

Over the past month, at the initial stimulus of a request for assistance from a representative of Catholicism, I have engaged through teaching and learning with the campaign in Massachusetts to legalize the prescription of lethal drugs to the terminally ill. Last week's dvar Torah addressed some of the issues with developing an approach within the Tradition. This week I'll offer two very different approaches. The first, immediately following this paragraph, is a formal statement in op-ed format, which I think makes the arguments that ought to be most compelling in the American political realm. The second is an attempt to locate this issue within a broader discussion of proper Jewish normative reasoning.

A.

Vote "No" on Ballot Question 2 this election day.

Human beings reasonably and responsibly differ, on the basis of reason, religion, or intuition, as to whether all human life must be preserved by all possible means and lived at any personal cost. Jewish tradition takes a complex and nuanced approach to this question, and I have no interest in imposing its specific outcomes on a secular polity. However, the "Death with Dignity Act" ironically violates fundamental and universal aspects of human dignity. I accordingly urge all Massachusetts citizens to vote "No" on Question 2.

Statements by numerous professional and religious groups have identified major flaws with the details of this proposal, ranging from inadequate psychiatric safeguards to the failure to eliminate financial incentives to compelling statistical evidence of slippery slopes. Many of these are independently sufficient reasons for a "No" vote. However, I wish to explain why I see the proposal as intrinsically and irremediably flawed, in the hope that this issue will not reappear in altered form on subsequent ballots.

Proponents stake their case on the values of autonomy and dignity. It was the writings of Rabbi Joseph B. Soloveitchik of blessed memory that taught me the religious centrality of those values. But I see precisely those values as demanding a "No" vote. Here's why:

Jewish tradition takes as a primary moral premise that the question "what makes your blood redder than his" is unanswerable. The fundamental consequence of this act is not to empower the terminally ill, but rather to persuade them that their lives are less valuable and less worth preserving than those of everyone else. Otherwise, we would treat the terminally ill exactly as we do anyone else who states a desire for death. This proposal seeks to enlist society and the law in support of the proposition that while all human beings are created equal, some become less valuable – their blood becomes "less red" - as their bodies deteriorate. What greater indignity could there be? It is for this reason that Jewish law emphasizes that murdering the imminently dying (*goses*) is no less murder.

A second key premise, drawn from Jewish sources but deeply rooted as well in American moral tradition, is that a decision whether to end or rather continue human life is never morally neutral. Human life is intrinsically valuable, and the default setting must always be to "Choose life!". That default may be legitimately overcome, as for the sake of individual or societal self-defense, or resistance to evil - but the burden of proof rests heavily on those who advocate death, whether their own or that of others. . It rests with added weight on those who seek to choose death actively and by ending a conscious life.

This is not a violation of the value of autonomy, but rather its fulfillment – we value life precisely because it enables choice, and the choice of death is a declaration that potential human choices, and therefore human lives,

are meaningless. It should therefore be a social goal to make that choice harder, to make the costs of that choice as clear and as high as possible.

Question 2 seeks to lower the moral and physical costs of choosing death. It seeks to support and enable suicide by those who would choose death only if it involves no pain, and only if their choice is not morally challenged. It seeks to make the decision between life and death morally neutral, to be decided solely on utilitarian grounds.

As a citizen who happens to be an Orthodox rabbi, I do not wish to give my imprimatur and the sanction of my society to the propositions that the terminally ill are less equal, or that the life or death of any human being is a matter of moral indifference to us. Accordingly, I urge a "No" vote on Question 2.

B.

There are at least five reasons and ways that Halakhah fails to exhaust or encompass the totality of Jewish normative obligations.

1) Potentially infinite volume –

A rulebook sufficient to cover every meaningful choice in life would take more than a lifetime to read, so it is necessary to leave some principle at a level of vagueness short of law.

This is the argument made by Ramban when he creates penumbras around the rule of Shabbat from *shabbaton*, around ethics from *veasita hatov vehayashar*, and around holiness from *kedoshim tihyu*.

It is possible to argue that this is a purely semantic exception to Halakhah. This approach is adopted by R. Aharon Lichtenstein Shlita in his "Is there an Ethic Independent of Halakhah?".

2) Law is by definition an abstraction -

Law is created by writing one principle that covers many circumstances, by eliding the unique features of any particular situation. Inevitably, in some circumstances the unique features affect the "rightness" or "wrongness" of a particular action in a way that the law cannot account for, or at least cannot reasonably be expected to account for in advance.

This may be the basis of Netziv inter alia's concept of *aveirah lishmah*, a sin for the sake of Heaven, which he believes can be justified by a spiritual utilitarian calculus (*mechashev hefseid aveirah k'negged skharah*).

I tend to view *aveirah lishmah* through the lens of civil disobedience, as pointing out a gap between the law as currently interpreted and decided and the law as it ought to be, as it would more perfectly conform to the Will of G-d (*retzon Hashem*).

On that approach, one can also argue that the exception is semantic in the sense that the aspiration of Halakhah is to encompass the totality of Jewish normative obligations, and that the claim that an action is normative is equivalent to saying that a correct interpretation of Halakhah would include it.

