Tragic choices. Criteria for “triage” of Covid-19 patients in need for intensive care

ABSTRACT - In the present paper, the Author stresses the point that far from being a state of emergency where law and legal principles are suspended, Triage is a legal question to be faced with formal criteria. Every form of consequentialist thinking adopting different kind of material criteria, such those embraced in the guidelines drawn up by national medical societies in order to manage the pandemic, by necessarily involving a discrimination against fragile patients is incompatible with the basic principle of fundamental equality of human lives. The Author particularly focuses on the German case, where for its special constitutional tradition this basic principle is strongly avowed.

KEYWORDS - Covid-19, Triage, Utilitarian reasoning, Rule of law, Right to life, Human Dignity
THOMAS GUTMANN

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What I’m talking about is something which is right before our eyes today. Of course, we all remember Bergamo, the first real bad situation we had in Europe, while we are waiting for the third wave of Covid-19 today with mutated versions of the virus, and we’re looking at around 80 000 deaths in Italy so far caused by Covid and around half of this number, 41 000, in Germany. Just today, this morning, the SIAARTI, “Società Italiana di Anestesia, Anelgesia, Rianimazione e Terapia Intensiva”, and the SIMLA, “Società Italiana di Medicina Legale e delle Assicurazioni”, published new Triage guidelines with changed set of criteria than the ones they published in March. At the same time, Italy has a very hard discussion these days about the new draft pandemic plan.

I’ve worked the field of the ethics or of ethical and legal principles for the allocation of scarce lifesaving resources for 30 years now, mainly in the field of organ allocation, allocation of livers and hearts for transplantation, and I wrote a couple of texts about Triage. I would start with my first point, which is to stress that Triage is a legal question in the first place. The way we have to deal with Triage in our societies, in Italy and in Germany, has to be decided by law, not by ethics and not by physicians, not by the medical systems.

Under the rule of law, it cannot be for physicians to decide which citizens will survive and who will die. This is a normative question, not a medical one, and the only form of normativity which can deal with this question is law. The rule in Triage seems to hint at a situation where normal principles of normativity seem to be suspended. Triage looks like some form of a state of emergency, maybe even in a carlschnittian sense. I have read so many discussions that seem to follow the premise that this is a very special situation, and for this very special situation there are different rules about how to decide who will live and will die and who has the competency to decide. I think this premise is wrong. We’re not in a state of emergency. There are no special criteria for the question of who decides and how to decide. There is no special legitimacy for physicians to decide about which citizen may survive and which citizen must die. It is the law which has to

* Professore di Diritto Privato, Filosofia del Diritto e Diritto della Medicina presso l’Università di Münster, Germania.
decide, or at least the legal principles we are living in have to be applied, they are not suspended. We are not in the situation where law is not applicable.

I think this seems to be the general premise all over the world. In Germany, in Austria and Switzerland, in Italy, it is physicians who are making guidelines for Triage. There’s something fundamentally wrong with this premise that anything or anybody could legitimize physicians to make these sort of decisions, structural decisions.

This is at the heart of the Constitution, it’s the heart of the legal system, it is one of the most difficult questions for the rule of law to decide, but if the law doesn’t decide this question, so what should the law be for to decide after that? If the law refuses to decide, the most important question is what do we have a legal system for? So, Triage is a legal question.

We had the same discussion on most Western countries (I don’t know too much of the Italian discussion here) with the same question all over when it came to the allocation of scarce medical resources in organ transplantation. The traditional premise of the medical system was: it is the medical system, it is the physician, the transplant surgeon who decides who will survive and who will die. It took us about 20 years to make clear that this is a legal question, and this question already arrived at the German Supreme Court and at the German Constitutional Court. Also about Triage we are expecting a ruling by the German Constitutional Court, maybe in March (I hope it will come sooner because March will be too late), about what are the legal criteria for Triage and who is the one who has to decide. The answer will be: it is the Parliament in a formal act of legislation and certainly not any kind of medical society or a single physicians. So, Triage is a legal question.

It has to be a legal question for another reason, because ethics cannot decide and does not decide anything. I do speak as an ethicist here and I do work as an ethicist too, not only as a lawyer. In the ethical debate if I had every conceivable position for Triage criteria from, as we call it in the philosophical wording, strictly deontological positions assuming radical equality of patients to different sorts of consequentialist thinking, of social utility thinking, of worth ethics, I think there is nothing you can’t find in the ethical discussion. There is an extreme pluralism of ethical voices and there definitely is in a pluralistic society as ours; there is no ethical consensus or ethical solution for questions like that. That’s one of the reasons everything which is really important, especially for basic interests by people protected by law, that is that these criteria are defined in a general way, and the only
way to define criteria in a general way is to define them in a legal manner, to define them by law. This is one of the main objectives of legal systems.

