

Physicians' Strikes: Ethical and Halachic Considerations

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After a decade in which the Israeli medical profession honored a mutual agreement with its employers not to strike, a lengthy and complicated period of erratic non-provision of services to patients occurred recently. It is often stated that in Israeli society the right to strike is perhaps given highest priority among all recognized citizen rights. Interesting in this regard was the experience of District Judge Hadassa Ben-Itto who chaired a committee on patients' rights from 1988 through 1990 after her appointment by the then Israeli Minister of Health, Shoshana Arbeli Almozlino. She tried, in vain, to include some provision which would guarantee continued medical services to patients during strikes by health workers. Unsuccessful in this effort to weaken the impact of possible future physician strikes on patient care, she resigned from the committee in 1990.

Physicians' strikes are not unique to Israel, and have affected many other countries, including France,¹ Germany,² Australia,³ and Canada,⁴ among others. Each situation had its specific character; the degree of suffering imposed upon patients and the success of the strike varied from one strike to another.

There has been some discussion in the medical and ethics literature about the ethics of physicians' strikes. A vigorous defense of such activities was

outlined by Brecher,⁵ whose views I challenged in several countering articles.^{6,7} Some, like Daniel,⁸ have outlined specific very limited conditions under which a strike might be considered ethical. Others, like Pellegrino⁹ and Cohen,¹⁰ have rejected categorically the possibility of an ethical strike. Both the Association of American Medical Colleges¹¹ and the American College of Physicians¹² have taken positions against physician strikes. The American Medical Association, after abandoning a long-standing opposition to unionization of physicians, nevertheless stated: "Physicians should refrain from the use of the strike as a bargaining tactic".¹³ In spite of these unequivocal policies by these mostly American medical organizations there is no clear consensus among physicians on the subject. Strikes in general, and of physicians as well, seem to be almost a universal feature of our lives in most Western countries.

In the following paragraphs I am going to argue strongly against strikes by medical personnel. In my discussion I will be addressing myself largely to democratic societies in which societal decisions are reached by reasonably open and fair processes,

⁵ Brecher R., "Striking Responsibilities", *J Med Ethics* 1985;11: 66-69.

⁶ Glick S.M., "Physicians' Strikes: a rejoinder", *J Med Ethics* 1985;11:196-197.

⁷ Glick S.M., "Health Workers' Strikes: a Further Rejoinder", *J Med Ethics* 1986;12:43-44.

⁸ Daniels N., "On the Picket Line: Are Doctors' Strikes Ethical?" *Hastings Center Report*, February 1978:24-29.

⁹ Pellegrino E.D., *Humanism and the Physician*, Knoxville: University of Tennessee Press, 1979.

¹⁰ Cohen J.J., "White Coats Should not have Union Labels", *NEJM* 2000;342: 431-434.

¹¹ Cooper J.A.D., "The Withholding of Medical Care by Physicians", *J Med Ed* 1979;54: 122-123.

¹² American College of Physicians, "Ethics Manual, 4th edition", *Ann Intern Med* 1998;128:576-594.

¹³ House of Delegates Position Statement H-385.943, Collective Action and Patient Advocacy, American Medical Association, 515 North State Street, Chicago, Il. 1999.

¹ Drucquer M., "The Necessary Strike: French Medicine in Turmoil", *BMJ* 1983;286:2085.

² Nowak D., "Doctors on Strike: the Crisis in German Health Care Delivery", *NEJM*, 2006;355: 1520-1522.

³ Arnold P.C., "Australian Doctors on Strike", *BMJ* 1984;289:175.

⁴ Mechanic D., Faith R.G., "Doctors in Revolt: the Crisis in the English National Health-Service", *Medical Care* 1970;8:442.

where there is an honest judicial system, and where there is little governmental compulsion in the professional placement of physicians.

It is worth stepping back for a moment to consider dispute settlement in general.

