PARSHAH PERSPECTIVES ON MODERN MEDICINE: TERUMAH

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ORGAN ALLOCATION IN HALAKHAH: IS IT PROPER TO GIVE PRIORITY TO A PRIOR DONOR EVEN THOUGH SOMEBODY ELSE MIGHT BE SICKER?

Some of the challenges of trying to at least loosely tie medical halakhah issues to the parshah are the parshiyot of the Mishkan. Dr. Avraham Steinberg notes that there aren't really any medical issues to discuss in Terumah and so, since Terumah literally means "donation" and one of the oft cited sources delineating a precedence for life saving is a Sefer Atzei Shitim (1:10) [mentioned in Parshat Terumah as the lumber used for the beams of the Mishkan], this post will discuss possible preference and precedence in organ transplants.

There are two different flavors to this question. The first concerns the halakhic rationale and criteria for creating an organ waitlist. Considering that there are a great many people who are in desperate need of various organs, there is a waitlist of recipients. There are many criteria that factor into waitlist placement, including severity of illness, chances of survival with and without the transplant, as well as chances of success, and physical proximity to the donor. Organ transplants in the United States are coordinated through UNOS, the United Network for Organ Sharing, which develops these algorithms. One question is what criteria would factor into a halakhically generated waitlist algorithm.

A second issue relates more to live organ donation. Today, it's quite common to donate blood and even bone marrow but it's also possible to donate kidneys and parts of livers from living, healthy donors.

In kidney donation, a donor is often able to select or control to whom their kidney is directed. There is no national kidney registry and each donor or potential donor generally registers with a particular organization or hospital. Some donors arrive at their decision to donate particularly because of this element of control. Often, it is a parent, sibling, child, or friend in need of a kidney transplant that spurs a donor to consider the option of donating a kidney. The donor's only impetus may be the direct need of somebody they deeply care about and they might be unwilling to donate to a stranger.

There are others who respond to the more general 'need' and don't necessarily have a particular recipient in mind. Organizations that coordinate these transplants often present potential donors with an option of choosing to whom they would like to donate. Some donors prefer to donate to somebody of the same gender, or the same age-group, or to a particular cultural subset of people. Different people are motivated by different concerns, values, and reasons. Considering that there is no ethical or halakhic mandate to donate a kidney, there is much latitude in recognizing and acknowledging a donor's particular preference.

That said, it's still important and interesting to consider whether Halakhah offers its own order of priorities. Since kidney transplants are life saving operations and given that a donor may have the ability to select among potential recipients (either particular people or

particular types, groups, or classes of people), it would seem that the Mishnah's (Horiyot 13a) listing of preferences in life-saving should be quite relevant.

As the Gemara already notes, the order of preference is only relevant though when all other aspects are equal. Reality rarely mimics this ideal. Invariably, one patient will be 'sicker' than another (and even then, a clear assessment is not always possible due to a myriad of comorbidities and complications) and no two patients will have exactly the same chances of graft success and survival. Halakhah would then argue for prioritizing the patient with the greatest chances of success. But even that seemingly straightforward criterion includes many different components. There isn't one factor that determines survival, but is instead a complicated calculus of multiple variables, all working together to promote health and life. In many cases, it's probably not all that clear how to draw up a prioritization of potential recipients.

It's likely that even the Sefer Atzei Shitim (above) who prioritizes a בריא over a מסוכן does so because of the higher likelihood of saving the בריא. Clearly, even the term בריא, needs to be taken in context, as he or she is also currently in need of life-saving treatment and as such, is also not at the peak of health.

Is it halakhically proper to include other calculations into a donor's decision? Considering that the donor is willing to donate a kidney, they presumably recognize the attendant associated risk as too insignificant to pose a halakhic challenge. While the actual risk can be mathematically and statistically quantified, what that risk means and whether it's considered "acceptable" or not are far less absolute and certain. Different people will arrive at different conclusions based on the very same set of facts. It's perhaps for this reason that most Poskim view kidney donation as halakhically permissible, but not required.

But once somebody is already willing to undertake that level of risk, should they be halakhically required to follow the Mishnah's order of priority in selecting a potential recipient? From a strict medical perspective, the risk to the donor has nothing to do with the identity or status of the recipient. If so, why should Halakhah grant any personal preference into selecting a recipient meeting some other, non-halakhically related criteria?

But it just feels wrong to completely ignore a donor's motivation. Considering that kidney donation, while certainly laudatory is not strictly halakhically not required, it's within each donor's right to declare that unless a particular type of recipient is found (e.g., biologically related, similar or different gender, similar or different age group, etc.) then he or she isn't willing to donate. Since the donation cannot be halakhically compelled, practically speaking, the donor has wide latitude in determining the ultimate destiny of their kidney.

