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## SHOULD PSAK BE PASTORIZED?

Part 5 of the Long COVID and Yom Kippur Series

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Earwitnesses report that Rav Chaim Brisker claimed never to have instructed a dangerously ill person to eat only 'shiurim' on Yom Kippur. He also emphasized the importance of this psak to his son and successor R. Moshe Soloveitchik. In PART 4, I used this tradition to illustrate the position that eating on Yom Kippur is "hutrah" rather than "dechuyah" with regard to pikuach nefesh, meaning that so long as a situation is defined as pikuach nefesh, there is no prohibition of eating.

SBM alum Rabbi David Fried challenged my presentation of Rav Chaim: "What I was always taught by my rebbeim is that Rav Chaim distinguished between when there's actually sakanat nefashot right now, and when a person needs to eat to prevent an underlying condition from potentially worsening into a situation of sakanat nefashot, and only in the former would 'shiurim' not apply." Rabbi Fried's version is confirmed by Chiddushei Maran RYZ HaLevi (CMRYZH) to Rambam Shevitut Asor 2:8. (See also the other report of Rav Chaim's position in Hamoadim baHalakhah p.82; I am not fully convinced this distinction was Rav Chaim's.)

CMRYZH explains the position as follows:

If a person is deathly ill, we treat the person and not the disease – anything that improves the patient's health diminishes the risk of death, and eating full shiurim is always better for their overall health than eating 'shiurim'. However, if the person is in danger of becoming deathly ill, then we violate Torah prohibitions only in order to prevent the illness, not to treat the patient's overall condition, and 'shiurim' are preferable.

This sounds like a conceptual distinction, but on careful examination, Rav Chaim's contribution turns out to be purely empirical. R. Chaim held that eating full shiurim rather than 'shiurim' improved outcomes for deathly ill patients, but did not affect whether patients became deathly ill.

"... it emerges that the entire danger is generated solely by prevention of eating, and in such a case, since this danger can also be prevented by 'shiurim', it is forbidden to feed him a full shiur'."

CMRYZ contends that this fits beautifully with Sefer HaChinukh (#313)'s position that one may eat 'shiurim' for a condition that is less than "sakanah gemurah".

"less than (these amounts) – there is no karet prohibition, rather this is like a chatzi shiur. Therefore, someone who is ill, even though not in a complete danger/sakanah g'murah, if he is very weak – it is proper to feed him and give him to drink little by little."

CMRYZ understands this to mean that where there is only the potential of developing a fatal illness, eating "shiurim" is appropriate, unless full shiurim are necessary to prevent the development of a potentially fatal illness; but where potentially fatal illness is already present, one must go straight to full shiurim.

By contrast, we saw in PART 4 that Rav S. D. Botschko understands Sefer HaChinukh to mean that without sakanah gemurah, one may never eat full shiurim. Rav Botschko therefore concludes that the case of ein bo sakanah gemurah must not involve any risk of death at all.

We saw in PARTS 1-2 that ROSH requires neither a choleh nor a doctor to claim risk of death in order for eating to be allowed, only risk of sakanah. So perhaps Sefer HaChinukh means the objective correlate of ROSH; if neither patient nor doctor needs to claim risk of death, it follows that the situation need not actually involve "risk of death" to permit eating. On that basis, we could combine CMRYZ and Rav Botschko's readings of Sefer HaChinukh to produce a third position, namely:

In situations that are defined as sakanah, even if they don't involve actual "risk of death", one should preferably eat "shiurim", but one may eat full shiurim (or violate Shabbat) if necessary.

At first glance, this position seems a plausible match for the consensus halakhah as formulated by the Shulchan Arukh, as against Rav Chaim's position that the strategy of 'shiurim' never applies where there is present danger, and Rav Botschko's suggestion that 'shiurim' can be a psak rather than a strategy.

However, there are at least two compelling arguments against this position reflecting the actual halakhah.

The first is that Talmud Avodah Zarah 28b permits violating deoraita Shabbat prohibitions to treat various eye infections only

because “the eyes connect to the heart”. This implies that even the threat of blindness is not by itself sufficient to permit such violations. If blindness is not sufficient, what conditions short of death could be sufficient? (Rav Botschko might claim that this passage applies only to deoraita violations involving full shiurim, but our position cannot claim this.)

The second is that we have no Biblical source for allowing transgressing for the sake of health beyond life (unless we read vachai bahem itself broadly, as per Rav Aryeh Tzvi Frommer in PART 2).