Not too many years ago disputes between individuals were settled by physical struggles until one side or the other subdued or killed the opponent. Duels were an elegant and socially acceptable way of deciding controversies between otherwise honorable individuals. In most civilized countries today such methods would be considered primitive and barbaric. Instead, most democratic societies have established courts of justice and laws by means of which disputes are settled, based on the premise that an impartial trained individual will decide in the dispute, based on the merits of the evidence. The use of force is considered unethical, and appropriately so; civilized societies have by and large rejected the "might is right" behavioral pattern in interpersonal disagreements. In Judaism the *din Torah* to settle disputes goes back to antiquity as the preferred, and perhaps the only acceptable, way of dealing with serious disagreements.

However when dealing with labor disputes in democratic societies, in almost all cases, the general public accepts almost axiomatically the legitimacy of strikes as the normal method of settling these disagreements. In fact the strike not only is considered legitimate, but it is a recognized basic and an almost inalienable human right, achieved after many decades of often difficult and prolonged legal and political struggle. But is a strike in fact a just and fair way of settling disputes? Who exactly wins in the case of a strike? Is justice the deciding factor in the outcome? Unquestionably those "strong" labor unions which have the greatest power of coercion because of the nature of the services they provide and the chaos and suffering they can cause by striking, gain the best working conditions as a result of striking. In Israel the workers in the electric company and the dock workers have achieved disproportionately favorable labor contracts, not because they are felt to be most deserving, but because their strikes

quickly become unbearable for society as a whole. In another context and time American president Ronald Regan "broke" the air traffic controllers' union and was accorded much public support for his action. A labor strike of any kind in essence represents the attempted use of force to settle a disagreement.

But even if we were to accept strikes in principle as ethical, or as the lesser of evils, many strikes in modern society raise an entirely new, and more difficult, ethical dilemma, which to the best of my knowledge has not been adequately addressed. If *ploni* has a dispute with *almoni* and feels that the latter has wronged him, by what right may *ploni* inflict damage on a third party, an innocent bystander, so that the bystander will pressure *almoni* to grant relief to *ploni*? What is the ethical justification by which a third uninvolved party may be deliberately punished to apply pressure on a disputant? I am unaware of any ethical theory, unless it be extremely utilitarian – simply because it works – but is not ethical. In Kantian terms the use of people merely as means rather than as ends is a serious ethical violation.

There is a recent Israeli supreme court decision¹⁴ unrelated to medical issues which is relevant here. Israel had refused to release a number of imprisoned Lebanese citizens who had already completed their terms in prison. This refusal was imposed in order to apply pressure for release of Israeli soldiers and to obtain information about missing Israeli soldiers. These Lebanese prisoners had no direct involvement in the capture or imprisonment of the Israeli soldiers, but were being held as a "bargaining chip". In response to an appeal by the Lebanese hostages, the nine man Israeli court ruled as illegal and immoral holding innocent individuals hostage in order to put pressure on the perpetrators of the kidnapping of the soldiers.

¹⁴ Barak A. et al, "Plonim vs. Minister of Defense", Bagatz 7048/97; April 12, 2000.

Most strikes in the public sector present an analogous situation. A third party, the citizenry, is deprived by the workers of public services to which they are normally entitled, and in essence are being kept hostage, in order to apply pressure on the employers. Such an act might well seem to be no less illegal and unethical, in line with Kant's well known ethical principle.

Historically, strikes developed in societies where power was vested largely in the hands of an upper class which controlled the media, the means of production, the courts and the government. The deprived, underprivileged, impoverished and exploited workers had no reasonable way of getting a fair share of society's resources or fair compensation for their hard work. They then had no realistic alternative other than the weapon of the strike as a form of response directed against their oppressors, the exploitative employers. The latter when faced with the threat of considerable personal financial damage, even ruin, often found it expedient to submit, at least in part to the workers' demands and grievances. Throughout the industrialized world the gains made by organized labor contributed immeasurably to raising societal standards of living and relieving many of society's injustices and inequalities.

