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The Talmudic Rabbi as Triage Officer: Decision-Making in Times of COVID-19

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Abstract: The essay outlines a four-phase triage process made by a fictive Talmudic rabbi working on an equally fictive hospital COVID-19 ward. The rabbi bases his decision on four different Talmudic texts, proceeding one by one, with each text building on the preceding one, until he is ready to allocate his scarce medical resources to one of the patients, thus being forced to deny them to others. Along the way, the paper will examine how this Talmudic reasoning can also be applied to the patient, or even a potential patient, clarifying the demands of the individual's ethical responsibility to avoid triage situations in the first place through social distancing and even more so through getting vaccinated. The paper argues that the rabbi has a number of Talmudic tools at hand that make his decision easier, not because he strictly follows Jewish law, but because of the rich experience standing behind Jewish legal traditions, making a universally valid ethical justification of difficult decisions possible. The essay proposes that including such theological material in triage guidelines would help make those decisions more acceptable in the long run, especially for societies in which religious traditions still play a certain role in the cultural consciousness.

Keywords: triage; COVID-19; Talmud; bioethics; medical ethics; Trolley Problem; human equality; resource withdrawal; life expectancy

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1. Introduction

The COVID-19 crisis tragically revived a bioethical problem that many ethicists had deemed entirely theoretical by now, at least in the Western world: triage, the priority-based allocation of scarce medical resources in times of a mass health crisis, such as an epidemic, according to ethical criteria. Suddenly, rapid life-versus-death decisions had to be made—mostly by emotionally overwhelmed doctors in emergency units. In the spring of 2020, the world watched in shock as Italian doctors were forced by dramatic circumstances to prioritize COVID-19 patients in the most basic way, according to age, i.e., a lower age meant a better chance of surviving the virus. Later, information started trickling in that in places outside of the global media spotlight, such as provincial Iran or Russia, but then also Mexico and Brazil, medical personnel were performing such tragic triage on an even larger scale.

During the crisis, medical organizations and secular ethical councils of almost all Western countries affected by the virus formulated triage-related position papers with guidelines for doctors and hospital triage officers on how to deal with resource shortages. These papers frequently tackled even the most difficult ethical distinction between *withholding* and *withdrawing* devices from patients in need of them in favor of other patients. Although some papers were more radical than others regarding the suggested responses to such anticipated shortages, hardly any of them considered, at least explicitly, cultural and religious influences in the perception of life-and-death decisions.

In countries where traditional religious views still play a critical role in the collective consciousness of the society (e.g., Italy, Israel, and Iran), or in countries with a large, religiously observant immigrant population (e.g., France, Germany, and Belgium), such

views should probably not be ignored. This is true for several interconnected reasons, the most important of which was stressed by bioethicists long before the COVID-19 crisis: the reasons given for prioritizing resources have long-term societal effects. If the criteria used for resource allocation contradict strict cultural values or traditional perceptions of certain groups within a society, the end result may be more people alive but a society at war with itself.[1] This is especially true for more traditional belief systems that call for reluctance regarding human interference in questions of life and death (see the extensive public debates about abortion or self-determined death). At least in Judaism, but likely also in other monotheistic religions, there has always been a theological tension between the human obligation to heal the sick and the 'divine intentions' behind illness and recovery.[2]

In addition to the thus-far underestimated societal and cultural value of incorporating religious ideas into triage concepts, there is yet another piece to this puzzle. The written legal histories of law-based theological traditions such as Islam and Judaism hold a large arsenal of precedents with concrete criteria for the prioritization of saving lives. Over the millennia, cases have accumulated where religious authorities have had to pronounce practical rulings in complex ethical dilemmas of prioritizing one life over another. Jewish law, for example, has a rich tradition of rabbinical responsa on the subject. These case-based texts often reach a high level of complexity in their discussions, balancing competing arguments against each other, satisfying the intricacy of the issue at hand, where medical and ethical thought is inseparably mixed. This may, in part, be a consequence of long years of persecution, culminating in the atrocities of the Holocaust, where the allocation of scarce medicine was one of the decisions often made by the rabbis, as the spiritual leaders of the ghetto or concentration camp.[3]

The high level of complexity found in religious-legal sources is naturally absent in the modern, secular position papers on triage, which are written as guides for immediate practical action. This essay will examine whether modern bioethics, especially in the area of moral problems caused by pandemics, has anything to learn from the long experience of religious traditions. One possible direction would be a deeper reflection on ethical justifications that seem obvious when viewed from the perspective of a common moral sense but are hard to explain on a more abstract level of philosophical thought. Theological traditions are rich in discussions on questions of guilt and human responsibility for moral sin, as well as their probable consequences. Translated into philosophical ethics, these discussions could provide productive material and a useful means for coping with the new and surprising challenges of a deadly pandemic—especially for medical personnel unaware of these traditional sources. It is this complexity, especially, that has developed from millennia of religious debates on sin and punishment, where human weakness and social circumstances play a crucial role, that makes both the burdening answers to triage questions, and the likely resulting guilt, easier to cope with.

