

The Role of the Public in Halakhic Considerations of Public Health

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With so much of the world focused on responding to and dealing with the ramifications of the Covid-19 pandemic, a few reflections on halakhic considerations of public health.

Halakhic literature is replete with sources, indications, and rulings that we must always do our utmost to save each and every life. As Rabbi Lord Immanuel Jakobovits eloquently explained,

Judaism regards every human life ... as being of infinite value. Infinity, by definition, is indivisible, so that any fraction of life, whether 10 years or a minute, whether healthy, crippled or even unconscious, remains *equally* infinite in value.

Practically speaking, this reasoning is the basis for the Mishnah Berurah's ruling (Biur Halakhah 329:4) that we must violate Shabbat on behalf of a *goses* (somebody who is 'actively' in the midst of dying ((Defining a *goses* is beyond the scope of this essay, but is something that clearly needs further elucidation, albeit not necessarily for the argument above.)) even if it's not possible to cure them and the Shabbat violation would only help them live for a short while. If life is of infinite value, then by Rabbi Jakobovits's understanding, each moment is of infinite value and is subject to *pikuach nefesh*. ((Whether this is a requirement or merely a permission is an interesting question that necessitates its own treatment.))

Under 'normal' circumstances, although perhaps not popular in secular bioethics and society, practicing this value is rather straightforward. A pandemic challenges this status quo by heightening questions of triage and resource allocation. There may come a time when the needs of "the public" deviate from those of any particular individual. Protecting "the public" or "society" or the "general population" may require stay at home orders so as to limit the potential spread of an infectious virus. Minimizing social interactions as much as possible limits the potential possibilities of viral spread, thereby protecting the largest number of people from contracting the virus in the first place. However, these same orders may threaten an individual's ability to make a living and potentially put them at increased risk, it will necessarily isolate people who's mental health may be adversely affected by a lack of in person social interaction, and may force delaying procedures and activities (such as elective surgery) that will invariably negatively affect a segment of the population.

There is a school of thought that argues that considering that "the public" is collective of individuals, the very same considerations that apply to individual risk, should be acted upon and relevant. The result would be that each person would have to calculate how these

orders may affect their personal risk and act accordingly. The challenge is that these individual considerations pay no heed to the notion of public health.

A second school of thought maintains that the whole is much greater than the sum of its parts. "The public" takes on a different character and quality than a simple collection of individuals and therefore has and needs different sets of criteria and responses for risk assessment and safety concerns.

Recognizing that environmental, societal, and organizational / governmental factors play an important role in keeping people healthy, the enterprise of public health aims to utilize these very resources to prevent disease, prolong life, and promote health. Efforts range from protecting the water supply to enforcing safety standards in drug manufacturing to preventing disease to fighting epidemics. All of these require thinking about health and safety in a manner that transcends the individuals and recognizes the collective challenges that societies face.

This post will argue that Halakhah adopts this second approach and that halakhically speaking, concerns for the community are different than for the individual.

For example, rare incidents take on increased significance when it relates to populations. Halakhah recognizes that every activity has some level of risk, sometimes it is quantifiable and other times, simply perceived. But when it comes to issues relating to the public at large, even trivial risks take on increased significance. Even when some given risk seems inconsequential on the individual level, when an entire population is taken into account, the same level of risk takes on increased significance.

An individual may be willing to accept a 1:10,000 risk, considering it to be sufficiently unlikely that it will even occur to him or her. But from a public perspective, in a city of 30,000 people, it means that, statistically speaking, three people will actually be affected; it's just not possible to know who. For an individual, the likelihood may seem so distant that it's not something they can or will worry about. But when it comes to larger populations, these same small risks have 'real life' consequences in knowing that they will almost certainly affect some members of that population. Calculating which risks are appropriate and at what level are therefore necessarily different.

Two cases in the Gemara will serve as examples for this concept:

Regarding efforts made to redeem captives, the Mishnah rules that אין פודים את השבויים יתר על כדמייהו מפני תיקון העולם—*we do not redeem captives for more than their values, as a function of תיקון העולם*. In explaining the meaning of this enigmatic phrase, the Gemara offers two different rationales: either an economic or security related concern. The latter is highly intuitive. If the Torah demanded that ransom be paid regardless of the cost, it will likely result in continued and increased kidnapping. The Gemara describes the first concern as

one of דוחקא דציבורא—pushing the community / society to its financial limit. This latter concern certainly stands out as an anomaly.

