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## **Survey of Recent Halakhic Literature: Coronavirus Queries (4): Assignment of Ventilators**

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## SURVEY OF RECENT HALAKHIC LITERATURE

### CORONAVIRUS QUERIES (4): ASSIGNMENT OF VENTILATORS

#### I. HOLDING VENTILATORS IN RESERVE

Two young physicians consulted R. Moshe Feinstein, *Iggerot Mosheh*, *Hoshen Mishpat*, II, no. 73, sec. 2, with regard to triage dilemmas. In particular, they sought advice as to whether they might withhold life-prolonging attention from one patient in order to provide life-saving treatment to another patient. Institutionally, the same problem writ large occurs in situations in which a medical facility confronted by a dearth of ventilators may hold a ventilator in reserve for the benefit of a future patient whose life could be saved rather than making it available immediately to a patient whose life can be prolonged for only a relatively brief period of time.

That dilemma confronted an emergency-room physician in Johannesburg, South Africa. The hospital possessed only a single ventilator and limited its use to patients who were expected to recover. The hospital was either concerned that a patient, once attached to the ventilator, could not lawfully be removed or the hospital was not prepared to do so over the protestations of a patient's relatives. The doctor questioned whether he should abide by the hospital's protocol or whether he should make the ventilator available to all patients on a "first come, first serve" basis. That query was addressed by R. Yitzchak Zilberstein, *Shi'urim le-Rofe'im*, II, no. 164 and in his *Hashukei Hemed*, *Bava Mezi'a* 62a; R. Shlomoh Zalman Auerbach, *Minhat Shlomoh*, II, no. 82, sec. 2; R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, I, no. 858; R. Eliezer Waldenberg, *Be-Shevilei ha-Refu'ah*, no. 7 (Elul 5745), reprinted in *Ziz Eli'ezer*, XVII, no. 10; R. Samuel ha-Levi Woszner, *Teshuvot Shevet ha-Levi*, VI, no. 242; and the late R. Moshe Soloveitchik of Zurich, *Ve-ha-Ish Mosheh*, II, no. 4.

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Both Rabbi Feinstein and Rabbi Zilberstein assert that no duty of rescue devolves upon a person until there is an actual patient in need of succor.<sup>1</sup> At that point, a person must do all that is within his power to save a life. But, until then, they contend, no individual need do anything to provide for such an eventuality.<sup>2</sup> Otherwise, goes the argument, everyone would be obligated to enroll in medical school—or at the very least, in a first aid course—in order to acquire the knowledge and skills necessary to render emergency treatment when called upon. Similarly, they maintain, no duty is owed to a patient who has not yet arrived at the hospital whereas there is an immediate duty *vis-à-vis* the patient who is present here and now. Certainly, runs the argument, a person is under no obligation to search for lost property in order to fulfill the *mizvah* of restoring lost property to its rightful owner. Similarly, a person need not seek out a patient in need of treatment.

A close reading of Rabbi Feinstein's responsum, *Iggerot Mosheh, Yoreh De'ah*, II, no. 151, prohibiting autopsies even for purposes of obtaining medical information, indicates that he fully understood that his ruling with regard to autopsies was far more restrictive than that of *Noda bi-Yehudah, Yoreh De'ah, Mahadura Tinyana*, no. 210. Rabbi Zilberstein espouses *Iggerot Mosheh's* restrictive position and applies it to holding a ventilator in reserve. Both rulings are in conflict with the position of *Noda bi-Yehudah*, as will be discussed presently. Rabbi Waldenberg, in effect, avoided the actual issue involved in holding a ventilator in reserve for any period of time. He assumed (or more likely was told) that patients requiring ventilators appear "constantly on a daily basis." Accordingly, his responsum is devoted primarily to establishing that tomorrow's

<sup>1</sup> See also R. Moshe Feinstein, *Iggerot Mosheh, Yoreh De'ah*, II, no. 151 and *Yoreh De'ah*, III, no. 155.

<sup>2</sup> Those authorities agree that society must plan for such contingencies. The Mishnah, *Bava Batra* 7b, provides that townspeople may demand erection of fortifications surrounding their city for protection against future attack. That obligation, however, does not flow from a duty of rescue nor, technically, is it a manifestation of any halakhic duty. Society has no such duty; it is the individual who has a claim against society as expressed in the Mishnah, "The townspeople may compel one another to..." Rambam, *Hilkhot Shekhenim* 6:1, rules that townspeople may compel construction of a synagogue and in *Hilkhot Shekhenim* 6:4 he rules that all property owners may be compelled to share the cost of securing a source of water for the town. Such claims arise from the contractual relationship between citizens of a town or city obligating them to provide social amenities for the townspeople analogous to the nature of benefits that partners contract to provide one another as members of the partnership. Taxes raised for such purposes are comparable to assessments levied by a homeowner's association or a co-op board for the purpose of providing benefits to its members or shareholders.

anticipated patient is today's *holeh le-faneinu*.<sup>3</sup> The question then resolves itself into the issue of assigning priority to a person who can be restored to *hayyei kiyyum*, i.e., normal longevity anticipation.<sup>4</sup> That issue will be addressed in a later section. Rabbi Auerbach assumed the same facts as did Rabbi Waldenberg and responded in an identical manner.<sup>5</sup>

However, as has earlier been argued,<sup>6</sup> a statistically certain eventuality establishes a *holeh le-faneinu*. Moreover, the notion that there is no present obligation to prepare for fulfillment of a future *mizvah* seems incorrect.<sup>7</sup> The Palestinian Talmud, *Berakhot* 9:3, declares that in addition to the blessing pronounced before fulfilling a *mizvah*, a separate *berakhah* must be pronounced upon construction of a *sukkah*, writing phylacteries, etc. Such acts do not constitute fulfillment of any *mizvah* whatsoever. They are acts of preparing *makhshirei mizvah*, i.e., preparatory accouterments of a *mizvah*. Yet the formula of the blessing is “who has commanded us to construct a *sukkah*,” “to write *tefillin*” and the like. We are commanded to dwell in a *sukkah*, to don phylacteries, etc., but

<sup>3</sup> R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, I, no. 858, similarly regards the future patient as a *holeh le-faneinu* but advises attaching the first patient to a ventilator with an automatic timer.

<sup>4</sup> Rabbi Waldenberg and Rabbi Woszner actually couch the issue as that of ignoring a *treifah* in order to preserve the life of a *shalem*. Although the issue is the same, the categorization is quite imprecise. See R. Moshe Soloveitchik, *Ve-ha-Ish Mosheh*, II, no. 4, p. 128, who makes the important point that not every terminally ill patient (or even a majority of such patients) is a *treifah*. R. Menasheh Klein, *Mishneh Halakhot*, XVII, no. 175, pp. 327 and 329, makes the fairly obvious point that rescue of a *shalem* takes priority over rescue of a *treifah*. Indeed, the considerations to be discussed later with regard to *hayyei sha'ah* are applicable in the case of a *treifah* as well. See *infra*, Section II. For the distinction between a *treifah* and a *goses* see *Shitah Mekubbezet*, *Bava Kamma* 20b, cited by Abraham S. Abraham, *Nishmat Avraham*, *Yoreh De'ah* 339:1, note 1.

Rabbi Soloveitchik states that he is “inclined” to the position that the ventilator be given to the first patient. In context, he seems to consider future patients in most circumstances as not being in the category of a *holeh le-faneinu*.

<sup>5</sup> See also *Mishneh Halakhot*, XVII, no. 175, p. 328, s.v. *ela*. Rabbi Woszner, *Teshuvot Shevet ha-Levi*, VI, no. 242, assumed that it was “*alul* (likely)” that the ventilator would be required by a patient who might be restored to good health.

<sup>6</sup> See J. David Bleich, “Priorities in Allocation of Resources,” *Tradition*, vol. 53, no. 4 (Fall 2021), pp. 91–102.

