IS IT PREFERABLE FOR A SHABBAT OBSERVANT PHYSICIAN TO TRADE SHABBAT CLINICAL DUTIES WITH A NON-OBSERVANT COLLEAGUE?

When the Torah introduces the beginning of the story of the Jews' redemption from Egypt, it writes וירא אלקים את בני ישראל וידע אלוקים, leading many to wonder what precisely did Hashem know that caused Him to start the redemption process. Beit Ha-Levi (Shemot) points to the Midrash that points out that the Bnei Yisrael were idolaters in Egypt no less than the Egyptians themselves. If so, the Midrash wonders, why did they deserve to be saved and the Egyptians punished? The Midrash answers that Egyptians' worship was entirely willful and desired; the Jews only did so out of complete desperation and under the never ending pressures and tribulations of slavery. Had they lived under more 'normal' conditions, the Bnei Yisrael would never had done so.

Beit Ha-Levi expounds on this idea, explaining that when a person is forced to do an action, he is not usually held liable for its consequences, known as אונס. However, if a person is performing an action under duress, but honestly speaking, would have been willing to do that same action of his own volition, he is indeed liable. In other words, אונס only serves and qualifies as an exemption when the אונס is the sole motivation for the action.

He extends this topic to violating Shabbat on behalf of a sick person (פיקוח נפש).

The Torah permits and even requires violating Shabbat to save somebody's life (and even to do so when both the current situation and the expected outcome are uncertain) free of any consequence for the Shabbat violation. However, argues Beit Ha-Levi, this exemption from liability only applies to somebody who, without the necessity of פיקוח נפש would have otherwise not violated Shabbat. Therefore, a Shomer Shabbat physician who is emergently called to the hospital on Shabbat may drive there on his own and is not held liable at all for the myriad violations involved in driving on Shabbat. However, if the physician normally does not observe Shabbat and freely drives throughout the day, he is held liable for his driving to the hospital, as Shabbat is not a factor in his decision making.

Rav Shlomo Zalman Auerbach (Shemirat Shabbat Ke-Hilkheta, ch. 32) uses this idea to explain why it's not advisable for a Shomer Shabbat physician to trade Shabbat clinical responsibilities with a Jewish non-Shomer Shabbat colleague. When the individual who is normally Shomer Shabbat must appropriately violate Shabbat on behalf of his or her patients (violating only the appropriate level of prohibition for each level of sickness and even then, minimizing the severity of the violation whenever possible), the mitzvah of pikuach nefesh exempts them from any Shabbat culpability. [It's important to note that this is most certainly not a carte blanche permission to clinically treat a Shabbat like a Tuesday but rather, only applies to those actions that are halakhically permitted to perform on Shabbat.] While this physician may very likely desire not to have to be in a position to violate Shabbat for the sake of pikuach nefesh (and according to some, it might be forbidden to לכתחילה insert oneself into such a position), the very acts that would normally constitute חילול שבת are liability free. The non-Shomer Shabbat colleague however, would presumably willingly violate Shabbat

restrictions under 'normal,' non-pikuach nefesh circumstances. For this physician, it's not the pikuach nefesh that is motivating his חילול שבת. As such, argues Rav Aurbach, according to the Beit Ha-Levi, even when such a physician performs those very life-saving actions on Shabbat that entail Shabbat violations, he is held accountable for them. Rav Auerbach therefore concludes that it's preferable for the Shomer Shabbat physician to treat patients on Shabbat [when following the proper halakhic guidelines] than to have a non-Shomer Shabbat physician do so.

Rav Moshe Feinstein disagrees (Shu"t Iggerot Mosheh 4 OH 79). Completely dismissing Beit Ha-Levi's point without addressing it directly, Rav Moshe argues that it is most certainly preferable to trade clinical duties, particularly with a Jew who is otherwise not Shomer Shabbat. For this non-observant Jew, if he were not treating patients, he would most likely be engaged in some other Shabbat-violation activity. Being in the hospital at least affords him the opportunity that some of his Shabbat violations would be permissible on account of pikuach nefesh. Rav Feinstein argues that from a pure mathematical-halakhic perspective of minimizing worldwide חילול שבת, it makes sense to trade whenever possible.

While Beit Ha-Levi's point appears rather intuitive, it faces numerous challenges.

Rambam (Shabbat 2:15) writes that נתכוין להעלות דגים והעלה דגים ותינוק פטור אפילו לא שמע שטבע הואיל והעלה תינוק עם הדגים פטור—if a person casts a net to catch fish on Shabbat and he 'catches' fish as well as a child who just happened to be drowning, he is exempt from culpability for fishing on Shabbat since he saved a child at the same time. Following Rabbah's opinion in Menachot (64a), Rambam concludes that זיל בתר מעשיו—we exclusively follow a person's actions in determining culpability and seemingly completely discount their intentions. Just like the case that the Beit Ha-Levi described, this person intended to violate Shabbat and it 'just so happened' that his action turned out to be permissible because he also saved a child's life in the process. While he engaged in pikuach nefesh, he would have violated the entailed Shabbat restriction in any event. Nonetheless, he isn't held liable for the violation.

