

<https://www.britannica.com/topic/categorical-imperative>

**Categorical imperative**, in the ethics of the 18<sup>th</sup> century German philosopher Immanuel Kant, founder of critical philosophy = a rule of conduct that is unconditional or absolute for all agents, the validity or claim of which does not depend on any desire or end. “Thou shalt not steal,” for example, is categorical, as distinct from the hypothetical imperatives associated with desire, such as “Do not steal if you want to be popular.” For Kant there was only one categorical imperative in the moral realm, which he formulated in two ways:

**“Act only according to that maxim by which you can at the same time will that it should become a universal law”**

is a purely formal or logical statement and expresses the condition of the rationality of conduct rather than that of its morality, which is expressed in another Kantian formula:

**“So act as to treat humanity, whether in your own person or in another, always as an end and never as only a means.”**

בראשית פרק א פסוק כז

ויברא אל-הים את-האדם בצלמו  
בצלם א-להים ברא אתו  
זכר ונקבה ברא אתם:

בראשית פרק ה פסוק א

זה ספר תולדות אדם  
ביום ברא אלהים אדם  
בדמות א-להים עשה אתו:  
זכר ונקבה בראם  
ויברד אתם  
ויקרא את-שם אדם  
ביום הבראם:

בראשית פרק ב פסוק יח-כד

ויאמר יקנוק אל-הים  
לא-טוב  
היות האדם לבדו  
אעשה-לו עזר כנגדו:  
...  
ויאמר האדם  
זאת הפעם  
עצם מעצמי ובשר מבשרי  
לזאת יקרא אשה  
כי מאיש לקחה-זאת:  
על-כן יעזב-איש את-אביו ואת-אמו ודבק באשתו והיו לבשר אחד:

### סנהדרין עד.

אמר רבי יוחנן משום רבי שמעון בן יהוודק:

נימנו וגמרו בעלית בית נתזה בלוד:

כל עבירות שבתורה, אם אומרין לאדם עבור ואל תהרג - יעבור ואל יהרג,

חוץ מעבודה זרה וגילוי עריות ושפיכות דמים.

ועבודה זרה לא?! והא תניא:

אמר רבי ישמעאל:

מנין שאם אמרו לו לאדם עבוד עבודה זרה ואל תהרג, מנין שיעבוד ואל יהרג?

תלמוד לומר: וחי בהם - ולא שימות בהם.

יכול אפילו בפרהסיא?

תלמוד לומר: ולא תחללו את שם קדשי ונקדשתי.

?!?

אינהו דאמור כרבי אליעזר,

דתניא:

רבי אליעזר אומר:

ואהבת את ה' א-להיך בכל לבבך ובכל נפשך ובכל מאדך -

אם נאמר בכל נפשך, למה נאמר בכל מאדך?

ואם נאמר בכל מאדך, למה נאמר בכל נפשך?

אם יש לך אדם שגופו חביב עליו מממונו - לכך נאמר בכל נפשך;

ואם יש לך אדם שממונו חביב עליו מגופו - לכך נאמר בכל מאדך.

[ע"פ מאירי - רבי עקיבא אומר: בכל נפשך - אפילו נוטל את נפשך.]

גילוי עריות ושפיכות דמים - כדרבי, דתניא:

רבי אומר:

כי כאשר יקום איש על רעהו ורצחו נפש - כן הדבר הוה, וכי מה למדנו מרוצח?!

מעתה, הרי זה בא ללמד ונמצא למד:

מקיש רוצח לנערה המאורסה: מה נערה המאורסה - ניתן להצילו בנפשו;

ומקיש נערה המאורסה לרוצח: מה רוצח - יהרג ואל יעבור, אף נערה המאורסה - תהרג ואל תעבור.

רוצח גופיה - מנא לן? סברא הוא.

דההוא דאתא לקמיה דרבה, ואמר ליה:

אמר לי מרי דוראי: 'זיל קטליה לפלניא, ואי לא - קטלינא לך.'

אמר ליה: 'לקטלון ולא תיקטול. מי יימר דדמא דידך סומק טפי?! דילמא דמא דהוא גברא סומק טפי.

### יומא פב.

תנו רבנן:

עוברת שהריחה בשר קודש או בשר חזיר - תוחבין לה כוש ברוטב, ומניחין לה על פיה,

אם נתיישרה דעתה - מוטב; ואם לאו - מאכילין אותה רוטב עצמה,

ואם נתיישרה דעתה - מוטב; ואם לאו - מאכילין אותה שומן עצמו,

שאין לך דבר שעומד בפני פקוח נפש

חוץ מעבודה זרה וגילוי עריות ושפיכות דמים.

...

מאי חזית דדמא דידך סומק טפי?! דילמא דמא דההוא גברא סומק טפי!?"

### פסחים כה.

כי אתא רבין אמר רבי יוחנן: בכל מתרפאין, חוץ מעבודה זרה וגילוי עריות ושפיכות דמים

לכדתניא:

שנים שהיו מהלכין בדרך, וביד אחד מהן קיתון של מים,  
אם שותין שניהם – מתים;  
ואם שותה אחד מהן - מגיע לשוב -  
דרש בן פטורא:  
מוטב שישתו שניהם וימותו,  
ואל יראה אחד מהם במיתתו של חברו.  
עד שבא רבי עקיבא ולימד:  
וּחִי אַחִיךָ עִמָּךְ -  
חייך קודמים לחיי חבריך.

הוריות יג.

\מתני\

האיש קודם לאשה – להחיות, ולהשב אבדה;  
והאשה קודמת לאיש – לכסות, ולהוציא מבית השבי.  
בזמן ששניהם עומדים בקלקלה - האיש קודם לאשה.

\גמ\

ת"ר:

היה הוא ואביו ורבו בשבי - הוא קודם לרבו, ורבו קודם לאביו, אמו קודמת לכולם.  
חכם קודם למלך ישראל: חכם שמת - אין לנו כיוצא בו; מלך ישראל שמת - כל ישראל ראויים למלכות.  
מלך קודם לכהן גדול, שנאמר: ויאמר המלך (אליהם) [להם] קחו עמכם (או מעבדי) [את עבדי] אדוניכם וגו'.