Contrast the modern employer, a local or national government agency, or a huge firm owned by thousands of stockholders. When employees go on strike the president of the company or the public official who is 'responsible' for the alleged unfair treatment of the workers does not suffer personally by the strike. His salary and perquisites continue undiminished. On the other hand, the public served by the company or by the public agency suffer, often greatly, although they are innocent bystanders. The strike is based on the hope that these innocent bystanders will apply enough pressure on the offending management – a bizarre and certainly questionable ethic indeed. This ethical dilemma exists for any employees of large corporations and particularly for workers in the public sector.

I have no realistic expectation that any democratic society of which I am aware is

currently likely to rescind or seriously limit strikes. The concept of the right of workers to organize for collective bargaining and to strike is currently so deeply engrained in modern democratic societies that it is unlikely to change significantly in the near future. There are also various vested interests on both sides of the conflict in preserving the present ground rules.

Are strikes by physicians in a different category than strikes by most other groups?

I do believe that physicians have a different, and much greater, responsibility towards the people they serve than do most other workers. Firstly and most obviously they deal with human lives. It is true that in many of the physician strikes that have occurred, with a few notorious exceptions, there have usually been efforts on the part of the striking profession to ensure some degree of provision of emergency services. Daniel¹⁵ in his first criterion for an ethical physician's strike states that it must not endanger human life. Interestingly enough it has even been rumored that community mortality rates actually fell during one of Israel's physician strikes, although it is hard to get reliable data on the subject. Nevertheless as a physician with over a half century's experience, I am convinced that it is impossible to prevent serious human suffering and unnecessary deaths during strikes even if emergency services are allegedly provided. In these situations there are inevitably delays and cancellation of critical treatments, and the elderly, the poor and the already underprivileged are those who largely end up bearing the brunt of such strikes.^{16,17} The well to do generally find avenues of treatment via the private sector.

¹⁵ See note 8 *supra*.

¹⁶ Pilpel D., Naggan L., Sarov B., "Coping with Health Services Disruption: Perceiving Need and Utilizing Available Services During a Doctors' Strike", *Medical Care* 1985;23: 1372-1380.

¹⁷ Barnoon S., Carmel S., Zalzman T., "Perceived Health Damages During a Physicians' Strike in Israel", *Health Services Research* 1987;22:141-154.

Almost all of the physician strikes of which I am aware on several continents have taken place largely, if not almost exclusively, for the personal benefit of the physicians and not for improvement of patient care conditions (in many of the cases demands for improvement of patient care were publicized as part of the physicians' demands, but they were often secondary in nature and more often were used to provide an improved public image for the strikers and some rationalization for their consciences). In none of the strikes of which I am aware were the physicians in such dire economic straits as to justify the degree of endangerment of patient lives and suffering caused by the action.

Physicians are the prime example of professionals. During the past decade there has been a geometric rise in the number of articles on professionalism in the medical literature. On my last count of Medline in 2009 there were over 300 articles on professionalism. The key component in professionalism in every definition is the primacy of the interests of the patient and the community over those of the physician. In almost every Western medical school for centuries physicians have taken some form of oath promising to forgo personal benefit for the sake of their patients. Some of medicine's distinguished leaders such as Kass,¹⁸ Pellegrino¹⁹ and Cohen²⁰ have emphasized the unique and hallowed physician-patient relationship. Sieghart²¹ in addressing the World Congress of Law and Medicine called out a challenge to the assembled audience that the professions should act as the conscience of society.

One of the most damaging effects of physician strikes is the impairment of the public's trust in physicians and the medical profession.²² Much has

been written about the changing physician-patient relationship and its recent deterioration as a result of many factors. When physicians deny treatment to patients for their own personal benefit it is likely to be perceived as a betrayal of an implied trust. A devastating negative impact on the reputation of the medical profession across the country was described²³ as the result of a physician strike in Ontario, Canada a number of years ago.

