

THERAPEUTIC HOMICIDE:
A PHILOSOPHIC AND HALAKHIC CRITIQUE OF
HARRIS' 'SURVIVAL LOTTERY'

ABSTRACT. In a well-known paper entitled, 'Survival lottery', published in a philosophical journal, John Harris proposed for discussion an interesting idea for saving the lives of certain kinds of patients who are at the point of death. Let us assume that there are two such patients, one that could be saved by a heart transplant, and the other by the transplantation of a pair of lungs. However, no suitable organs are available for this purpose. Might it perhaps not be immoral to select, by national lottery, a healthy person, who would be sacrificed, his organs used as transplants, and thus *two* lives be saved through the sacrifice of only *one*? This proposal is subjected first to a critical philosophical and ethical analysis, and then to a critical analysis from the point of view of Jewish Ethics as embodied in *Halakhah*.

John Harris' 'Survival Lottery' (1975, pp. 81–87) proposes a thesis that is as striking as it is clear. It suggests that whenever two dying patients are in need of organ transplants, and no suitable organs are available for transplantation, a national lottery be held so that a suitable donor could be selected randomly. The donor would then be sacrificed, with the appropriate organs being transplanted to the dying patients. Two lives, after all, are better than one. To be specific, Y and Z are dying patients. Y needs a new heart; Z needs a new pair of lungs. If Harris has his way, a central computer will be asked to select a suitable donor – A – at random, who would be killed (surely in a most humane manner) so that his heart and lungs could then be transplanted to Y and Z respectively.

A close reading of Harris' proposal leaves the reader with the impression that the author himself is not entirely persuaded by his own argument. To be more precise: he feels that the intellectual argument is a compelling one; but intuitively (perhaps: emotionally) he acknowledges that there is something unaesthetic about the

random selection and sacrifice of an innocent third party in order to save two lives. Nonetheless, since he can find no flaw in the intellectual argument, the proposal stands. My view of the intellectual argument is less charitable than that of Harris; what follows (in Section I) is an attempt to list some of the weaknesses of that argument. I shall offer my critique in the form of a commentary on selected passages from Harris' presentation. Section II will examine the classical Jewish sources for a *Halakhic* (i.e., Jewish legal) perspective on Harris' Survival Lottery.

I

- (1) Y and Z argue that if a doctor refuses to treat a patient, with the result that the patient dies, he has killed that patient as sure as shooting, and that, in exactly the same way, if the doctors refuse Y and Z the transplants that they need, then their refusal will kill Y and Z, again as sure as shooting. The doctors, and indeed the society which supports their inaction, cannot defend themselves by arguing they are neither expected, nor required by law or convention, to kill so that lives may be saved (indeed, quite the reverse) since this is just an appeal to custom or authority. A man who does his own moral thinking must decide whether, in these circumstances, he ought to save two lives at the cost of one, or one life at the cost of two (p. 82).

The implied argument is that two lives are more valuable than one, hence two lives ought to be saved at the expense of one. It is not at all clear, however, that two lives are more valuable than one. Two is numerically more than one, but not necessarily more valuable. I wonder, for example, if Harris would have traded Ted Williams for two minor leaguers? Moreover, it is not at all clear that numbers should bear moral weight in a situation such as ours. The arguments for the irrelevancy of numbers in such situations have been advanced by John M. Taurek; the interested reader is referred to his study Taurek, 1977, pp. 293–316).

- (2) (a) Y and Z readily agree that a man ought not to do what he ought not to do, but they point out that if the doctors, and for that matter society at large, ought on balance to kill one man if two can thereby be saved, then failure to do so will involve responsibility for the consequent deaths (p. 82).

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(b) Another plausible objection is the natural reluctance to play God with men's lives, the feeling that it is wrong to make any attempt to re-allot the life opportunities that fate has determined, that the deaths of Y and Z would be 'natural', whereas the death of anyone killed to save them would have been perpetrated by men. But if we are able to change things, then to elect not to do so is also to determine what will happen in the world (p. 84).