כהן גדול קודם לנביא, שנאמר: ומשח אותו שם צדוק הכהן ונתן הנביא - הקדים צדוק לנתן;  
ואומר: שמע נא יהושע הכהן הגדול אתה ורעיך וגו'.  
יכול הדיוטות היו?

ת"ל: כי אנשי מופת המה, ואין מופת אלא נביא, שנאמר: ונתן אליך אות או מופת.

משוח בשמן המשחה קודם למרובה בגדים; מרובה בגדים קודם למשיח שעבר מחמת קריו;  
משיח שעבר מחמת קריו קודם לעבר מחמת מומו; עבר מחמת מומו קודם למשוח מלחמה;  
משוח מלחמה קודם לסגן; סגן קודם לאמרכל.

מאי "אמרכל"?

אמר רב חסדא:

אמר כולא.

אמרכל קודם לגזבר; גזבר קודם לראש משמר; ראש משמר קודם לראש בית אב; ראש בית אב קודם לכהן הדיוט.

איבעיא להו: לענין טומאה, סגן ומשוח מלחמה - איזה מהם קודם?

אמר מר זוטרא בריה דרב נחמן:

ת"ש, דתניא:

סגן ומשוח מלחמה שהיו מהלכים בדרך, ופגע בהם מת מצוה - מוטב שיטמא משוח מלחמה ואל יטמא סגן, שאם יארע בו פסול בכהן גדול - נכנס הסגן ומשמש תחתיו.

והתניא:

משוח מלחמה קודם לסגן!?

אמר רבינא:

כי תניא היא - להחיותו.

\מתני\

כהן קודם ללוי, לוי לישראל, ישראל לממזר, וממזר לנתין, ונתין לגר, וגר לעבד משוחרר.  
אימתי? בזמן שכולם שוים,  
אבל אם היה ממזר תלמיד חכם וכהן גדול עם הארץ - ממזר תלמיד חכם קודם לכהן גדול עם הארץ.

סנהדרין עג.

\משנה\

ואלו הן שמצילין אותן בנפשן: הרודף אחר חבירו להרגו, ואחר הזכר, ואחר הנערה המאורסה;  
אבל הרודף אחר בהמה, והמחלל את השבת, ועובד עבודה זרה – אין מצילין אותן בנפשן.

\גמרא\

תנו רבנן:

מניין לרודף אחר חבירו להרגו שניתן להצילו בנפשו?  
תלמוד לומר לא תעמד על דם רעך.

...  
אלא, "ניתן להצילו בנפשו" - מנלן?

אתיא בקל וחומר מנערה המאורסה:

מה נערה המאורסה, שלא בא אלא לפוגמה - אמרה תורה ניתן להצילה בנפשו,

רודף אחר חבירו להרגו - על אחת כמה וכמה!

וכי עונשין מן הדין?!

דבי רבי תנא:

הקישא הוא: כי כאשר יקום איש על רעהו ורצחו נפש. וכי מה למדנו מרוצח?

מעתה, הרי זה בא ללמד ונמצא למד, מקיש רוצח לנערה המאורסה:

מה נערה המאורסה ניתן להצילה בנפשו - אף רוצח ניתן להצילו בנפשו.

ונערה מאורסה גופה – מנלן?

כדתנא דבי רבי ישמעאל, דתנא דבי רבי ישמעאל:

ואין מושיע לה - הא יש מושיע לה - בכל דבר שיכול להושיע.

גופא:

מנין לרואה את חברו שהוא טובע בנהר או חיה גוררתו או לסטין באין עליו, שהוא חייב להצילו?

תלמוד לומר לא תעמד על דם רעך.

והא מהכא נפקא?! מהתם נפקא:

אבדת גופו מניין? תלמוד לומר והשבתו לו

?!  
?

אי מהתם הוה אמינא: הני מילי - בנפשיה, אבל מיטרח ומיגר אגורי - אימא לא? קא משמע לן.

*Halakhah's deepest moral intuition is that one cannot choose among human lives. Does this forbid any form of triage?*

### Halakhah and Moral Intuition: A Case Study

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

וְחִי אַחִיךָ 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 . . .

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 didakh sumkin tfei? Dilma dama dechavrekh 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*.

<https://kavvanah.blog/2023/02/08/aryeh-klapper-divine-will-and-human-experience/>

11) With regard to equality: The Talmud (Pesachim 25b and parallels) teaches that commitment to the ontological equality of all human lives must precede Torah interpretation. It derives the Jewish obligation to die rather than commit roughly adultery or incest (*gilui arayot*)

from a verse that compares adulterous rape to murder – "*because like a man rising against his fellow and murdering his life-spirit – so too this*". But what is the source for the obligation to die rather than commit murder? The Talmud answers that this is derived from reason: "What have you seen that makes your blood redder than his?!" The halakhic implications of the analogy in the verse are accessible only to interpreters who already acknowledge that principle.

Ontological equality is a fundamental principle with many halakhic ramifications. Chapter 6-8 discuss political equality; chapter 9 discusses economic equality; and chapters 8 and 26 address the explicit Biblical obligation for the law to treat converts and born Jews equally.

#### 16) **Are Jews and non-Jews equal? What of laws that imply inequality?**

An acid test for the role that ethics plays in one's halakhic thought is whether one applies the rhetorical question "what have you seen that makes your blood redder than his" to situations where only one party is Jewish. I apply it to such situations. I assume ontological equality.

I do not think one can give a general answer to "laws that imply inequality". There are ethical grounds for distinguishing between citizens and non-citizens in some legal areas without contradicting ontological equality. I hope that some psakim currently accepted within halakhah will eventually be considered beyond the pale.

There is no obligation to believe that the halakhah as currently decided is perfect, only that it is binding. The Torah describes the sacrifice brought when the Sanhedrin errs, and no one has ever claimed that this sacrifice "never was and never will be".