Another negative impact of almost all strikes is the almost inevitable confrontational atmosphere engendered between the physicians and their employers,²⁴ as well as conflicts with patients and their families. During the strike and the prolonged negotiations, charges and countercharges are the natural concomitants of the process, many of them exaggerated, but with significant residue. Since many physicians have significant opposition to strikes, emotionally charged disagreements between striking and non-striking doctors may also occur, again with negative side-effects. Quality health care requires team work and active cooperation between all levels of personnel, which are often damaged during strikes.

Unfortunately, in my view, published studies indicate that a majority of medical students feel that physicians should be allowed to strike,^{25,26,27} with the highest percentage favoring strikes, 97%, reported from Israel.²⁸ In the most recent resident strike in Israel the medical student organization came out strongly in support of the residents.

Halachic considerations

²³ Meslin E.M., "The Moral Costs of the Ontario Physicians Strike", *Hastings Cent Rep* 1987;17:11-14.

²⁴ Cruess R.L., Cruess S.R., "Professionalism Unionization and Physician Strikes", *Acad Med* 2011;86:548-551.

²⁵ Wassertheil-Smoller S., Croen L., Siegel B., "Physicians' Changing Attitudes About Striking", *Med Care* 1979;17:79-85.

²⁶ Hadzibegovic I., Danic A., Hren D., "Medical students' Opinions on Physicians' Strike: Cross Sectional Questionnaire Study", *Croat Med J* 2004; 45: 63-66.

²⁷ Su-Ting T.L. et al. "Developing Personal Values: Trainees' Attitudes Towards Strikes by Health Care Providers", *Acad Med* 2011;86: 580-585.

²⁸ Lachter J., Lachter L., Beiran I., "Attitudes of Medical Students to a Physicians' Strike", *Med Teach* 2007;29:411.

¹⁸ Kass L.R., "Professing Ethically", *JAMA* 1982;249:1305-1310.

¹⁹ See note 9 *supra*.

²⁰ See note 10 *supra*.

²¹ Sieghart P., "Professions as the Conscience of Society", *J Med Ethics* 1985;11:117-122.

²² Jackson R.L., "Physician Strikes and Trust", *Cambridge Quart Healthcare Ethics* 2000;9:504-512.

The *halachic* attitude to the responsibility of the physician towards his patient differs in a major way from the current legal and ethical norms in the West, especially in the United States of America. Under American norms no physician is required to treat a new patient. If a physician-patient relationship has been established physicians may not abandon their patients unless they make prior arrangements for continuity of care. Even in situations of emergency there is no legal requirement in almost all of the states in America to provide assistance. Good Samaritan laws in many states only provide legal protection against malpractice suits if physicians volunteer to provide emergency care, but do not mandate care.

In contrast, in Jewish law provision of treatment to a patient is not a matter of private contract, or discretion, but is a religious obligation. The obligation is both the result of a positive Biblical commandment derived from the obligation to restore lost property to its owner, and the result of several admonitions whose violation represents serious infractions of Biblical mandate. The *Shulchan Aruch*²⁹ states quite bluntly, "If a physician withholds his services it is considered as shedding blood". Even if other physicians are available to treat the patient, the particular physician approached by the patient must not refuse to treat, because "Not by every person is an individual privileged to be cured" – this admonition probably results from the recognition of the importance of patient confidence in the therapeutic efficacy of the physician. Bleich, in his review of the issue of the *halachic* literature on physicians' strikes³⁰ provides a more detailed discussion of the literature on the obligation of the physician to treat.

The specific issue of physicians' strikes has been discussed over the years by a number of rabbinic authorities. It may be summarized in brief, that none have permitted physician strikes. In the most detailed responsum thus far Rabbi

Shlomo Goren, former Israeli Chief Rabbi³¹ reached the following conclusion, "Even if the physicians will suffer great financial losses by breaking the strike in order to treat patients, and as a result their demands will be rejected, they cannot be freed from their obligation to come to the aid of the patients, because of the Biblical admonition, "do not stand idly by the blood of your fellow".