Alongside triage, ethical dilemmas concerning the vaccination process against COVID-19 have sparked an impassioned debate: Is individual freedom to be preferred over social solidarity? Is there an ethical justification for the state to punish those who refuse to be vaccinated? In addition, do states have an obligation to prioritize care for their own citizens, or would universal, rational ethics not demand a just worldwide distribution of the vaccine, independent of the financial situation of different countries? Those questions, however, are less subject to theological deliberations and practical rulings within specific religions—probably because the almost hedonistic concept of 'freedom' (e.g., to breathe, to party) involved here is generally foreign to many streams of religious thought, which in most cases stresses the rights of the community over the rights of its individual members, while secularism is often associated with individualism.[4]

In order to demonstrate the contributions that religious thought can make to COVID-19-related ethical decisions, in what follows, I will outline a four-phase triage process made by a fictive Talmudic rabbi working on an equally fictive hospital COVID-19 ward. The rabbi bases his decision on four different Talmudic texts, proceeding one by one, with each text building on the preceding one, until he is ready to allocate his scarce medical resources

to one of the patients, thus being forced to deny them to others.[5] Along the way, I will examine how this Talmudic reasoning can also be applied to the patient, or even a potential patient, and not only to the physician, clarifying the demands of the individual's ethical responsibility to avoid triage situations in the first place through social distancing and even more so through getting vaccinated.

The reference to the Talmud, suggested here, is not an apologetic attempt to re-introduce legal theocracy into modern Western medicine. In this paper, I am not interested in the legal (*halachic*) solutions Judaism has offered for bioethical questions, but rather in the universal ethical thought that stands behind them. As is well known, not all (Jewish) legal rulings are strictly ethical, and not all ethics can be translated into positive law. Since Kant's famous distinction between moral duties (*Tugendpflichten*) and legal duties, this relationship has been intensely debated, not the least in terms of human freedom from legal coercion, an issue that has become highly topical again during the pandemic.[6] Thus, I will limit myself here to a discussion of the more abstract ethical aspects of our subject and leave their practical application largely aside. I believe that this is a particularly fruitful approach because, as several Jewish scholars have already noted, Kantian ethics overlap in an astonishing way with some moral opinions of the Talmud.[7]

Moral philosophy, however, has been severely challenged by the COVID-19 pandemic. In this paper, I will try to raise at least some of the most basic questions that have resurfaced in the course of the crisis: Is ethics indeed universal and a priori, or do we need to apply special rules for extreme situations? If it is universal, how do we balance egalitarian moral duties against utilitarian claims for efficiency? Or, alternatively, if ethics is not rule-but rather outcome-oriented, what is the desired standard: more years of life or socially worthier lives? Are we allowed to calculate life expectancy at all? Finally, can ethical decisions be made that directly contradict a state's criminal laws, even in democratic countries?

2. All Human Life Is Equal

The first text under study affirms the absolute equality of the value of each and every human life. The Talmudic rabbis expressed this insight in a most radical way, using childbirth as the example chosen to determine the law. The Mishnah in Ohalot (7:6) rules thus:

> *If a woman is having trouble giving birth, they cut up the child in her womb and brings it forth limb by limb, because her life comes before the life of [the child]. But if the greater part has come out, one may not touch it, for one may not set aside one person's life for that of another.*[8]

In the case of a woman who is having a difficult labor, it is permissible to kill the baby within her body because the mother's life takes precedence. However, if most of the baby's body has emerged from the mother's, interference is prohibited, and nature must have its way. The abstract reason given for this is: "We don't reject one soul because of another," a ruling that went straight into the unwritten codes of Jewish ethical consciousness and was soon applied by many rabbis in a much wider range of cases than difficult childbirth. In fact, it became the precedent for almost all questions of preference for one life over another. The rabbis could hardly have chosen a better example: the not even fully born child, helpless and naked, is compared to her adult mother and found to be fully equal to her. It is this fundamental principle that underlies all the following discussions in terms of triage, that is, the decision to allocate lifesaving resources to one patient and not to the other—we must never forget that, in principle at least, all human beings are equal.[9] Thus, despite the fact that for the concrete preference decisions that are forced on our fictive rabbi this Talmudic principle is not practically helpful, it raises the two most important questions of his assignment: if all humans are equal, how can criteria be defined for one patient to be treated first—and, even more problematic, are we allowed to discontinue the treatment of one patient if another patient has better chances of survival? Philosophically speaking, an absolute and a priori value (equality of human life) is here qualified (but not repealed) by a variable and empirical value (a medical condition), i.e., the chances of survival, and if those are predictably equal, then likely by values that depend on social and cultural contexts.[10]

3. Two Travelers in the Desert and One Bottle of Water

Concerning our actual problem, that is, the allocation of scarce resources under emergency circumstances, where more equal individuals have life-threatening conditions that can be only treated at one time, we should turn to another text from the Talmud. This is the famous story of the two travelers in the desert with only one bottle of water shared between them.[11]

