

With the benefit of modern technology, new medications and therapies enable physicians to save lives in ways that were not possible in the past. Although newer treatments are oftentimes more effective, sometimes their availability is limited. A facility may have fewer ventilators than patients in need of respiratory support. Life saving antibiotics against new infections may not have been produced in quantities large enough to meet the need of all affected patients. Individuals whose lives depend on receiving a donor transplant organ may succumb to death before they receive the organ that they need. These situations raise many questions. In life and death situations, how are limited resources allocated? What guidance does *halacha*, Jewish law, offer to guide physicians in prioritizing one life over another?

The issue of allocation of finite resources is not addressed directly in Talmudic law, yet the Talmud discusses two similar moral questions from which we may apply conclusions. The first discussion related to allocation of limited resources appears in a *mishna* in *Horayot*, and establishes a precedent in dire situations in which only one person can be saved at the expense of another.

"A man takes precedence over a woman when it comes to saving a life and to restoring something lost. A woman takes precedence with regard to provision of clothes and to be redeemed from captivity. When both stand equal chances of being degraded, then the man takes precedence over the woman.

A priest takes precedence over a Levite; a Levite to an Israelite; an Israelite to a *mamzer* (product of a forbidden relation); *mamzer* to a *Natin* (member of a caste of Temple servants); a *Natin* to a convert; a convert to a free slave. When [do we say this]? When they are all equal. But if there were a *mamzer* who was a sage and a high priest who was an *am ha'aretz* (one who is lax in observing tithes and purity laws), the *mamzer* sage takes precedence (*Horayot* 3:7-8)."

The second appears in the Talmud Bavli in *Baba Mezja* (62b) regarding a case of limited water needed to sustain two individuals:

"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 town. Ben Petura expounded it is better that they both drink and die, and one of them not witness the death of his companion. Until Rabbi Akiva came and taught [that]... your life takes precedence over the life of your brother."

While both of these texts discuss the allocation of limited resources, be it life-giving water or finite communal funds to redeem captives, commentators on the Talmud do not

apply the precedent set in *Horayot* to the case of the travelers in *Baba Mezja*. Rabbi Moshe Sokol, the dean of Lander College for Men, explains that the correlation is not drawn because of two key distinctions between these cases. In *Horayot*, a third, unaffected party is responsible for the allocation of scarce resources. In contrast, in *Baba Mezja*, one of the threatened individuals possesses the scarce commodity and bears the responsibility of allocation. In addition, the two cases differ by the very nature of the resource itself. While the water supply mentioned in *Baba Mezja* is divisible, only one life can be saved in *Horayot* [1].

The infinite value of human life is a cardinal principle in Jewish thought. Preservation of life takes precedence over the observance of all *mitzvos*, save the three cardinal sins (Rambam, *Yesodei HaTorah* 5:2). It is prohibited to shorten life by even a single moment, for all of life is precious. Both Ben Petura and Rabbi Akiva held preservation of life to be a central pillar in *halacha*, yet they arrive at contradictory conclusions in regard to these situations. What exactly is at the core of each of their arguments?

Rabbi Naphtali Tzvi Yehuda of Berlin, commonly referred to as the Netziv, explains that Ben Petura and Rabbi Akiva debate whether it is preferable to extend both lives briefly, or to save one life at the expense of the other. According to Ben Petura, regardless of who is in possession of the limited resource, either one of the individuals or a separate third party, the resource should be shared equally. Rabbi Akiva agreed that if a third party held the limited resource, it should be shared. However, if one of the affected individuals was in possession of the necessity, only one should receive it and be saved [2].

Throughout *halachic* literature, Talmudic debates tend to follow the opinions of Rabbi Akiva. Therefore, according to the Netziv's understanding, when there is a divisible resource, it is better allocated to save an individual than divided in attempt to temporarily prolong the lives of all affected. It seems that Rabbi Akiva's view follows common sense, for it is better to save one life than to lose two, while Ben Petura's argument of dividing the scarce commodity among those in need, thus saving none, is flawed and begs another interpretation.

Rabbi Chaim Ozer Grodzinski, a Lithuanian Talmudic scholar of the 19th and 20th centuries, interprets the conflict between Ben Petura and Rabbi Akiva to be related to the relevance of property ownership in life and death situations. He explains that if two individuals shared ownership of the water, Rabbi Akiva would agree with Ben Petura that the water should be divided equally between them. But, if the water were owned by only one person, Ben Petura argues that ownership is irrelevant, and the

resource should be shared. In contrast, Rabbi Akiva holds that ownership is morally pertinent, therefore the owner of the water should save his own life at the expense of his friend's rather than share and cause both lives to be lost. Rabbi Grodzinski concludes that the case in *Baba Mezria* applies only to water owned by a single party. Ben Petura and Rabbi Akiva debate the moral legitimacy of property rights in grave circumstances. While Ben Petura argues that ownership is irrelevant, Rabbi Akiva holds that ownership is morally pertinent [3].

