

## The Role of the Public in Halakhic Considerations of Public Health – Part 3

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Apropos of our previous discussions of differences between individual and public health, [this anecdote](#) from Rav Mordechai Farbstein about a question he was asked, is relevant and insightful:

The young man asking was a soldier in an intelligence unit, who were able to tap into the communication network of an enemy country and decipher its communications. This soldier's job was to use computer technology to decipher the codes he was listening to and pass them forward to his superiors. To do so necessitated *chilul Shabbat*. This soldier argued that he would decipher only some of the communications he would listen to—only those, that according to his estimation had a high probability of being relevant to Israel. However, those communications that had a low probability of being relevant to Israel—such as those originating in Africa—he would like to wait until after Shabbat to decipher. His commander argued that even while they are comfortable relying on his informed opinion, it's only when it can be based on factual data. Meaning, he should decipher all of the communications he can listen to, but would have discretion in determining which messages to transfer forward to his commanders on Shabbat.

We both approached Rav Shlomo Zalman Auerbach to ask his opinion. He ruled that the soldier must decipher all of the communications, based on an important understanding of the definition of pikuach nefesh. That it is not about a single individual performing both the original Torah violation as well as the fu

Even though there is halakhic difference between saving the life of an individual or that of many people, and we violate Shabbat even for a safek pikuach nefesh, nonetheless, there is an important difference in the level of risk that is considered pikuach nefesh. It's quite possible that at a certain level, that minimal risk won't qualify as pikuach nefesh for an individual, but would qualify as pikuach nefesh for the public.

For example, people are generally not fearful of inter-city travel, even though it comes with some risk, let's assume 1 in 10,000. However, a political leader who would quickly accept a death rate of 1 in 10,000 of his citizens would be negligent and irresponsible in his actions. Because when it comes to the public, such a level of risk qualifies as a danger [and hence, pikuach nefesh].

Therefore, Rav Auerbach ruled that the soldier must decipher all of the communications, since what was at stake was the national defense. Even though such a small likelihood of risk might not be considered dangerous enough for an individual to qualify as pikuach nefesh.

Comparing this to [Rav Elyashiv's psak](#) regarding the public allocation of funds, the notions are similar. When it comes to matters of public health, the considerations must be broadly construed to include risks and dangers that individuals might not worry about, but that a society as a whole must certainly take into consideration. While Rav Elyashiv frames these risks as צרכי רבים and therefore, by definition rising to the more commonly used framework of pikuach nefesh and Rav Auerbach describes it as the need for a public entity to consider even smaller notions of risk—they are effectively making the same argument. Communal needs are broader than individual needs and when decisions are made for communities, they must be cognizant of how decisions affect all members of society.

Interestingly, in the [most recent Assia](#), Rav Yehoshua Weisinger compares Rav Auerbach's broader vision of public pikuach nefesh to that of Rav Shlomo Goren (Torat ha-Refuah, p. 80):

השקפת הנודע ביהודה והחתם סופר נכונה וישמה מבחינת ההלכה אך ורק כשמדובר ברופאים יהודים בגלות, כאשר לא מוטלת עליהם האחריות לבריאות העם במדינה כל שהיא. עליהם מוטלת המצווה והחובה לטפל בחולים בפונים אליהם בלבד, ואינם אחראים לתכנון הרפואי לטווח ארוך או קצר. לגביהם נכונה השקפת היסוד של גדולי הפוסקים הנזכרים, שכל שאין החולה לפניהם, אסור להם להשתמש בקריטריונים של פקוח נפש כדי לדאוג לחולים בעתיד, שאולי לא יופיעו בפני רופאים אלה, ואם יופיעו—אין סיכוי קלוש זה מהווה יסוד להתיר איסורי תורה לרופאים, שאינם אחראים על הרפואה בעתיד.

אולם כאשר מדובר במדינה יהודית עצמאית, שממשלת ישראל אחראית לתכנון המערך הרפואי במדינה לכל האזרחים, אחריות לאומית זו אינה מתבטאת בתכנון אינדיבידואלי יום יומי של הרפואה בישראל, כי אם באחריות כוללת לטווח ארוך. הלא ברור שמדי שנה בשנה, יתאשפזו בבתי החולים של המדינה, מספר משמעותי של חולים הזקוקים להשתלה. ואם לא נדאג מראש לתרומת אברים, לא נוכל לעמוד בדרישות הרבות שתתעוררנה אפילו בטווח של שנה מראש (הכוונה לבנק עור).