Two flaws mar the argument here. The first is the facile equating of killing and allowing to die. The claim is that there is no morally significant distinction to be made between killing and allowing to die. Such a claim needs to be proven, not merely stated. It seems to me that such a categorical claim is just as unacceptable as its counterpart, namely, that there is always a morally significant distinction between killing and allowing to die. Ultimately, the moral significance of killing or allowing to die in a given situation is colored by the situation itself. Thus, e.g., I suspect that most ethicists would agree that a mother who deliberately starves a baby to death by not feeding it has committed no less a moral outrage than had she decided to stab the baby to death. On the other hand, if two men were journeying through a desert and had only one flask of water between them, and only the one who drank the entire flask of water would be able to reach settled land, should the one who owns the flask of water drink it, thus allowing his companion to die, he would hardly be held responsible for "killing" his fellow traveler. If, however, the owner of the flask of water, aside from drinking it, decided to slay his fellow traveler, he could hardly do so with impunity. In other words, before one can assign moral value to a particular action or inaction, one must determine among other things the nature of any covenants or relationships between the participants, the motives of the participants, and whether or not one is obligated to rescue a neighbor even at the cost of one's own life. In Harris' hypothetical case, then, before one can determine that the doctors (or society at large) are morally guilty of "killing" Y and Z by allowing them to die, one must first address such issues as the various covenants between the participants in our moral dilemma, the motivation of the various participants concerned, and whether or not society's mandate to the physician includes the obligation to take a life in order to save one or more lives.

The second flaw in Harris' argument is imbedded in the statement: "But if we are able to change things, then to elect not to do so is also to determine what will happen in the world." Such an argument

can be (and has been) used to justify any and every criminal act, hence it is a paradigmatic *argumentum ad absurdum*. Thus, e.g., if we are able to rob banks in order to distribute money to the underprivileged, then to elect not to do so . . . ! Harris' implied claim is that in the case of Y and Z the end justifies the means. Once again, such a claim needs to be proven, not merely implied or stated.

(3) . . . to appease those who wonder why poor old A should be singled out for sacrifice, Y and Z put forward the following scheme: they propose that everyone be given a sort of lottery number. Whenever doctors have two or more dying patients who could be saved by transplants, and no suitable organs have come to hand through 'natural' deaths, they can ask a central computer to supply a suitable donor. The computer will then pick the number of a suitable donor at random and he will be killed so that the lives of two or more others may be saved.²

Elsewhere in his discussion, Harris states unequivocally that healthy third parties such as A must be included in the survival lottery, for to confine the lottery to the unfortunate who require new organs would be to "discriminate against Y and Z as members of a class whose lives are less worthy of respect than those of the rest of society" (p. 86).

But in fact, the survival lottery as proposed by Harris is discriminatory. It places A (and not Y and Z) in double jeopardy. Chance (or: fate) has decreed that of all humans, including A, only Y and Z are short an organ. A has won this first "lottery." Now A is being asked to enter a second lottery in order to find a suitable donor for Y and Z. This is inherently unfair. It is also ironic: Y and Z survive because they are deathly ill; A dies because he is healthy! Indeed, if Y and Z can call for a lottery, why not A too (after he has been designated the victim)? A could argue that he won the first lottery fair and square, yet Y and Z — when the results didn't quite turn out to their liking — were allowed to issue a call for a second lottery. Now that he has lost the second lottery, A sees no reason why the same courtesy shouldn't be extended to him. Moreover, even if it is conceded that two (Y and Z) are more valuable than one (A) — A admits that he is uncertain about this —, A knows that he is far more valuable to society (e.g., he is an academician) than many other potential victims, hence his conviction that still a third lottery needs to be held so that an appropriate victim can be selected from those least valuable to society.³

- (4) The most promising objection to such a society, and indeed to any principle which required us to kill A in order to save Y and Z, is, I suspect, that we are committed to the right of self-defence. If I can kill A to save Y and Z then he can kill me to save P and Q, and it is only if I am prepared to agree to this that I will opt for the lottery or be prepared to agree to a man's being killed if doing so would save the lives of more than one other man. Of course there is something paradoxical about basing objections to the lottery scheme on the right of self-defence since, *ex hypothesi*, each person would have a better chance of living to a ripe old age if the lottery scheme were to be implemented. None the less, the feeling that no man should be required to lay down his life for others makes many people shy away from such a scheme, even though it might be rational to accept it on prudential grounds, and perhaps even mandatory on utilitarian grounds. Again, Y and Z would reply that the right of self-defence must extend to them as much as to anyone else; and while it is true that they can only live if another man is killed, they would claim that it is also true that if they are left to die, then someone who lives on does so over their dead bodies (p. 81-85).

There is a morally significant distinction between Y and Z's responsibility for the death of A (if Harris has his way), and A's responsibility for the deaths of Y and Z (if Harris does not have his way), even aside from the issue of active versus passive killing. Y and Z are in desperate need of new organs; their lives are in jeopardy. Not so A. If Y and Z take A's life (even if by means of lottery), they are clearly identified as aggressors against A. On the other hand, if A opts to stand idly by the deaths of Y and Z, he is neither more nor less an aggressor than any other human being who "lives on over their dead bodies." In short, A is unidentified morally as an aggressor, and the casting of lots cannot identify him as such. To equate Y and Z's aggression against A with A's aggression against Y and Z is to introduce moral confusion.

