

Some Modern Responsa on Medico-Moral Problems

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Having written and lectured extensively on Jewish medical ethics, I often receive personal as well as public enquiries for guidance in this field, in addition to fairly frequent requests for articles. Some of my responses have been featured in virtually every issue of *L'eylah*, the magazine published twice a year by my Office since the Winter 1975/76, and continued in association with Jews' College since the Spring 1985. Included in every issue over the past five years has been a feature "From the Chief Rabbi's Correspondence Files," presenting a sample of letters written in reply to enquiries and sometimes challenges from correspondents in various parts of the world, including many on medical subjects, all accompanied by an introduction explaining the background to my response.

Here reproduced are several of these articles and correspondence items as they appeared in *L'Eylah*, with introductory notes where required.

The Doctor's Duty to Heal and the Patient's Consent

This was submitted to an interdenominational working party, which consequently published its proceedings in a book Consent in Medicine; Convergence and Divergence in Tradition, King Edward's Hospital Fund for London, 1983. The book included this chapter as the Jewish contribution.

In Jewish thought and law, human life enjoys an absolute, intrinsic and infinite value. Man is not the owner of his body but merely its custodian, charged to preserve it from any physical harm and to promote its health where this has been impaired.

This principle has both positive and negative applications. It turns healing where necessary into a religious duty, devolving on patient and doctor alike. Conversely, neither patient nor doctor has the right to refuse receiving or rendering such medical aid as is essential for the preservation of life and health. This principle therefore overrides such personal freedoms as may conflict with it,

just as the obligation to prevent a suicide (or murder) attempt, by force if necessary, annuls the right of freedom to choose (or inflict) death. Again, innocent life is not ours that we can dispose of it, and where the individual may wish to surrender it, society or any member of it becomes obligated to frustrate any act – by commission or omission – of self-destruction.

On the other hand, out of respect for his dignity and to encourage his cooperation, a patient is entitled to be informed of any treatment to be given him, so long as such information is calculated to help the patient. It should be withheld or modified only if there are well-grounded fears that, far from helping him, it would be liable to damage his interests, either mentally by fearing the prospect of the treatment, or physically in inducing him to resist the treatment. For the same reason, a patient should be informed of a fatal prognosis only if one is reasonably certain that by revealing his condition he will not suffer a serious physical or mental setback, notably by breaking his will to live and his confidence in recovery. In such cases, Jewish ethics would have no compunction in suppressing the truth from the patient or even deceiving him. His well-being must be the primary consideration.

As a rule, the doctor's opinion – as the medical expert – takes precedence over any lay view, including the patient's. However, this rule is not absolute, since it only operates in favor of the patient's interests. The classic Jewish source for this rule is to be found in the detailed regulations of the Day of Atonement. Normally it is a great offence to consume any food or drink throughout that twenty-five hour period, unless fasting would cause the slightest risk to life. Hence, if any competent doctor advises that the patient's condition requires him to eat, he is obliged to do so, even if he himself feels confident that he can fast without any hazard. On the other hand, once a patient himself feels that he cannot fast without risk, his opinion must be respected in his favor, and food must be served to him even if a hundred doctors unanimously say otherwise. This rule is derived from the verse "The heart knoweth its own bitterness" (Prov. 14:10). In other words, in regard to anything required by the patient, his own assessment of his needs is supreme and overrides any medical opinion, even if this judgment involves what would otherwise be a grave religious violation. But in the reverse circumstances, when medical opinion requires a possibly lifesaving action not deemed necessary, or rejected, by the patient, his wishes

must be disregarded, even at the cost of spiritual ideals (e.g. his desire to fast on the Day of Atonement), and *a fortiore* his physical considerations (e.g. the desire to avoid the pain of surgery or the crippling effects of an amputation essential to save his life).