> *Two people were walking on a desolate path and there was a jug of water in the possession of one of them, [and the situation was such that] if both drink from the jug, both will die, but if only one of them drinks, he will reach a settled area. Ben Petura taught: It is preferable that both of them drink and die, and let neither one of them see the death of the other. [This was the accepted opinion] until Rabbi Akiba came and taught that the verse states: "And your brother shall live with you," indicating that your life takes precedence over the life of the other.*[12]

If both of them drink, the Talmud declares, they will both die. If only one drinks, he will make it to the nearest human residence. The case is then discussed by two speakers. Ben Petura argues that it is better if the travelers share the water, and both perish because otherwise one of them would see his friend die before his very eyes. Rabbi Akiba teaches, in strict opposition to this opinion, that your own life should always precede the life of your friends. He bases this ruling on the biblical advice to "…let your brother live with you" (Lev 25, 36), apparently meaning: next to you, and not instead of you.

At first sight, this Talmudic debate also seems to be irrelevant to our problem, at least if Rabbi Akiba is right—and our rabbinical triage officer knows that the weight of traditional Jewish legal thought was on the side of Rabbi Akiba here.[13] It seems irrelevant because medical resources in modern hospitals are controlled by a third party, the medical personnel, and those resources are obviously not subject to dispute, negotiations, or even fights between patients. However, on closer reflection, we can learn at least three different lessons from that passage, all of which are important for the decision-making process:

1. Saving the life of one person *permanently* is to be preferred over saving the lives of several people temporarily. We should not divide the available resources among all patients equally but devote them to those lives that can be fully saved.
2. One can also learn from this text (if one opposes the re-allocation of medical resources for ethical reasons) that once treatment of one patient has been started, the resources are in her possession and can no longer be taken away from her (as the water is already in the possession of one individual rather than the other).
3. More radically, should somebody have said before the onset of our pericope: "I don't need water in the desert, I don't want to carry those heavy bottles, this restricts my personal freedom, this is my personal decision", etc. (that is, if somebody is himself responsible for his COVID-19 infection, either by intentionally breaking social distance rules or by refusing to be vaccinated), he can be treated last, or with the lowest priority in allocating resources for that reason.[14]

As important as these lessons are for our rabbi, he may also read the Talmudic story about the two travelers differently, for legal Jewish thought allows him to side with the minority opinion, that is, with Ben Petura, even if for other reasons than those mentioned by this Talmudic figure. However, there are several sound ethical arguments for opposing Rabbi Akiba's ruling. One is that property (being in possession of the bottle) is arguably not enough of an ethical justification in life/death situations, and we will soon return to this. On a more philosophical level, one can deny the narrator's ability to predict the outcome of the water-sharing—for he puts himself in the place of God, or, in less religious language: there is always hope that a caravan will pass by our travelers. This hope might be an even stronger factor if it is based on human agency, as we will see, and not on pure coincidence.[15] Nevertheless, the "playing God" problem has always been at the core of the theological and ethical discussions of our subject, with Jewish authorities deeply divided in their conclusions, see Solnica et al. (2020).

Ingeniously, the Talmud here again builds its story in a radically abstract way, as in the childbirth example. We do not hear anything specific about the age, status in life, or medical condition of the two travelers, thus excluding all options to decide according to this kind of information. The Talmud thus forces us to think the issue through as true philosophers. However, if we imagine the travelers as father and son, we immediately realize that Rabbi Akiba's simple property solution becomes obsolete, because not only does a son have special duties to his father, the father would not necessarily insist on his property rights. In general, with more information on the travelers, a larger variety of ethical criteria opens up, which seems to make the decision even harder.[16] Some of those criteria will be discussed below, for we can safely assume that our triage officer is aware of the necessary information regarding two patients in critical condition, arriving at the same time at the hospital entrance when only one emergency bed is available.

First, let us revisit the age factor. Generally speaking, age should not be a standard for prioritizing lives, similar to other non-medical criteria such as skin color, nationality, gender, or religion. In the COVID-19 pandemic, however, this was different. First, all of the medical criteria (preconditions) were very often equal among the patients to be prioritized. Second, age seems to have turned into a medical benchmark in itself because one of the most peculiar medical features of the COVID-19 pandemic was that, unlike the flu, for example, age seems to play a decisive role in the course of the disease caused by the COVID-19 virus. Thus, age suddenly became relevant. But which age is to be preferred? Can the increased danger to older people be ignored only because of their predictable shorter life expectancy? While Western moral thought seems to favor youth,[17] Jewish thought seems to value the wisdom of older age at least to the same degree. This is probably best expressed in the proverbial "biblical ages" of some of the important figures in the book of Genesis.