- (5) Such is the case for the survival lottery. Utilitarians ought to be in favour of it, and absolutists cannot object to it on the ground that it involves killing the innocent, for it is Y's and Z's case that any alternative must also involve killing the innocent. If the absolutist wishes to maintain his objection he must point to some morally relevant difference between positive and negative killing. This challenge opens the door to a large topic with a whole library of literature, but Y and Z are dying and do not have time to explore

it exhaustively. In their own case the most likely candidate for some feature which might make this moral difference is the malevolent intent of Y and Z themselves. An absolutist might well argue that while no one intends the deaths of Y and Z, no one necessarily wishes them dead, or aims at their demise for any reason, they do mean to kill A (or have him killed). But Y and Z can reply that the death of A is no part of their plan, they merely wish to use a couple of his organs, and if he cannot live without them . . . *tant pis!* None would be more delighted than Y and Z if artificial organs would do as well, and so render the lottery scheme otiose (p. 86)

Harris, indicating an awareness that A is not quite the same aggressor as Y and Z, responds by attenuating the aggressiveness of Y and Z. Just as A has no evil designs against Y and Z, so too Y and Z intend A no harm. They merely wish to borrow his heart and lungs. Such a reading of Y and Z's action is not likely to persuade the courts. It is no more a defense than that of the gunslinger who perforated the heart of the sheriff with bullets and claimed that he had no intention to kill but was merely engaging in target practice on the sheriff's heart, or of the madman who decapitated his wife during the night and then claimed that he did so "to see her surprise when she woke up in the morning and realized she was headless."⁴ In these instances, no moral significance can be assigned to a distinction (between the alleged action intended and the evil executed) that is so patently artificial.⁵

Finally, Harris' suggestion in Sections 4 and 5 that the survival lottery is "perhaps even mandatory on utilitarian grounds," or, at the very least, that utilitarians ought to be in favor of it, is by no means certain. A utilitarian could easily posit that what is best for the most is the general protection of all innocent persons against any intentional assault that may result in death.⁶

II

From a Jewish perspective, the critical issue raised by Harris' *Survival Lottery* is whether or not medical necessity justifies the taking of innocent life. *Is therapeutic homicide condoned or condemned?*

The point of departure for a Jewish discussion of therapeutic homicide is Exodus 20: 13: You shall not commit murder.⁷ This ban against taking life looms large in our discussion for, unless one can adduce another biblical verse or a rabbinic source that qualifies the plain sense of the ban, it would seem to rule out any and all forms

of homicide. In fact, the verse is qualified in Scripture and in rabbinic literature so that, for example, various categories of war are justified.⁸ Similarly, the life of an aggressor may be taken in self defense.⁹ These exceptions to the rule, however, are not analogous to therapeutic homicide. In therapeutic homicide an *innocent* life is taken in order to save lives. Does Jewish teaching condone the taking of innocent life?

Mishnah Ahilot 7: 6 provides some guidance:

If a woman is in hard labor, the fetus or portions of it may be removed surgically, since the life of the mother takes precedence already born, it may not be harmed, since the claim of one life cannot override the claim of another life (Danby, 1967, p. 660).

The *Mishnah* permits (better: requires) abortion when the fetus threatens the mother's life. However, once the baby is legally born, "the claim of one life cannot override the claim of another life." Thus, the *Mishnah* rules that medical necessity justifies the taking of innocent fetal life if its birth conflicts with its mother's life, in order thus to save the mother's life. At the same time, the *Mishnah* proscribes the taking of an innocent life in order to save a life. While *Mishnah Ahilot* is clearly relevant to our problem, it hardly resolves it. For even if the principle is accepted that one may not take an innocent life in order to save a life, Harris' Survival Lottery raises a more complex question: May one take an innocent life in order to save *lives*? Perhaps two or more lives should be saved at the expense of one. One must look elsewhere in rabbinic literature for insight into our problem. *Tosefta Terumoth* 7: 20 reads:

If a group of men are surrounded by pagans who demand that one of the men be handed over to be killed or else all the men will be killed, the men must allow themselves to be killed rather than hand over a single Jew.¹⁰