Legal rulings that discriminate against Gentiles in the civil sphere should be subject to strict legal scrutiny, especially in societies where Gentiles do not similarly discriminate against Jews. Everyone who lives by halakhah has the obligation to point out unjustifiably discriminatory psakim and seek to correct them.

I generally don't see an ethical issue in laws that restrict Jewish rituals to Jews.

## Feminism and Universalism

## Triage – COVID and age

### **A Brief, Tentative, and Partial Halakhic Statement on Ventilators and Triage**

The fundamental ethical principle of Judaism – one that is Torah-assumed rather than Torah-derived – is that all human lives must be treated as ontologically equal. No person may ever act on the basis of judging one person's blood to be "redder" than another's.

The fundamental principle is in tension with the last Mishnah in Tractate Horayot, which seems to establish a hierarchy of lifesaving. This tension has been resolved within the halakhic tradition either by interpreting the Mishnah as referring to cases that are not actually life-and-death, or else by declaring it unintelligible and therefore irrelevant in practice.

The fundamental principle is modified by the right to preserve my own life before attending to anyone else's life. However, I may not preserve my life by causing someone else's death, nor may I choose to save one person over another because I value the first more.

The default setting for triage therefore is taking patients in the order they arrive.

However, several considerations may in practice override this default.

The first is that doctors, and society at large, have the right to use their resources efficiently for the purpose of healing. If two patients arrive, and only one can be treated, doctors may treat the one they are more likely to restore to health. They are not declaring that person more valuable, only that their resources are more valuable when used on that person. Similarly, they may choose to treat two patients rather than one, even if that will give each of the two a lower chance of surviving than either one alone.

However, if two patients of different ages can each be restored to health, even if one is aged and the other young, they may not privilege the young over the old, or vice versa. This is true for any other characteristic, including age, sex, sexual orientation, beauty, talent, skill, knowledge, religion, or virtue.

The second is that people, individually and collectively, can declare their willingness to have other lives preferred to theirs. For example, American society tends to believe that legal minors should be privileged in such situations. Because minors cannot vote and therefore would play no role in privileging themselves, a democratically approved decision to privilege minors would be morally acceptable.

However, individual doctors or hospitals may not institute any such protocols on their own.

The third is that while the moral calculus of individuals must relate only to already living individuals on whose cases they have direct impact, society is entitled to consider statistical impacts and the welfare of people who will join the society in the future. For example: An individual may not decide to withhold treatment from a patient with a poor prognosis in order to conserve resources for *likely* but not yet ailing future patients. All the more so an individual may not conserve neonate resources for likely imminent but as yet unborn children. However, a society may choose to make such decisions, and an individual may implement such decisions once the society has made them. Again, a society may do so only for the exclusive purpose of maximizing the efficient use of its medical resources to heal.

The above considerations are relevant only with regard to access to treatment. Killing is a deontological wrong and cannot be justified by any efficiency considerations.

Applying these rules can of be challenging in practice, and no set of abstract principles can yield unambiguous outcomes in every case. However, they must provide clear guidance in many cases in order to be useful. Here therefore are model outcomes in four frequently raised "hard cases".

Q. Can doctors use an experimental method of hooking multiple patients up to a single respirator when there are not sufficient respirators for all?

A. Doctors and hospitals are entitled to rely on their informed judgment. The standard of informed judgment is generally that of professional ethics. If in their informed judgment, this treatment offers a greater chance of utilizing medical resources efficiently to heal, they may do so.

Q. May doctors remove one patient from a ventilator in order to use it for another patient who is more likely to be healed?

A. The question depends on whether removing a ventilator constitutes killing or rather denying access to treatment. This is NOT a distinction between passive and active – denial of treatment can be active, and killing can be passive. Rather, it depends on whether the patient removed from the ventilator will immediately be considered a dying person, or rather a patient. If the former, they may not be removed. If the latter, the fact that they are already receiving treatment does not prevent doctors from choosing to allocate their resources more efficiently.

Q. May society choose to give medical personnel priority access to ventilators?

A. If a society believes that ventilating medical personnel will prevent an otherwise likely shortage of adequately trained professionals, and therefore will overall be a more efficient use of medical resources to heal, it may do so. This decision must be made societally rather than by individual hospitals, and medical personnel who might be privileged by the policy must have purely advisory roles in the decision process. Because the risk of corruption or the appearance of corruption is so high, such a policy should be implemented only in extreme emergencies, on the basis of incontrovertible evidence, and for the shortest period possible.

Q. If a patient expresses willingness to be removed from ventilation so that another patient can be treated, may doctors accede to their wishes?

A. Obtaining valid informed consent under such circumstances is extremely difficult. However, if that hurdle could be overcome in good faith, doctors may choose to accede to their wishes, provided that the patient removed from the respirator would not immediately be classified as dying.

May we be blessed to see all these questions become purely theoretical as rapidly as possible.

Respectfully submitted,

Aryeh Klapper

It is a great honor to receive this question from you. In addition to your own remarkable experience and success in the field of halakhic medical ethics, you've received letters of guidance from gedolei hora'ah on this issue, which I perused thirstily when you were gracious enough to share them. My hope is only to contribute to the discussion.

Rav Rimon shlita in his letter to you raises two possible prioritization criteria – personal vulnerability (so prioritize the elderly and other high-risk categories), and communal vulnerability (so prioritize schoolchildren). He suggests a halakhic basis for preferring the first. Noda b'Yehuda 2YD210 rules that autopsies for the sake of improving medical knowledge are permitted on the ground of *pikuach nefesh* only when there is a "*choleh lefaneinu*", an already ill or injured patient who may directly benefit from the knowledge to be gained. Rav Rimon cites Chazon Ish as extending this category to "*reiuta lefaneinu*", a patient who is already susceptible to a fatal condition despite not being ill. Those in high-risk categories can be considered *reiuta lefaneinu*, and therefore should have priority over others. Rav Rimon acknowledges that the analogy is imperfect. On a technical level

- a. no one involved is yet ill
- b. even the people at high risk generally are not more susceptible to becoming infected
- c. everyone involved is either *lefaneinu* or not, in the same way.