Nonetheless, for one who otherwise has no preference and is seeking halakhic guidance, it would seem most proper to allow the organization coordinating the transplant to determine which recipient would benefit the most without regard to other factors. Since the donor is

willing to donate and presumably considers the risks 'acceptable,' a strict halakhic approach would not factor a donor's particular preferences into the calculation.

On the other end of the spectrum, should a previous kidney donor themselves need a kidney transplant (a statistically rare occurrence), they are granted priority status on the UNOS waitlist. The idea is to provide potential donors with an 'insurance policy 'of sorts, recognizing that kidney donors are voluntarily accepting a somewhat increased risk of future renal disease. Without this 'priority status,' the person's status as a previous kidney donor wouldn't be relevant to placement location on the UNOS waitlist, other than having only a single kidney will affect their medical and health status. So while it's remote, a kidney donor can be reassured that should they ever need a kidney, they will effectively 'skip the line.'

Practically, this means that if a donor eventually develops a need for their own transplant, they will potentially be prioritized ahead of people who might be sicker than them. From the 'big picture' perspective, this system makes a lot of sense. The likelihood of a previous donor themselves needing a transplant is quite small and the theoretical benefit that it provides to the much larger pool of donors who will never themselves develop renal disease helps move the entire system forward. While not exactly an incentive, this 'guarantee' certainly plays into the mix of various motivations behind a donor's willingness to donate in the first place. It clearly makes for good public policy.

But from a halakhic perspective, the question facing such a patient (prior donor who now needs their own transplant) is less straightforward. If they do exercise their 'priority status,' it very likely means that somebody who is sicker than them will be pushed further down the list. Before that prior donor came along, somebody else was at the top of the list and expecting to receive the next matching kidney. The achievement of being 'first in line' is not as much an accomplishment as it is an assessment of their medical status. In theory, the prior donor can join the list like anybody else, taking the appropriate place on the list that reflects their current health status. Given that they know that their decision to exercise their priority status may result in other, sicker patients not receiving a kidney in time, should Halakhah demand that a prior donor allow those patients who are sicker than him or her to maintain their place on the list and not have their priority downgraded by the prior donor's priority status?

Effectively, the prior kidney donor is 'cutting line,' albeit with permission that everybody in line agrees with and recognizes is a necessary component of the line even existing, but cutting the line nonetheless. Rav Yitzchak Zylberstein (Shiurei Torah La-Rofe'im, no. 159) has several discussions about the halakhic propriety of cutting the line in various situations, not all of which are life and death situations. He concludes, based on a comment of the Me'iri, that 'cutting the line' doesn't involve the theft of any actual object and therefore cannot be considered stealing, but rather, a deviation from the proper and righteous path (צדק צדק תרדוף). However, he first considers a more intriguing possibility.

The Gemara (Bava Metzia 62a) presents the famous dilemma of two people lost in the desert who only have one canteen of water. If the two split the water, they will both almost certainly

die. However, if one of the two drinks all of the water, he stands a decent chance of surviving. Ben Petora argues that one person's decision shouldn't bring about the death of somebody else, even in a roundabout manner. Rabbi Akiva disagrees, explaining that the Torah demands that when it comes to life-saving, חייך קודמין לחיי חברך—your own life takes precedence to your friend's.

Various explanations are offered for both positions, with detailed analysis about what are the specific points of argument. In the course of his discussion, Chazon Ish (YD 69:2) writes that since the Halakhah declares that the owner of the canteen is entitled to drink it in its entirety, the friend may not steal it for himself. Under 'normal' circumstances, Halakhah would allow stealing, if necessary to save a life, just as it permits transgressing virtually all other prohibitions for the sake of pikuach nefesh. Chazon Ish argues that the canteen case is different. Since the Halakhah already sides with the canteen owner with the full knowledge that his life depends on that determination, stealing the canteen isn't merely theft, but rather manslaughter. Halakhah categorically forbids causing the death of an innocent person, even for the sake of saving somebody else's (or even your own) life.

Rav Zylberstein suggests that the same can be said about cutting the waitlist line. Effectively, this person isn't merely 'stealing' the first available kidney or the right to be considered for the first available kidney. Instead, he is actually 'stealing' the chances of survival of the person whose place he is taking. Accordingly, it shouldn't be allowed.

Notwithstanding Rav Zylberstein's siding with the Me'iri's perspective, a strong argument can be made for the comparison between cutting the line and stealing the means of another person's survival.[1] But even so, there might be room to argue that despite the comparison to stealing another person's means of survival, it could still be permissible.

Elsewhere, Chazon Ish discusses a variant of the famous 'trolley problem': If there is a missile heading to a small city, where it's estimated that it will kill 100 people and the possibility exists to shoot at the missile and deflect it (the Iron Dome system hadn't yet been developed in the Chazon Ish's lifetime), but doing so will cause it to land in a different area, where only 10 will be killed—is it permissible to do so?