Generally speaking, the Torah demands that we spare no expense, time, or effort in life saving. Indeed, many Poskim assume that the Mishnah's rule only applies when the captive's life is not at risk. Others assume that the the rule applies across the board. Regardless of the imminent risk, captivity is most certainly a precarious and risky situation. It would not have been out of character for the Mishnah to have argued for the opposite conclusion of doing anything possible to avoid these types of situations. Financial considerations should have no place in these discussions.

That said, the Gemara seems to be distinguishing between private and public concerns. When it comes to individuals, the Torah indeed demands going to great lengths—including time, effort, and money—on behalf of others. However, when it comes to communal funds and societal efforts, the calculus is clearly somewhat different. Putting a strain on communal funds is fundamentally distinct from straining individuals.

When it comes to public needs, there are many more competing interests that must be balanced. Every dollar society spends in one arena is one dollar less than can and perhaps should be spent in other arenas. Whereas one might have thought that the society as a whole should be obligated to spend even more than a private individual, given the far greater resources, the Mishnah clearly indicates that other societal concerns—דוחקא דציבורא—are equally if not more significant. Spending exorbitant amounts of societal monies to save or or even a few individuals, means that those same monies won't be available for other communal needs. Without even addressing what those competing needs are, the Mishnah assumes that taken together, the sum total of societal needs are greater and take precedence, even to redeeming captives. In fact, Chatam Sofer (Shu"t Chatam Sofer, HM 177) explains that דוחקא דציבורא is indeed part and parcel of the concerns of pikuach nefesh.

The Gemara (Nedarim 80b) discusses two cities that share a single spring as their water source. When the water is limited, the upstream city has rights to the water before the city further downstream. But reality is never that clear cut. The Gemara wonders about a case in which the water is more limited: when there is enough for both cities to provide for their citizens thirst, but only if neither provides for their additional needs, such as laundry. Hakhamim rule that the cities should split the water, making sure that each person can receive water to drink. Rabbi Yossi disagrees and rules that the upstream city can use the water both for drinking as well as for laundry, even if their doing laundry will result in the downstream city not having enough water to drink.

On the face of it, Hakhamim's position makes the most sense. When it comes to saving lives vs. laundry, saving lives must clearly take priority. It's such a basic tenet of Halakhah, that it leaves very little room to explain Rabbi Yossi's position. The Gemara itself challenges his

position and offers a somewhat difficult explanation to the effect that there is a remote possibility that a lack of laundry can lead to a risk of actual danger.

But even accepting this explanation at face value, Netziv (Ha'amek She'eilah 147:4) wonders why it is relevant. Certainly, the risk of the citizens of the second city dying from thirst is more statistically relevant and certain than the far fetched possibility of the lack of laundry resulting in a tangible risk to life! Netziv explains that from the first city's perspective—or more accurately, from the public / societal needs of the first city—there is a real, albeit remote risk that the lack of laundry will put some of its citizens in danger. Since the first city has first rights to the spring (evidenced by the Gemara's assigning drinking rights to the first city at the expense of the second city), they should not give up those rights when doing so may present a danger to their citizens.

Netziv argues that according to Rabbi Yossi, this is true even when the risk to the first city's citizens is remote and the risk to the second city's citizens is far more real. In fact, he argues that normative Halakhah follows Rabbi Yossi's opinion. The rationale, explains Rav Shlomo Dichovsky (Torah she-be'al Peh 31) is that צרכי רבים—communal needs are always considered to be pikuach nefesh.

Similarly, the Gemara (Shabbat 42a) permits extinguishing a glowing metallic object (גחלת של מתכת) found in a public area on Shabbat. While Rashi explains that the specific prohibition of extinguishing in this case is only Rabbinic in nature, BeHaG argues that it indeed involves a Torah prohibition. Considering that avoiding the burning object is certainly possible and it shouldn't qualify as an instance of pikuach nefesh, Ran explains that BeHaG must believe that נזקא דרבים כסכנת נפשות חשיב לן—a public danger, even remote, is considered to be pikuach nefesh.

Clearly, the standards by which we judge danger, risk, and thresholds of pikuach nefesh are different in the public setting than a private one.

The ramifications that this approach leads to are indeed fascinating and will be explored in a [soon to be released] future post.