

The reality of human endeavour is that most of the meaningful aid we provide for our fellow human beings comes at a tangible financial cost, and our resources are limited. Seeking a policy which will help those who can be helped most, medical ethicists suggest that patients with a poor medical prognosis be denied life-sustaining treatment which does not promise to cure their illness.<sup>2</sup>

So it is that Clare Clarke of Britain's University of York wrote in a 2001 paper,<sup>3</sup> "Insufficient funding to meet the escalating costs of health care has resulted in a scarcity of certain life-sustaining resources. Some form of rationing appears inevitable and the use of biological age has been advocated as a criterion for rationing these limited resources." In Italy, Elio Borgonovi of Universita' Bocconi wrote in 2004,<sup>4</sup> "Economists, managers and health policy makers think that it is wrong, even unethical, not to consider that resources are limited. If these are inefficiently allocated they can impede other treatments with higher benefits (in term of health and life saved)/cost ratio." And in the Medical Intensive Care Unit of Hospital St. Louis, in Paris, France, "Over the last 15 years, the management of critically ill cancer patients requiring intensive care unit admission has substantially changed. High mortality rates (75-85%) were reported 10-20 years ago in cancer patients requiring life sustaining treatments. Because of these high mortality rates, the high costs, and the moral burden for patients and their families, ICU admission of cancer patients became controversial, or even clearly discouraged by some. As a result, the reluctance of intensivists regarding cancer patients has led to frequent refusal of admission in the ICU."<sup>5</sup>

This paper will turn to Jewish tradition to address the question of denying or limiting life-sustaining treatment for a patient, "Sally", whose incurable terminal illness is expected to end her life in a matter of weeks. Sally's desired treatment could extend her life by days or weeks, but would require facilities and staff which would otherwise be deployed for patients with a strong prognosis for recovery.<sup>6</sup>

What does Jewish tradition say of this challenging ethical scenario?

#### Jewish tradition accepts the rationing of communal resources

The ratio of communal resources to communal needs has always been lopsided; more than two thousand years ago, Jewish tradition described an acute version of the problem. Besieged by bands of thugs who kidnapped Jews and sold them into slavery, communities would dedicate funds to ransom the captives. However, communal leaders faced two limiting considerations: (1) How much money could the community afford to provide for this captive's ransom? (2) Would ransoming the captives encourage the thugs to grow their activities, increasing the level of need?

Rabbinic authorities addressed this situation by imposing a limit on the ransom communities could pay. As the law is recorded in the Mishnah,<sup>7</sup> "One may not redeem captives for more than their market value, for the sake of general communal welfare."<sup>8</sup> The Talmud<sup>9</sup> offers both of the aforementioned considerations in justifying this limit: lest the community be overly strained, and lest the thugs be encouraged to increase their activities. While there are practical differences between the two arguments,<sup>10</sup> the underlying logic is the same for both: the resources of the community are

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<sup>1</sup> Rabbi Mordechai Torczyner is Rosh Beit Midrash of Yeshiva University Torah MiTzion Beit Midrash Zichron Dov of Toronto. Rabbi Torczyner may be reached at torczyner@torontotorah.com.

<sup>2</sup> There is a separate argument regarding whether such treatment is even considered an act of "healing"; this will be discussed as part of the section, "Jewish tradition distinguishes between a cure and life-sustaining care" below.

<sup>3</sup> Clare Clarke, Rationing scarce life-sustaining resources on the basis of age, *Journal of Advanced Nursing* 35 (2001)

<sup>4</sup> Elio Borgonovi, Economic aspects in prolonged life sustainable treatments, *NeuroRehabilitation* 19 (2004)

<sup>5</sup> Deciding intensive care unit-admission for critically ill cancer patients, *Indian Journal of Critical Care Medicine* 11 (2007)

<sup>6</sup> This article will not discuss the case of prolonging a pain-filled death, which raises additional dimensions beyond the scope of the discussion at hand.

<sup>7</sup> An ancient outline of Jewish law, published in the city of Tzipori, in Roman Palestine, in 3<sup>rd</sup> century CE.

<sup>8</sup> Mishnah Gittin 4

<sup>9</sup> An expansion of the Mishnah's outline, recording rabbinic debates regarding the laws contained in the mishnah. One edition of the Talmud was published in Roman Palestine in the 5<sup>th</sup> century CE; a separate edition, published in Babylon in the 6<sup>th</sup> century CE, is generally considered more authoritative in determining Jewish law. References to "Talmud" in this paper refer to the Babylonian edition, unless otherwise indicated.