Moreover, in early 2021, when COVID-19 vaccines were still difficult to obtain, and decision-makers faced the urgent question of who would be vaccinated first, the issue of age was a central aspect of the debate. Should the socially active, young "super spreaders" be given the first available doses, or should the weak and vulnerable elderly population be preferred? Jewish tradition can here look back on multiple instances where the Hebrew Bible defines deference to "migrants (*ger*), orphans and widows" as a divine commandment, that has, a clear, almost unreasonable emphasis on care for the helpless and poor.[18] This commandment then found expression in the Talmudic concept of "Tzedakah", which is only very poorly translated by *charity* or *alms giving* and is actually based on the Hebrew root meaning justice.[19]

Beyond the age criterion, what about the so-called 'social worth' of our traveler-patients? Again, at first sight, we believe that professors, politicians, generals, or judges must not be preferred for what they are, if only because of the first principle we learned from the Talmud: all human life is fully equal. If there are no differences in medical preconditions, the chief of general staff must be treated equally with the last of his soldiers.[20] Yet, as soon as we reverse the 'social worth' criterion, ethical difficulties mount even here: as people indeed contribute to society in different degrees (no matter what the measurement for the worth of the contribution is), we can easily imagine the case of a person who has sacrificed much of her life for the well-being of others, but because of heavy medical preconditions (through no fault of her own) she will be treated last, if at all.[21] In addition, there is the question of giving preference to the medical personnel themselves, not only for pragmatic, utilitarian reasons but rather because of what is called *Reciprocity Ethics*: giving them treatment priority in recognition of their having placed themselves at direct (not potential) risk to help others. Here too, the Jewish approach might encourage our triage-rabbi to apply this criterion, albeit very carefully. An often quoted, and, in fact, ethically extremely difficult passage of the Talmud states the following order of people to be saved, indicating at least that the 'social worth' criterion can make at least some difference: A Torah scholar precedes the king of Israel because, in the case of a Sage who dies, we have no one like him, but in the case of a king of Israel who dies, all of Israel are fit for royalty. A king precedes the High Priest, and the High Priest takes precedence over the prophet. It seems,

however, from the Talmudic discussion around the passage that here, mostly utilitarian reasons determine the decisions.[22]

One last example is what might be seen as the Christian solution to the travelers' problem: voluntarily giving up the water or, in our case, the medical resources or even the vaccine dose allocated to you because of your age or medical condition—and this might also be the preferred behavior in the father/son scenario.[23] It is unclear, according to Jewish sources, whether our triage-rabbi should interfere with such a decision because as much as suicide is anathema in most religions for obvious theological reasons (the God-givenness of life/the soul), the autonomy of the patient, especially with death in sight, is also of undeniable value. The critical distinction to be made here, also according to Jewish sources, is between action and deliberate inaction. While a patient's urgent request to withhold life support might be accepted, she is not supposed to take her own life actively, or, by extension, we should not actively withdraw life support.[24] We will soon return to the decisive difference between active and passive killing, even if done for medical reasons.

While we have so far discussed Ben Petura's opinion and, along with it, many of the alternative options opposing the majority ruling of Jewish law in the case of the two travelers, what Rabbi Akiba still has on his side is the simple and straightforward argument about numbers: it is better that one person dies than two, it is better that one is saved than none. For the numbers argument, expressed in the often thoughtlessly repeated demand to "save the most lives/life years," modern ethical thought has provided a perfect but highly complex theoretical model, the so-called "Trolley Problem".[25] Simply put, the question is if an unstoppable train that will soon be running over five absentminded workers on the rail track must be diverted to a side track, when there, unfortunately, a single unaware workman will be hit and likely be killed. Although the easy answer to the Trolley Problem is "yes", ethicists had surprising difficulty in finding a compelling justification for this answer. The complexity arises because the issue involves more than numbers. If it was only about numbers, argued Judith Jarvis Thompson in 1985, it would also be perfectly legitimate to shove a heavy-weight bystander onto the rail track in order to stop the approaching train and save five lives by sacrificing one.[26] Why is that ethically wrong, while diverting the train to the sidetrack is apparently right? The difference is the *deliberate* infringement of the rights of a single person.[27] As many ethicists consistently argue, rights trump (maximizing) utility and thus we can only minimize the number of deaths via something that is already threatening people (the train/the virus) and that will cause harm *regardless* of anything we do. Thus, drinking the water alone would be acceptable, while taking our fellow's bottle away by force would not, although the numbers are equal in both scenarios. That is probably the deeper reason why the followers of Rabbi Akiba argued from the point of view of possession and not from numbers.[28]

4. Human Rights Trump Numbers

Talmudic literature discussed this issue in a more abstract, almost historical form, describing a scenario of saving many people by a single person's sacrifice. Surprisingly, it concludes with almost the same answer as given by modern philosophical ethics. The Jerusalem Talmud records the following:

> *A number of Jews travelling on the road were attacked by a group of non-Jews who said: Give us one of you and we will kill him, if not, we will kill all of you. [The Talmud rules:] Even if all must die, do not surrender one soul from Israel.*[29]

The anonymous ruling is then followed by a longer, complex discussion of specific cases where it might still be permissible to surrender a person, but for our purpose, it is sufficient to ask again: why are numbers not relevant here?[30] First, again, because human rights trump numbers, it appears. Saving many lives is not sufficient justification to actively infringe on the rights of even a single (innocent) human being.[31] In addition, there is no ethical justification for believing that the other side will keep its part of the contract after having made such an immoral proposal.