In the medical field, resources are usually owned by a third party, namely the hospital or government. In these situations, according to both Ben Petura and Rabbi Akiva, the doctor is obligated to allocate treatments equally. Yet this apportioning of medical care may result in both patients dying, rather than allowing one to live while the other dies. Still, according to Rabbi Grodzinski's view, all authorities agree that the resources must be split. In contrast, the Netziv's reading of *Baba Mezria* dictates that the law follows the opinion of Rabbi Akiva that only one individual should receive treatment. How is it decided which patient has precedence?

In order to answer this weighty question, three *halachic* principles must be understood. The first is the basic belief that all human beings possess equal rights, regardless of socioeconomic status, religion, race, or social-standing. The second *halachic* imperative is that of extending the sum total of human life, including prolonging an individual's life and maximizing the number of individuals who can be saved. Thirdly, *halacha* tries to avoid drawing conclusions arbitrarily, especially in life-and-death situations [1].

When resources are divisible, all three principles can be upheld by equally sharing the resources among those in need. This is in accordance with Ben Petura's view according to the Netziv's interpretation of the Gemara. It also follows Rabbi Grodzinski's understanding according to both Ben Petura and Rabbi Akiva, that if both individuals share the resource, it is split equally between them.

In a case of indivisible resources, the imperative that all people deserve equal rights is in direct conflict with the attempt to extend the sum total of human life. Since only one individual may receive the resource, all those in need cannot be treated equally unless none receive the therapy. However, this would be antithetical to the imperative to extend the sum total of life. Therefore, to uphold the second imperative, extending the sum total of human life, and to avoid arbitrary decisions, prioritization is necessary.

There are six prioritization principles, many of which are derived from the *Mishna* in *Horayot* cited above, that operate in life-for-life situations. The first is *yichus*, lineage. *Horayot* details a hierarchy in which the priest is at the top of the social scale, and a freed slave is at the bottom. Although the hierarchy seems clear and straight-forward, it

is only implemented if all other qualifications are equal. *Yichus* is taken into consideration only after all other factors are weighed.

The second precedent considered is social need. Although this is not explicitly stated in rabbinic sources, many *halachot* reflect this principle. In a commentary on the *mishna* in *Horayot*, the *Tosefta* explains, "The priest anointed as a chief chaplain of the army takes precedence over the vice high priest." Although the *Tosefta* gives no explanation, Rashi explains in the Talmud Bavli on *Nazir* (37b) that this precedence exists because the chief army chaplain is needed by the community.

The third category of prioritization is the capacity to perform *mitzvot*. This category is not explicitly stated, but can be derived from rabbinic sources. In life-determining circumstances, precedence is given to men over women, as detailed in *Horayot*. Although the *mishna* does not give a reason, Maimonides explains in his commentary on the *mishna*, *ad loc.*, that men are given precedence because they are obligated in all the *mitzvot*, while women are only obligated in some of the commandments.

The fourth classification gives precedence to the learned. The *mishna* in *Horayot* teaches that a *mamzer* who is a sage has priority over a high priest who is an *am ha'aretz*. A *mamzer* is near the bottom of the social scale, and his status at birth forbids him from marrying into the congregation of Israel, except to another *mamzer* or a convert. In contrast, the high priest was one of elite who performed sacred work in the Temple. The precedence given to a learned *mamzer* over an ignorant high priest illustrates the value placed on Torah learning in *halachic* literature. Rabbi Moshe Sokol suggests that the precedence given to a *talmid chacham*, a learned individual, may in fact be a subset to the category of social need [1]. A *talmid chacham* embodies Torah and its wisdom. It is his obligation to teach and offer guidance to the community.

The fifth precedent given is in relation to the degree of those in need. *Horayot* prioritizes saving a female captive over a male because she is more likely to be raped. Yet when there is an equal chance each will be violated, rescuing the man takes precedence because the act is more shameful and will be of greater anguish to him. From this, it can be understood that if victim A is more likely to be harmed than victim B, victim A should be saved. If there is equal likelihood A or B will be violated, other considerations should be taken into account. It is important to note that these cases are not life-and-death but cases of physical and psychological harm.