<sup>10</sup> For example, a case in which a citizen wishes to ransom himself independently, at an unusually high price

limited, and so their distribution must be rationed.<sup>11</sup>

Rabbi Shabbtai Rappaport, a modern rabbinic authority, notes the same sort of rationing in the laws governing Jewish communal philanthropy.<sup>12</sup> As recorded by Rabbi Moses Maimonides,<sup>13</sup> an individual is required to "provide a pauper with anything he lacks."<sup>14</sup> Enumerating potential needs, Maimonides lists clothing, household implements, wedding expenses, transportation and even a runner to go before him. Whatever the pauper was accustomed to having before his descent into destitution, the individual must strive to provide for him, spending up to 20% of his assets in order to accomplish this. On the other hand, Maimonides limits the community's philanthropic obligation to provision of food, clothing and burial.<sup>15</sup> A community is not expected to expend all of its resources, or even the private standard of 20%, to meet the universe of needs which are incumbent upon the private citizen.

Applying this approach to general spending, we may fairly state that the Jewish community should develop a rationing system parallel to the system employed for ransoming captives and providing philanthropic support.

#### Jewish tradition distinguishes between a cure and life-sustaining care

Jewish tradition also recognizes that a cure outweighs Sally's stopgap treatment; so it is that Rabbi Yisrael Meir Kagan wrote in the early 20<sup>th</sup> century, codifying a much older rabbinic tradition, "One who can save either a healthier person or a dying person from a fire must save the healthier person."<sup>16</sup> Rabbi Moshe Feinstein, a leading 20<sup>th</sup> century American rabbinic authority, wrote that if two patients come to an emergency room simultaneously requiring immediate use of the same resource, and doctors estimate that one patient could be healed but the other could only have his life briefly extended, then the doctors should give the resource to the patient they believe they can heal.

Despite the above, there are three reasons to be wary when applying rationing to healthcare, and of legislation which draws a bold line between "cure" and Sally's "life-sustaining treatment".

#### First reason not to ration healthcare: The duty to rescue

As we have noted, it is legitimate to contend that rationing communal resources is part of Jewish tradition, and that Sally's life-sustaining treatment is not the same as full healing. However, biblical text establishes a philosophy of looking after the welfare of other individuals even when the benefit we can provide is minimal, such that we are commanded to deploy all available resources to provide Sally's care.

This responsibility to aid others is expressed in broad imperatives like "Love your neighbour as yourself"<sup>17</sup> as well as in specific commandments like that of restoring lost objects to their owner.<sup>18</sup> It is most clearly stated in the Torah's "duty to rescue" imperative, "You shall not stand by as the blood of your neighbour is shed."<sup>19</sup> As the Talmud<sup>20</sup> explains, "How do we know that one who sees another drowning in a river or being dragged by a beast or being beset by bandits must act to save him? The Torah says, 'You shall not stand by as the blood of your neighbour is shed.'" This establishes a duty to rescue those in need.

The Talmud<sup>21</sup> emphasizes the value of life-sustaining treatment even should it add only minimal time to a human life, instructing the Jew to violate the Sabbath – an act which is normally subject to the most serious of biblical penalties – in order to extend a life for even one hour. This has been inscribed in every code of Jewish Law, from every era of Jewish scholarship, in the strongest of language.<sup>22</sup> Illustrating the value of this "temporary life", Rabbi Shlomo Zalman Auerbach, a major rabbinic authority in Israel in the late 20<sup>th</sup> century, declared, "We have no measuring stick for 'life', to

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<sup>11</sup> Some explain the logic of the "encouraging the thugs" concern differently, as a contention that this might lead to kidnappings which would lead to injury or death. See, for example, Alan Jotkowitz, *The Modern Dilemma of Triage from a Halakhic and Ethical Perspective*, Tradition 47:1 (2014), pg. 66-67.

<sup>12</sup> Rabbi Shabbtai haKohen Rappaport, קדימיות בהקצאת משאבים ציבוריים לרפואה, Assia 13 (1990)

<sup>13</sup> One of the great codifiers of Jewish Law; lived in Egypt in the 12<sup>th</sup> century CE