How is this passage important to our rabbinical triage officer? So far, we have only discussed the first of our two questions, that of prioritizing treatment when resources are insufficient for all those in need of them, that is, the question of *withholding* resources from certain patients ranked with lower priorities. But what about *withdrawing* resources, that is, re-allocating resources already assigned to one patient in favor of another one whose chances of survival or full recovery are much higher? Or, to put it very drastically, is there a difference between passive killing (drinking the water alone) and active killing? Here we need to refer to a different Talmudic text:[32]

> *Reason tells us [the following ruling]: A certain person came before Raba and said to him: The lord of my place said to me: Go kill so-and-so, and if not, I will kill you, [what shall I do?] Raba said to him: [It is preferable that] he should kill you and you should not kill. Who is to say that your blood is redder [than his]? Perhaps that man's blood is redder*.[33]

This is a case where the government tells you: either you go and kill person A, or you will be killed by us. In our text, Raba rules unambiguously that you should not follow this order, asking the famous question: why do you believe that your blood is redder than the blood of your fellow? Thus, this would be a clear case of active killing, and it appears that the Talmud outspokenly refused the option to engage in it—probably also in consideration of the principle ruling we saw at the beginning: "We don't reject one soul because of another". The apparent asymmetry between the two cases, that in the childbirth scenario we are a third party, while in the killing case, we are the second party, is irrelevant to the underlying problem: is active killing allowed under certain circumstances?

Translating Raba's answer into the language of the COVID-19 pandemic: It seems that according to Jewish law, any act of disconnecting a patient from a respirator in favor of other patients, any act of reallocation of resources that would certainly cause the death of the first patient, is strictly prohibited. This would be considered a deliberate homicide, no matter the motivation, and obviously also punishable according to the applicable criminal law of the state where it happens. Taking a strikingly bold stance, however, some of the abovementioned "secular" position papers, written by European medical associations, clearly permitted disconnection and reallocation, and thus the breaking of positive law. The website of the British Medical Association (BMA), for example, stated in 2021 (this statement has since been removed): "In our view, there is no intrinsic ethical difference between decisions to withhold life-sustaining treatment and decisions to withdraw it, provided other clinically relevant factors are equal."

Our Talmudic rabbi at the entrance of the COVID-19 ward is probably aware that we can imagine situations where it is ethically preferable to withdraw and re-allocate medical resources, as tragic and emotionally challenging as this might be. Yet even before discussing withdrawal, the closest recreation of Raba's Talmudic precedent would be a situation where two COVID-19 patients put up a violent fight about being permitted into the ward in front of our triage officer, and he was physically unable to stop it until one of the already weak participants had lost her life. This is a case of what is known in ethical theory as "Excused Necessity", actively killing to save your own life, which might be culpable (acting as though your blood is redder) but hardly punishable, because, from the point of view of the victorious person, anything is better than death.[34] But what about re-allocation done by the medical personnel? In our case, they certainly do not disconnect a patient from life support by extension of the patient's own wish (either directly expressed or by proxy).[35] It might be argued, however, that in following the above-mentioned solution to the Trolley Problem it is permitted to withdraw allocated resources. Both turning the wheel on the one worker sleeping on the rail track and pushing a heavy-weight bystander onto the track seems to be active killing. The difference, that Thomson suggested, lies in arranging that something that already exists and will do harm *in any case* (e.g., the train/COVID-19) should be better distributed than it otherwise would be so that it will do harm to fewer people. In other words, one could still consider resource reallocation as a rather passive omission of ongoing treatment, for it is in fact the virus ("the train") that kills the patient, and the virus is unaware of someone's blood being redder than someone else's.

5. Long-Term versus Short-Term Survival

However, even if reallocation might be permissible, how does our Talmudic rabbi reach his decision, after considering so many criteria? Instead of leveling the distinction between active and passive, between withholding and withdrawing, the solution is to approach the problem from the opposite side: the distinction between long-term and short-term survival estimations—this is ultimately the first and most powerful tool at the disposal of medical decision makers. Complex mechanisms have been developed to calculate this factor, but all predictions concerning survival beyond the short-term category (less than a year) are still highly speculative. In addition, the common triage criterion, "life-limiting conditions", still requires a distinction between limiting the "quality of life" (as in the case of Alzheimer's) and the "prognosed length" of life (cancer). From the point of view of deontological ethics, however, life expectancy calculations are much easier to tolerate than the speculative prediction of future human behavior ("they *will* kill us all"), because here, in contrast to the cases discussed so far, human agency can be largely disregarded.