This modification of the general rule, giving the patient certain limited rights to overrule the doctor, implies that there is at least some residual claim to consent in favor of the patient. In black-and-white cases, where medical experience clearly sets the need for treatment at a maximum and the risk factor at a minimum, the general rule operates without reservation, and the patient need not be consulted (though he should be informed under the above-mentioned conditions), since his wishes for consent are irrelevant to the overriding duty to save his life. But the modification of the rule is weighty enough to take the patient's wishes into account when we deal with gray areas where the prospects of success are reduced and the chances of failure increased. The distinction here is not between "ordinary" and "extraordinary" treatments, but between procedures liable to be more or less effective, such as high-risk, experimental or controversial treatments.

In theory, once the patient's own views have to be disregarded, even force if necessary would have to be applied to protect his life – or even his health which one is equally obligated to preserve. But in practice, and bearing in mind that there are never black-and-white situations in medicine, leaving no room for some doubts or risks, all the judgements are bound to be sufficiently relative to exclude the use of force and to allow for some distinction between life and health. The line obviously cannot be drawn with absolute precision, especially since many a health hazard may lead to some eventual risk of life. There must therefore remain some element of subjectivity in judging the extent to which a patient's refusal to give consent should be considered in individual cases. Nevertheless, the above principles and directives of Jewish law and ethics are sufficiently well-defined to serve as general guidelines.

They may be summed up as follows:

1. It is a religious obligation to protect human life and health, incumbent upon a doctor as upon any other person in a position to do so.
2. A doctor is therefore never morally entitled to withhold or withdraw his services, whether or not a contractual relationship exists between him and his patient, unless a more competent

- doctor is available. A refusal to render medical aid where required is deemed as tantamount to bloodshed.
3. A patient has no right to refuse medical treatment deemed essential by competent medical opinion for the preservation of his life or health, and his consent need not be procured for such treatment.
 4. In this discharge of the doctor's obligation to save life and limb, and in the absence of the patient's consent, the doctor may even be required to expose himself to the risk of legal claims against him for unauthorized "assault and battery."
 5. While the patient should always be informed of treatments or procedures to be applied, both as a matter of respecting his rights and to secure his cooperation, his prior consent is required, and should be sought, only in cases of (a) high-risk treatments, (b) doubtful or experimental cures, and (c) differences of opinion among equally competent medical experts.
 6. The onus of choosing between various alternative forms of treatment, or none at all, rests upon the doctor, and patients should never be expected to render what are essentially purely medical decisions.

Conflicting Religious Demands between Doctors and Patients

A senior Jewish consultant and lecturer at a Californian medical school wanted to know how Jewish doctors should relate to non-Jewish patients when their respective religious beliefs were at odds on medical procedures or with the requirements of civil law. He had asked several American Rabbis, including experts on medical ethics, for guidance, but had received no reply. I sent him the following letter:

I am disappointed, but not altogether surprised, that you received no answer when over a year ago you asked for some rabbinical direction on "how does a Jewish physician behave with patients of a different religion whose religious convictions run counter to his own" (or are in conflict with the law of the land). It may be that there simply is no straightforward answer on how, in practice, to resolve such a conflict with others' religious and one's own civil loyalties. But since you are concerned to use this information not only for your own guidance but also for teaching purposes, I feel I cannot default in letting you have some appraisal of the relevant principles as I see them. I emphatically agree with you

that “Jews should be in the forefront of formulating answers” to such moral problems.

In strictly halachic terms, I have little doubt that Jewish physicians should carry out lifesaving procedures even against the wishes or religious convictions of the patient concerned, whether they are Jewish or non-Jewish. Thus, in the specific cases you mention, the infant born to Jehovah’s Witness parents should be saved by overriding their objection to blood transfusions, and the Catholic mother whose life is at risk by resorting to therapeutic abortion (in the latter case, many halachic authorities would prefer a Jewish physician to perform the operation since the laws of murder as applicable to non-Jews include the destruction of a fetus; but see *Tosaphot, Sanhedrin 59b*, permitting this for lifesaving purposes to non-Jews, too).