In essence Rav Rimon teaches us that the Chazon Ish did not only transform the definition of *choleh*, he also transformed the definition of *lefaneinu*.

Certainly the Noda b'Yehuda

I wonder whether this is the best paradigm, for several reasons, some of which Rav Rimon himself notes.

Let's begin with the second question, about "vaccination triage".

The core principle of Jewish medical ethics is that all human lives have equal worth, regardless of race, sex, religion, education, intelligence, age, disability, virtue, sanity and so forth<sup>1</sup>. The Talmudic phrases which embody this principle are "Who says your blood is redder than his?", which bans murder even at the cost of being murdered, and "We do not push one *nefesh* aside for the sake of another", which prevents saving an adult by killing a newborn.

So we can begin by ruling out any sort of prioritization that rests on evaluating the worth of someone's like. Imprisoned criminals have the same status as police officers; paraplegics have the same status as LeBron James; janitors have the same status as academics; the elderly have the same status as children; and of course, the rich have the same status as the poor.

One important *nafka minah* is the question of whether first responders should get automatic priority. I think that may depend very much on the basis for preferring them. If the argument is that they are more likely to become ill, and to infect others, I have no moral objection. If the argument is that they **deserve** to get it first as a reward for their heroism fighting the disease, I have grave moral objections. If the argument is that such a reward will incentivize future heroism, I am deeply ambivalent.

## Brain death and organ donation

### ***Whose Blood is Redder?***

Any discussion of the relationship between halakhah and ethics must begin with the Talmudic principle<sup>5</sup> “טפי סומק דידך דדמא חזית מאי”, or alternatively “טפי סומק דידך דדמא יימר מי”, “what have you seen that says your blood is redder than his?”. This line is the Talmud’s answer to the question of how one knows that one may not kill one person to save another. The Talmud sees this as so evident that the Torah does not need to say it explicitly, but rather assumes it, and that other verses that must be interpreted in light of it. I suggest that the underlying point is that anyone who does not understand this on their own cannot possibly interpret the will of G-d correctly, no matter how many details he or she is given in advance.

But what is the precise content of the assumption? The Talmud cites it as part of a narrative – it is Rava’s response to the concrete question “My lord says that he will kill me if I don’t kill Y – May I kill Y?” Rava does not ask for details about Y before responding, or qualify his response in any way. His response is a *rhetorical* question – he is not granting a license to choose one life over another whenever one can answer the question “what have you seen” reasonably, but rather stating that the question can never be legitimately answered. Thus the standard halakhah is that one cannot kill one person to save many others, and even that one may not kill a person alone to avoid having him or her killed together with many others. This applies even if the person you are killing is arguable not as “redblooded”.

How can we translate this halakhic conversation into a statement of ethical principle? I suggest that the Talmud maintains that the core of Jewish ethics, the essential moral *sevara*<sup>6</sup>, is that we do not use one life as a means for saving another. From this perspective, I contend, it is the anti-braindeath position that is based on ethics, and the burden of ethical proof is shifted. The pro-braindeath argument is based, explicitly or implicitly, on the claim that the lives of the donors should be sacrificed so as to prolong the lives of the recipients, and this is deeply troubling from a Jewish perspective.

I want to be clear, however, that *mai chazit* is not an argument against the recognition of brain death per se - *mai chazit* says nothing whatever about the definitions of life and death. Rather, it militates against the introduction of any *pragmatic* claim in favor of recognizing brain death. It invalidates any attempt to use one life to save another, which should predispose us to suspicion toward any argument that it is important to call some people dead so that we can save others.

I want to cautiously suggest further that *mai chazit* is not a declaration that all human life must be preserved at any cost, or even that I may never privilege my life over another. Rather, it should be understood<sup>7</sup> as a declaration that each life is its own telos, and that it is accordingly prohibited to use one life as a means of preserving another.

This formulation emerges from the famous Talmudic passage<sup>8</sup> in which “Two people are wandering in the desert, and one of them possesses<sup>9</sup> a canteen of water (which is sufficient for one to survive, but not both)”. Rabbi Akiva teaches that the Torah permits the one who holds the water to drink it, even if this means that the companion will die of thirst. How can this be squared with *mai chazit*?

I suggest that the key difference<sup>10</sup> is that in Rava’s case the death of Y is the *cause* of X’s survival, whereas in Rabbi Akiva’s case the death of Y is a *consequence* of X’s survival. But this is a radical formulation – it is sufficient for our discussion here to say that *mai chazit* is only

relevant where we see the issue as whether to kill X in order to save Y, and that in Rava's case no killing is involved.

It follows that *mai chazit* is not a factor in cases where only one life is concerned, and where the issue in question is the absolute issue of whether that life should be extended, and not whether ending that life is necessary to accomplish other ends. However, *mai chazit* does very directly bar killing one person by removing their vital organs even, in a sense especially, when the purpose of removing those organs is to save another life. *Mai chazit* therefore sees the purported ethical argument in favor of recognizing braindeath, that otherwise many much healthier people will die, as fundamentally contradictory to the core of Jewish ethics.

...

I do not wish to discuss here<sup>14</sup> whether this “hedging of bets” is a natural consequence of how one handles the uncertainties (ספקות) arising out of these kinds of disputes, or rather an equally clear violation of “risk of bloodshedding” (ספק שפיכות דמים) or “penumbra of murder” דרציחה אביזרייהו. Either way, it seems clear to me that this solution is both morally and practically untenable as a matter of communal policy.<sup>15</sup>

It is untenable practically, as it means that in communities composed largely of Orthodox Jews, there will be no organs to receive. It is untenable morally and practically because whatever rationale is offered, it will create the public impression that Orthodox Jews are willing to acquiesce in the caused-deaths of non-Jews but not of Jews so as to save their own lives. Desecration of G-d's Name is a moral problem in its own right, and in this case, what's worse is that the impression will be generally correct. This is a complete violation of the principle of “no one's blood is redder”.

...

### ***Problematizing the Principle of “No Redder Blood”***

Let us begin the search by noting that there are incontrovertible exceptions to the rule created by the principle of “no redder blood”.