I therefore suggest that the best way to account for all the evidence is to say that all sakanah in this halakhic context involves danger to life.

However, it's very important to translate ba liydei sakanah as “dangerous” rather than as “potentially fatal”, for the following reason: Pikuach nefesh includes not only risk of short-term death, but also risk of earlier death. This is why poskim ban smoking. The Rabbis held – and I think reasonably so – that a period of extreme weakness or chemical imbalance could lead to constitutional damage that would shorten life expectancy. (This may yield the result that the distinction between danger to life and danger to limb has little or no practical halakhic relevance.)

It's also important to recognize that evidence of sakanah can be obtained in a variety of different ways, and there can be halakhic implications from the way in which we obtain the evidence.

Way #1 = רופא אומר “צריך” – מאכילין אותו ע"פ בקיאים

A medical expert states that eating on Yom Kippur (or violating another Biblical prohibition) is necessary either to diminish a person's risk of dying from a specifically identified illness or injury, or else to prevent a condition from dangerously worsening.

ROSH's position, adopted by Shulchan Arukh, is that doctors tend to distinguish between the proximate cause of illness and the ancillary effects of fasting. Therefore a qualified doctor's statement that fasting could cause the patient's underlying condition to become dangerously worse suffices to establish risk of death, even if the doctor will not say that fasting is itself dangerous.

Way #2 = חולה אומר “צריך אני” – מאכילין אותו ע"פ עצמו

A severely ill person declares that eating is necessary for them.

Rabbeinu Tam sharply noted that patients are not prophets. Nor are they medical experts, and furthermore, they are under enormous stress. All they can report is how they feel. Halakhah presumes that patients who say “I must eat” are reacting to internal symptoms at least equivalent to a doctor's estimation that they are at risk of developing a condition that could shorten their lives. (Note that this mode requires that the patient be diagnosed as severely ill, or else obviously so. Apparently healthy people who

simply claim a need to eat cannot be fed by others; I'm not sure what halakhah would say about such a person feeding themselves.)

עוברת שהריחה – מאכילין אותה עד שתשוב נפשה; וכן כל אדם. וכן מי שאחזו בולמוס – מאכילין אותו עד שיאירו עיניו

A person reacts to food, or presents generally, in a way that makes it clear even to nonexperts that their condition is dangerous.

We saw in PART 4 (based on Ketubot 61a) that the fact of pregnancy is not taken as halakhically significant. While pregnant women may be more likely to experience such craving, healthy men who experience cravings are given the same leeway to eat on Yom Kippur. The rule about the person seized by a bulmus fit reflects the same principle.

This formulation of sakanah runs a serious risk of abuse and error. Rabbeinu Manoach to Shevitut Asor 2:9 writes “It is good to be strict about this because of the tricksters”. Where there was actually no sakanah, prohibitions may be violated accidentally or under duress. But these concerns must be balanced against Rav Chaim Soloveitchik's mantra that “I'm not being lenient about Yom Kippur; I'm being strict about pikuach nefesh”.

The strategy called ‘shiurim’ is one of a group of strategies that the Talmud and subsequent Halakhah refer to under the general rubric “hakal hakal techilah” = the least serious violation should be violated first. These strategies often have two purposes – to minimize the prohibitions violated, and to make people less likely to sacrifice their lives as “pious fools” rather than violate prohibitions. Rav Chaim's wholesale rejection of the ‘shiurim’ strategy could chas veshalom backfire if a patient who would have been willing to eat small amounts now refuses to eat at all. On the other hand, ruling that a patient must try ‘shiurim’ first may entail a risky delay before eating as necessary.

Another halakhic strategy is called lechishah, whispering. This strategy is based on two narratives (Yoma 82b-83a) in which a rabbi whispers to a pregnant woman with cravings that the day is Yom Kippur. Does this strategy work when the cravings are for foods that are permanently nonkosher? Is it relevant in the same way to people who deliberately violate Shabbat? (Note that some commentators think that we are whispering to the fetus, and others that we whisper the same things to men with cravings.)

Psak should perhaps be personalized, based on which error the specific asker is more likely to commit; on the other hand, general policies play a vital role in creating the background against which people ask questions.

Stay tuned for LONG COVID AND YOM KIPPUR: THE TESHUVAH, coming your way during the Aseret Y'mei Teshuvah!

Shabbat Shalom!

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