

## CENTER FOR MODERN TORAH LEADERSHIP

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## HALAKHAH AND MORAL INTUITION: A CASE STUDY

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In the midst of an exhortation to provide the newly poor with interest-free loans, Vayikra 25:36 declares

וְחִי אֲחִיר עִמָּךְ

and your brother will live *with* you.

A beraita on Bava Metza 62a cites Rabbi Akiva as making two astonishing interpretational moves with regard to this phrase. First, he contends that it relates to immediate life-and-death situations rather than to loan terms. Second, he contends that it creates a hierarchy rather than an equation: the obligation to save your brother's life applies only if he will live **with you**. You therefore have no obligation to save his life at the expense of yours.

The beraita deliberately presents Rabbi Akiva's position as morally counterintuitive. It begins by presenting the position of Ben Petora as derived from moral reason, whereas Rabbi Akiva responds with an argument from Scripture:

שנים שהיו מהלכין בדרך, וביד אחד מהן קיתון של מים,  
אם שותין שניהם – מתים; ואם שותה אחד מהן – מגיע לישוב.

דרש בן פטורה:

מוטב שישתו שניהם וימותו,

ואל יראה אחד מהם במיתתו של חברו.

עד שבא רבי עקיבא ולימד:

חיך קודמים לחיי חברך.

*Two people traveling on the way**with a canteen of water in the hands of one**If both drink – they die; in one of them drinks – he reaches a settlement.*

Ben Petora taught:

Better that both drink and die,

and let not one of them see the death of his fellow:

Until Rabbi Akiva came and taught:

"and your brother shall live with you"

Your life has priority over that of your fellow.

Why is Rabbi Akiva counterintuitive? Most likely because he directly contradicts what the Talmud understands to be Judaism's most fundamental principle of moral reason (Pesachim 25b, Yoma 82b, Sanhedrin 74a). The principle is formulated as a rhetorical question: "*Mai chazit dedama didakeh sumkin tfei? Dilma dama dechavrekeh sumkin tfei!*" What have you seen (that makes you say) that your blood is redder? Perhaps your fellow's blood is redder!" The halakhic consequence of *mai chazit* is that one cannot kill someone else to save oneself. But the same logic applies to lifesaving.

However, Ben Petora is not the only possible result of applying *mai chazit* to the canteen case. One might instead have the two travelers flip a coin for the water, or forbid both from drinking any water at all.

Nor is it absolutely clear that *mai chazit* forbids all possible cases of killing to save your own life. Tosafot point out that the *mai chazit* question can be asked in reverse: "What evidence suggests that his blood is redder than yours?" Tosafot conclude that *mai chazit* requires one to stay passive when faced with a choice between lives. You can do this even when halakhah constructs passivity as a violation of murder or bloodshedding.

Maybe Tosafot would allow this even when halakhah constructs your activity as merely passive. That way you can reach Rabbi Akiva's result, as drinking the water is only a violation of "Do not stand idly by your peer's blood." Rambam by contrast requires one to actively choose death before violating any prohibition of killing. Rabbi Chaim Soloveitchik argues that because the Talmud presents Rabbi Akiva as counterintuitive, Rambam must be correct, and Tosafot incorrect.

But Rabbi Akiva's position is nonetheless accepted by halakhah. What does that say about halakhah's relationship to its own deepest moral intuition? Plainly that intuition is

overruled by *and your brother will live **with** you*. But to how great an extent?

Let me raise the stakes before answering. Rambam holds that the *mai chazit* principle is not **just** about choosing yourself, but rather **even** about choosing yourself; *kal vachomer* a third party cannot choose between two other lives. This is the meaning of Mishnah Ohalot's declaration that while one can abort a fetus to save its mother, one cannot commit infanticide once the child's head has emerged, because *ein dochin nefesh mipnei nefesh*, "we do not push one human *nefesh* aside for the sake of another."

Rabbi Akiva's overruling might mean only that in the context of lifesaving, one is entitled to prioritize one's own life over another's. But if *mai chazit* is all that forbids third parties from choosing to kill one person to save another (outside the context of *rodef*), perhaps Rabbi Akiva implies more radically that *mai chazit* does not apply to lifesaving. In the context of triage, we therefore can and should develop criteria to decide whose blood is redder.

This opens the door to understanding the last units of Mishnah Tractate Horayot as establishing triage criteria: Kohens precede Levites, men precede women, and so on. For most halakhists, however, and in that category I include myself, Horayot cannot be interpreted in a way that fundamentally denies *mai chazit*. It seemingly follows that Rabbi Akiva intends only to permit choosing one's own life, and has no implications for choices made by third parties.

This understanding of Rabbi Akiva raises its own moral difficulties. If two people are dying of thirst in the desert, and a third party comes along with enough extra water to save one but not both, what should he or she do? The narrow reading of Rabbi Akiva leads to the conclusion that third parties must follow Ben Petora, and split the water between the two: "Let both die, but let neither see the death of his fellow."

Here we reach a crucial realization. The Talmud presents the **reasoning** of *mai chazit* as intuitive, such that Rabbi Akiva requires a Biblical verse to overrule it. But this does not require that all the **practical implications** of *mai chazit* are intuitive. Following an intuitive principle can lead to profoundly counterintuitive results. If one can never choose among lives, one will sometimes be forced to watch both die rather than save one.

Maybe that is the price we have to pay in order to prevent people from choosing to save people **like** themselves over people unlike themselves. However, I think there may be a way for halakhah to thread the needle and avoid Ben Petora's conclusion without opening a Pandora's box.

Why does Ben Petora require the two travelers to split the water? Rabbi Chaim Soloveitchik in his novellae on the Rambam suggests that according to *mai chazit*, neither of them could choose to drink. Really, they should both die with the canteen still full. Even Ben Petora can't abide a result that absurd, so he allows them both to drink half. That way, neither chooses his own life at the **immediate** expense of his fellow's.

Rabbi Akiva's verse comes to teach that halakhah does not want absurd results. **When not choosing yields a morally absurd result**, halakhah allows you to choose your own life over another's.

What should third parties do in similar situations? For example: Unlike canteens of water, ventilators cannot always be split between patients. Failure to choose would mean intubating neither patient, and letting both die.

We might point out again that Ben Petora's ruling is not the only possible outcome of applying *mai chazit* to lifesaving situations. We could treat patients in the order of arrival, and flip a coin if they arrive simultaneously.

I suggest instead the following. In a YU symposium on CRISPR technology, Rabbi J. David Bleich suggests that the Torah needs to grant permission to heal because healing seems to encroach on G-d's domain, "playing G-d." He argues that the Torah's permission to manipulate the human body is therefore confined to actions that can be constructed as "healing."

By the same token, the Torah's permission to heal allows doctors to heal as effectively and efficiently as they can, even when this entails choosing which patients get access to limited resources. But this permission extends only to choices based on purely medical criteria, and only on the axis of healing. There is no basis for applying the non-medical criteria of the Mishnah in Horayot, or for considering a patient's life-expectancy independent of illness or injury. This enables triage to remain within the bounds of *mai chazit*.