And of course, all these recommendations we see in Italy and Germany, and all over the world (I will talk a bit about Germany, Switzerland and Italy, because we're close, we can compare here), the SIAARTI recommendations, the German ones by the “German Society for Intensive Care Medicine”, or the recommendations or guidelines by the “Swiss Academy of Medical Sciences”, they don't give ethical reasoning. And to be sure, they cannot give ethical reasoning for what they do, they are just an act of will, but not an act of argument, not an act to try to justify this ethically. There isn’t ethical discussion in there, and there wasn’t any real ethical discussion behind the doors. There isn't even an ethical fundament for things like that. I will come back to that.

All these recommendations pay some lip service to legal and ethical principles, but these principles don’t guide these guidelines, they don't really underlie these guidelines. So, my thesis will be that in finding criteria for Triage situations where we have more patients who are in dire need of lifesaving scarce medical resources than we have resources, here it's intensive care, there is a basic normative trade-off. It's the same trade-off in ethics and in law, and the trade-off is between equality on the one side and utility on the other. There are different answers to this trade-off and the question is which answers are compatible with the basic principles of our legal systems. I will give you the German example and we’ll will have to discuss the situation in Italy.

My main thesis is that every form of utilitarian thinking, mild ones or radical ones, every form of trying to maximize some sort of health utility by defining criteria for Triage situations must discriminate against the vulnerable, the comorbid, against older persons, against disabled persons. The only difference between all these different utilitarian approaches, and one of them is the Italian one, is how radical is this discrimination against the vulnerable, the comorbid, the fragile, the old and the disabled.

I start with Germany as an example, because the German legal system may be a bit special in this regard and this, going back, is still a learning process from the experience with National Socialism in the 30s and 40s. You all know that the Nazis tried to kill people who they called «not worth living», disabled persons especially. One of the really great consensuses, or rather the two basic consensuses, from right-wing to left-wing politicians when it came to the drafting of the German Constitution, were: first, no more torture, and second, the principle which lays down that every human
life, regardless of the age of the person, or the morbidity of the person, or the life expectancy of the person, or the quality of life of the person, every human life has the same worth, every right to life has the same strength. An apt principle of absolute equality in the worth of life.

This is, technically or legally spoken, a combination of two articles of the German Constitution. The first is Article 2, the right to life, and the second one is Article 1, the principle of human dignity. You might call it a contingent development in Germany, I’d call it quite a necessary one, that the German Constitutional Court very early started to combine these principles and to say that one feature of human dignity is a sort of basic equality. So, on the very basic level of being a person we are radical equal.

Ronald Dworkin made the famous distinction between treating people as equals, which he called the main normative principle of Western states, with all the right to equal concern and respect and with the right to be treated as equals, on the one hand, and being treated equally, on the other hand. Of course, you can treat people unequally and still treat them as equals, still respect them in an equal fashion as persons. We are different so we have to be treated differently in many respects, but there is a basic equality: basic equality that we all have dignity equally, that we all have basic civil rights and basic human rights equally, that we have the right to equal considerable respect for this fundamental equality. And the German tradition in constitutional law combined these principles and made clear, starting in the 70s, that when it comes to the right to life, we are radically equal. So, in order to be treated as equals we have to be treated equally, regardless of age, of morbidity, of life expectancy, of social worth, and, of course, completely regardless of religion and race and things like that. So, there’s a radical equality when it comes to the right to life.

I give you an example. You might know the ruling but maybe not for this, let’s call it extremism, a sort of counter-extremism in German constitutional law, which is still mainstream, but it has its critics. I give you an example when it comes to the right to life as a negative right, as a freedom right. Ten or twelve years ago, after 9/11, Bundestag, the German legislator, made a law which said that in a situation like 9/11, when an airplane hijacked by terrorists tries to fly to the direction of, let’s say, Frankfurt, that’s the example everybody thought about, and it’s going to crash into the towers of European Central Bank or the Deutsche Bank, or everything, the minister of defence can send airplanes to shoot this hijacked plane down. Was a formal law, and the German Constitutional Court ruled that this law is unconstitutional because it’s an infringement of human
dignity. They said, and you can argue whether this is a sound argument or not, I’m just telling you how the argument works, that the hijacked passengers on the Boeing to be shot down have a right to life, but it is conceivable, so, the Constitutional Court said, that it is not an infringement of the right to life to be shot down because otherwise you would have another thirty seconds to live or another minute. Maybe it is, even under the rule of the principle of proportionality, not an infringement of the constitutional right to life to be sacrificed in a situation like that if you only look to the right of life. But if also you look to the right of human dignity, the Court said, it would be to instrumentalise, to objectify these people for reasons external to these people, and this would constitute an infringement of the dignity of these passengers. It’s a very conscious argument. You never must infringe human dignity, so the law allowing the minister of defence to have a Boeing hijacked by terrorists shot down is unconstitutional. The reasoning means, well, that we cannot save, let’s say, 3000 lives in the bank towers of Frankfurt am Main, in this example we all thought about, by killing 100 by shooting down the plane. Isn’t that irrational? The answer of the German Constitutional Court was: numbers don’t count. This equal right to life means that no single life may be sacrificed, not even for a greater number of lives saved. Numbers don’t count.