- Rabbi Akiva's principle cited above that a person's life takes precedence over someone else's,<sup>18</sup> which he learns from the verse “and your brother shall live with you” (Lev 25:36).<sup>19</sup>
- Additionally, the halakhic category of pursuer (רודף) establishes a right of self-defense that includes the right and even the obligation to use deadly force against an aggressor.<sup>20</sup>

These exceptions demonstrate that there are countervailing ethical tendencies on this issue within the tradition, as well as a variety of conflicting halakhic forces.

...

### ***The Problem with the Braindeath Definition***

To me it seems clear that the primary motive<sup>23</sup> for adopting the braindeath standard as the halakhic definition of death is the desire for organ transplantation, and that calling it death is a way of formally avoiding the “redder blood” issue<sup>24</sup>. This does not make the definition dishonest – death is a social, cultural, and legal construct, not an objective phenomenon, as we

will note forcefully below – but we should, at least at this stage, acknowledge the choice we are making. The question is whether that choice is wise or necessary.

In her book *Twice Dead*, Margaret Lock offers an anthropological study of brain death.<sup>25</sup> Lock writes that ICU nurses often refer to brain dead patients as alive, and to removing them from ventilators as ending their lives.<sup>26</sup> What is true of ICU nurses, and for that matter of transplant surgeons who do not rigorously police their language, is all the more so true of most laypeople whose only contact with the phenomenon is the sight of a body that seems indistinguishable from the nonbraindead intubated patient in the next bed – same rising and falling chest, same pulse, same skin color. It seems to me, therefore, that categorizing this condition as death runs a real risk of generating a felt lack of integrity. In Lincoln’s famous epigram, “calling a tail a leg doesn’t make it one”, and calling a person dead does not mean that one genuinely believes that the person is no longer alive. Furthermore, because the definition is not internalized, people will still feel deeply conflicted and queasy about it, and the cognitive dissonance involved will prevent them from donating their own organs or even approving their family members’ donations.

...

#### My Proposal

Considering the above, I suggest an alternative model. Brain death is not death, possibly not death, should not be death, or is not yet death. It may be preferable to follow this position consistently, and advocate the banning of both the donation and receipt of organs. We should certainly encourage the development of alternate technologies.<sup>36</sup>

However, if one knows that one will receive organs, and will advise others to receive organs, and feels that by doing so one is not endorsing or facilitating an act of murder – one should adopt the position that one is permitted to end the lives of braindead patients actively<sup>37</sup>, and therefore feel obligated to sign a donor card and encourage others to commit to donating in case of braindeath as well.

#### A Possible Objection

Several respondents to earlier versions of this paper argued that the “no redder blood” principle should create an absolute bias not only against choosing among lives, but even against treating different lives differently. On that reasoning, my suggestion is no better than declaring A dead so that I can take his organs and save B’s life – either way, I am treating life as a less-than-absolute value.

I argued above, however, that the “no redder blood” principle is specifically about evaluating lives against other lives, and does not say anything about end-of-life care judged exclusively by the interests of the particular patient. If the determination to end the donor’s life is made without regard to the possibility of transplant, then the question of whether to remove the organs addresses the mode rather than the fact of death. Accordingly, if one can with integrity claim that ending this patient’s life is in the patient’s best interest- in halakhic terms, if one can pasken that the soul of the patient is imprisoned in the body rather than inhabiting it - there is no halakhic or ethical bar to ending it in the manner that enables someone else to survive.

#### ***A Third Solution***

I note that there is one other mode of approach,<sup>38</sup> which is to suggest that a person is permitted to sacrifice his or her life for another, or multiple others, and that it is permitted to accept such a sacrifice from someone else.<sup>39</sup>

It may even be possible, perhaps advisable, to try to combine this approach with my previous suggestion so that informed consent to donation becomes a halakhic as well as secular legal requirement, although the technical means by which that should be accomplished are unclear.

#### Conclusion

Bottom line: The halakhic issue of braindeath has been misrepresented as a conflict between halakhic formalism and ethics, or as a debate about the extent to which halakhah should incorporate the factual conclusion of contemporary science. It is better understood as a conflict between abstract ethical principle and lived ethical intuition. I have suggested here a way of reconciling the two, and in particular a way of doing so that allows or mandates both the donation and reception of organs from braindead patients. May Hashem grant that I have not erred, and that the result of this article will be an increase in the Sanctification of His Name and greater appreciation of the human image of G-d.

## Embryonic Choice and Gene Editing

### ARYEH KLAPPER – The Kantian Moral Principle underlying Halakhah

The first question we face is whether, granted that you'll be conceiving via IVF, you can ask the clinic to do its best to ensure that your child is male.

Obviously this choice, if universally available, could theoretically yield the very unfortunate result of a world with many more men than women, or vice versa. But this seems to me weak grounds for an ethical critique in any single case, unless that case is located in a culture where that issue is present. I doubt this is true in your case, for four reasons:

- 1) the number of parents who use IVF is still pretty small ([2% according to https://www.pennmedicine.org/updates/blogs/fertility-blog/2018/march/ivf-by-the-numbersdocument?](https://www.pennmedicine.org/updates/blogs/fertility-blog/2018/march/ivf-by-the-numbersdocument?)), and not growing precipitously even though gene-screening is easily available
- 2) Studies in the US indicate that sex selection ends up with a fairly even split ([https://en.wikipedia.org/wiki/Sex\\_selection#cite\\_note-:22-48document?](https://en.wikipedia.org/wiki/Sex_selection#cite_note-:22-48document?))
- 3) market forces will raise the value and therefore desirability of a sexual minority to restore equilibrium if it is lost, and
- 4) evidence of a sustained asymmetry would be met by ad hoc regulation.

For all these reasons I see no direct consequentialist ground for opposing sex-selection.