However, other considerations may also have to be taken into account, possibly modifying this norm. In particular, we are required to avoid a *Chillul Hashem* by causing “enmity” between Jews and non-Jews if this is liable to result from disregarding the faith of the patient or his next-of-kin. The exposure of the doctor to a possible charge of assault and battery would not of itself exonerate him from the duty to save life, though the threat that his license to practice may be withdrawn following a criminal court action against him may well justify his refusal to carry out his duty in these particular cases so that he can perform it on other patients in the future.

Having regard to all these partly-conflicting considerations, I would think a Jewish physician should make every effort to secure the safety of life without consulting patients likely to object, if this can possibly be avoided, i.e. by not fully informing them of the emergency procedure to be adopted. This may be easier in the case of the Jehovah’s Witness infant, where perhaps the parents need never know that a blood transfusion has been administered, or at least not until after the operation if required in an acute emergency, than in the case of the Catholic mother, unless she too presents herself for treatment in a desperately acute state when the formalities of consultation and consent might reasonably be ignored on the excuse that her life was in immediate jeopardy accentuated by any delay in treating her.

Obviously, in reply to your enquiry, I can merely set out the moral imperatives as I believe Jewish law defines them, and as a

conscientious Jewish physician should do his utmost to act on, even resorting to whatever subterfuge he can find to escape from the legal or otherwise damaging consequences of his action. But I cannot determine how far this guidance can reasonably be expected to be applied in practice in any given circumstances. Nor would I wish you or others to regard this expression of my views as halachic ruling to be applied without consulting a competent Rabbi on the merits of each individual case. But you can take it that, in all life-threatening situations, Jewish ethics would certainly not be consistent with the ruling given by the California Attorney-General's Office whereby "noncompliance with the patient's wishes would constitute (an offense) punishable as a criminal action." In Jewish law, the duty to preserve life is paramount, incumbent alike on patient, doctor or anyone else in a position to do so.

Use of Nazi Medical Experiments

A rather small news item had caught my attention. It looked quite innocuous, but I felt challenged by it. It mentioned a Professor of Biology of Victoria University in Vancouver, Canada, of whom I had not previously heard. The item appeared to me important enough to seek further clarification, and the following exchange ensued:

I have just seen a press report on the statement attributed to you in the *Toronto Globe & Mail* regarding the usefulness of certain medical experiments carried out in the Nazi death camps. Because of my specialized interest in medical ethics, I read this with particular interest and some grave concern.

My concern derives not only from the obvious ethical dilemma, which you evidently sensed, on whether we are altogether justified in utilizing knowledge, however valuable in itself, gained by such diabolical means. I cannot easily resolve a dilemma of such magnitude and will not even comment on it here. But what troubles me personally is the implicit claim that some good might be derived from this evil.

Based on medical writings I read long ago, I have always maintained – in my books and lectures alike – that no practical benefits of any kind accrued from all the medical experiments so brutally carried out by the Nazis on many thousands of victims without any ethical constraints whatsoever, and I applied this to the moral sensitivities with which we ought to approach experiment-

ation on humans in medical research nowadays. Your remarks appear to throw a serious doubt on my assumption.

I would therefore much appreciate your clarification on whether the knowledge gained on hypothermia from these experiments refers mainly to diagnosis or prognosis (e.g. how long a person can endure subnormal temperatures), or includes new methods to treat this condition by therapeutic discoveries or advances gained directly from the medical findings in the death camps. If the latter can be confirmed, I would obviously have to revise assumptions I have made and asserted for several decades past.

Within a month I had the following reply:

I am responding to your enquiry concerning whether “practical benefits of any kind” accrued from medical experiments by the Nazis.

Firstly, I would point out that I am one of about 40 scientists and medical experts that have referred to the Alexander Report over the last 20 years. I attach a list of journal citations of the Alexander Report which shows initial citations being in the early 1960’s and our initial citation being in 1974. I would also like to draw your attention to the several citations of the Alexander Report in the book “Survival in Cold Water” (Blackwell Scientific, Oxford). The author is Dr. W.R. Keatinge (a physician at London Hospital). Chapter 6 of this famous publication cites Dachau results on cold water immersion several times. Also, Maclean, D. and Ernslei-Smith, D. cite the report in their book “Accidental Hypothermia,” Blackwell, 1977.