To resolve this and other challenges, many differentiate between actions done under duress (אונס) and those done for pikuach nefesh. While neither carry any culpability for any necessary halakhic violations entailed, they represent two fundamentally different avenues.

On the most fundamental level, an action done under duress is not considered to be an action that is properly attributable to the person in question. The person is completely uninterested in the ramifications or consequences of the action; he is only willing to perform the action so as to alleviate the stress or duress forcing him to act. Halakhah does not consider such an action to be volitional and therefore exempts such a person from liability.

When it comes to pikuach nefesh however, the person violating whatever necessary Torah prohibition is most certainly interested in the outcome. When a physician is called to the hospital for an urgent, life-saving matter, he or she most certainly wants the car to drive as quickly as possible. If a particular surgical intervention requires a Shabbat violation, the

surgeon similarly certainly desires the action to produce the appropriate result. These actions are all intentional and volitional and nonetheless, completely permissible.

Somewhat counterintuitively, R. Elchanan Wasserman (Kovetz He'arot 49:13) explains that the difference in attribution makes all the difference.[1]

Famously, Rambam records (Yesodei Ha-Torah 5:4) that even under the pain of death, a person may not violate the three cardinal sins (idolatry, adultery, and murder). However, if a person succumbs to the pressure and inappropriately violates one of these prohibitions under extreme duress, he is exempt from any further punishment. Even while these three sins represent extremes, nonetheless, an action committed because of extreme duress is not attributable to the person performing it and therefore he bare no culpability whatsoever for it. Immediately thereafter, Rambam writes (Yesodei Ha-Torah 5:6) that it's forbidden to derive any benefit from an object of Avodah Zarah, even to save one's own life. If a person violates this Halakhah and does so, he is subject to lashes. But this too is an action that a person must do; if it wasn't for the life threatening situation, he would certainly stay far away from anything having to do with Avodah Zarah. Why the distinction?

R. Elchanan explains that an action done for pikuach nefesh is attributable to the person performing it, as it's considered volitional. The Torah however, granted specific dispensation for actions performed for pikuach nefesh. The pikuach nefesh doesn't sever the connection between the person performing the action and its outcome, but rather acknowledges the action to be completely attributable to the person performing it. It's just that under the circumstances, the Torah declares that action to be permissible.

It's for this reason that R. Elchanan explains that it's completely forbidden to act in a foolishly pious manner and choose to not violate a particular prohibition at the expense of pikuach nefesh. Once it's a situation of pikuach nefesh, the action is no longer considered forbidden, therefore rendering meaningless any supposed thought to abstain from that action.

But at the same time, if and when the Torah would declare a particular action forbidden even on account of pikuach nefesh, such as Avodah Zarah, then if a person should violate the Halakhah and perform that action, the action directly relates to him and he is therefore held liable for its consequences.

My good friend, Rabbi Jake Sasson, points out that this distinction between the exemptions of pikuach nefesh and duress may explain a famous disagreement between Ba'al ha-Ma'or and Ramban.

In Talmudic times, it was deemed medically necessary to wash or bathe a baby in warm water immediately after a brit milah; it was considered so important that it was deemed pikuach nefesh. [The Shulchan Arukh (Orach Chayyim 331:9) already notes that in his time this was no

[1] R. Yitzchak Zylberstein (Chashukei Chemed, Niddah 38b) draws the same distinction and presents R. Elchanan's approach in a similar light.

longer practiced.] Therefore, if a brit milah was just performed on Shabbat and the previously prepared hot water would have spilled, it was both permissible and required to warm more water to bathe the baby. But what would happen if the water spilled before the brit milah? Would it be permissible to proceed knowing full well that immediately after the brit milah the baby will need hot water and it will then be permissible to warm up water on Shabbat because of pikuach nefesh. Ramban (Hiddushei ha-Ramban, Shabbat 134b) adopts this approach. He argues that אין למצוה אלא שעתה and that at the moment that the milah is to be performed, that is only mitzvah consideration that is relevant. That it will inevitably necessitate violating Shabbat thereafter for the pikuach nefesh of the child is irrelevant and therefore he argues that it's permissible and required to do the milah, even though it is inevitably creating a situation where Shabbat will have to be set aside for pikuach nefesh.

Ba'al ha-Ma'or disagrees (Rif, Shabbat 53a). He seemingly takes a larger view and recognizes that currently, the child is not in any danger and Shabbat need not be suspended on his behalf. Considering that warm water is no longer available, it is inappropriate to 'artificially' create a situation where pikuach nefesh will allow for a particular Shabbat violation. Meaning that even though he certainly agrees that should warm water be necessary for pikuach nefesh, it would certainly permit violating Shabbat to warm the water, creating a situation where water will need to be warmed on Shabbat when it could have otherwise been avoided, is prohibited. Beit Yosef argues that this is in fact the approach of the majority of the Rishonim.

While perhaps intuitive, Avnei Nezer (Even ha-Ezer 245) points out that the Gemara (Ketubot 3b) is quite explicit that it's permissible to enter a situation where an otherwise forbidden action will be permissible because it will be done out of אונס. Why then does the Ba'al ha-Ma'or forbid the milah under similar circumstances?