<sup>7</sup> Rabbi Zilberstein does concede that a person is obligated to prepare in advance for the prayers of *Yom Kippur* and *Purim*, apparently because such obligations are certain and known in advance, but not for instances of *pikuah nefesh*. [Nevertheless, in *Shi'urim le-Rofe'im*, II, no. 165, p. 109, he asserts that there is no obligation before mid-day on the day preceding *Pesah* to purify oneself in order to be able to offer the paschal sacrifice. Cf., Rashi, *Pesahim* 69b, s.v. *ve-kol*.] The distinction between the obligations of *Yom Kippur* and *Purim* and obligations of future *pikuah nefesh* whose occurrence is known with certainty is elusive.

what is the source of a *mizvah* to construct a *sukkah* or to write *tefillin* that would justify the formula “who has commanded us?” The answer must be that there is no such explicit *mizvah* but we are nevertheless impliedly commanded to engage in such acts. One cannot dwell in a *sukkah* that does not exist; one cannot don non-existent *tefillin*. Accordingly, fulfillment of the *mizvah* of dwelling in a *sukkah* entails an obligation to erect a *sukkah* before *Yom Tov*; the *mizvah* of *tefillin* necessarily entails an obligation to prepare the required phylacteries. Codifiers of Halakhah, including Rambam, *Hilkhot Berakhot* 11:8, regarded the Palestinian Talmud’s declaration as non-normative. Nevertheless, Rambam, *Hilkhot Berakhot* 11:9, acknowledges that the *she-beḥiyanu* blessing is pronounced upon erection of a *sukkah* even though it is only an accouterment of a *mizvah* and, accordingly, does not occasion a blessing for construction of the *sukkah per se*. The Mishnah, *Shabbat* 130a, records the view of R. Eliezer to the effect that a tree may be felled on *Shabbat*, a fire built, and water boiled in preparation for circumcision of a child. The Sages disagree because they maintain that Sabbath restrictions are suspended only for actual performance of circumcision but not in performance of the preparatory steps that can be carried out before *Shabbat*. The inference to be drawn is that necessary steps to assure fulfillment of a *mizvah* must be taken in anticipation of an imminent obligation even though there is, as yet, no incumbent obligation with regard to the *mizvah* itself.<sup>8</sup>

A person need not search for lost property nor seek out a patient in need of life-saving treatment but statistical certainty, or even probability, of a patient appearing in an emergency room is tantamount to a *holeh le-faneinu* to whom he owes a duty even before he appears and for whose treatment he must prepare in advance. A person need not enroll in medical school because as a non-physician no one will appear at his doorstep seeking life-saving medical attention. The patient will seek treatment elsewhere and, consequently, the non-physician will not incur an obligation of rescue. Not every person is obliged to enroll in a first aid course or to learn how to administer CPR only because the statistical probability of being called upon to use such skills is extremely remote.

In his classic application of the principle of *holeh le-faneinu*, *Noda bi-Yehudah*, *Yoreh De’ah*, *Mahadura Tinyana*, no. 210, was quite prepared to sanction an autopsy in order to obtain information useful in

<sup>8</sup> A related question is whether a person may place himself in a situation in which it would later be impossible for him to fulfill an obligatory commandment that becomes incumbent upon him. See *infra*, note 9. For a discussion of that question and the question of whether a person will later be free of transgression by virtue of *ones* see J. David Bleich, *Contemporary Halakhic Problems*, V (Southfield, Michigan, 2005), 121–127.

the treatment of another already existing patient. *Iggerot Mosheh, Yoreh De'ah*, II, no. 151, employing the line of reasoning earlier presented, declined to permit an autopsy under precisely such circumstances. His argument is that, while a physician must harness all the skills he has mastered and apply all the knowledge he has acquired in treating a patient, he is not required to seek knowledge or expertise that he does not possess.<sup>9</sup> Accordingly, contends *Iggerot Mosheh*, since the physician is under no obligation of that nature, neither he nor any other physician may engage in an act of prohibited desecration of a corpse in order to acquire such knowledge.

Assuredly, *Noda bi-Yehudah* would rule that a cardiologist is obligated to read the article that has appeared in the current issue of a medical journal that will provide life-saving information that he will apply in treating a patient already under his care. If the cardiac anomaly addressed occurs with sufficient statistical frequency as to constitute a *holeh le-faneinu* he is obligated to read the article even if no such patient has as yet scheduled an appointment to visit him in his office.<sup>10</sup> Performance of an autopsy for the same purpose is no different.

## II. *HAYYEI SHA'AH* OF MULTIPLE PATIENTS VERSUS *HAYYEI KIYYUM* OF A SINGLE PATIENT

All authorities agree that, other considerations being equal, priority should be given to a patient who can be restored to *hayyei kiyyum* over a patient who will achieve only *hayyei sha'ah*, i.e., temporary prolongation of life.<sup>11</sup> It is not immediately clear why priority should be accorded to a patient who is likely to experience a full recovery over a person whose life

<sup>9</sup> See also *Iggerot Mosheh, Yoreh De'ah*, III, no. 155 and *Hoshen Mishpat*, II, no. 74, sec. 2. It would seem that, according to *Iggerot Mosheh*, a person is never required to make preparations for performance of a *mizvah* until the *mizvah* actually becomes incumbent upon him. R. Yisrael David Harfenes, *Teshuvot Va-Yevarekh David*, II (Brooklyn, New York, 5749), no. 168, presents an exhaustive list of sources discussing whether a person is at all obligated to make necessary preparations for performance of a *mizvah* before the *mizvah* becomes incumbent upon him and whether a person may place himself in a situation in which it will later be impossible for him to fulfill the *mizvah*. See also the examples and sources discussed by R. Yitzchak Yonah Ehrman, *Shirat Yitzhak* (Jerusalem, 5762), pp. 124–179.

<sup>10</sup> The late R. Yosef Eliyahu Henkin praised the legendary Dr. “Shabbos” Friedman as a doctor who never went to sleep at night “without a *perek* (chapter) in a medical journal and a *perek Mishnayot*.”

<sup>11</sup> For a discussion of the degree of longevity anticipation that is defined as *hayyei sha'ah* see J. David Bleich, “Hazardous Medical Procedures,” *Bioethical Dilemmas*, II (Southfield, Michigan, 2006), 239–275.

can only be prolonged.<sup>12</sup> Halakhah refuses to recognize priority of the young over the aged; equal priority is extended to the nonagenarian and the neonate. The halakhic principle is that all lives are of equal and infinite value.<sup>13</sup> By the same token, there is no diminution of obligation to the person whose anticipated survival is ephemeral because every moment of life is of infinite value. To the mathematically unsophisticated, all infinities are equal.<sup>14</sup> But even the sophisticated ethicist can certainly entertain the notion that all infinite moral values are equal. If every moment of life is indeed of infinite value it should follow that the obligation of rescue extends equally to every individual regardless of longevity anticipation.

Yet in a triage situation it is universally recognized that, *ceteris paribus*, rescue of a person who can be restored to good health is accorded priority over treatment of a person with limited survival capacity. That principle emerges from the discussion of the Gemara, *Bava Mezi'a* 62a. Two people are lost in a desert. One of them possesses a jug of water sufficient in quantity to sustain a single person long enough for him to reach an adequate water supply. If the water is divided between the two, the death of each will be marginally delayed but neither will survive. Ben Petura ruled that the water must be shared equally by both wayfarers so that “one will not witness the death of his fellow.” R. Akiva ruled that the owner of the container of water should drink its contents in their entirety because Scripture declares, “‘And your brother shall live with you’ (Leviticus 25:36); your life takes precedence over the life of your fellow.”

Without finding it necessary to say so explicitly, *Hazon Ish*, *Sanhedrin* 26:21 and *Hoshen Mishpat*, *Likkutim*, no. 20, *Bava Mezi'a* 62a, as well as other commentators take it for granted that the aphorism “*ve-al yireh ehad mehem be-mitato shel haver*” should not be rendered “and let not

<sup>12</sup> The Gemara’s statement, *Avodah Zarah* 27b, to the effect that “*le-hayyei sha’ah lo hayshinan*—we do not consider *hayyei sha’ah*” is limited to the risk of *hayyei sha’ah* in order to achieve a complete recovery. The Gemara, *Yoma* 85a, states explicitly that *Shabbat* restrictions are suspended for prolongation of life, even life that is but *hayyei sha’ah*.

<sup>13</sup> See *Mishnah Berurah*, *Bi’ur Halakhah* 324:20, s.v. *ela*.

<sup>14</sup> In 1874, Georg Cantor, using the so-called “diagonal argument,” showed that the set of real numbers is not equinumerous to the infinite set of natural numbers. Cantor’s Theorem establishes that the size of the counting numbers is strictly less than the size of the real numbers and hence not all infinities are equal. See Georg Cantor, translated by Christopher P. Grant, “On a Property of the Class of all Real Algebraic Numbers,” *Crelle’s Journal for Mathematics*, vol. 77 (1874), pp. 258–262. See also Raffaella Cutolo, Ulderico Dardano and Virginia Vaccaro, “Axiomatic Set Theory and Unincreasable Infinity,” *Applied Mathematical Sciences*, vol. 8, no. 134 (2014), pp. 6725–6732.

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one witness the death of his fellow” but as “and one *will not* witness the death of his fellow.” That phrase does not constitute a halakhic imperative. Witnessing the death of another is tragic and heartrending but it is not a violation of any halakhic norm.<sup>15</sup> The aphorism is a depiction of an empirically necessary result, not of a result ordained by a halakhically driven principle. In terms of human emotion, “And one will not witness the death of his fellow” is a quasi-consolation.