Similar conclusions have been reached by Rabbi Zilberstein,³² Rabbi Lopez,³³ Rabbi Gershuni,³⁴ Rabbi Weiss, Rabbi Auerbach³⁵ and Rabbi Bakshi Doron.³⁶

The former Israeli Chief Rabbis Shapiro and Eliyahu gave conditional permission³⁷ for a strike if the demand of the physicians is to submit the dispute to arbitration, but if the employers agree to arbitration the physicians must return to work. The Klausenberger Rebbe under whose auspices the Laniado Hospital functions forbade physician strikes, and the staff at the hospital did not participate in physician strikes. In the decision by Rabbis Auerbach and Weiss they refer to function at the level that hospitals normally function on Shabbat as the minimum that must always be provided. It must be pointed out, as is obvious, that a one day function at Shabbat levels may not represent a serious problem in health care service function, but beyond a day or two serious impact on patient health is unavoidable.

An interesting opening for a strike seems possibly to have been provided by Rabbi Chaim David Halevy³⁸ who indicated that physicians may stop functioning at their salaried positions if they continue to treat their patients in their private offices under fee for service. While superficially

³¹ Goren S., "Shvitat Harofim L'or Hahalacha", *Assia Tevet* 5745;39:32045.

³² Zilberstein Y., "Personal Communication to Dr. Neisser", November 11, 1980.

³³ Lopez M., "Hashvita b'Halacha", *Torah Sheb'al Peh* 5744;25:85-93.

³⁴ Gershuni Y. "Hashvita v'hahashbatah", *Torah Sheb'al Peh* 5745;26:21-32.

³⁵ Weiss I.J., Auerbach S.Z., Letter to Administration of Shaare Zedek Hospital (Heb.), *Assia Kislev* 5744:45.

³⁶ Bakshi-Doron E. reported in *Hazofeh* (Heb.) January 1, 2001, p. 5.

³⁷ Shapiro A.C., Eliyahu M., "Psak Halacha. 15 Tamuz 5743", *Assia Kislev* 5744:37:47.

³⁸ Halevi H.D., "Shvitat Harofim b'Halacha", *Barkai* Fall 5745;2:22.

²⁹ *Shulchan Aruch, Yoreh De'ah* 336:1.

³⁰ Bleich J.D., "Survey of Recent Halakhic Periodical Literature – Physicians' Strikes", *Tradition* 1984;21:80-84.

this solution might seem reasonable, the range and level of services that could be provided in such arrangements could at best be very limited. In addition in most prepaid governmental insurance systems the patients have in essence already paid for physician services through the national tax system, and to ask them to pay a second time seems unjustified. Furthermore as indicated above³⁹ many poor citizens have neither the money nor the ability to seek out private care and therefore will be doomed to suffer illness, and even death, because of such an arrangement.

Whereas this is not the place to discuss the *halachic* attitude towards strikes in general, and there is a rich literature in this regard, unquestionably strikes, even when and where permissible, are regarded as a matter only of last resort. Much to be preferred is a *din Torah*, or in its absence, binding arbitration.

It is interesting to note that there are segments in our society for whom strikes are not considered legitimate. Strikes are not considered for the military, or for the judiciary. It would seem eminently reasonable and most desirable to include physicians among those groups for whom binding arbitration by objective experts would be preferable to strikes. The latter are damaging and destructive not only to the physicians' professionalism, to the trust of the public in their physicians, but also to the lives and health of those twhom we have promised to cherish and preserve. Even if collective actions are felt to be indicated efforts must be made to direct these at other than the patients.⁴⁰ As I indicated in an earlier paper on the subject "It is incumbent on physicians as leaders in society to assert themselves in creative and dynamic ways in order to find mutually acceptable ethical methods for the settling of labor disputes in an equitable and ethical manner".⁴¹

³⁹ See notes 16 and 17 *supra*.

⁴⁰ Goold S.D., "Collective Action by Physicians: Beyond Strikes", *Cambridge Quarterly of Healthcare Ethics* 2000;9:498-503.

⁴¹ See note 6 *supra*.