The sixth precedent, a subjective category, gives priority to closer relationships between the one in need and the rescuer. The rescuer has an obligation to save his relatives prior to saving others. The Talmud in *Baba Mezria* (71a) instructs the hierarchy of giving charity, explaining one should first care for his nation prior to helping other

nations. One's family and community members should receive aid prior to others.

Although these qualifications are clear and authoritative, changes in prioritization slowly developed in *halacha* throughout the centuries. The first shift was away from the principle of a *talmid chacham* above the rest. Rabbi Moshe Isserles (the Rama) includes in the *Shulchan Aruch* (251:9) the Jerusalem Talmud's teaching in *Horayot* (3:4) that clothing for the wife of a *talmid chacham* has precedence over the life of an ignorant individual. The Shach, a 17th century commentator on the *Shulchan Aruch*, reexamined the application of this law in his day. He explains that in his time there is no sage of this caliber, and therefore saving a life takes precedence over providing clothing. The Shach's limitation is a dramatic shift away from the learned having precedence over the ignorant.

Similarly, the hierarchy in *yichus* of a priest's precedence over an Israelite's is discussed by Rabbi Yaakov Emden, an 18th century leading German Talmudist. Over the generations, there has been a decline in the priesthood and Leviteship. Rabbi Emden explains that priests have their status only because of presumption (*chazakah*), and therefore precedence should not be given based on lineage, although he remains "undecided about this matter" [4].

Rabbi Yaakov Emden also alters the category of capacity for *mitzvot*, but rather than limiting its application, as he did for lineage, he expands it. He asserts that a normal male has precedence over a minor, an individual who is deaf, or someone who is classified as a *shoteh* (fool). Unlike the Shach who limited the *talmid chacham*'s application to his era, Rabbi Emden expands it, explaining that a learned person takes precedence over an ignorant individual. He also gives priority to those who possess a longer life expectancy, including the young and healthy over the old and sick. This category also includes the potential for creating future lives and prioritizes the fertile over the sterile.

Both the Shach's shift away from giving precedence to the learned and Rabbi Emden's limitation of application of *yichus* are clear illustrations of *halacha*'s movement towards granting all individuals equal respect. Another such evolution in *halacha*, according to Rabbi Moshe Hershtler, author of *Halach U'Refuah*, is that once a

physician begins to treat a patient, he is obligated to continue this patient's treatment, even if presented with another patient who would have been given priority according to the six qualifications detailed above. He explains that although there is no *halachic* evidence, "reason dictates it" [5].

Rabbi Moshe Feinstein, one of the leading scholars of the 20th century who was renowned for his expertise in *halacha*, agrees with this principle. If patient X is mortally ill and has a short life expectancy and patient Y can be cured entirely, Rabbi Feinstein rules that if patient X comes to the emergency room first, he must be treated before patient Y. He explains that patient X may be distressed if he sees patient Y treated before him, and this distress can cause further deterioration in his health [6]. In a discussion on the precedents detailed in the Talmudic texts, Rabbi Moshe Feinstein rules that one may only implement priority to determine who should receive the limited resources when the two individuals are equal on all other accounts. Rabbi Sokol suggests, "One gets the strong impression that Rabbi Feinstein feels general reluctance to apply the classical prioritization criteria" [1]. This is not inconsistent with the earlier tradition detailed in the *mishna* in *Horayot*. Rather, the original sources do not address these detailed cases of chronological priority.

Throughout history, *halacha* has grappled with the challenge of ethically allocating limited resources while respecting the imperatives of equal rights of individuals, extension of sum total of human life, and the avoidance of arbitrary decision-making. With the advancement of medical technology, life and death weighs heavily in the balance when the demand for a new treatment outweighs supply. The wisdom of the Torah offers guidance in forming moral determinations in these life and death predicaments.

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References

- [1] M. Sokol, "The Allocation of Scarce Medical Resources: A Philosophical Analysis of the Halakhic Sources," *AJS Review* 15, no. 1 (Spring 1990).
- [2] Ha'amek She'ela, She'ilta 147:3.
- [3] Ahi'ezer, in *Yoreh De'ah* 16 (Vilna, 1925), p. 35.
- [4] Migdal Oz, in Perek "Even Bohen," pinah aleph.
- [5] Rabbi M. Hershtler, *Halakha u-Refu'ah*, vol. 4 (Jerusalem, 1985), p. 84.
- [6] Rabbi M. Feinstein, *Igrot Moshe, Hoshen Mishpat*, vol. 3 (New York, 1985), resp. 73, 74, p. 304.