blood of your brother." Similarly, if one sees his brother drowning in the sea, accosted by robbers, or attacked by wild animals and can save him personally, or can hire others to save him, and does not save him . . . transgresses "Thou shalt not stand by the blood of your brother."

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40. Gloss on *Sannedrin* 73a. See *Keli Chemdah* to *Parshat Vayeitsei*, pp 190ff; *Chavot Yair*, no. 146.

41. Meiri to *Sanhedrin* 73a; *Responsa Mahari Weil*, no. 157; *Shulchan Aruch haRav*, *Hilchot Nizkei Guf vaNefesh*, 67; *Marcheshet* vol. 1, no 43; *Gilyonei haShas* to *Sanhedrin* 73a, *Responsa Maharsham*, vol. 5, no. 54; R. Chayyim Palagi, *Nishmat Kol Chai*, vol. II, *Choshen Mishpat*, no. 48. *Responsa Maharshdam*, *Yoreh Deah*, no. 24, maintains that the measure of a person's ability to compensate is based upon the time of the rescue and that if, at such time, the rescued does not have the resources to pay his lifesaver, he is exempted from any obligation of compensation.



*Minchat Chinuch* questions why Rambam in contradiction to the talmudic account in *Sanhedrin* 73a, claims that it is only the "brother's blood prohibition" that is violated by not saving a person's life and ignores the positive commandment of "Thou shalt return him to himself." The difficulty with Rambam's statement may be resolved, however, by understanding his reading of the talmudic passage.

Whence do we know that if a man sees his neighbor drowning, mauled by beasts, or attacked by robbers, he is bound to save him? From the verse, "Thou shalt not stand by the blood of thy neighbor." But is it derived from this verse? Is it not rather from elsewhere? Viz., Whence do we know [that one must save his neighbor from] the loss of himself? From the verse, "And thou shalt restore him to himself." From that verse I might think that it is only a personal obligation, but that he is not bound to take the trouble of hiring men [if he cannot deliver him himself]; therefore, this verse teaches that he must.

As discussed above, Rashi understands this passage to teach us that the lifesaving obligation is derived from both the positive and negative commandments, with the thrust of our passage highlighting the additional financial responsibility that the "brother's blood prohibition" adds to the pre-existing personal obligation prescribed by the positive commandment. Rambam, however, understands the development of the Talmud's reasoning quite differently. According to his reading, the Talmud first posits that the lifesaving obligation is derived from the "brother's blood prohibition." When the objection is raised that the verse "Thou shalt restore him to himself" already teaches that responsibility, Rambam maintains that the Talmud rejects that verse as a source of the obligation because it is not sufficiently inclusive; it only mandates personal involvement. The "brother's blood prohibition," being broader in its demands – requiring a person to do all that he can, both personally and financially, to save another's life – is accepted by the Talmud, according to Rambam, as the sole source of the lifesaving mandate. Hence, Rambam's ruling is consistent with his reading of the Talmud.

Let us return to the cases under consideration. According to our evaluation, Heinz, finding no legal alternative, is permitted to steal the medication in order to save his wife's life. The strict interpretation which considers theft an inviolate prohibition regardless of circumstance is not normative. The halacha, furthermore, relieves Heinz of any criminal responsibility or financial liability, holding — with Tosafot, Rambam, and *Shulchan Aruch* — that although third parties should be held liable for property they appropriate in order to save another's life, declaring them financially responsible may retard, or even prevent, their involvement and lead to the loss of innocent life. Clearly, in situations where lawful means of rescue are both available and immediately accessible, resort to unlawful measures is prohibited.

In the case of brother A who saved his life by revealing to the SS the location of his brother B's hidden wealth, the Rabbinical Court of Tel Aviv was forced to decide between conflicting claims. Brother B, the one whose money was taken, claimed that his brother, A, could have saved himself by giving the Nazis his own money. As such, brother A saved his life by appropriating another's property and should, therefore, be liable in accordance with the opinions of Tosafot, Rambam, and *Shulchan Aruch* discussed above. Furthermore, he accused brother A of saving his personal property by handing over B's money, an act for which he is certainly liable. An evaluation of this issue is beyond the scope of this paper. Brother A claimed that because the Nazis knew of brother B's money, and knew nothing of his own, he was the victim of extortion and had no responsibility to save his brother's wealth by sacrificing either his life or property. Since it was unable to determine the facts in the case, because brother A did admit to having used brother B's money to save his life, and because brother A was able to recover his property after the war, the court arranged a compromise monetary settlement that was acceptable to both parties.<sup>42</sup>

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42. Y. Frankel, "A Holocaust Survivor Who Saved Himself with His Brother's Money" in *Crossroads: Halacha and the Modern World* (Jerusalem: Zomet, 1987), pp. 87-90.

Living by ethical principles in our imperfect world creates many dilemmas for the moral personality. At times, challenges created by Nature or by the activities of human actors call into question those principles and test one's commitment to live by them. The circumstances in which moral principles may be breached for the greater good of society or of saving one's life deserve rational and mature evaluation. It is only through dedication to living a life devoted to the Good, and by contemplating one's principles and commitments prior to their being called into question, that one can hope to pass these tests of faith and, like our patriarch Abraham whom God tested ten times, be able to "walk before [God] and be wholehearted" (Genesis 17:1).