We have a huge philosophical discussion starting with a famous article by Taurek in the 70s about the deontological and consequentialist discussion about «do numbers count?». Is it always better to save the greater number? You know all the trolley examples, let’s say: it is allowed to sacrifice one person or two persons in order to save five and things like that? We have an intense philosophical discussion about that, but in Germany we also have a legal discussion and the ruling is: numbers don’t count when it comes to saving lives. We cannot let someone die in order to save other people. So, when it comes to the right of life every life has the same value, and we must not discriminate when it comes to saving lives or to killing even, we must not discriminate on any reason. Not only we must not discriminate following criteria like race, or religion, or ideology, or gender, we must not discriminate at all. We must not discriminate regarding health status, we must not discriminate regarding age, we must not discriminate regarding life expectancy or morbidity.

So, to put it quite clear, the life of the multimorbid 89-year-old, it’s worth exactly the same as the life of the healthy 18-year-old when it comes to the German constitution.
We all have different normative intuitions. And I guess every one of us has a bit of utilitarian in himself, so there's something that seems to be something wrong with this kind of deontological extremism. And I think that no constitutional court in the Western world would have made the same ruling as the German one when it came to the 9/11 situation. This is a special tradition in the German constitutional system, but it's a tradition which, I would say, is thinking a certain premise which is part of the principle of human dignity to its end.

Amartya Sen once said that normative approaches, ethical theories can be differentiated by the kind of information they accept into ethical thinking. In this regard, this principle that every life has radically equal worth, every right to life is radically equally strong is a normative principle which is very meagre, very scarce of information. We don't accept any material differentiation. There is no conceivable normative reason to differentiate between people when it comes to life and death questions.

So, if you put that seriously (and I don't say you should follow the German example, I just tried to explain this line of thinking as an example) there is only one criterium left you can decide Triage questions and it is *urgency*. You have to define which patients need the emergency room right now, because otherwise they will die soon. These are urgent patients and every one of these urgent patients has a legal right to be treated in the hospital as long as there are resources. And I stress this point because in Switzerland, the guidelines say that even if you still have enough free places in the emergency room, in the intensive care unit, you must not accept older and fragile people. And in Switzerland we had already a couple of cases where older patients suffering from Covid-19 died because the hospitals refused to treat them although they still had more than 400 free beds in the intensive care units, which would clearly be illegal in the German legal system and, as most of my colleagues think, it is illegal in the Swiss legal system. I don't know about Italy, but I think that everybody was treated in Italy as long as the resources held.

So, what about Triage? Now the intensive care units are full, you don't have enough intensive care places for the people who need ventilation and most of the people who need ventilation and don't get it will die. What can you do? The German answer would be a very simple one: you treat those people in the order they arrive at the hospital and when all the beds are full, all the beds are full. There is no possible criterium for discriminating against certain patients. If everyone has the same right to live, then you cannot take an 80-year-old person from the ventilator and let him die in order to save a
20-year-old person, because both have exactly the same right to life. So, in the end, the only criteria left are completely formal ones, without any material dignity. You could toss a coin, if you want. Or you can toss the coin and just keep those people who happened to come first to the hospital. That's the German solution, and I'm quite sure that this will be the answer of the German Constitutional Court.

There's a problem with this, and the problem is that the little utilitarian in your heart will protest. And this little utilitarian in your heart will tell you: «isn't this a waste of resources to care for all the elderly and let the young die? This is a waste of life use. Shouldn't we try to make the best use of our resources? Shouldn't we try to maximize utility?». If you start that you have to differentiate, if you start consequentialist thinking you have a lot of options. A classic utilitarian would say: «well, we will allocate scarce lifesaving resources as we should and look at everything we do along the lines of social utility. We try to maximize social utility per se». That might mean assessing how important is this person for our society, then we could define what is the worth of, let's say, a physician compared to a philosopher, what's the worth of a nurse compared to somebody collecting garbage. This would be a classical consequentialist solution.