<sup>14</sup> Mishneh Torah, Laws of Gifts to the Needy 7:3

<sup>15</sup> Ibid. 9:12

<sup>16</sup> Mishneh Berurah 334:68

<sup>17</sup> Leviticus 19:18, and see Talmud, Sanhedrin 84b

<sup>18</sup> Deuteronomy 22:1-3, and see Talmud, Sanhedrin 73a

<sup>19</sup> Leviticus 19:16

<sup>20</sup> Talmud, Sanhedrin 73a

<sup>21</sup> Talmud, Yoma 85a

<sup>22</sup> See, for example, Maimonides, Mishneh Torah, Laws of Shabbat 2:18 and Code of Jewish Law Orach Chaim 329:4

gauge its value and importance even without Torah and commandments. We violate Shabbat even for an elderly, ill, boils-ridden person, even if he is deaf and mute and entirely insane, and he can fulfill no commandment, and his life is only a great burden for his family...<sup>23</sup>

Therefore, Jewish tradition does not employ the distinction between curing illness and sustaining life to provide license to ignore Sally's life-sustaining treatment. This treatment may be of lesser value than a cure, but it cannot be eliminated across the board; it is still of great importance.

#### Second reason not to ration healthcare: Duty of care

Despite the aforementioned duty to rescue, Jewish tradition does prioritize use of resources to cure illness over use of resources to sustain life. However, the calculation becomes more difficult when a prior, special relationship exists between Sally and her caregiver.

The "special relationship" between healthcare provider and patient, imposing a duty of care even when no such duty exists in general society, is recognized in law. Current Chief Justice McLachlin of the Supreme Court of Canada declared in a 1992 case, "The relationship of physician and patient can be conceptualized in a variety of ways. It can be viewed as a creature of contract, with the physician's failure to fulfil his or her obligations giving rise to an action for breach of contract. It undoubtedly gives rise to a duty of care, the breach of which constitutes the tort of negligence."<sup>24</sup> This raises a strong question: may a physician who is already treating a patient decline to offer non-curing, life-sustaining care?

Contemporary rabbinic authorities contend that once Sally is in a physician's care, the special relationship indeed obligates the physician to continue to treat her even after the reasonable prognosis is that she will not be healed. So it is that Rabbi Moshe Feinstein ruled, "Once he is brought into the unit for treatment, he acquires the space, whether he pays for his time in the hospital or whether he does not pay, and he is treated for free."<sup>25</sup> Newer patients will be turned aside, despite their strong expectations for recovery, in order for this physician to continue to use these resources to care for Sally.

#### Third reason not to ration healthcare: Society's compelling interests

One could outline a case in which neither the Torah's duty to rescue nor the special patient-physician relationship existed. Consider, for example, a policy that a Medical Intensive Care Unit facing multiple simultaneous new admissions should give priority to patients with better prognoses. However, society may yet have two compelling interests that justify rejecting such a triage approach.

In law, society's compelling interest often overrides the needs of individuals. For example: as observed in the Law Society of Upper Canada's Rules of Professional Conduct,<sup>26</sup> "A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them," and this communication requires mutual trust. Therefore, a lawyer is generally prohibited from disclosing his client's words, even to protect a financially vulnerable party. We accept the vulnerable party's harm for the sake of society's compelling interest in lawyer-client trust.

The same recognition of society's compelling interest is seen in Jewish law. For example, as noted above,<sup>27</sup> society may decline to prevent an individual's sale into slavery, in order to serve the compelling interest of avoiding extreme financial pressure upon the community.

In truth, one might employ the "compelling social interest" argument to argue in favour of limiting or eliminating life-sustaining care. Society has a compelling interest in reining in spending, at the expense of individual patients, in order to protect its resources. However, two compelling social interests weigh on the opposite side of the scale.

First, society is harmed by ambiguous policies which might lead to pressure – external or self-imposed – on its members to surrender justified, cost-effective healthcare. Because the line between "cure" and "life-sustaining" is not easily drawn, and because estimation of "appropriate" and "extravagant" financial cost is subject to significant debate, patients, their

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<sup>23</sup> Minchat Shlomo 1:91:24

<sup>24</sup> Norberg v. Wynrib, [1992] 92 DLR (4th) 449 at 485–6

<sup>25</sup> Igrot Moshe Choshen Mishpat 2:73:2, and see similar views by Rabbi Shlomo Wosner (Shevet haLevi 6:242:3) and Rabbi Shlomo Zalman (Nishmat Avraham Yoreh Deah 252:2). An additional point raised by Rabbi Feinstein is the concern that abandoning treatment may constitute active injury to the patient, as the patient perceives his abandonment and becomes distressed.