However, I think a different argument has much more power. Whenever we choose to bring a person with characteristic X into being, rather than a person with characteristic Y, we are inherently **valuing** people with characteristic X over people with characteristic Y. The Talmud accepts as an a priori moral principle that a human being cannot act as if one person is more valuable than another. The original context from which this principle emerges is a prohibition against one person killing another to avoid being killed him/herself = "what can say that your blood is redder than your fellow's!". However, halakhists universally extend it to cases where neither involved life is your own = "what can say that A's blood is redder than B's?". It seems to me a reasonable extension to say that just as one cannot choose to remove A from the world rather than B, one also may not choose to **bring** A into the world rather than B.

There is however a clear reason to oppose this extension. It seems to ban any PIGD, including for genetic diseases such as Tay-Sachs, and the given of your question is that this is permissible, and this seems to be the overwhelming current consensus of the halakhic community.

A second reason to oppose the extension is that the cases are not quite comparable. In the Talmud's case, you would be killing A **for the sake of** saving B. In our case, you are choosing A over B, but you are not not-choosing B for the sake of bringing A into the world; it's just that you can't have both.

I suggest that these two distinctions cancel each other out, so that the extension remains valid, as follows.

The Talmud's statement can be translated ethically as a belief that every person must value every other human life equally. However, this does not mean that every person must value his or her own life equally. We can recognize that for some people, life is a burden rather than a boon. In the overwhelming majority of such cases, it is still not permitted to kill those people, probably because murder is a deontological evil (although one can also justify this position on virtue or consequentialist/slippery slope grounds).

Not-bringing a person into life is not a deontological evil, and probably not an evil of any kind. Therefore, if one reasonably believes that life would be a burden to the person, one may ethically choose not to bring them into life. In other words, one is not choosing the non-T-S embryo over the T-S embryo; one is simply not-choosing the T-S embryo, and choosing the non-T-S embryo. The two acts are not causally connected, because if all the embryos were T-S, you would choose not to bring any of them into the world.

So much for Tay-Sachs – what about for lesser conditions, about which one cannot reasonably believe that life would be a burden? For example – could one do PGID to select against a gene that has a small chance of causing excruciating pain throughout life? A gene that has a large chance of causing significant pain throughout life? A gene that lowers life expectancy? That causes color-blindness?

Let's go back one step. If not-bringing into life isn't evil, what is ever wrong with PGID?

I suggest that the wrong is not one of action, but rather of implication. By choosing A over B, you are implying that lives such as those of A are more valuable than lives such as those of B.

Perhaps you can prevent the implication by making absolutely clear that your choice is a matter of personal preference or aesthetics rather than of value. The simplest way to make this clear would be to agree, in the manner of Borges' "The Lottery in Babyon", to a small but random possibility that the clinic will, without telling you, not implement your choice. This seems impractical and likely evil, however. But we can say that so long as the selection technique remains less than 100% accurate, and so long as you are committed to carrying the baby to term even if it turns out not to match your preference, that is sufficient.

Now commitment to carrying a baby to term is not a legally enforceable condition, and therefore such a condition is irrelevant to a hospital ethics review board. No one would have any way of knowing whether your stated commitment to doing so was sincere. A review board might choose to allow PGID only for conditions which experience have shown do not usually, or often, lead to abortion when mistakes are discovered; or it might choose to ban PGID for all conditions which ever lead to abortion; or it might choose to permit it for all conditions which ever don't lead to abortion.

But as it happens, the review board is not charged with your issue of sex-selection; its mandate covers only induced mutations. Therefore, the only issue here is halakhic. As a halakhist, I need not know whether such a commitment on your part is sincere – I need only tell you that you must decide on the basis of whether you ~~can~~ could make such a commitment sincerely. I ~~can~~ suggest that a fair test would be whether you were willing to take a *neder* to that effect. (In the cases mentioned in Rabbinic literature where a preference is expressed via prayer or action, there is no hint that abortion would be considered if the preference were not granted.)

This is true on the level of psak, as there is plainly no legislation enacted on this issue in the halakhic world. However, on the level of halakhic morality, you might consider what percentage of couples in your community would sincerely take the same *neder* in the same circumstances; if many or most would not, then you might refrain on the grounds that Chazal would surely have legislated a prohibition had this situation arisen in their day. My own sense is that this is not the case with regard to sex-selection, certainly for first-children, since the mitzvah of procreation requires one to strive to have at least one child of each gender in any case. But perhaps I am wrong.

Now – while I noted that everything above was irrelevant to the review board **in terms of sex selection**, it provides a very useful introduction for discussing the issues related to induced mutations. Let’s start by drawing a contrast.

## Suicide

Klapper, Aryeh. “Should Assisted Suicide Be Legalized? A Jewish Perspective.” *Canopy Forum*, December 12, 2019.  
<https://canopyforum.org/2019/12/12/should-assisted-suicide-be-legalized-a-jewish-perspective-by-aryeh-klapper/>

### Should Assisted Suicide Be Legalized? A Jewish Perspective Aryeh Klapper

Autonomy and dignity are standard grounds for arguments supporting the legalization of assisted suicide. The *prima facie* case is excellent: forbidding suicide limits human autonomy, and compelling people to live against their will diminishes their self-determination and therefore their dignity. Counter-arguments often rest on assertions about the supreme value of life, even when life lacks autonomy or dignity. These assertions appear sectarian and therefore fail to convince when invoked in secular contexts. There is, accordingly, a grave risk that public discourse about assisted suicide will come to mirror that regarding abortion, in which religious belief and modern liberalism are incompatible foes rather than partners.

Jewish tradition provides resources for an alternative discourse that is hospitable to religion but takes place *within* a framework that valorizes autonomy and dignity. Below, I present some of those resources in their own terms while also showing how they can be applied to construct discourse in the secular public space.

## The “Equally Red Blood” Principle

Jewish law sees the text of the Torah and a form of moral reasoning called *sevara* as independently legitimate sources of Divine law. In some cases, the Talmud argues that the *sevara* is so obvious that a Torah verse confirming it would be redundant. Following the rabbinic premise that nothing in Torah is redundant, verses that appear to communicate principles discoverable by *sevara* are reinterpreted to teach something else. This suggests that *sevara* is epistemologically antecedent to Torah, and accordingly meets the standard for nonsectarian ethics: it is universally accessible and universally applicable.