*Hazon Ish* understands Ben Petura as accepting the quite cogent notion earlier set forth, i.e., that when all other relevant factors are equal, the infinite value of all human life leads to non-preference of *hayyei kinyum* over *hayyei sha'ah*. Two persons are in danger; two lives hang in the balance. Neither should be preferred over the other; neither should be sacrificed for the other. Nor should a catatonic posture be assumed and the water go to waste because no preference may be shown. The Solomonic solution is to divide the water equally. Neither wayfarer will survive the desert journey but both will enjoy enhanced, albeit brief, longevity in the wake of partial hydration. After all, when a complete rescue is impossible, *pikuah nefesh* demands achievable *hayyei sha'ah*. Thus, Ben Petura effectively declares, “Let the water be divided equally so that each of the travelers will receive equal benefit and let the water not be assigned to one of the individuals who will survive to witness the death of his fellow.”

Ben Petura recognizes that, not only is every life of infinite value, but every moment of life is of infinite value. Preservation of *hayyei sha'ah* is no less an imperative than restoring a person to perfect health. The mandate of *hayyei sha'ah* is no less compelling than the demand for a complete cure. All moral infinities are equal.

R. Akiva is in fundamental disagreement. In fulfillment of the *mizvah* of *pikuah nefesh* and in terms of a victim's claim to rescue, the person who can be restored to normal life-expectancy must be given priority. That does not imply that Ben Petura's logic is faulty; it means that, although Ben Petura's moral logic is impeccable, it is circumscribed by the biblical injunction “And your brother shall live with you—your own life must be accorded priority.” “And your brother shall live with you” is neither a vague, amorphous pietism nor an imperative born of emotional response; it is a normative, objective declaration of a halakhic imperative.

According to R. Akiva, the scriptural injunction orders a person to engage in self-preservation rather than in the rescue of his fellow.

<sup>15</sup> Cf., however, R. Israel Meir Alter, *Hiddushei ha-Rim al ha-Torah, Likkutei Shas ve-Shulhan Arukh*, addenda and R. Chaim Sofer, *Teshuvot Mahaneh Hayyim*, II, *Hoshen Mishpat*, no. 50.



However, according to *Hazon Ish*, the halakhic mandate expressed in that verse gives voice to not one, but two principles: 1) Priority of self-preservation; and also 2) prioritization of *hayyei kiyyum* over *hayyei sha'ah*. Extrapolating from that single admonition, it is to be concluded that the Torah has therein declared a value system in which *hayyei kiyyum* is accorded precedence over—and hence greater value than—*hayyei sha'ah*.

It then follows that, according to *Hazon Ish*, an even broader application is to be inferred from R. Akiva's dictum. The application results in a rule of far greater applicability than that announced by R. Akiva in the case of two wayfarers and one jug of water. Imagine a person lost in a desert who is not at all thirsty but who is in possession of a single container of water. He comes upon two dehydrated wayfarers. He faces a dilemma: Should he save the life of one traveler by giving him the entire quantity of water or should he divide the water between the two, thereby prolonging the life of both but rescuing neither?

There is no duty of self-preservation in that set of circumstances. Ben Petura would rule that the owner of the water owes an equal duty to each. Therefore, he must divide the water between the two wandering individuals with the result that, having treated both equally, neither will witness the death of his fellow. Hence, a first reading of the text might lead to the conclusion that, under such circumstances, there would be no disagreement between Ben Petura and R. Akiva. But according to *Hazon Ish's* incisive analysis, R. Akiva recognized a second principle that serves as the underlying premise for application of the rule of self-preservation, *viz.*, that *hayyei kiyyum* is of greater inherent value than *hayyei sha'ah* and hence must be preferred in all cases in which two lives cannot be preserved concomitantly. That principle demands consistency in assigning priority to *hayyei kiyyum* over *hayyei sha'ah*. Consequently, rules *Hazon Ish*, since the Halakhah is in accordance with R. Akiva, a third party who owns a container of water does not have the option of treating both dying parties equally by sharing the water between them. He may choose which potential victim he will rescue<sup>16</sup>

<sup>16</sup> *Hazon Ish* states that the owner of the jug may give the water to "whomever he wishes" but provides no criteria for choosing one person over another. Cf., however, *infra*, note 33 and accompanying text. Cf. also, R. Naphtali Hertz Landau, *Heker Halakhah*, s.v. *holeh*, sec. 2, who quite strangely suggests that under such conditions a third party must refrain from any action.

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but he dare not assure *ḥayyei sha'ah* for both rather than *ḥayyei kiyyum* for one.<sup>17</sup>

Indeed, Ben Petura might well agree with R. Akiva's underlying principle "Your life has priority over the life of your fellow." But he would agree to application of that principle only if the *ḥayyei sha'ah* of both individuals cannot be preserved. For example, it would apply in a situation in which the quantity of water is too small to prolong the life of two persons even ephemerally but sufficient to assure survival for *ḥayyei sha'ah* of one by partial rehydration. Consider the more likely case of two persons who have ingested the same poison. One of the patients has in his possession a single dose of an antidote. The dose is the minimum necessary to save the life of one person. Dividing the dose between the two will be of absolutely no value whatsoever to either person. Ben Petura must perforce recognize that such a dilemma does not present a choice between *ḥayyei sha'ah* and *ḥayyei kiyyum*; it is either *ḥayyei kiyyum* or nothing. In the case considered by him, Ben Petura did not say, "Spill out the water." In the present case, he would not say, "Withhold the antidote." Instead, Ben Petura ruled that the water be apportioned so that each benefits equally, albeit minimally. If both cannot benefit even to a minimal degree, Ben Petura would agree that a choice must be made, even if the choice may be arbitrary. According to *Ḥazon Ish*, Ben Petura would acknowledge that, if the owner of the antidote is one of two possible beneficiaries, he must exercise his duty of self-preservation. The controversy is solely with regard to whether *ḥayyei sha'ah* is on par with *ḥayyei kiyyum* or whether the latter is always to be preferred over the former.<sup>18</sup>

### III. IMMEDIATE *ḤAYYEI SHA'AH* VERSUS FUTURE *ḤAYYEI KIYYUM*

The situation addressed by Ben Petura and R. Akiva serves as a paradigm for triage situations. But the classic triage dilemma is whom to treat first

<sup>17</sup> This is also the position of R. Iser Yehudah Unterman, *Shevet me-Yehudah*, I, *sha'ar* 1, chap. 8, sec. 5 and R. Shlomoh Zalman Auerbach, *Minhat Shlomoh*, II, no. 82, sec. 2. However, in his *Gilyonot le-Hiddushei Rabbenu Ḥayyim ha-Levi al ha-Rambam*, *Hilkhot Yesodei ha-Torah* 5:1, *Ḥazon Ish*, expresses a contradictory view. In those comments he declares that a third party coming upon two wayfarers dying of thirst must divide the water between them even though as a result both will eventually succumb to thirst. In the *Gilyonot*, *Ḥazon Ish* asserts that, according to both R. Akiva and Ben Petura, the owner of the container of water has an equal obligation to each of the wayfarers. See R. Samuel ha-Levi Wosznier, *Teshuvot Shevet ha-Levi*, VI, no. 242, who rejects the comment of *Ḥazon Ish* in his *Gilyonot* in favor of *Ḥazon Ish*'s position in his *Likkutim*.

<sup>18</sup> See R. Jacob Ettlinger, *Arukh la-Ner*, *Yevamot* 53b and *idem*, *Teshuvot Binyan Zion ha-Hadashot*, no. 173.

when multiple patients present simultaneously and no additional time whatsoever is expended in choosing to treat the more seriously ill patient first. But what if the more serious patient is on another floor—or even on the other side of the room? Or the more likely situation of days gone by: The physician is summoned to attend to two severely ill patients. Both reside on the same street but the physician must pass the door of the less seriously ill patient in order to reach the home of the second more severely afflicted patient.

The general principle is “*Ein ma'avirin al ha-mizvot*—One does not pass over a *mizvah*” (Mekhilta, Exodus 12:17) even for the purpose of fulfilling another *mizvah*.<sup>19</sup> *Iggerot Mosheh*, *Hoshen Mishpat*, II, no. 75, sec. 2, applies that principle to a physician summoned to attend to two patients in different places who must consequently “pass over” one patient in order to reach the second.<sup>20</sup> However, it is questionable whether *ein ma'avirin* applies in all such cases. Preservation of both *hayyei sha'ah* and *hayyei kiyyum* constitute fulfillment of the *mizvah* of *pikuaḥ nefesh*. It has been established that *hayyei kiyyum* is accorded priority over *hayyei sha'ah*. It is certainly clear that, of the two, *hayyei kiyyum* is a more enhanced form of life. As such, it would seem that preservation of *hayyei kiyyum* is, at the minimum, a more “beautiful” form of fulfilling the *mizvah* of *pikuaḥ nefesh*.