3) Depends on the person (saints vs. sages) -

Rambam makes clear that Halakhah is designed to accomplish the greatest good for the majority of people, and I think he also holds that Halakhah therefore adopts and seeks to inculcate the approach of the Golden Mean. However, Rambam also acknowledges in various ways the spiritual burden this places on exceptional individuals, and the spiritual legitimacy of those who

seek at least to overdevelop some aspects of character at the expense of others. He calls these last *chassidim* as opposed to *chakhamim*.

In the fifth chapter of Shemoneh Perakim and elsewhere, Rambam implies that the exceptional may engage in halakhically illegal behavior for their own spiritual needs (for example praying silently even though Halakhah mandates verbalizing). He does not to my knowledge directly address this issue with regard to *chassidim*, but I suggest that he would also recognize that, for example, the *chasid* of generosity can properly violate strictures against distributing more than 20% on one's principal to charity.

I have argued elsewhere that Rambam's sometimes ambivalent accommodation of the *chasid* represents a rejection of Kant's principle of universalizability, namely that no action can be ethical only if one would wish every person to behave the same way in the same situation. Here I want to suggest a reconciliation – perhaps Kantians can and should also acknowledge the possibility that their ethics do not exhaust the totality of human normative obligation, even on interpersonal issues.

This may also be a useful frame for the life of Avraham Avinu, remembering that tradition regards him as a *chasid*.

4) Cannot set precedent (different limit of universalizability) -

Some actions may be proper only if they are explicitly categorized as exceptions to the law rather than as legal. This categorization may be necessary to prevent slippery slopes, or because the same choice made repeatedly will harden individual or social character.

I think this idea is captured in Jewish tradition by the term *hora'at sha'ah*. The classical example is Eliyahu HaNavi bringing an extra-Temple sacrifice at Mount Carmel as part of a public showdown with the priests of Baal. I have argued elsewhere that the cost of that decision was the impossibility of eliminating sacrifices on private altars to G-d (*bamot*) during the First Temple, even under the most righteous and halakhically committed kings.

This exception can also be treated as semantic in the sense that Halakhah codifies the necessity of suspending it in the face of emergency.

5) Can only be ratified post facto (Heisenberg Uncertainty Principle) -

Some actions may be justified only if they result from pure intuition rather than considered analysis, so that even considering the question of whether they are halakhically justifiable may render them halakhically unjustifiable. It may therefore be necessary to avoid teaching the law regarding them.

The generative case for this in the Tradition is "*kannaim pog'in bo*", that zealots may kill people engaged in a particular set of halakhically forbidden actions that are not ordinarily capital. Note that the transgressor is not halakhically liable if he kills the zealot in self-defense, i.e. the zealot is treated as a *rodef* (pursuer with intent to kill) rather than as an office of the court. Many rishonim argue that Moshed refused to tell Pinchas in advance whether he was permitted to kill Zimri, as telling him it was permitted would have made it forbidden.

Rabbi Ariel Burger, Jeff Spitzer, and Rabbi Ysoscher Katz respectively and variously have challenged me often to consider the possible necessity of "aggadic" as opposed to "halakhic" thinking. In the academic world this argument is usually made via the late Robert Cover, and accompanied by a claim that aggadic

thinking should literally be prioritized over halakhic thinking, meaning that we should see narratives as the precursors and sources of law, and law as a translation of the values encoded in narrative.

I often consider in this context the thesis of Rabbi Cooperman of Michlalah that Biblical narratives are intended to show the limits of law, which is why they are full of heroic characters behaving in halakhically unjustifiable ways, for example Yaakov Avinu marrying two sisters.

Now one of the major difficulties facing halakhic analyses of suicide is the sheer number of aggadic narratives that incorporate individual or group suicides as heroic. The motives vary, but they include fear of rape, fear that one will eventually violate a *yehareg v'al ya'avur* offense otherwise, and penitential regret for a past transgression.

My suggestion is that we may wish to view suicide as an example of the last category above, as an action which cannot ever be justified if taken as the result of halakhic analysis.

Perhaps "kannaim pog'in bo" principles require the decision to be made *against* the moral pressure of whatever establishment one recognizes, in others such decisions may be justified only if one is deeply and autonomously certain.

It may also be that such decisions must also be made regardless of consequences – a decision made after reflecting on personal economic impact might be unjustifiable, for instance. It would certainly be unjustified if it was made with a conscious calculation that one would have acted differently if the costs had been higher. For example – if Pinchas had decided to kill Zimri only after considering whether his stock portfolio would decline as the result of his actions, and certainly if he was aware that he would have acted differently had there been a realistic chance it would lead him to bankruptcy, his action would have been simple murder.

Legalizing prescriptive suicide has the effect of enlisting the establishment as moral supporters of the decision for death, and in practice the drugs are intended to lower the costs in pain and risk of suffering in attempting suicide. It therefore may have the ironic impact of making suicide absolutely unjustifiable. It removes the decision from the realm of aggadah.

Shabbat shalom
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