I have a friend who is a professor for Jewish ethics in Jerusalem, who worked as a hospital rabbi in the Bronx, and I had a discussion with him in the Bus about Triage. He said: «I have an answer: rabbis first. Of course, I’m a rabbi, rabbis first. Because rabbis, if they survive, they can do so much for the other ones». He was a nice guy, he wasn’t quite seriously, but that is the line of thinking. So, who is really important of you and who is not? Let’s make a list. Of course, most of our constitutions, especially also the Italian one, would forbid looking at social utility.

So we go to the next step: what about health utility? Shouldn’t we try to use scarce medical resources, ventilation places in emergency care units, to create the biggest utility, the biggest lump sum, the biggest aggregate sum of health utility? How to measure health utility? Well, health economy’s students measure health utility by quality adjusted life years or disability adjusted life years. You say: «what we want to maximize is the number of life years saved of patients and we have a second criteria, it is the quality of life of these patients». So, if you are in total health your life years count as you multiply your life years with 1; if you're in a very bad state, you are a quadriplegic and have a severe depression, you have a life quality of 0.1, so every year you live has the worth of 1/10 of a completely healthy person. That's what we do. That’s what health economists do. So, if
you want to maximize utility, health utility, you have to say: «we try to maximize the use, the quality adjusted life years of our patients». To do that, you have to select patients to be saved who are healthy, who have quite some life expectancy, who have no comorbidity. So, you have to choose the healthy ones, the young ones. You have to discriminate, of course, against older people, you have to discriminate against fragile people, you have to discriminate against multimorbid people, because they don’t live long enough and they don’t have enough quality of life in order to be chosen. Or, to put it in another way, if you start talking about health utility, you have to treat people as vessels of utility. And if you are not a good vessel for utility because you’re too old, or too sick, or too fragile, or too disabled, then it’s just not worth to invest any resources into you. There are better people to be invested in. So, this would be the best you could do. Step two.

Step three would be if you say this is still too utilitarian, you say: «let’s count life years, but let’s not count the quality of life». So, in this third step, still utilitarian but not hardcore utilitarian, we could say: «let’s save the greatest number of life years and let’s say every life, every year which is being lived, has the same worth». Which is: «let’s maximize life years». Then again you would have to discriminate against older people who will not live as long as younger people, you will have to discriminate against vulnerable people, against people with dementia who will not live that long, against disabled people who will die younger and so on. This was the official Italian guideline by SIAARTI published in March 2020, ten months ago. And it was one of the most, relatively seen, consequentialist rulings in our guidelines within Europe.

The only ones who, of course, traditionally are extremely utilitarian are the British. The UK guidelines said: «we have to maximize utility». They didn’t say anything about what they thought about utility. At least, they thought about maximizing quality adjusted life years. The Italian guidelines said: «we have to maximize life years». It’s said in the SIAARTI guidelines of March 2020: «We have to save our resources for patients who: first, have the best chances of short-term survival, and second, patients with whom we can save the most life years». So, this is quite an extremist position and it was criticized all over Europe. Now, with the guidelines issued today, this morning, the Italian guidelines changed the utilitarian ratio and they made a further step down to level four, as I call it. Total social utility, quality adjusted life years, maximisation of life years. Now the German guidelines do the same, as the Swiss guidelines do. They say: «we want to maximize short-term survival; we want to maximize the number of
lives saved». And to operationalize this, it’s said, «we’re looking at the chances a patient has to come out of the ventilation, to come out of the intensive care unit alive». So, short-term survivals. A couple of weeks, maybe months.

This is what I would call a reduced form of utilitarianism. Less extreme in Italy than the former rules, much less extreme, but does it make sense? I think it doesn’t make sense, because if you’re a utilitarian, if you want to maximize lives, you have to see that to have a life has a timestamp, that you cannot have a life without having a time to live. You can live minutes, days, weeks, months, years, decades. So, the only way to measure life, if you want to maximize it, if you want to aggregate it in the patient collective, you have to give it its duration. It doesn’t make sense to say we want to save the number of lives who at least live, let’s say, three weeks. Why three weeks? Why not three months, why not three years, or three decades? I think this is an incoherent criterium.