Although, as a general rule, the opportunity to fulfill one *mizvah* is not delayed nor is a *mizvah* ignored in order to fulfill another *mizvah*, exceptions are made in order to fulfill a *mizvah* in a more optimal or more enhanced manner. Thus, barring anticipation of inclement weather,

<sup>19</sup> For a detailed discussion of that principle see *Encyclopedia Talmudit*, I (Jerusalem, 5733), 665–671. Cf., however, *Turei Even*, *Megillah* 7b and *Teshuvot Hatam Sofer*, *Orah Hayyim*, no. 208, who maintain that *ein ma'avirin* is not a mandatory principle. See *infra*, note 30. Other authorities maintain that *ein ma'avirin* is merely a subcategory of “*Zerizin makdimin le-mizvot*—The alacritous perform *mizvot* as soon as possible” which for most decisors is a description of a high pious practice rather than a halakhic mandate. See also *Encyclopedia Talmudit*, XII (Jerusalem, 5727), 410–411.

<sup>20</sup> See also *Iggerot Mosheh*, *Hoshen Mishpat*, II, no. 74, sec. 1 and *infra*, note 27 as well as note 31 and accompanying text. *Iggerot Mosheh* applies the same principle in the situation of a physician who has been summoned by two patients. *Iggerot Mosheh* declares that the doctor must “go to the patient who called him first and to the one who is closer to his home.” *Iggerot Mosheh* fails to indicate which patient should be treated first in the event that the patient who called him first is more distant from his home than the patient who called later. However, *Iggerot Mosheh* joins in the consensus of halakhic opinion that maintains that the principle of *ein ma'avirin* applies to a temporally prior obligation no less than to physical proximity. According to *Iggerot Mosheh*, since the obligation of rescue devolves upon the doctor at the moment he becomes aware of the need for his services, the physician should assign priority to the patient who summoned him first.

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recitation of the blessing upon appearance of the new moon is postponed until the evening after *Shabbat* so that the blessing be enhanced by its recitation in Sabbath attire. A person often has the choice of reciting the morning prayer at home immediately upon arising or delaying *shaharit* somewhat so that he may recite the prayer communally together with a *minyan*. A person may, and indeed should, delay the prayer in order to pray in the optimal manner. Lifting the four species on the first day of *Sukkot* is a biblical obligation. The *mizvah* can be fulfilled only once during that day. Upon awakening *Sukkot* morning a person may face a quandary: He has in his possession a perfectly kosher *etrog* but it is not a *hadar*, i.e., it lacks the characteristics of a “beautiful” *etrog*. The owner of the *etrog* knows that later in the day a far more beautiful *etrog* will be available in the synagogue or that he will be able to acquire such an *etrog* from a friend. Should he fulfill the *mizvah* early in the morning with alacrity or should he delay in order to “beautify” his fulfillment of the *mizvah*? In each of those cases, delay is warranted in order to enhance fulfillment of the *mizvah*.<sup>21</sup> If so, should one not also ignore the patient whose life can be prolonged only to the extent of *hayyei sha’ah* in order to “beautify” the *mizvah* of *pikuah nefesh* by restoring a person to *hayyei kiyum*?

The issue arises in a more complicated guise in the situation of a soldier who has been granted military leave but has discretion to avail himself of taking the leave immediately or to delay his furlough until some future time. Should he avail himself of the earliest opportunity to pray with a *minyan* or should he wait until *Shabbat*?<sup>22</sup> In that situation the issue is complicated by the fact that *Shabbat* is a sanctified day and prayer itself on *Shabbat* is also endowed with the enhanced sanctity of the

<sup>21</sup> See *Shulhan Arukh, Orach Hayyim* 426:2; R. Israel Isserlein, *Terumat ha-Deshen*, no. 35; and R. Jacob Reischer, *Teshuvot Shevut Ya’akov*, I, no. 34. See also R. Elijah of Lublin, *Teshuvot Yad Eliyahu*, no. 42.

<sup>22</sup> In the situation of a prisoner who was able to secure release for a single day with the option of selecting the particular day at his discretion, R. David ibn Zimra, *Teshuvot Radvaz*, I, no. 13, ruled that the prisoner should avail himself of the earliest opportunity to pray with a *minyan*. That is also the opinion of *Sefer Hasidim*, no. 878. See also R. Abraham Danziger, *Nishmat Adam* 68:1. R. Zevi Ashkenazi, *Teshuvot Hakham Zevi*, no. 106, rules that a person may delay the opportunity to pray with a *minyan* until *Shabbat*. See also sources cited by *Ba’er Heitev, Orach Hayyim* 90:11. R. Abraham Danziger, *Hayyei Adam* 68:1, states that it is not proper to delay for more than “one day or two days” because of the possibility that he may die in the interim. However, in *Nishmat Adam, loc cit.*, the same authority rules in accordance with the opinion of *Sefer Hasidim*. R. Israel Meir ha-Kohen Kagan (known as *Hafez Hayyim*), *Maḥaneh Yisra’el* (Jerusalem, 5734) 15:5, asserts that all would agree that, because of the danger he faces, a soldier should conduct himself in accordance with the view of *Sefer Hasidim*. Cf., *Nishmat Adam* 68:1, s.v. *ve-hineh*.

day. Should he delay until Purim in order to participate in public reading of the *Megillah*? Or should he delay until *Parashat Zakhor* on which day he will also be able to discharge the biblical obligation of reading the relevant verses of the Torah? In each of those cases the issue is not postponement for the purpose of fulfilling the *mizvah* at hand in a more enhanced or more optimal matter but choosing between two separate *mizvot*, one more significant than the other. Each day's prayer is a separate and distinct *mizvah*. The delay will not enhance the presently available *mizvah* but provide the opportunity for a different, more "beautified" *mizvah*, or in the case of delay until Purim or *Parashat Zakhor*, also the opportunity for fulfillment of multiple obligations.

A far more apt analogy is that of a patient advised by his physician that he cannot sustain two fast days in close succession to one other, i.e., the Fast of Gedaliah and *Yom Kippur* one week later. The patient's quandary is should he seize the "bird in the hand," i.e., the opportunity to fast on the Fast of Gedaliah and then have no choice but to partake of food on *Yom Kippur*? The issue is not which is the more significant *mizvah*, fasting on the Fast of Gedaliah or on *Yom Kippur*. The requirement to fast on *Yom Kippur* is a biblical commandment; the Fast of Gedaliah was decreed by rabbinic ordinance. Hence, the consideration governing the choice would seem to be obvious. Yet, the issue is entirely different because partaking of food on a fast day is not failure to observe a *mizvah*; it is an overt transgression. One does not transgress here and now in order to avoid life-preserving transgressions in the future even if the latter transgression is more severe or the requisite transgressions will be greater in number. At present, there is no imminent danger justifying transgression; any future transgressions will be in face of *force majeure* for which there is no culpability whatsoever.

The question of choosing between fasting on the Fast of Gedaliah and fasting on *Yom Kippur* merits investigation solely because the prohibition against eating on the Fast of Gedaliah is of rabbinic origin. Did the Sages intend their edict to be binding even if the result will entail subsequent violation of a biblical prohibition or did they exclude fasting in such circumstances from their edict just as they excluded a presently ill person from that edict?

The option of delaying treatment or of ignoring the needs of a patient at risk for *hayyei sha'ah* in order to restore another patient to *hayyei kiyyum* is more complicated. Preservation of life presents a two-fold *mizvah*, or better, two distinct *mizvot*, one positive and one negative. "And you shall restore it to him" (Deuteronomy 22:12) applies to restoring

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a potentially lost life no less so than to returning lost property. Postponement or delay in order to fulfill a more “sanctified” positive commandment might perhaps be warranted. The *mizvah* of preserving *hayyei kiyyum* should certainly be regarded as more sanctified than the *mizvah* of restoring *hayyei sha’ah*. The second commandment, “do not stand idly by the blood of your fellow” (Leviticus 19:16), is a negative commandment that is transgressed by failure to act. A person dare not violate one negative commandment in order to avoid a later transgression even if the later transgression is more grievous.

Moreover, the issue with regard to fulfillment of the commandment “And you shall restore it to him” is more complex than it might appear. The biblical commandment “And you shall restore it to him” constitutes a separate *mizvah* with regard to each and every person. The rescue of A is one *mizvah*; the rescue of B is a *mizvah* of the same nature but it is separate and distinct. Failure to assure one patient’s *hayyei sha’ah* in order to rescue a patient confronting the curtailment of *hayyei kiyyum* does not constitute enhanced fulfillment of a *mizvah* at hand. Rather, it is the sacrifice of one *mizvah* for fulfillment of a separate and discrete *mizvah*. One *mizvah* may not be ignored for the purpose of fulfilling another *mizvah* even if the second would be granted priority were both to be presented simultaneously.