This is the point when we can refer to our last Talmudic text, which uses very similar language: the "life of an hour" is contrasted to "long lasting life" (חיי שעה/חיי עולם).[36]

> *Rabbi Yochanan said: If there is doubt as to life and death, a [Jewish] patient must not be treated by them [gentile doctors]. If it is certain that the patient will die, he can be treated [by gentile doctors]. [But even if it is certain that the patient will] die [if he is not treated], nevertheless, isn't there is value in temporal life? We are not concerned with temporal life! And from where do you know that we are not concerned with temporal life? As it is written "If we say: We will enter into the city, then the famine is in the city, and we shall die there…" But isn't there temporal life [to be lost]? Rather not, we are not concerned with temporal life*![37]

This text starts with the question of whether Jews should seek medical treatment from non-Jewish physicians. Rabbi Yochanan believes that this is only permissible if the patient would otherwise certainly die—in cases where death is still in doubt, one should not consult gentile doctors. The Talmud then asks: Is there not value in the "life of an hour"? This means, apparently, even if it is certain that the patient will eventually die without treatment, this will not happen immediately. Maybe it would be better to live on for a short time than to die at the hand of an anti-Semitic physician right now? This objection is then refuted, however: We shall not consider "living for an hour" in a case where there is even a small chance that the patient can be permanently healed. The proof text for this ruling is taken from the well-known story of the four starving lepers (II Kings, 7:3–4) who sat outside an enemy city. At one point they decided to risk entering the dangerous place because otherwise, they would die from hunger. Here, the Talmud remarks rhetorically: But what about the life of an hour they still had without entering the city? No, we shall not consider "living for an hour".[38]

Of course, this text is not a direct permission to reallocate life-saving resources to the patient with higher chances of recovering permanently. Our triage rabbi, however, knows that here Jewish law offers a solution, at least for cases where the patient is not responding at all to the treatment given to him. For such cases, Jewish tradition recognizes the category of the *trefah*, that is, a patient very close to irreversible death. For this person, the Talmud has special legal standards, different from those for a healthy or even a recovering patient: someone who kills a *trefah* is not liable for the death sentence, as she would otherwise be for murder.[39] This tradition might help our rabbi avoid the harshest verdict for disconnecting life support from a hopeless case in order to transfer it to another patient with better chances of survival—assuming, of course, that this is the only resource currently available. The difficulty for universal ethics obviously lies in determining 'irreversible death', since we all have to die at some point.[40] Not responding to treatment seems to be an appropriate criterium here, though most cases mentioned in the literature are different and involve pre-treatment.[41] Referring to the above-mentioned Talmudic debate about which reasons might justify extraditing a single person to save the whole group, some Jewish legalists have argued that handing over a *trefah* is permitted because she is certain to die in any

event. This is based on the Talmudic argument that if a singled-out person is subject to the death penalty, she must be surrendered. Yet, here again, the difference between natural forces (such as an illness) and human agency (being murdered or sentenced to death) is very important, while the first can be reasonably predicted, the latter cannot be calculated.

6. Summary

In summary, a Talmudic rabbi tasked with prioritizing patients at the entrance to an overcrowded COVID-19 ward has a fair number of tools at hand to make his triage decisions. In the light of his textual learning, our rabbi would very likely first look into medical opinions regarding the chances of the different patients to survive intensive care, assigning priority to those with the least expected health damage in the long run, even if more people can be treated with short-term success.[42] Only when all medical indications (including age) are completely equal would he very carefully apply a criterion such as 'social worth', giving priority, for example, to infected medical personnel. He would probably refrain from taking into account whether the patient was herself responsible for her infection, or if the patient refused to get vaccinated—if only because such refusals appear to him as a form of non-punishable mental illness.[43] He will have the greatest difficulty with a situation in which all of his IC-beds are fully occupied with apparently hopeless cases, and suddenly, a young patient arrives who, according to the doctors, requires only a few days of hospitalization in order to recover from the worst symptoms of COVID-19.

Should our rabbi succeed in managing even this situation, it would still be far from proving that ancient Judaism has useful answers for all moral problems that arise in fighting a pandemic. However, it can probably be argued that the Talmud provides our rabbi with a rather complex set of arguments, and thus with a balanced approach that considers both practicability and ethical rigor. Given those means, he might even be in a slightly better position than a modern "secular" triage officer who is forced to rely on short position papers written by ethical councils or medical associations who, in their honest attempts to provide easy and practicable solutions, often oversimplify the moral difficulties at hand. Decisions made on this basis, however, can cause traumatic experiences later on for the officers themselves and society as a whole. For the sake of social peace, this paper argues that it might be worthwhile to think with regard to our religious traditions—especially when it comes to rational moral justifications of ethical decisions that seem all too self-evident to us.

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Notes

1 Discussed, for example, here: https://www.nytimes.com/2020/03/21/us/coronavirus-medical-rationing.html (accessed on 18 August 2021).