The ruling is as harsh as it is unequivocal: a group may not protect itself by arbitrarily sacrificing some of its members, i.e., by taking innocent life. Indeed, it may not even *hand over alive* an innocent person to an enemy who threatens to kill the victim. Better to be the victims of crime than to be collaborators in crime. Most important for our purposes is the fact that numbers play no role here. The group may consist of 100 persons or more; only 1 victim is called for. Nonetheless, the many may not be saved at the expense of the few. Clearly, the *Tosefta* teaches that the saving of many

lives does not justify the taking of innocent life. Analogously, medical necessity would not justify the taking of innocent life, and the number of lives at stake would in no way influence the Jewish ethical stance. Indeed, from a Jewish perspective, therapeutic homicide would be viewed as a more serious offense than murder committed under duress (e.g., where A orders B at gunpoint to kill C or be killed, and B kills C in order to save himself). Under Jewish law, therapeutic homicide is a punishable offense, whereas murder committed under duress, while certainly prohibited and viewed as a heinous crime, is not punishable in a court of law. The distinction between medical necessity and duress, with the former being categorized as a punishable crime, was codified by Maimonides (d. 1204) in his *Code: Book of Knowledge*. The passage reads:

One who is enjoined to suffer martyrdom rather than violate the law, but chooses to violate the law in order to escape death, has profaned the name of God Nonetheless, since he violated the law under duress, he is not punished [by a court] with stripes. It is unnecessary to add that even if he committed murder under duress, he may not be sentenced to death by a court. Corporal punishment is administered only when one transgresses willfully, in the presence of witnesses, and after due warning One who is grievously ill, and is informed by physicians that the only remedy available must involve a violation of the law, applies the remedy. When life is in danger, anything forbidden by the Torah may be applied as a remedy [if necessary], except an act of idolatry, sexual immorality, or murder. Even if necessary to save life, these laws may not be violated. If a patient violates these laws in order to provide a remedy, the court metes out the prescribed punishment (Hyamson, 1965, p. 406).

Maimonides nowhere explains why in the case of murder he distinguishes between duress and medical necessity, with the latter being categorized as a punishable crime. The following explanation is suggestive: In the case of therapeutic homicide, a healthy A is sacrificed for the sake of an endangered B. B cannot claim medical necessity vis-à-vis A, since his medical necessity in no way implicates A more than it does any other healthy member of society. If A is killed, B can be held accountable in a court of law for willfully, maliciously, and capriciously bringing about his death. In the case of a murder committed under duress, the murderer B can claim duress as a defense since the victim C was selected by the perpetrator A, and only by killing C could B survive. Quite unwittingly, C has become identifiable as an aggressor against B.¹¹

In sum, classical Jewish teaching is unequivocal in its response to therapeutic homicide. Medical necessity cannot justify the taking of

innocent life. The number of lives at stake would in no way influence the ethical stance. Therapeutic homicide would be condemned as an unconscionable violation of the most universally recognized of the Ten Commandments: you shall not commit murder.¹²

NOTES

¹ For earlier critiques of Harris, see J. G. Hanink (1976, pp. 223–5) and Peter Singer (1977, pp. 218–22).

² Whether or not life and death issues should be decided by a lottery is a moral problem that awaits serious investigation. A negative conclusion would pull out the rug from under Harris' proposal (p. 83). See, provisionally, S. Z. Leiman (1978, pp. 8–11).

³ Several years ago I presented this argument against repeated calls for the casting of lots at an ethics seminar at Princeton Theological Seminary. A participant whose name I do not know (but to whom I am most grateful) suggested that it be called "the law of redundancy."

⁴ Cf. R. A. Duff (1973, p. 16).

⁵ See especially J. G. Hanink (1976, pp. 224); cf. S. H. Kadish and M. G. Paulsen (citing the basic principles of the law of murder in England): "It is murder if one person kills another by an intentional act which he knows to be likely to kill or to cause grievous bodily harm, although he may not intend to kill or to cause grievous bodily harm and may either be recklessly indifferent as to the results of his act or may even desire that no harm should be caused by it" (1969, p. 270).

⁶ See, for example, D. H. Hodgson (1967, pp. 73–77).

⁷ For a discussion of the different ways of rendering the original biblical Hebrew of this verse, see Gerald J. Blidstein (1965, pp. 159–171).

⁸ See, e.g., Deuteronomy 20: 1–20 and cf. *Maimonides*, Chapters 6–8.