The perspective of the Noda bi-Yehudah and Chatam Sofer ((They both famously argued that Shabbat and other Torah prohibitions may only be violated when there is a חולה בפנינו—a sick patient in front of us, in contrast to the future, unlikely possibility that a potential sick patient will one day appear. A more intricate analysis of their positions will hopefully be part of a future post.)) are correct and applicable, from a halakhic perspective only for Jewish doctors in the Diaspora, where they do not have a responsibility for a nation in any sovereign country. They only have a responsibility toward patients who

come to them, and are not responsible for any medical planning, whether short term or long. Regarding such physicians, the fundamental approach of those Gedolei ha-Poskim that when there are no sick patients currently before them, that they may not take into consideration the future potential possibilities of pikuach nefesh, who these physicians may never encounter, and even in the slight chance that they may do so—this small likelihood is insufficient grounds to allow them to violate Torah prohibitions; they are not responsible for future treatments.

However, when the discussion is about a sovereign Jewish state, where the government is responsible for all of the nation's citizens, this national responsibility is limited to a individual day-to-day medical concerns, but rather a responsibility for long term care as well. It's clear, that each year, there will be many patients presenting to Israeli hospitals who will need such transplants [*he was writing about skin graft banks – DS*]. And if we don't plan ahead to have these available, we will not be able to contend with the need when it should arise, even in a year from now.

While Rav Goren frames his approach as arguing with the Noda Bi-Yehudah (Shu"t Noda Bi-Yehudah Tinyana, YD 210) and Chatam Sofer (Shu"t Chatam Sofer YD 336), it's highly likely that they would actually agree with his more expansive approach. A fierce Zionist, Rav Goren masks his expansion of their approach behind his nationalistic pride, comparing an individual doctor in the Diaspora to the sovereign State of Israel. However, the real distinction isn't so much between a self-ruling Jewish government and Diaspora Jewry as it is between different eras of medicine and science.

It's quite true that the focus of the Noda Bi-Yehudah and Chatam Sofer was on the individual doctor. Their argument was that it doesn't make sense for a doctor to violate a Torah prohibition on behalf of some potential future patient whom that physician would likely never encounter. Rav Goren seems to be arguing that as a sovereign state responsible for the health of an entire population, the state's considerations must extend beyond any particular physician's likelihood of encountering a particular patient. He seems to suggest that Noda Bi-Yehudah and Chatam Sofer would disagree.

However, it would seem that reading Noda Bi-Yehudah and Chatam Sofer in such a limited way misses the forest for the trees. Although they indeed couch their terminology around the physician himself, they are quite clear that what is at stake is a definition of pikuach nefesh. They are both quite clear that they do not believe that it's statistically likely that the original Torah violation will actually lead to pikuach nefesh in the future. In their example of the permissibility of an autopsy after a failed surgical intervention so as to potentially gain some knowledge to help a future patient, the only manner in which they conceived that a future patient would benefit is from the knowledge and skill that the physician in question would acquire. Meaning, the surgeon might be able to learn from his mistake and be able to

better treat a similar future patient. Neither Noda Bi-Yehudah nor Chatam Sofer thought that this was remotely likely.

They don't even consider the potential global or even regional implications of the accumulation of knowledge. In their world, it wasn't conceivable that medical knowledge or expertise obtained by one physician would directly translate into treating and saving the life of another physician's patient. Arguing the accuracy of their assumption is beyond the point—their psak was based on this assumption. Should that assumption change—as indeed it most certainly has in the modern age—their psak would as well.

Today, information obtained in one small corner of the world can and does have life-saving impact in another. The rapid accumulation of data, public health outcomes, and trial results during this pandemic have been coming in from all over the planet. Collaboration between scientists in different countries is commonplace and medical trials across continents is natural. Instinctively, it's quite clear (at least to this writer) that Noda Bi-Yehudah and Chatam Sofer would agree that whenever it's reasonable that one Torah violation will lead to pikuach nefesh of somebody ill, even if they aren't technically nearby, is absolutely warranted and likely mandatory.

Rav Goren's point about governments taking on the role of insuring communal health is indisputable. But it's not so much because the Israeli government is a sovereign entity that is relevant, but rather that today's public health is a far broader construct than Noda Bi-Yehudah and Chatam Sofer could imagine. It's specifically in recognizing the potential reach that any one person's actions might have taken together with Rav Auerbach's understanding of the halakhic notion of public health that warrants a new perspective on ancient questions.

One such question that Poskim are currently grappling with is the permissibility of vaccine research on Shabbat.

*To be continued ...*