Both *Iggerot Mosheh* and Rabbi Zilberstein rule that the principle “first come, first served” must be applied in every triage situation even if the life of the first and closest patient can only be preserved for a brief span of time whereas the second patient can be restored to a normal lifespan. As stated earlier, *Iggerot Mosheh* further rules that, when summoned by two sick individuals, the physician must respond in the order in which the requests are received. *Iggerot Mosheh* does not address the situation of a second patient who is in closer physical proximity to the physician than the patient who called the doctor first. *Iggerot Mosheh*’s ruling is surprising because priority of request would not seem to constitute an applicable halakhic category. To be sure, it would seem that, if treatment has already commenced, the rule that *ha-osek be-mizvah patur min ha-mizvah*—one who is engaged in a *mizvah* is exempt from another *mizvah*—should apply.<sup>23</sup> Similarly, it might be argued, relative proximity

<sup>23</sup> See *Sukkah* 28a and *Sotah* 41b. For discussion of the underlying reason see Rambam, *Commentary on the Mishnah, Avot* 2:1; Radvaz, *ibid.*; Taz, *Orah Hayyim* 191:1. Rambam, *Commentary on the Mishnah, Avot* 3:1, explains that human beings cannot determine the relative value of each *mizvah* and therefore, as the Mishnah admonishes, we must be as meticulous with regard to fulfilling a seemingly less significant

should trigger application of the principle “*ein ma'avirin al ha-mizvot*—one should not ‘pass over’ *mizvot*.”<sup>24</sup> However, mere mental determination

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*mizvah* (*kalah*) as we are in fulfilling a more significant *mizvah* (*hamurah*). Radvaz, in his commentary on the same Mishnah, objects because, at least some *mizvot*, e.g., circumcision and partaking of the paschal sacrifice, are ostensibly more *hamur* than others. Radvaz himself comments that a servant assigned a task must fulfill the task as it has been assigned to him even if it seems insignificant before turning his attention to a more important task. Were he to interrupt the task which he has been assigned, it would appear that he disdains the king’s command whereas continuing with the assigned task serves properly to fulfill the will of the king. In a similar vein, *Taz*, *Orah Hayyim* 191:1, states that interrupting a *mizvah* by performing a mundane task, or even another *mizvah*, seemingly manifests a lack of seriousness and concern for fulfillment of the *mizvah* in which he has been engaged and gives rise to the impression of an attitude of light-heartedness *vis-à-vis* fulfilling *mizvot*.

<sup>24</sup> Ritva, *Sukkah* 35a; *Or Zarua*, *Hilkhot Sukkah*, no. 299; and *Tosafot Berakhot* 17b, state clearly that the principle constitutes a prohibition. See also R. Betzalel Zolty, *Mishnat Ya'avez*, *Orah Hayyim*, no. 65, sec. 3. Cf., R. Shimon Moshe Diskin, *Mas'at ha-Melekh*, *Ketubot* 7b, sec. 37 and R. Jacob Kanievski, *Kehillot Ya'akov*, *Berakhot*, no. 15, and *Shabbat*, no. 11, s.v. *ve-hineh be-inyan*. Rambam, *Hilkhot Sukkah* 6:1; *Me'iri*, *Sukkah* 33a; and Rashi, *Berakhot* 17b, maintain that an *osek be-mizvah* is merely exempt from fulfillment of other *mizvot* but is not prohibited from fulfilling other *mizvot*. Rabbenu Yonah, *Berakhot* 17b, cites both opinions. See also *Ozar Iyyunim*, published as an addendum to the *Metivta Oz ve-Hadar* edition of *Berakhot*, no. 10, sec. 4.

Furthermore, a person engaged in a *mizvah* is not permitted to transgress negative commandments just as an *onen* who is exempt from fulfilling positive *mizvot* is not permitted to violate a negative commandment. See *Pri Megadim*, *Petihah Kollelet*, part 2, sec. 28 and *Bi'ur Halakhah* 71:1, s.v. *mi. Pnei Yehoshua*, *Sukkah* 25a, s.v. *ha-Mishnah*, maintains that this is the case even if the prohibition is violated only passively, e.g., an *onen* who transgresses by failing to destroy *hamez* before *Pesah*. Other authorities assert that the distinction is not between a positive commandment and a negative commandment but that every *osek be-mizvah* is relieved of all other affirmative obligations regarding performance of a *mizvah* but is nevertheless forbidden to commit any act that would actively violate any commandment, whether positive or negative. See *Hiddushei R. Akiva Eger*, *Sukkah* 25b; R. Isaac Schmelkes, *Teshuvot Bet Yizhak*, *Yoreh De'ah*, II, no. 65, sec. 1; R. Shlomoh ha-Kohen of Vilna, *Teshuvot Binyan Shlomoh*, I, no. 47, s.v. *u-mihu*; and R. Elchanan Wasserman, *Kovez Shi'urim*, *Bava Batra*, sec. 42. See, however, R. Jacob Ettlinger, *Bikurei Ya'akov* 640:19; *Kaf ha-Hayyim*, *Orah Hayyim* 640:40; and R. Yechiel Michel Tucatzinsky, *Gesher ha-Hayyim*, I, 18:8, who disagree. Cf., *Pri Megadim*, *Orah Hayyim*, *Eshel Avraham* 640:10; *Mishnah Berurah* 640:31; and R. Chaim Chizkiyahu Medini, *Sedei Hemed*, *ma'arechet ha-ayin*, *klal* 67. See also R. Aaron Levine, *Tikkun Me'ir*, I, 4:2, sec. 1; R. Aaron Felder, *Yesodei Semahot* 3:23 and note 23; and *Ozar Iyyunim*, *Sukkah*, no. 10, sec. 9.

In addition to the positive commandment “And you shall restore it to him” (Deuteronomy 22:2) the obligation of rescue is expressed in the form of a negative prohibition, “Nor shall you stand idly by the blood of your fellow” (Leviticus 19:16). The latter is a negative commandment that is transgressed by passive nonperformance. However, *Pri Megadim* maintains that an *osek be-mizvah* is exempt from all positive acts involving other commandments regardless of the technical classification

does not seem to be of halakhic import in establishing priority either by reason of *ein ma'avirin* or *osek be-mizvah*.<sup>25</sup> *Iggerot Mosheh* does not explicitly invoke either principle but apparently maintains either that a person becomes an *osek be-mizvah*, i.e., “engaged” in the performance of a *mizvah*, the moment he becomes aware of his obligation<sup>26</sup> even though

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of the *mizvah* as a positive or negative commandment and, conversely, is restricted from performing overt acts that constitute a violation of a positive commandment.

Other rabbinic scholars resolve the problem on the basis of an entirely different consideration. The Gemara, *Kiddushin* 34a, declares that women are obligated to fulfill the commandments of *mezuzah*, *ma'akeh* (building a rampart around the edges of a roof) and sending away the mother bird before collecting her eggs or taking her fledglings because “those commandments are not time-bound.” A number of early-day authorities question the need for that talmudic explanation. That explanation would appear to be superfluous because each of those positive commandments is accompanied by a negative commandment as well. Women are exempt only from time-bound positive commandments but not from similarly time-bound negative commandments. Ramban, *Kiddushin* 34a, resolves the question by declaring that such negative commandments are designed to reinforce and strengthen the accompanying positive commandments. Accordingly, reasons Ramban, a person exempt from the positive commandment is also not bound by the ancillary negative *mizvah*. R. Meir Simchah ha-Kohen of Dvinsk, *Or Same'ah*, *Hilkhot Yom Tov* 3:5; R. Meir Auerbach, *Imrei Binah*, *Orah Hayyim*, no. 13; *Kovez Shi'urim*, *Bava Batra*, sec. 48; and *Kehillot Ya'akov*, *Kiddushin*, no. 32, sec. 4, cite Ramban in asserting that a person exempt from a primary commandment on the basis of *osek be-mizvah* is exempt from any accompanying *mizvah* as well. See also R. Yehudah Leib Graubart, *Havalim ba-Ne'emim*, I, no. 19. The negative commandment, “You shall not stand idly by the blood of your fellow,” serves to reinforce the positive commandment of rescue “And you shall restore it to him.” Consequently, any person exempt from the positive commandment, which is the primary *mizvah*, is exempt from the ancillary negative *mizvah* as well.

<sup>25</sup> A significant number of authorities maintain that a person traveling for the purpose of fulfilling a *mizvah* is included in the category of *osek be-mizvah*. See *Shitah Mekubbezet*, *Berakhot* 11a; *Amudei Esh*, no. 5, sec. 21; and R. Chaim Benyamin Pontromali, *Petaḥ ha-Dvir*, III, no. 248, sec. 13. Cf., however, *Teshuvot Rashbash*, nos. 1, 2 and 334, who disagrees. See also *Sedei Hemed*, *Kelalim*, *ma'arekhet ha-ayin*, *klal* 44. The clear inference is that the controversy or doubt is limited to a person who has actually undertaken a preparatory step for performing the *mizvah*. Seemingly, all authorities would agree that mere mental determination does not render a person an *osek be-mizvah*. See *infra*, note 26.