I have brought the above references to your attention so that you may be aware of the large amount of “use” of Dachau data. If you take the time to analyse these publications, you may be able to decide whether or not such use has “practical benefits of any kind.” I cannot give an opinion for the work of others. As for our citation of the Alexander Report, I can comment on its practicality. On our list of hypothermia publications (attached) I have put an asterisk besides two publications that cite the Alexander Report. Examination of these will show that in the Discussion sections I have referred to Dachau findings in two ways. One is to criticize the use (by others) of Dachau findings on survival in cold water for purposes of predicting survival time of average persons who are not lean and emaciated. It would be like using channel swimmers

(generally possessing high skin fatness) to represent average persons. Both are unrepresentative. The other “use” of Dachau data is to support the expectation that core cooling rate of humans in cold water is relatively linear below that linearity which we and other experimenters observe when studying people in the core temperature range of 37-35°C. Several figures (e.g. fig. 14, p. 216) indicate this. This helps to ratify our procedures for predicting survival times of average persons which is based on a linear extrapolation of our cooling rates down to 35°C, core temperature. Since better knowledge of survival time in cold water has practical benefits for education in cold water safety and planning of rescue facilities, then I would have to say that our citation of *specific* raw data from the Dachau experiments is of indirect practical benefit.

If anyone feels that “use” of Dachau data in the above ways suggests that I condone the way the data were obtained, such a person is making a completely unjustified and unfair judgment.

I expect that you have read the Alexander Report. I attach a copy of the front page, on which the “NOTE” is interesting in the context of your letter: “hopes that it will be of *direct benefit* (italics mine) to US science and industry.”

I hope this information will be useful in your analysis of the important ethical and philosophical questions regarding citation of medical information obtained as a result of man’s warring activities.

I found the reply unconvincing and wrote again:

...Let me make it clear at once that nothing I wrote was meant to suggest that, by using information gained from the Nazi experiments on humans, the scientists accepting and applying these data were condoning the methods by which they were obtained. I too would regard such a charge as “completely unjustified and unfair.” On the other hand, I think you will agree that we are here not dealing merely with “medical information obtained as a result of *man’s warring activities*” (my italics). The atrocities committed by the Nazi doctors could surely hardly be described simply in such relatively human terms (except insofar as any war is not exactly human).

My concern was solely to establish whether the diabolical cruelties inflicted by Nazi physicians ostensibly in the name of medical progress did in fact yield any significant results of direct benefit to humanity. Frankly, after a careful reading of your letter

and perusal of the works cited, I am still not convinced that such a claim can be made and sustained. The reference in the “NOTE” on the front page of the original Alexander Report, to which you draw my attention, merely “hopes that it will be of direct benefit to US science and industry.” The expression of such a “hope” is hardly identical with an *assertion* that a direct benefit has in fact accrued to US science and industry, let alone to humanity. This reference in itself is therefore quite inconclusive.

What is at stake here, I believe, is not just a matter of semantics, nor is it the condoning of Nazi crimes. It is the basic moral question whether any good of any significance resulted from the most evil mass perversity in human history. Even if it did, it would not make the evil any lesser. But if it did not, as I have always so far assumed on a basis of the medical evidence available to me, then at least we can claim that medicine did not gain from experiments carried out on a massive scale in violation of the most elementary human rights. A constant reminder of this fact, if it could be established beyond all doubt, might serve as a powerful warning to the present and future generations never again to sanction unethical methods for the dubious benefits of medical or scientific advances.

If that lesson were to be learned from the Nazi prostitution of medicine, it would indeed be the one “direct benefit to humanity” which no one could dispute.