The Chazon Ish points out that it's pretty clear that the difference in the number of people put at risk is in itself insufficient grounds for permitting deflecting the missile. The Tosefta (Terumot 7:23) rules that if a travelling group is surrounded by bandits who demand that the group hand over a member of the group to be killed or else they will kill everybody in the

[1] He also suggests that cutting the line or otherwise configuring a situation that favors certain people in the line over others isn't tantamount to stealing the other people in line's chances of survival since "today, almost everybody can find a kidney abroad [outside of Israel]. If so, it's not comparable to stealing their survival, but merely costing them large sums to find themselves a kidney elsewhere." Respectfully, considering that studies show that a very large number (between 30-50%) of people on the US waitlist die before ever receiving a kidney, this claim is hard to justify. While it may be true that kidneys are indeed available on the black market for exorbitant sums, it seems ethically and halakhically inappropriate to condone and even encourage such dangerous, unregulated, and frankly frightening modes of therapy.

group, then ימותו כולם ואל ימסרו להם נפש אחת מישראל. Despite the clear calculation benefit of only one person dying as opposed to the entire group, we may not be involved in any way in causing the death of an innocent person, even when doing so might save a larger group. Applying this Tosefta, it would seem that deflecting the missile would be forbidden, since it would effectively be the same as 'handing over' the 10 to be killed so as to save the 100.

However, Chazon Ish wonders about the reason behind the Tosefta's ruling. There are many other potential cases where the saving of one life might lead to the death of another. Not all are always forbidden. Chazon Ish suggests that perhaps the rationale behind the Tosefta's ruling is that handing over a random person to a group of marauding bandits is considered a מעשה אכזריות של רציחה—a cruel, life-ending action. There is nothing inherent in the act of handing this innocent person to the bandits that will in and of itself save the rest of the group. It's only because doing so manages to assuage the blood thirsty desire of the bandits that they agree to let the rest of the group live. Chazon Ish describes handing over the innocent person to be an inherently life-ending action and forbidden.

In other situations, however, when the necessary life-saving action could be more accurately described as inherently life-saving, Chazon Ish thinks that the even the Tosefta might agree that the action is permissible. He suggests that deflecting the missile is precisely such an action. There is nothing inherent in deflecting the missile that causes the death of the group of 10. Their death would more appropriately be described as tangential, or a side effect to saving the larger group. Such a life-saving action, Chazon Ish argues, is permissible. This is true even though the outcome is still that some will live and as a result some will die. Effectively, he argues for a value based morality, where the permissibility of an action depends on its inherent properties (in this case, life-ending or life-saving) as opposed to solely based on its outcome (saving 100 at the expense of 10). While he leaves the matter as requiring further study, many assume that Chazon Ish found this to be a compelling explanation of the case.

Applying this idea to the question at hand: When a prior kidney donor themselves need a kidney transplant and exercise their 'priority status' to jump to the front of the waitlist, they are engaging in an action that will [hopefully] save some—themselves—and potentially put others—those who were already on the waitlist and are now pushed farther down—at risk. It's parallel to the case described by Chazon Ish as it's goal is to save a life, even when others might be put at greater risk. However, 'cutting the line' should certainly be described as a life-saving act, completely aimed at promoting the prior donor's life. The necessary correlate that others are pushed further down the waitlist is not inherent to the act, but secondary to it.

If so, then a prior donor exercising their priority status should certainly be allowed, since they are engaged in an inherently life-saving act, even while others might be put at risk.

A good friend and colleague, Rabbi Raphael Stohl pointed out another avenue to permit the prior donor to exercise their priority status by recognizing that everybody on the waitlist agrees to the system and algorithm that establishes the list's priority. Meaning that while this

list is intended for cadaveric kidney transplants, all of the people on the waitlist recognize the superiority of a live kidney transplant. Everybody on the list would prefer a live transplant, but they simply aren't always possible. Considering that the existing members of the list are certainly encouraging of live kidney donation (and wish that they could receive one themselves), they recognize that one of the 'incentives' (or at least 'insurance policies') for live donors is the assurance that should they themselves need a transplant, that they will receive priority status. The existing members of the list are grateful for live donors and wish there were more of them. This is akin to halakhot governing priorities in giving tzedakah, where a person should help his family and even his friends first, out of a sense of הכרת הטוב (see Rabbi Stohl's *Torat Ha-Kavod*, p. 158 for further elaboration on this idea).

This interpretation completely obviates the need for a discussion of the nature of 'cutting the line' since it assumes that there is absolutely nothing wrong in doing so. It is most certainly not considered stealing, but rather an accepted part of the system, that the existing members of the waitlist are not only willing to tolerate, but even promote out of a sense of gratitude.