<sup>26</sup> Thus, even for *Iggerot Mosheh*, it is only awareness of the devolvement of an obligatory *mizvah* that gives rise to the principle of *osek be-mizvah*, whereas mere determination to engage in a discretionary *mizvah* would not do so. Whether the rule applies to actual involvement in fulfilling a discretionary *mizvah* is the subject of controversy. *Netivot ha-Halakhah* 72:19 regards the rule as restricted to fulfillment of mandatory commandments whereas *Imrei Binah*, *Orah Hayyim*, no. 13, sec. 3, and R. Aryeh Pomeranchik, *Emek Berakha*, *Sukkah*, sec. 15, regard discretionary *mizvyot* as included as well.



he has not actually commenced performance of the *mizvah* or that such awareness constitutes temporal priority giving rise to *ein ma'avirin*.<sup>27</sup>

It seems to this writer that two patients in need of treatment enjoy equal priority regardless of proximity, time of arrival or even commencement of treatment. If so, under all circumstances, *hayyei kiyyum* is to be afforded priority over *hayyei sha'ah*. Assuredly, *osek be-mizvah* and *ein ma'avirin* are both applicable principles but there is no reason to assume that they enjoy a status greater than that of an explicit biblical mandate. Moreover, there seems to be compelling reason to conclude that the principles of *ein ma'avirin* and *osek be-mizvah* do not apply in instances of *pikuaḥ nefesh*. It would seem that *mizvot* are not suspended in the face of *pikuaḥ nefesh* because of commandments mandating rescue but because of an entirely independent concern for preservation of life, even in the absence of a *mizvah* to do so. The derivations of that principle adduced by the Gemara, *Yoma* 85b, speak of suspension of *mizvot* for preservation of life without reference to the commandments concerning rescue. Certainly, the Gemara's final derivation, "And you shall live by them" (Leviticus 18:5), refers to suspension of prohibitions simply for the purpose of preserving life without any indication of, or contingency upon, fulfillment of the *mizvah* of rescue.

The underlying issue can best be framed in the form of a classical *hakirah* (a type of analytic deconstruction): Why are biblical prohibitions suspended in instances of *pikuaḥ nefesh*? Is it because of prioritization of the *mizvah* of rescue? Or is it because a supervening value, *viz.*, preservation of life *per se* is assigned precedence? Application of each of those hypotheses will lead to a different conclusion in instances in which prohibitions must be violated in order to preserve life but no *mizvah* will be fulfilled by such preservation. If the principle of *osek be-mizvah* is

<sup>27</sup> See *supra*, note 19. Some authorities maintain that the principle does not apply if the closer *mizvah* is less stringent (*kalah*) in nature than the distant *mizvah* that is more stringent (*hamurah*). See *Turei Even*, *Megillah* 7b. Cf., however, R. Malkiel Tennenbaum, *Teshuvot Divrei Malki'el*, I, *Orah Hayyim*, no. 8. Restoration of a person to *hayyei kiyyum* in comparison to preservation of a greater number of lives for a brief period is certainly a *mizvah hamurah*. Moreover, the rationale underlying this rule is that "passing over" a *mizvah* evidences a certain disdain for that *mizvah*. See *Teshuvot Divrei Malki'el*, I, *Orah Hayyim*, no. 16. If so, "passing over" a patient for purposes of *pikuaḥ nefesh* can hardly be regarded as a form of *bizui mizvah*. Moreover, even were it to be so regarded, *bizui mizvah* is certainly suspended for purposes of *pikuaḥ nefesh*. See *infra*, note 27 and accompanying text. See also R. Chaim Halberstam, *Teshuvot Divrei Hayyim*, *Dinei Shomerim*, no. 19; R. Joab Joshua Weingarten, *Kabba de-Kashyata*; R. Meir Simchah ha-Kohen of Dvinsk, *Hiddushei R. Meir Simchah ha-Kohen*, *Shevu'ot* 44b; and R. Chaim Ozer Grodzinski, *Teshuvot Abi'ezer*, III, no. 6, sec. 2.

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understood as rendering any other *mizvah* nugatory,<sup>28</sup> an *osek be-mizvah* cannot be required to rescue a life when he is already engaged in a *mizvah*. However, if it is preservation of life alone that is the dominating principle, such preservation of life would be the prevailing consideration and mandate intervention even in the absence of any *mizvah* of rescue.

The biblical admonition, it may be argued, serves simply to teach that *mizvot* may not be allowed to interfere with preservation of life. If so, it would seem that the principle of *osek be-mizvah* does not pertain in matters of *pikuaḥ nefesh* because it is the potential effect of the act, rather than the act itself, that mandates suspension of *mizvot* in the interests of *pikuaḥ nefesh*.<sup>29</sup> If any and all biblical mandates are preempted for the purpose of *pikuaḥ nefesh* it should follow that the principle of *pikuaḥ nefesh* requires that priority be given to *ḥayyei kiyyum* because of the qualitative nature of the life that is to be preserved. Granted that *osek be-mizvah* and *ein ma'avirin* are both applicable principles there is nevertheless no reason to assume that with regard to *pikuaḥ nefesh* they enjoy a status greater than that of an explicit biblical mandate. Consequently, the treatment of a patient who may potentially be restored to *ḥayyei kiyyum* should always be given priority. Indeed, R. Joseph Shalom Eliashiv is quoted in *Shi'urim le-Rofe'im*, II, no. 165, p. 109, as stating that neither *ein ma'avirin*<sup>30</sup> nor *osek be-mizvah*<sup>31</sup> apply in instances of *pikuaḥ nefesh*.<sup>32</sup>

*Iggerot Moshel, Hoshen Mishpat*, II, no. 74, sec. 1, states that the physician should heed the summons of the first patient who requests his services “and only if the second is more severely ill than the first should he go to the second.” When two patients require treatment, treatment of both is not possible and all relevant halakhic considerations are equal, *Iggerot Moshel, Hoshen Mishpat*, II, no. 75, sec. 2 and *Minḥat Shlomoh*, II,

<sup>28</sup> See *infra*, note 32 and accompanying text.

<sup>29</sup> See *supra*, note 19 as well as *supra*, note 26 and accompanying text.

<sup>30</sup> See *supra*, note 19.

<sup>31</sup> Application of the principle *osek be-mizvah patur min ha-mizvah* results in either a) only exemption from performance of another *mizvah*; b) a situation of *ones* with regard to performance of the second *mizvah*; c) a prohibition against performing another *mizvah*; or d) renders the second *mizvah* entirely nugatory to the extent that, in the case of a mandatory obligation, performance of the *mizvah* must be repeated. See *Ozar Iyyunim*, no. 10, secs. 10:3 and 10:8, s.v. *yesh le-ayyen*. If *osek be-mizvah* only establishes an exemption from performing other *mizvot* or renders the person an *ones* with regard to other *mizvot* there is no reason to assume that the rule applies to cases of *pikuaḥ nefesh*. If it establishes a prohibition, that prohibition should also be suspended in instances of *pikuaḥ nefesh*. If, however, it renders the second *mizvah* nugatory, the principle should be entirely irrelevant. Cf., *supra*, note 26 as well as note 27 and accompanying text.

<sup>32</sup> See, however, *supra*, note 19 as well as note 27 and accompanying text.

no. 82, sec. 2, as well as Rabbi Zilberstein, *Shi'urim le-Rofe'im*, II, no. 165, p. 112, rule that the choice be determined by casting lots.<sup>33</sup> The toss of a coin represents a modern-day equivalent of casting lots. Such a procedure does serve to eliminate any possible bias or self-interest and assuredly gives rise to a sense of fairness, but on first impression there does not appear to be halakhic mandate for such a procedure.

However, upon reflection, a public facility may be required to adopt such a policy. An individual having an equally compelling duty to two persons has autonomous discretion with regard to which duty he shall discharge and which he will ignore because of *force majeure*. However, in a public facility, the patient enjoys a concomitant proprietary interest to treatment. When dissolution of a partnership becomes a matter of necessity or prudence and the partnership owns an asset that cannot be equitably divided, one of the partners may claim the asset against compensation in exchange for the other partner's interest. If both partners seek an *in rem* distribution, lots must be cast to determine the outcome. Since the medical apparatus or treatment in question is not divisible and each patient has an enforceable claim, it would seem that each has the right to demand a lottery to determine priority of treatment. As shown earlier in discussing the case of two wayfarers and a single jug of water, a person may not sacrifice himself in order to save another. By the same token, a person may not relinquish his right to treatment or to medical equipment in favor of another patient.<sup>34</sup> Similarly, he has no authority to relinquish his right to partake in a lottery for that purpose.

#### IV. WITHDRAWAL OF A VENTILATOR

*Iggerot Mosheh, Hoshen Mishpat*, II, no. 74, sec. 2, further rules that, quite apart from other considerations, a person whose longevity anticipation is limited to *hayyei sha'ah* may not be removed from the I.C.U. unit in order to make his bed available for the treatment of another patient. His reasoning is that the patient has acquired a form of proprietary interest of which he may not be deprived. *Minhat Shlomoh*, II, no. 82,

<sup>33</sup> *Minhat Shlomoh*, II, no. 82, sec. 2, s.v. *u-be-noge'a*, states that the priorities enumerated in the Mishnah, *Horiyot* 13a, should be applied. That is also the opinion of *Iggerot Mosheh, Hoshen Mishpat*, II, no. 75, sec. 2. Cf., *ibid.*, no. 74, sec. 1. However, in a different letter published in the same *siman*, *Minhat Shlomoh*, s.v. *katav*, states without further elaboration, "It seems to me that in our time it is extremely difficult to act in that manner." See *supra*, note 16. Both authorities state that when the priorities established in *Horiyot* cannot be applied the choice should be made on the basis of lots.