<sup>26</sup> Commentary to Rule 2.03(1), 2000 edition

<sup>27</sup> See footnote 7 in the section " Jewish tradition accepts the rationing of communal resources".

families and their caregivers will be hard-pressed to know on which side of the rationing line they lie. What would we make of chemotherapy which would add three days, three weeks or three months to life, without defeating the cancer? Is a bed or ventilator an appropriate expenditure of resources if it costs \$5,000, \$10,000 or \$100,000 per week? Because of these blurry definitions, patients will experience pressure to label themselves "Sally" and surrender their claims to healthcare even when that care adds significant life at responsible cost.<sup>28</sup>

Jewish legal tradition voices a similar concern regarding ambiguous policies which could benefit part of society but which might be misunderstood or misapplied, harming others. For example: in the realm of divorce, a particular 4<sup>th</sup> century CE sage wished to implement an optional, protective protocol in order to ensure that Jewish documents of divorce were written properly. His peers responded that implementing such a protocol would create uncertainty regarding divorce documents that had been written without it, leading to disqualification of those documents by authorities who would not realize that the protocol was unnecessary, or by unlearned individuals. Therefore, the sages banned this safeguard.<sup>29</sup> Well-intentioned policies may help a certain sector of society, but society has a compelling interest in avoiding confusion and misapplied pressure.

Second, society is harmed when it ignores the humanitarian challenges which spur progress. Denying the homeless their right to a shelter might save society's resources, but it would be an inhuman way to lower the cost of mitigating poverty. Refusing to pay to treat anxiety disorders might reduce society's healthcare expenses, but it would be an inhuman way to lower the cost of mitigating mental illness. And denying coverage for Sally's life-sustaining treatment might reduce the cost of Medical Intensive Care Unit care, but it would be an inhuman way to lower the cost of mitigating critical illness.

Society has a compelling interest in preserving pressure upon its agencies to develop effective, creative, less expensive solutions for caring for its Sally's. The biblical imperative, "You shall not stand by as the blood of your neighbour is shed,"<sup>30</sup> summons mankind to find these better ways, instead of pointing to the budgetary calculations of healthcare providers or budget-writing bureaucrats to justify the status quo. Indeed, the Bible<sup>31</sup> predicts, "The pauper shall never cease from the midst of the land," but rather than abandon hope of progress, it continues, "Therefore I instruct you: Open up your hand to your brother, to your pauper, to the indigent person in your land." Some rationing of resources may be required, but on the whole, infinite need should spur not concession, but action.<sup>32</sup>

Of course, one might contend that reducing Sally's life-sustaining care could be employed as a temporary measure without eliminating medical research. Realistically, though, the public agenda will be set by the most immediate need, and without that goad, we would need to rely on that which Pope Francis recently termed, "a crude and naïve trust in the goodness of those wielding economic power."<sup>33</sup> Society would be better served by maintaining the pressure that drives the ongoing enterprise of seeking a more humane solution.

### Conclusion

Jewish tradition has long recognized the problematic mismatch between our communal financial resources and the needs we must fill, and has rationed those resources accordingly. Further, Judaism does distinguish between the value of curing a disease and the value of providing non-healing, temporary, life-sustaining care. Nonetheless, reducing life-sustaining treatment risks flouting Judaism's duty to rescue, could run afoul of the duty of care implicit in a prior physician-patient relationship, and would contradict society's compelling interests 1) by creating pressure on individuals to decline justified healthcare and 2) by eliminating pressure to develop humane solutions for patient needs.

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<sup>28</sup> For a shocking application of the concern for inappropriate pressure in the realm of legalized assisted suicide, see the testimony of Margaret Dore, *Preventing Abuse and Exploitation*, ABA Senior Lawyers Division 25:4, "I have had two clients whose fathers signed up for the lethal dose. In the first case, one side of the family wanted the father to take the lethal dose, while the other did not. He spent the last months of his life caught in the middle and traumatized over whether or not he should kill himself... In the other case, it's not clear that administration of the lethal dose was voluntary. A man who was present told my client that his father refused to take the lethal dose when it was delivered ("You're not killing me. I'm going to bed"), but then took it the next night when he was high on alcohol."

<sup>29</sup> Talmud, Gittin 5b

<sup>30</sup> Leviticus 19:16

<sup>31</sup> Deuteronomy 15:11

<sup>32</sup> Indeed, the 1<sup>st</sup> century CE sage, Rabbi Akiva, was challenged by a Roman authority, "If your God loves the poor, why does he not support them?" To which Rabbi Akiva replied, "So that we will be saved from punishment in Hell." (Talmud, Bava Batra 10a) Leaving aside the question of why one person must suffer in order to provide for merit for another, Rabbi Akiva contends that the existence of suffering should not discourage us, but rather, should be viewed as an opportunity for us to help.

<sup>33</sup> In a critique of trickle-down economics in *Evangelii Gaudium* (2013)