This antecedence is dramatically evident in Talmudic discussions about what actions Judaism requires an adherent to die rather than perform. Jewish law maintains that almost all religious duties and prohibitions may be ignored in cases where observance proves life-threatening. However, there are three offenses—murder, sexual sin, and idolatry—for which adhering to the law takes precedence over saving one’s life. The duty to die rather than commit idolatry is derived from a verse, and the primacy of avoiding incest and adultery is derived from a verse that compares rape to murder. But the duty to be killed rather than murder another is itself derived from *sevara*. In other words, the meaning of the verse comparing

rape to murder can be discovered only after the *sevara* regarding murder is known.

The *sevara* demanding that we choose death over murder is presented in a narrative. An anonymous man tells the sage Rava that his feudal lord has ordered him to kill an innocent third party, and the penalty for disobedience is death. Rava responds: “Be killed, but don’t kill! Who can say that your blood is redder? Perhaps his blood is redder!” Rava’s question is rhetorical; he would not accept any explanation of why one person’s blood is redder. In other words, Rava holds that it is a self-evident truth that all human beings are created ontologically equal, and that they remain so throughout their lives.

## **Life is a Crucial but Not Supreme Value**

The “Equally Red Blood” principle is necessary to ban murder for self-preservation because Jewish tradition otherwise treats lifesaving as an almost supreme value; it allows the violation of all prohibitions except idolatry, adultery and incest, and murder.

That life outweighs almost all prohibitions is seemingly derived from the text of Leviticus 18:5: “These are the commandments that a human being shall perform and live by them”. The Rabbis noted that “live by them” suggests that one need not perform them when that will lead to death; but also that “these” implies a “those”, namely idolatry etc.

The need for a Biblical proof text suggests that the default is that one may never do wrong to avoid dying. However, Jewish tradition concludes that this is only true parochially, for Jews, because they are commanded to sanctify God’s Name even at the cost of their lives. Gentiles are not so commanded. Therefore, the verse would be redundant if it only covered Gentiles, because the default *sevara* is that the preservation of life overrides all prohibitions (except those against taking life).

What is that *sevara*? Before settling on the verse “and live by them”, the Talmud entertains a set of other suggested sources for the rule that lifesaving overrides observance of Shabbat. One of these is a *sevara* – “You (the lifesaver) must desecrate one Shabbat so that he (the person whose life you are saving) may observe many Shabbats”. This derivation is given legal force in the tradition, even though it is not the primary derivation. Its implication is that what makes life so valuable is that life brings with it the capacity to do worthwhile things. This is not the sole ground for valuing life, but it is vital for its place in the Jewish hierarchy of values.

## **Application**

The fact of mortality intrinsically and ineluctably diminishes the dignity of human beings. Human beings can choose when to die, in the sense that they can choose to die sooner; but we cannot choose not to die. However, a reasonable argument can be made that, at least under some circumstances, an autonomously chosen time and mode of death produces less indignity than otherwise. Under such

circumstances, there is significant political support for making it legal to assist people who have chosen such a time and mode in implementing their choice. Nonetheless, the default setting of American society is that suicide is tragic, and the product either of mental illness, unbearable suffering, or moral failure. We generally presume that someone seeking to jump off a bridge should be persuaded not to; someone found with slashed wrists should be hospitalized; and so forth, without extensive prior inquiry into whether choosing death will enhance their dignity. The rising suicide rate is regarded as an “epidemic” and as a healthcare crisis.

The obvious way to square these two attitudes – the default against suicide and the support for assisted suicide – is to say that we evaluate some lives as less worth preserving than others. We see suicide as an unreasonable choice for the young and healthy, with emotionally satisfying relationships, and so forth. But we see suicide as a reasonable choice for, say, the terminally ill, or for those facing dementia or complete paralysis.

## **Put differently: We decide that the blood of some people is less red than that of other people.**

The counterargument from Jewish tradition is not that life is of supreme value, but rather that all lives are of equal value. Supporting some suicides while preventing others violates this principle of ontological equality. Such violations may be intrinsically wrong, on grounds that have universal appeal. Opposing such distinctions may also be good public policy on slippery slope grounds.

Proponents argue that legalizing assisted suicide is proper because it maximizes autonomy and dignity. The counterargument from Jewish tradition is not that life is more valuable than autonomy and dignity, but that life derives its value, or ‘the redness of its blood’, from the capacity to choose, and that we ought not judge some opportunities to choose to be more valuable than others. Choosing death is a claim that all one’s other choices are meaningless, in other words that one’s blood is no longer red at all. Assisting a suicide validates that claim.

## **Caveat and Conclusion**

I have argued that Jewish tradition provides two secularly useful arguments against legalizing assisted suicide. First, Jewish tradition asserts the ontological equality of all human lives, whereas legalizing assisting some but not all suicides requires the claim that some lives are more valuable than others. Second, Jewish tradition argues that life is valuable because it enables autonomous choice, whereas assisted suicide declares future choices to be worthless. I need to make clear that these are arguments against legitimization and legalization, but they do not necessarily imply that suicide is always unjustifiable. In fact, while Jewish legal texts universally deprecate suicide in general, many Jewish narrative texts valorize specific suicides. This gap requires explanation.

My suggestion is that Jewish tradition distinguishes between legal ethics and case ethics. Laws create general policies, and general policies will always yield wrong

outcomes in some outlier cases. More strongly – there is a class of actions that can be ethical only when they are taken in full awareness that they are legally proscribed, and ideally punishable, unless the courts choose to exercise discretion not to prosecute. Jewish markers for that class include principles like “sinning for the sake of Heaven”, which valorizes illegal actions engaged in to successfully achieve a greater good, and “zealots attack him”, which tolerates a kind of vigilante justice in flagrante for some kinds of offenses. I have argued elsewhere that this is the proper category for the case of torture in “ticking bomb” cases.