2 The Hebrew Bible explicitly states, "I am the Eternal, your healer." Ex 15:26, causing a debate of 2000 years within Judaism about the physician's right to interfere, based on several other scriptural references. The majority opinion eventually not only accepted this right but declared the refusal to heal the sick to be bloodshed, based on Lev. 19:16. This view was even codified as binding law in the 16th century (ShA, YD 336).

3 See Kirschner (1985); Grodin et al. (2019). I will not include this rabbinic material in the present study as I confine the discussion to Talmudic literature.

4 See the classical discussion in Taylor (2007).

5 All of these Talmudic texts have been discussed before in connection with Jewish bioethics; I merely try to bring them into dialogue with some aspects of the COVID-19 pandemic. I will not refer, however, to later rabbinical sources, not even to responsa written on questions directly relating to COVID-19. For a good introduction to specifically Jewish answers to the involved ethical problems, see Dorff and Crane (2013). For advanced discussion, see Zohar (1997).

6 This distinction is fully developed in Kant's *Metaphysics of Morals* from 1797; for discussion, see Ripstein (2009).

7 Jewish Neo-Kantian philosophers in the 19th and early 20th centuries especially drew attention to those interesting similarities. See Kohler (2018) for a summary.

[8] The translation is taken from Sefaria (https://www.sefaria.org.il/Mishnah_Oholot.8?lang=bi accessed on 2 January 2023).

[9] In practical terms, the question here is whether, given that all other criteria are equal, a *lottery* is eventually an applicable triage method—a subject heavily discussed in bioethical literature. The Talmud seems to support this option. See White and Angus (2020).

[10] In fact, this Mishnah is even more complex because even in the first case discussed in the text, when the baby is still within the body of her mother, this is already considered life, and we have to ask what difference partial birth is supposed to make here. While the Mishnah has been used to argue the Jewish view on abortion, in the COVID-19/triage/vaccination context under discussion in this essay, the unborn baby case is not relevant.

[11] Bab. Talmud, Baba Meziah 62a and parallels.

[12] Translation from Sefaria (https://www.sefaria.org.il/Bava_Metzia.62a.2?lang=bi&with=all&lang2=en accessed on 2 January 2023).

[13] For an extensive and comprehensive discussion of this passage, including the Jewish reception history, especially in modern rabbinical thought, see Zoloth (1999). Interestingly, some modern Jewish thinkers side with Ben Petura, including Aaron Lichtenstein, Emanuel Levinas, Ernst Simon, and Louis Jacobs.

[14] In Israel, there is an (unwritten) rule that even in the case of a multi-victim terrorist attack, the treatment of all wounded must be prioritized according to medical criteria, including that of the attacker.

[15] In terms of COVID-19 vaccination debates, there was an interesting parallel to this tension when several countries received the first vaccine doses and had to make the following decision: Either use all available doses to vaccinate as many people as possible (and hope for more vaccine to arrive soon), or use only half of the received bottles, preserving the ability to give the already vaccinated the second dose three weeks later. Almost all countries did the latter.

[16] Always prioritizing children over adults is a debated issue but not relevant to the COVID-19 pandemic. The counter-argument here is that children basically depend on the generation that cares for them, a thought that the Talmud would certainly support.

[17] Most "secular" position papers follow what is called the "Fair Innings" argument (the value of still many "rounds" ahead as opposed to a "fulfilled life" already lived). See Williams (1997); Bognar (2015).

[18] Ex 22:21/Deut. 10:18/Deut. 27:19/Jer. 22:3/Zech. 7:10 and more. Hermann Cohen (1842–1918) has noted that with all our respect for the great cultural achievements of the ancient Greeks, the Hebrew prophets introduced an "epoch making turnaround" when they were not content with celebrating culture and philosophy as long as there was human suffering. This is what Cohen calls their "invention of the fellow human being (*Mitmensch*)" and the postulation of the duty to love her, none of which was as self-evident then as we tend to believe today. See Cohen, *Der Begriff der Religion im System der Philosophie*, Giessen 1915, pp. 75–76 (and other places).

[19] Compare bT Succah 49b, Baba Batra 10a, Hullin 131a, and many more.

[20] In Israel, early in 2021, high-ranking army officers were vaccinated before their soldiers—on the grounds of utility.

[21] In Britain, the case of Lucy Watts, MBE, was heavily discussed in 2020. Watts is a prominent advocate for people with disabilities and health conditions, especially young people, having inspired thousands with her personal example. However, her own condition (respiratory muscle weakness) makes it unlikely she could survive IC for COVID-19, so she would be prioritized very low in case of triage if only medical criteria were considered. (https://www.bbc.com/news/disability-52149219 accessed on 2 January 2023).

[22] bT Horayot 13a. The whole passage begins, however, with the statement that a man always precedes a woman when it comes to saving lives, which seems to contradict many other passages discussed in this paper. For discussion, see Rosner (2007). Jersey City 2007, pp. 172/173 and Zoloth, *Health Care*, pp. 168–71.