⁹ See, e.g., Exodus 22: 1 and cf. b. *Sanhedrin* 72a. These passages treat the voluntary aggressor. Less certain is the rabbinic attitude toward taking the life of an involuntary aggressor. (A favorite paradigm of the moralists regarding involuntary aggression is the case of the three mountain climbers roped together and climbing a mountain. Two of them fall over a ledge and dangle in space. The other, unable to pull his companions to safety, is slowly losing his grip on the mountainside, with the inevitable consequence that all will plunge to their deaths. May the safe mountain climber cut the rope, thus accelerating the deaths of the others while saving his own life?) In general, Jewish teaching allows for the taking of innocent life in such cases, so long as the involuntary aggressor is clearly identified by the circumstances of the case. One modern rabbinic commentator suggests the following distinction between voluntary and involuntary aggression: If able, one *may* take the life of an involuntary aggressor. One could also risk death (or choose to die by inaction) rather than

take innocent life under such circumstances. On the other hand, if able, one *must* take the life of a voluntary aggressor; one may not choose to die by inaction. See R. Simon Efrati (1961, pp. 88–89).

¹⁰ For an extensive discussion of this and related rabbinic passages, see David Daube (1965).

¹¹ The moral distinction between a murderer who freely selects his victim and one whose victim is forced upon him is adumbrated in early rabbinic sources. According to the *Jerusalem Talmud* (Terumoth 46b), if a group of men are surrounded by pagans who demand that one of the men be handed over to be killed or else all the men will be killed, the men must allow themselves to be killed rather than hand over a single Jew. If, however, the pagans designate the victim by name, Rabbi Johanan (a Palestinian teacher of the third century C.E.) rules that the victim may be handed over even if not guilty of a capital offense. It would appear that freely selecting the victim, even under duress or medical necessity, is sufficiently volitional on the part of the perpetrator that he must bear culpability for murder. If the victim is forced upon the murderer, the murderer can claim duress as a defense after the fact. In the case of the Jews surrounded by pagans, the victim – if designated – may be handed over to the pagans, but he may not be killed by the Jews. Murder under duress is always prohibited; after the fact it is not punishable in a court of law.

For other attempts to account for the Maimonidean distinction between duress and medical necessity, see R. Meir Simḥa ha-Kohen, *Or Sameah*, *ad loc.*; R. Menaḥem Krakovsky, *Avodath ha-Melekh*; and R. Mordecai Mowshowitz, *Shalmey Mordecai* (Hyamson, 1965).

¹² This paper has benefited from the usual sound advice of my colleague Professor David Berger. I am deeply grateful to him.

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Corrections to “Therapeutic Homicide” Sid Z. Leiman

Despite my corrections to the first galleys (of “Therapeutic Homicide”) sent to me by the publisher, I received a second set of galleys with all the typesetter’s errors in place. I sent a letter to the publisher, listing every typesetter’s error, with a full explanation of the error and why it must be corrected. I was astonished to receive my copies of the published essay – with all the typesetter’s errors in place. So when Menachem Butler asked for a copy of the essay for distribution, I informed him that it could be distributed only if the following minimal list of corrections is appended to the essay.

p. 52, first paragraph, line 6: argument.¹
one line from bottom: involve.

p. 53, second paragraph, line 24: cost.

p. 54, second paragraph, last line: saved (p. 83).²
fourth paragraph, line 7: healthy.

p. 55, first paragraph, line 8: basing objections.

p. 57, second paragraph, line 3: precedence over the life of the fetus. But if the greater part of the fetus was already born.

p. 59, note 2, line 3: Harris’ proposal. See.
note 8: cf. Maimonides (1963), pp. 220-230.

p. 60, note 10, line 1: rabbinic.

note 11, last paragraph, line 2: see the comments of R. Meir Simha ha-Kohen, *Or Sameah*; R. Menahem Krakovsky, *Avodath ha-Melekh*; and R. Mordechai Mowshowitz, *Shalmey Mordecai* to the passage in question.

note 12, addendum:

After this article was submitted, John Harris’ *Violence and Responsibility*

(Routledge and Kegan Paul: London, 1980) reached these shores. In it (pp. 66-84 and notes), Harris presents a revised version of “The Survival Lottery.” His original philosophical arguments are reiterated, but flaws in the implementation of the survival lottery have led him to a more modest proposal than the one originally envisioned. Harris now proposes that the survival lottery be confined to the dying, among other reasons so as not to discriminate against the healthy. In fact, all the Harris passages cited and scrutinized here reappear in the revised version. Thus, the revised version does not vitiate (indeed, for the most part it does not address) the criticisms presented here. Nonetheless, the reader interested in Harris’ most recent thinking on the subject, will want to consult the treatment of the survival lottery in his *Violence and Responsibility*.

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p. 61: Leiman, S.Z.: 1978, “The Ethics of Lottery,