<sup>34</sup> Cf., however, *infra*, note 39 and accompanying text.

sec. 2, *s.v. katav*, applies the same line of reasoning to the removal of a ventilator in order to preserve the life of another patient.<sup>35</sup> If so, the situation is comparable to a person who owns a single container of water. No one may seize that water to provide for the hydration of a person in equal need. As has been shown, the Halakhah follows the opinion of R. Akiva who ruled that the principle of self-preservation governs. Rabbi Zilberstein applies the same principle to the ministrations of a physician. Rabbi Zilberstein asserts that, once a physician has begun treatment of one patient, that patient has acquired a right to medical attention by the doctor and, consequently, the physician may not deprive the patient of that right by turning his attention to another patient even if the latter is more seriously ill.<sup>36</sup> However, Rabbi Zilberstein distinguishes between a public institution and a private facility. Rabbi Zilberstein asserts that patients acquire such interests and rights only with regard to public facilities in which all members of society enjoy a partnership interest but not in a private facility.

The underlying concept is quite correct: Societal and public entities are partnerships. But no partner has the right to demand the sale of a particular asset and distribution of the proceeds. A partnership entered into for an indefinite period may be dissolved in whole upon the demand of a single partner<sup>37</sup> but it cannot be dissolved in part other than upon acquiescence of both partners.<sup>38</sup> Moreover, the type of partnership reflected in public entities is non-dissolvable in nature because each “partner” has conveyed a servitude of “non-dissolvability” upon all other holders of a

<sup>35</sup> *Minḥat Shlomoh* is also cited to that effect by *Mishneh Halakhot*, XVII, no. 175, p. 328. However, in a different letter published in the same section of *Minḥat Shlomoh*, Rabbi Auerbach speaks of a patient who gained (*zakhah*) the right to use of a ventilator and states that, if the first patient no longer “derives benefit” from the ventilator, it is permissible “to transfer” (*le-ha'avir*) the ventilator to another patient. The implication is that the patient has been attached to a ventilator and the issue is removal of the ventilator for reassignment to another patient. If so, there is a discrepancy between the two statements.

<sup>36</sup> *Minḥat Shlomoh*, II, no. 82, sec. 2, *s.v. katav*, states that if a physician has commenced treating a patient he should not interrupt to treat a more seriously ill patient because “a person engaged in a *mizyah* is exempt from another *mizyah*.” *Minḥat Shlomoh* adds that “perhaps it is even forbidden” to do so. *Minḥat Shlomoh*’s comment to the effect that “perhaps it is even forbidden” is undoubtedly an elliptical reference to the controversy among early-day authorities regarding whether *patur min ha-mizyah* constitutes only an exception or an actual prohibition. See *supra*, note 24 as well as note 31 and accompanying text. As has been asserted earlier, even if the principle *osek be-mizyah* constitutes a prohibition, that prohibition should be suspended in face of *pikuah nefesh*.

<sup>37</sup> See *Shulḥan Arukh*, *Hoshen Mishpat* 176:16.

<sup>38</sup> See *ibid.*, 173:1.

partnership interest. Each of the “partners” retains only a right of use under appropriate circumstances. Nevertheless, it may be asserted that each partner in a publicly owned asset has limited the exercise of his own proprietary interest to situations in which there are no competing claims. It is even more reasonable to assume that, under circumstances in which competing claims exist, each partner has limited his proprietary interest to assertion of his interest only in accordance with usual applicable halakhic canons of prioritization. Assuming, *arguendo*, that this reasoning is specious and no such presumption exists, it can rapidly be generated. All that would be required is for members of society to signify their acquiescence and mutual renunciation of individual proprietary rights when exercise of such interests are deemed to be inappropriate or socially disadvantageous.<sup>39</sup>

Nevertheless, it is this writer’s opinion that application of halakhic principles of triage does not justify detaching even a terminally ill patient from a ventilator. With some rare exceptions, a person is not permitted to accept death in order to preserve the life of another. *Hazon Ish* makes it clear that the traveler having a right to a container of water may neither give nor share it with a person with similar needs.<sup>40</sup> A person does not have a proprietary interest in his life or body. Consequently, a person does not have the right to renounce his right of use of a ventilator for preservation of his own *hayyei sha’ah* even if another patient may derive greater benefit. *A fortiori*, society may not demand that a ventilator be held in reserve and not be made available to a patient who requires the ventilator for extension of *hayyei sha’ah*. That is so even if the patient on the ventilator agrees to forego respiratory assistance. That is also the case even when it is statistically certain that a patient will appear whose life can be saved and restored to good health if assigned a ventilator.<sup>41</sup>

<sup>39</sup> This is correct only if the patient’s claim is based upon a property interest that can be renounced antecedently. However, as discussed earlier, a person entitled to life-saving treatment cannot waive such right regardless of how that right came into being. See *supra*, note 34 and accompanying text.

<sup>40</sup> See R. Abraham I. Kook, *Mishpat Kohen*, no. 144, sec. 15; and *Shevet me-Ye-hudah*, I, chap. 8, sec. 5. Cf., however, R. Chaim ibn Attar, renowned as the author of *Or ha-Hayyim*, in his *Rishon le-Zion, Yoreh De’ah* 249:1 and *Teshuvot Mahaneh Hayyim*, II, *Hoshen Mishpat*, no. 50. Cf., R. Moshe Soloveitchik of Zurich, *Sefer ha-Zikaron le-ha-Gr”y Abramsky*, p. 447.

<sup>41</sup> Cf. R. Asher Weiss, *Minhat Asher – Be-Tekufat ha-Koronah, Mahadura Tinyana* (Jerusalem, Iyar 5780), no. 6 and R. Hershel Schachter, <https://www.kolkorona.com/rav-schachter-official-pesakim> (April, 2020). However, it is precisely for the reason herein set forth that a second patient cannot be assigned to a single ventilator if the longevity of the first patient would be compromised thereby. See *infra*, note 48 and accompanying text.

It is for the same reason that, as has been earlier argued, when two patients in a public facility have equal claims to medical attention for use of a potentially life-saving apparatus neither patient may relinquish his right to treatment or waive the prerogative of casting lots to determine which patient is to be given priority.<sup>42</sup>

#### V. WITHDRAWAL OF A VENTILATOR AS A FORM OF HOMICIDE

It is widely assumed that removing a patient from a life-support system constitutes an overt act of homicide.<sup>43</sup> A resultant dilemma arises when a patient incapable of long-term survival is placed on a ventilator and a second patient subsequently appears whose recovery is anticipated provided that he receives required short-term respiratory assistance. If no other ventilator is available the second patient will succumb. Since the death of a terminally ill patient may not be hastened even in order to rescue another patient there is no question that the ventilator may not be re-assigned if removal is deemed to be active homicide.

R. Yitzchak Zilberstein suggests that a ventilator provided to the patient whose life will be prolonged but who is unlikely to survive be attached to an automatic timer. Rabbi Zilberstein reasons is that if the

<sup>42</sup> It may also be the case that severing the ventilator from its source of electrical power by detaching the plug, rather than by removing the patient from the ventilator, is also a form of *gerama* but is nevertheless prohibited as *gerama* of homicide.

<sup>43</sup> See, for example, *Minhat Shlomoh*, II, no. 82, sec. 2, s.v. *halpatat* and R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, I, no. 859, s.v. *akh*. See also *Ve-ha-Ish Mosheh*, II, no. 4, p. 125 and p. 129, who suggests that removal of a respirator may be a *gerama*, or an indirect cause, and hence a non-proximate act of homicide. R. Zalman Nechemiah Goldberg, *Moriah*, vol. VIII, no. 4–5 (Elul 5738), p. 55, distinguishes between a patient who will die immediately upon removal of the respirator and one who will die only a short period of time thereafter. Removal of the respirator from the first he regards as a direct act of homicide while the second he categorizes as a *gerama*. A comparable distinction is made in another context by R. Chaim Ozer Grodzinski, *Teshuvot Ahi'ezer*, III, no. 60. See, however, R. Yitzchak Levi Halperin, *Halakhah u-Refu'ah*, ed. R. Moshe Hirshler, vol. II (Jerusalem, 5741), p. 160, who dismisses that distinction.