R. Sasson argues that perhaps Ba'al ha-Ma'or differentiates between otherwise forbidden actions done because of אונס and those done for pikuach nefesh, as per the distinction above. Even Ba'al ha-Ma'or would not forbid entering a situation where otherwise forbidden activities will be permissible because of אונס, because under those circumstances, the action would not be attributable to the person performing it and would entail no liability or culpability. However, actions done for pikuach nefesh are attributable to the person performing them as he is very much interested in their outcome. When there is a situation of pikuach nefesh the Torah no longer describes those actions as forbidden, but Ba'al ha-Ma'or argues that when violating prohibitions on account of pikuach nefesh is avoidable, it's forbidden to enter such a situation. It's specifically because the action done on account of pikuach nefesh is attributable to the person that Ba'al ha-Ma'or rules that it's prohibited to לכתחילה enter or cause such a situation.[2]

[2] As many Acharonim point out, Ba'al ha-Ma'or must differentiate between creating a situation where prohibitions will become permissible on account of pikuach nefesh on Shabbat itself and setting up such a situation before Shabbat. While he prohibits performing the milah under the circumstances described, he permits (Rif, Shabbat 7a) setting sail more than three days prior to Shabbat even though the person

Ramban may consider אונס and pikuach nefesh to be similar inasmuch as neither action is halakhically considered to be attributable to the person in question, with pikuach nefesh classified as a subcategory of a larger notion of duress. (R. Sasson finds additional cases in which Ramban seems to adopt this approach elsewhere as well.) His approach lines up with that of the Beit Ha-Levi, seemingly equating the two types of exemptions.

Given that the Poskim generally follow Ba'al ha-Ma'or regarding the question of brit milah, following the same logic, it would make sense to rule against the Beit Ha-Levi's approach and support Rav Moshe's contention that permits and even encourages switching Shabbat clinical duties with an otherwise non-Shomer Shabbat Jew.

But perhaps more importantly, Rav Auerbach's application of Beit Ha-Levi's principle is questionable. Beit Ha-Levi argues that when somebody would have otherwise violated Shabbat under 'normal' circumstances, if there also happens to be a pikuach nefesh or אונס situation, it does not exempt them from culpability. The same would apply to other areas of Halakhah as well. If a person 'normally' does not observe the restrictions of Yom ha-Kippurim and eats normally but on one particular Yom ha-Kippurim happens to be so sick so as to warrant a halakhic exemption from fasting, they are not in fact exempt. The pikuach nefesh and אונס exemption only exist when pikuach nefesh and אונס are the only motivating factors in violating the particular restriction. Since this person would have violated the prohibition under all circumstances, the fact that currently there happens to be some level of pikuach nefesh or אונס doesn't remove any level of culpability.

But when it comes to a physician who must violate Shabbat on behalf of his or her patients, their only motivation is healing their patients. If the patient wasn't sick, they wouldn't be violating Shabbat for this particular action or in this particular manner. It seems highly irrelevant that if they were at home and not treating patients that they would have most likely violated some other Shabbat restrictions. The question is only if it is preferable for somebody who is otherwise shomer Shabbat to perform some otherwise forbidden melakhah on behalf of the patient. But it's not as if the non-Shomer Shabbat physician would be performing that same melakhah if it weren't for pikuach nefesh. The only reason the physician is performing surgery, suturing, or writing critical notes about a patient encounter is because he or she is treating ill patients. The motivation of the Shomer Shabbat physician is the same as the motivation of the non-Shomer Shabbat physician. While the Shomer Shabbat physician is aware that those very same actions would have otherwise been forbidden on Shabbat save for the pikuach nefesh exemption, the fact of the matter is that the only reason anybody is doing any of these actions is because of pikuach nefesh. Even if the non-Shomer Shabbat physician would not normally describe it using these terms.

Sefer Erez Ba-Levanon (no. 58) points out that what may be more similar to the Beit Ha-Levi's description is choosing how to travel to the hospital, when the options are to use a non-Shomer Shabbat taxi driver or a Shomer Shabbat neighbor who is able to assist. The

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knows that he will need to violate Shabbat for sailing related pikuach nefesh purposes on Shabbat itself. See Kehillot Ya'akov, Shabbat no. 15 for further discussion.

Shomer Shabbat driver is only willing to drive because he is aware of the necessary pikuach nefesh. On the other hand, if not for the call to drive to the hospital, the non-Shomer Shabbat taxi driver would have presumably driven somebody else going elsewhere. Under those circumstances, the Beit Ha-Levi's principle applies and Rav Auerbach would presumably rule that it's preferable to choose the Shomer Shabbat driver (assuming that it wouldn't cause any additional delay or otherwise adversely affect the medical outcome).

That said, Tzitz Eliezer (8:15:13) finds additional reasons to argue in favor of the Shomer Shabbat physician treating patients on Shabbat and not trading that 'opportunity' (in his language) with somebody who is not Shomer Shabbat, relying on the Beit Ha-Levi's argument only as supportive evidence.