Assisted suicide, and perhaps suicide more generally, may fall into this category as well. The proper policy is to create an enormously powerful default in favor of the value of life. Legalizing assisted suicide has the effect of enlisting the state as a moral supporter of the decision for death, and of the proposition that the lives of some citizens are less valuable than those of others. It therefore may have the ironic impact of making assisted suicide absolutely unjustifiable morally.

**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.

## Abortion

1. The Mishnah seems to say straightforwardly that a pre-emergence fetus is not the legal equivalent of a human being, and therefore can be aborted if the mother's life is endangered, whereas a postemergence fetus is legally human and thus, there being no issue of blame here, may not be endangered for the sake of the mother (and likely vice versa).

2. Rav Chisda claims that the legal humanity of the post-emergence fetus is an insufficient explanation of the prohibition against therapeutic abortion. He claims that there is a legal issue of blame, if not a moral one, and that the fetus in either case is legally considered a pursuer. Thus the only reason one may not kill the post-emergence fetus is that, in contradiction to R. Huna's dictum, minors may never be killed as pursuers. The Talmud responds by claiming that R. Huna's dictum is irrelevant to the Mishnah, which deals with a case in which "Heaven is pursuing her", i.e. there is no human pursuer.

3. The names are different or reversed, but the structure of the argument is the same as in the Bavli.

The final answer, however, is formally not that there is no pursuer here, but that there is mutual

pursuit. This may amount to the same thing, but it may imply a different vision of pursuit. In the

Bavli there seems to be an objective standard of pursuit, whereas the Yerushalmi may believe that

one merely looks for a basis for choosing the pursued over the pursuer.

In both Bavli and Yerushalmi, however, the conclusion seems to be that pursuit is not legally relevant

to the case of therapeutic abortion. Presumably both would explain the permission in the pre-emergence

case as we did previously, by saying that the pre-emergence fetus is not legally human.

While the

attack on R. Huna in both Talmuds would allow for pursuit to be an (additional) explanation of the preemergence case, defending R. Huna requires declaring it completely irrelevant.

4. Rambam, however, while ruling like R. Huna, cites pursuit as the rationale for the pre-emergence

case. As noted, this is against the straightforward reading of the mishnah. It also contradicts his

own explanation for the prohibition in the post-emergence case, where he explains that pursuit is

irrelevant since "this is the nature of the world". If this is the nature of the world postemergence, it is no less so pre-emergence; and if being the nature of the world makes pursuit

legally irrelevant post-emergence, it should have the same impact pre-emergence. Why does Rambam feel compelled to use pursuit as the explanation of the pre-emergence case when doing so contradicts his Talmudic sources and generates an internal contradiction?

5. Ravin cites R. Yochanan as saying that one may not save life by committing an act that falls into the category of bloodshedding. If Rambam believed that abortion falls into that category, we would understand his rejection of the straightforward reading of the mishnah and introduction of the law of pursuit. If abortion is bloodshedding, one may not abort to save life regardless of the legal status of the fetus.

6. The Talmud says that a prohibition called bloodshedding that applies to Gentiles.

7. Rambam limits the parameter of that prohibition, including abortion within it. This would seem to support our suggestion above that abortion is considered bloodshedding. However, he then adds that non-Jews are executed for violations, but none of this applies to Jews. If that means that the category as a whole does not apply to Jews, that at least some of these cases aren't forbidden to Jews, our evidence vanishes.

8-10. However, we discover that in three of the four cases Rambam lists re Gentiles, his treatment of the same case with regard to Jews states that the act is forbidden and considered bloodshedding, although not a capital crime. It seems reasonable to conclude that the same is true of abortion, and that we have adequately explained Rambam's rereading of the mishnah.

11. But there is a problem with this explanation. We're arguing now that Rambam felt that the less-than-human status of a fetus did not suffice to legitimate therapeutic abortion because abortion nonetheless violates the prohibition against bloodshedding, and for whatever reason R. Yochanan declared that under no circumstances is one permitted to save a life by committing bloodshedding. But Rava says that the R. Yochanan's rule is not exegetically derived, but rather a function of the moral principle that "who says your blood is redder than his" (pace the Mishnah at the end of Horayot). If this is so, R. Yochanan's principle should not extend to therapeutic abortion, where there is an objective basis for deciding that the mother's blood is more valuable, namely that the fetus is not yet a human being. As a result, we must wonder yet again why Rambam is compelled to introduce the law of

pursuit into the Mishnah.

12. Tosafot make a reasonable deduction from R. Yochanan's principle, namely that it is reversible and it

also prevents one from choosing someone else's life over your own. Accordingly, Tosafot rule

that one should passively murder rather than actively get oneself killed.

13. R. Chayyim claims that Rambam disagrees (his argument is based on Rambam's failure to mention

the passivity exception in the case of adultery. Whether he is correct or not and this is certainly

debatable and is not dispositive with regard to our issue.)

R. Chayyim argues that for Rambam to disagree with Tosafot and choose active getting killed over

passive murder requires him to believe that R. Yochanan's dictum is technical rather than rational in

the sphere of law. Rava is not explaining the ground of R. Yochanan's dictum, but rather its origin.

We know that there is a broad exception to most halakhot called *ivochai bohem* and the question is

whether that exception applies to the prohibition against bloodshedding. Constructing one case in

which the exception should not apply allows us to determine that the exception was not meant to apply

to this prohibition. (Tosafot, by contrast, think that we evaluate at the case level rather than the law level.)

14. R. Chayyim argues that the story in Bava Metzia is evidence for Rambam, as why should Ben

Ptora have had them split the water prior to R. Akiva's drashah? Let whoever has the water keep

it! Rather, it must be that each was obligated to give the other the water, and splitting it is a

practical accommodation to the recognition that having them pass the full canteen back and forth

while dying of thirst is too macabre to be law. R. Akiva's drashah rejects Ben Ptora in the context

of lifesaving, but his logic would still apply to conflicts between lifesaving and bloodshedding.

There are of course other explanations of the story, most obviously the Chazon Ish's suggestion that the

issue is the legal value of short-term life.

Rav Yisraeli on war?