There are, however, authorities who regard removal from a ventilator as a passive act because it simply prevents oxygen from reaching the patient. Invoking that reasoning, they sanction removing a ventilator from a terminally ill patient and assigning it to a patient whose life may be saved as involving no more than giving priority to *hayyei kiyum* over *hayyei sha'ah*. See, for example, *Mishneh Halakhot*, VII, no. 175, pp. 329–330. See also *Mishneh Halakhot*, VII, no. 287 and XVII, no. 175, p. 330 as well as XVII, no. 180. Although the language of his statement is somewhat unclear, *Minhat Shlomoh*, II, no. 82, sec. 2, s.v. *katav*, states that it is permissible “*le-ha'avir*” a ventilator from a patient in a clinical state in which for the majority of patients the ventilator would be of “no benefit” in order to assign it to a patient who may recover. Cf., *supra*, note 35.

ventilator is in an off position, restarting the ventilator is tantamount to reattachment.<sup>44</sup> At that point there are two patients in simultaneous need of the ventilator. If so, just as in the case of initial presentation of two patients, the patient with the potential for a full recovery should be accorded priority.<sup>45</sup>

It seems to this writer that such a proposal is faulty for a number of reasons. The first patient remains attached to the ventilator after the device is shut off by the timer. A technician must detach the ventilator and transport it to the second patient. At that point the duty to treat each patient is presented simultaneously. However, according to *Iggerot Moshe's* opinion that medical personnel have an immediate obligation to the patient in closest proximity, that is not the case. The patient who must be approached in order to remove the now non-functioning ventilator is, at the moment, presumably in closer proximity to the physician or the technician than any other patient. If so, according to Rabbi Zilberstein and Rabbi Feinstein, the obligation of the physician or technician to restart the ventilator is immediate and hence prior to his obligation to another patient whose physical location is somewhat removed. Moreover, as will be argued presently, interrupting an existing flow of oxygen itself is a form of homicide. Setting the timer to terminate further flow of oxygen is at the minimum in the nature of *gerama* and hence is categorically forbidden.

<sup>44</sup> Assuming that it is acceptable to attach a ventilator to a timer, the timer should not be set after the patient is already receiving oxygen by means of the ventilator. Attaching or setting a timer at that point is tantamount to cutting off oxygen at a future time by means of a *gerama*. Rather, the apparatus should be attached to the timer and the timer set before the patient is placed on the ventilator.

In addition, in many timers, if one wishes to reset the timing mechanism so that it should be triggered at a later time, care must be taken that a timer be used that does not require detachment and re-attachment of a prong but simply sliding the prong that will trigger the timer. Detachment of the prong is tantamount to detachment of the timer, and consequently re-attachment is tantamount to setting the timer that otherwise would run continuously causing it to stop as a result of that action which is also a *gerama*. See this author's article, "*Hishtamshut be-Mekhonat Hanshamah le-Or ba-Halakhah*," *Yesburun*, XLII (Nisan 5781), 763–768.

<sup>45</sup> This expedient was actually implemented by some Israeli hospitals not in order to deal with a triage dilemma but to make passive euthanasia possible. A patient is attached to a ventilator with a twenty-four hour timer that set off a red light or an alarm after twelve hours to serve as a reminder to reset the timer. The patient or an individual holding a health care proxy could request an extension at any time. But, if the desire is for the patient to die without further treatment, the timer would be allowed to turn off the ventilator automatically at the end of the cycle and not be reset. See Judy Siegel, "Death with Dignity to be Allowed from Next Month," *The Jerusalem Post*, November 13, 2006, p. 5.

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If that act is not regarded as an act of homicide, it might be argued that providing oxygen is nevertheless mandated simply as an ongoing act of rescue. If that is indeed the case, the issue would be which of two acts of rescue should be given preference. If so, and were that the sole issue to be considered, consistent with the position advocated by this writer in section III of this article, withholding life-sustaining aid from one patient and providing it to another who is likely to achieve greater longevity thereby would be a faultless, and even commendable, act of triage.

### VI. HOMICIDE IN THE FORM OF *MEZAMZEM*

However, removing a patient from a ventilator is an act of an entirely different nature. The Mishnah, *Sanhedrin* 76b, declares:

If he pushed him into water or fire so that he could ascend, yet he dies, he is free [of the death penalty]. The following are subject to punishment by decapitation:... a murderer... who kept [his victim] under water or in fire so that he could not ascend.

The Gemara provides several additional examples, including:

If one casts his fellow into a pit in which there is a ladder and another came and removed it or even if he himself pays [someone] to remove it, he is not culpable because, when he threw [his fellow into the pit], he could have climbed out. From where do we know [that he is liable to the death penalty] for keeping [the victim] down? Samuel said: The verse says, “Or if with enmity he smote him with his hand” (Num. 35:21)—This extends the law to one who keeps his fellow restrained [e.g., in water] thus causing his death... If one bound his fellow in the sun and he died or in a place of intense cold and he died, he is culpable... If a person who overturns a vat upon [his fellow who then died of suffocation], he is culpable... If one casts his fellow into an alabaster chamber and lit a candle therein so that he died, he is culpable.

The underlying concept is couched in a single Hebrew word: “*mezamzem*,” meaning “restraining.” A person engaged in any of the acts described by the Gemara does not perform an overt act that serves as a halakhically cognized proximate cause of death. The perpetrator has not killed his victim; rather, he has restrained the victim from saving himself by rising above the water or by removing the overturned vat in order to avail himself of oxygen. Certainly, the perpetrator has performed an act but for which the victim would not have died—an act recognized in common law as a proximate cause. However, in Jewish law such an act



would ordinarily be categorized as a *gerama* rather than as an overt act. Preventing the victim from seeking oxygen will certainly result in his death but placing a vat over his head is itself not an overt act of homicide; it serves only to prevent an act of self-preservation, *viz.*, seeking oxygen. Since it is not the immediate cause of death it should properly be classified as a *gerama*, an indirect or non-proximate, cause. Nevertheless, the Gemara invokes a pleonasm in establishing that a non-proximate cause in the form of *mezamzem*, or restraint, constitutes homicide.

A person who forcibly keeps his victim's head under the water or places a vat over his head and thereby prevents him from accessing oxygen is guilty of murder.<sup>46</sup> A patient attached to a ventilator has access to a steady stream of oxygen. The sole difference between a patient capable of independent respiration and a ventilator-dependent patient is that, in the case of the latter, the oxygen is contained within a cannister or the like rather than drawn from the natural atmosphere. Cutting off the patient from that stream of oxygen is tantamount to preventing the patient from seeking oxygen by raising his head above water. The halakhically pertinent circumstances are not changed by virtue of the fact that the ventilator also forces oxygen into the patient's lungs under pressure. No one could breathe in the absence of air pressure resulting from gravity that holds the earth's atmosphere in place thereby making it accessible rather than allowing it to dissipate into the stratosphere. Thus, directly removing a patient in respiratory distress from a ventilator constitutes a form of capital homicide in the form of *mezamzem*.<sup>47</sup>

Were removing a patient from a ventilator not to be regarded as a proximate cause of homicide in the nature of *mezamzem* it would nevertheless constitute a *gerama*. Taking human life by means of *gerama* is biblically prohibited as a non-capital form of homicide. *Gerama*, even if the act is not in the nature of *mezamzem*, is certainly forbidden. Consequently, the Gemara, *Sanhedrin* 77a, assumes that it is forbidden to sacrifice one life even by means of *gerama* in order to preserve the life of another. If so, the expedient of employing a timer to shut off a ventilator and thereby depriving the patient of otherwise available oxygen even so that the ventilator may be reassigned to another patient is prohibited as a form of *gerama*.

<sup>46</sup> Similarly, removing or interrupting the flow of a life-sustaining infusion would also constitute homicide in the form of *mezamzem*.

<sup>47</sup> For a fuller discussion see this writer's article in *Yesburun*, XLII, 763–768.

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### VII. SHARED VENTILATORS

Shared utilization of a single ventilator may assume various different guises. It is not the necessary result that, when two parties are attached to a single ventilator, neither of the patients will receive a full complement of necessary oxygen. The capacity of present-day ventilators is not limited to a single canister of oxygen. To all intents and purposes, under normal conditions, the available supply of oxygen is unlimited. Two patients requiring the same settings for control of oxygen concentration, the same flow and rate of pressure at which the oxygen is to be administered, etc., may be attached to a single ventilator without compromising the survival of either patient. The danger is that one patient will later require a setting, or multiple settings, different from those of the other patient and that result cannot be accomplished when utilizing a common ventilator without compromising the treatment of the other patient. Any increase in the danger to the first patient is forbidden.<sup>48</sup>

The protocol of at least one major medical institution made available to this writer provides that a shared ventilator is to be employed only when the needs of both patients can be met by identical settings and only upon ascertaining that another ventilator will be held in reserve should the needs of one of the patients change. As has been discussed, a patient requiring assistance for *ḥayyei sha'ah* cannot be denied such assistance because of a need to reserve the ventilator for a future patient whose *ḥayyei kiyyum* will be endangered. Nor may a single setting be employed that exposes one of the patients to greater potential danger even though the purpose is to prolong the lives of both.

<sup>48</sup> See *supra*, note 41 and accompanying text.