[23] In March 2020, the case of Fr Berardelli, an Italian priest, caused much discussion. The 72-year-old was reported to have given a ventilator (that his parishioners had purchased for him) to a younger patient and subsequently died from COVID-19. Later, the story turned out to be untrue, but the ethical dispute about decisions of this kind remains interesting. (https://www.bbc.com/news/world-europe-52015969 accessed on 2 January 2023) Immanuel Kant, in the third formulation of the Categorical Imperative, explicitly included duties towards oneself, that is, to treat also yourself not as a means, but as an end in itself, which seems to exclude deliberate martyrdom, that is, giving up the water/ventilator for someone else.

[24] End-of-life ethics in Judaism are a matter of dispute. A radical change was introduced here by Rabbi Moshe Feinstein in the 20th century when he ruled that a patient might not be forced to accept nutrition against his will (Iggrot Moshe, *Hoshen Misphat* 2, no. 74, for discussion Dorff/Crane, pp. 333–35). However, the Talmudic precedent for this and similar rulings is rare, and the available cases are rather strange and farfetched. See Newman (1990).

[25] First described by Philippa Foot in 1967, the most comprehensive discussion is in Thompson (1985), with countless other articles following up.

[26] Thompson, p. 1409. The other example given is a doctor who kills a person in order to harvest organs for five other people who are in urgent, life-saving need of transplantations.

[27] Admittedly, a very strict utilitarian might be willing to accept the opposite option here.

[28] For an extensive discussion of what he calls the "omission/commission distinction" in the context of the two-travelers text, see Zohar, *Alternatives*, pp. 103–6.

[29] TJ, *Trumot* 47a. The same appears in Tosefta *Trumot* 7, 23. The Mishnah in *Trumot* (8, 12) has a slightly different version: Here it is about women threatened with rape, but I believe, given the other versions, the idea behind this text is more generally human, the way I discuss it in this paper. See Zoloth, *Health Care*, pp. 172/73.

[30] This has sometimes been explained along the lines of ethnic belonging ("Jews don't do that to each other") because of the word *Israel* at the end of the passage. But again: I believe this passage conveys a stronger ethical message than tribal pride, self-defense, or even in-group solidarity. Here, it is interesting to compare this to the same problem mentioned in the Gospel of John (11:50), where the Jewish High Priest is said to have exclaimed: "Don't you realize that it is better for you that one man die for the people than that the whole nation perish?" in order justify killing Jesus to appease the Romans.

[31] This conclusion has been disputed, especially in the context of rabbinical responsa during the Holocaust. (See Dorff/Crane, p. 342, note 30.) The matter is too complex to be discussed sufficiently in this paper, however. In Kantian ethics, it seems to depend on the question of whether we refer to the Nazi soldiers (or to the Romans in the note above) as if they were an unstoppable train, a natural force, or if we still consider them human agents.

[32] bT San 74a. See, for extended discussion, Maccoby (2013).

[33] Translation from Sefaria (https://www.sefaria.org.il/Sanhedrin.74a.20?lang=bi&with=all&lang2=en accessed on 2 January 2023).

[34] See Ghanayim (2006) and for the Jewish legal context: Dorff/Crane, p. 337f.

[35] This latter option seems to be available from the famous ruling of Rabbi Feinstein (mentioned above) regarding end-of-life decisions. In cases where the patient herself wishes to end her life, the difference between withholding and withdrawing is indeed less relevant. See, for discussion, Dorff/Crane, pp. 334/335.

[36] bT Avodah Zarah 27b.

[37] Modified translation from Sefaria (https://www.sefaria.org.il/Avodah_Zarah.27b.4?lang=bi&with=all&lang2=en accessed on 2 January 2023).

[38] Of course, the abstract solution is supported by our knowledge that the lepers find the city empty and full of food (II Kings 7:8).

[39] bT San 78a. Maimonides codified this in the 12th century less leniently, but there are other commentators who continued the Talmudic line of thought: killing a trefah is killing a dead person (see Dorff/Crane, p. 335 and notes).

[40] Here, our rabbi should be made aware of the fact that under Talmudic standards of medicine, death was in fact much easier to predict than today with modern medical science and artificial life-prolonging options (which is a problem in itself).

[41] See the gruesome example from 1884 used by Dorff/Crane, p. 337.

[42] Here, our rabbi should be made aware, however, that long-term survival is a difficult criterion in the modern age compared to the Talmudic era. This should probably not be over-emphasized, however, because it can discriminate against poor people and people of color who are more likely to have multiple and serious medical pre-conditions because of poorer previous access to quality medical care and the direct negative effects of poverty on health. (See: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7762908 accessed on 2 January 2023).

[43] Comparable to the modern Jewish approach to suicide, Judaism condemns suicide but almost unanimously not the person committing it. See Resnicoff (1998).

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