Either your radical egalitarian says, as we Germans do, or at least as the German Constitution seems to say: «we aren’t interested in how long a person will live, if we can save him here and now. An 89-year-old maybe has another six months to live, but he has the same right to be saved, besides Covid, as the perfectly healthy 20-year-old. There’s no difference, we just don’t care. It is forbidden by law to look at life expectancy when it comes to the saving of lives or to Triage». Or you say this is a normative nonsense, as Bentham would say, or John Stuart Mill, or Boris Johnson, maybe, and you say: «let’s make the best utility function out of what we have to do. We can’t save everyone. This is horrible, but the situation at least let us save as much life as possible, and this can only mean as many life years, or quality adjusted life years». There’s nothing in the middle: saving short-term lives doesn’t make any sense. The German guidelines maximise short-term survival, meaning survival off ventilation, or, maximizing, this is the Swiss approach and starting with this morning, starting with today, it’s also the changed Italian approach. To quote: «Il Triage deve basarsi su parametri clinico-prognostici definiti e il più possibile oggettivi e condivisi. La valutazione, mirata a stratificare le probabilità di superare l’attuale condizione critica con il supporto delle cure intensive, dovrà procedere basandosi sulla valutazione globale di ogni singola persona malata attraverso i seguenti parametri:

• Numero e tipo di comorbilità
• Stato funzionale pregresso e fragilità rilevanti rispetto alla risposta alle cure
• Gravità del quadro clinico attuale
• Presumibile impatto dei trattamenti intensivi, anche in considerazione dell’età del/la paziente».

This means criteria for short-term survival. If you look at the criteria given by the Swiss Academy of Medicine and now by SIAARTI in Italy and, very similarly, by the “German Society for Intensive Care Medicine” they say: «well, how do you evaluate a patient’s chance of short-term survival? What are the criteria?». These are those I just quoted. First it’s age: the older you are, statistically, the worse are your chances. Second is comorbidity: if you’re healthy, your chances are better. Third is what everyone now in Central Europe, and Italy started this today with the recommendations, is looking on as the so-called fragility state. Do you need help by other people in order to live? So, if you suffer from dementia, your fragility state is high. If you are debilitated, if you are disabled, if you’re a quadriplegic, if you’re sitting in a wheelchair, you need help. The more help you need, the less are your chances to get the ventilation if you get Covid. So, everything the Italian guidelines, the German guidelines, the Swiss guidelines say is: «if you’re fragile, if you are old, if you’re suffering from dementia, if you are comorbid, if you are vulnerable in any way, you will not get treatment». And in the end, it doesn’t make a difference whether you look at long-term survival or short-term survival because the criteria are the same. That’s what I wanted to show you with my thesis, that although, let’s say, a part of our hearts is utilitarian (it is not ethically wrong to make as many people happy as possible to make the world a better place, to maximize utility) and we all are, let’s say, part-time utilitarian, if you start this logic in the allocation of scarce medical resources, you have to discriminate against the vulnerable. Because they are no good vessels for utility.

That’s what John Harris 20 years ago called the principle of double jeopardy. Who is bad off, who is not good off, who is not well off will have taken away what he could get. We take from the weakest. That’s the price you pay when you start utilitarian thinking. On the other hand, of course, there’s a heavier price to pay if you do it the extremely non-utilitarian way: you waste lifetime. You will not maximize at least the lifetime you can save with the resources you have; you underachieve. That’s the question, we have to take that seriously, and this question must be a question of constitutional law, the one way or the other, and as long it’s not, it must be a question of a formal decision by the people in a democratic way, and it is certainly one of the hardest decisions we have to make besides of starting a
war or something like that. But what is law if it hasn’t an answer to this question?

In Germany it’s a constitutional principle that every question of *iustitia distributiva*, of allocation justice, distributive justice, which effects basic rights of citizens has to be made by the parliament. This is found in the principle of the rule of law and in the principle of democracy. In this case, the situation of Germany seems to be special because the only institution who could really define criteria for Triage is the German Parliament. But at the same time, the Constitution itself seems to give the only possible answer to the question. So, do we really need a law in Germany as long as we do think that the answer is given directly by the Constitution, which normally, of course, isn’t the case? So, this is the basic question, and again, I didn’t try to tell you how wonderful it is to be a German and that everybody in the whole world should follow the German example. I just tried to explain that, for contingent reasons, in the development of the German Constitution we seem to be very strict in this point, stricter than other constitutional systems in the Western world. I guess we will give quite an extreme, quite a one-sided answer to this question. But whatever answer you’d like to give you will not be able to escape this basic normative trade-off between an idea of radical equality, every life has the same worth and the same means *the same* and not almost the same or sometimes the same, on the one hand, and on the other hand the utilitarian principle, which is not wrong in itself, of course, of saving the greatest number of *x*, *x* being lives, or people, or life years, or quality adjusted life years. You cannot escape the logic of this problem. We cannot give different answers and I tried to, as an example, give or explain what we might call the German constitutional mainstream.