Shortly thereafter I quite unexpectedly received the following letter from Sir Abraham Goldberg, Regius Professor of the Practice of Medicine at the University of Glasgow:

Quite independently I was motivated to write to Professor Hayward of the University of Victoria about the reports of his use of the Dachau data. I enclose a copy of the letter I sent to him and also a copy of his reply. Professor Hayward also enclosed your letter to him and his reply to you. It is perhaps not remarkable that we have concurred on this issue but I am sure that you are absolutely right in your ethical appreciation of these practices. There is ample information on patients with hypothermia because of the high incidence of this condition in the world. Apart from the overwhelming ethical issue there is also the problem of acceptance of data from a totally unacceptable “scientific” source.

Enclosed with this was a copy of Professor Goldberg's letter to Dr. Hayward. I felt all the more gratified by it as coming from a medical personality of eminence and as I had been surprised that the news item had not raised more eyebrows in the first place:

I have recently read your comments to the *Toronto Globe & Mail* about your use of data from the Nazi death camps during the Second World War. In particular, it was stated that you had found the "experiments" on hypothermia to be extremely useful in your own studies in British Columbia for the past twelve years. In the report it was stated that you were worried about using the data and had to confront the dilemma of its use. If this report is correct, may I respectfully suggest that in your use of this data you have made an error of judgment.

According to William L. Shirer in "The Rise and Fall of the Third Reich" (Chapter 27) these "experiments" were conducted by "fewer than 200 murderous quacks, albeit some of them holding eminent posts in the medical world." Shirer notes that although the criminal work was known to thousands of leading physicians of the Reich, the actual perpetrators were people of the lowest professional standards. I have it on excellent authority that in present-day medical science not a single item is ever accepted or used. By the act of using this data you must appreciate that you confer on it a scientific respectability which it certainly does not possess. What is more, by mixing the data with that of your own scientific work you must, by association, dilute the scientific credibility of your own labors.

You are quoted as saying that it was your hope that in some small way the use of the data by you would mean that "these people did not die futilely." May I suggest that this is faulty rationalization on your part. That, to me anyway, would be the last thing that these innocent victims of such degradation would have wished. They would surely have wished that the sacrifice of their lives would contribute to an era when such inhumanities would never again be carried out. An acceptance of any part of these horrors as legitimate science does not contribute to this aim. It is obvious from the experience of the past few decades that medical scientists cannot divorce themselves from ethical considerations. Every medical study in man must today be viewed in the light of the Helsinki Declaration. The evil practices whose data you have used, contravene every tenet of this Declaration and certainly would never

have been published in any scientific journal in this world. May I respectfully suggest that you reconsider your decision on this very important matter. It is still not too late.

I, of course, appreciate that you yourself have nothing but abhorrence for these acts. My letter is meant as a mark of concern to a fellow doctor.

To this Dr. Hayward had simply replied:

I understand and respect the opinions you have expressed. However, some of your inferences about our work suffer from the fact that you have based your comments on a newspaper article which was written in response to a long-distance telephone call. Such media articles (with a sensationalist tone) are often unreliable for presenting complete and accurate facts relating to an issue. I'm sure you will agree. Consequently, I thought I would send you some information that may "modify" your thoughts on this issue. I know that it will not change your fundamental point about not referring to Dachau data at all.

I'm enclosing copies of correspondence I've had with the Chief Rabbi of London, because his letter and yours are quite similar.

We are, of course, well aware of the Helsinki Declaration and conduct all our studies according to its guidelines.

*Source: ASSIA – Jewish Medical Ethics,
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Source: The Schlesinger Institute for Jewish Medical Ethics

Some objectivists say moral variation is greatly exaggerated — people really agree about values but have different factual beliefs or life circumstances that lead them to behave differently. For example, slave owners may have believed that their slaves were intellectually inferior, and Inuits who practiced infanticide may have been forced to do so because of resource scarcity in the tundra. Moral variation is best explained by assuming that morality, unlike science, is not based on reason or observation. What, then, is morality based on? To answer this, we need to consider how morals are learned.