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Ancient Answers to Modern Questions: Death, Dying and Organ Transplants - A Jewish Law Perspective

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ANCIENT ANSWERS TO MODERN QUESTIONS: DEATH, DYING, AND ORGAN TRANSPLANTS - A JEWISH LAW PERSPECTIVE

STEPHEN J. WERBER¹

I. INTRODUCTION	13
II. DEFINING DEATH	18
III. ORGAN TRANSPLANTS	23
IV. "CHOOSE LIFE"-MEDICAL DIRECTIVES, EUTHANASIA, SUICIDE	27
A. <i>Suicide</i>	28
B. <i>The DNR Conundrum</i>	31
C. <i>Euthanasia</i>	34
D. <i>Assisted Suicide</i>	42
V. CONCLUSION	44

I. INTRODUCTION

Medical advances have made it possible to extend life or defy death as it was known for centuries and have also compelled ethicists and health professionals to rethink our definition of death. Moral issues surrounding application of medical advances upon issues of death and dying have assumed a preeminent position among societal concerns. These moral issues relate to a matrix of other complex issues: the extent to which we should consider the psychological effects of extended long term illness upon the victim and his or her family; defining quality of life and how it bears upon the decision-making process; and

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The author thanks his former student, Linda Hurwitz Sher, whose Judaic Law course paper was of inestimable assistance. Rabbi Daniel Roberts of Temple Emanu-El, Cleveland, Ohio, provided helpful insights, materials, and comment. The questions posed by Cleveland-Marshall College of Law visiting Baker-Hostetler scholar, Samuel Gorovitz, together with his gentle editorial suggestions, led to clarifications instrumental to this article. The hospitality and assistance of the professional library staff of the Cleveland College of Jewish Studies was invaluable.

A personal note: This article focuses on Jewish law, a subject which cannot be fully divorced from aspects of religion. Some references to God were, therefore, inevitable. As this is a scholarly work which refers to God in the abstract rather than the religious and holy sense, the word is used without the use of devices such as "G-d" or "Lord." Such devices could be found as insensitive to some as the use of the term "God" is to others. To any who find the writing out of the word "God" to be insensitive, my sincerest apologies.

placing the financial aspects of the dying process into perspective when we know that a substantial portion of all medical expenditures for a given person are made in that person's final year of life. Although only the most callous would allow financial elements to determine life issues, their ramifications upon the lives of those who survive can be too serious to ignore.²

When is it proper to terminate lifesaving efforts? When is it proper for a family member to assist in bringing about an earlier death? Does the answer change if the assistance is provided by a medical professional? Does Jewish Law provide guidance and aid us in drawing lines that are practical while supporting the emotional needs of all concerned? Does Jewish Law permit a modern definition of death (brain death), or must more traditional, ancient definitions apply to foreclose organ transplant procedures which would save or enhance life?³ Is one view or the other the more moral or correct?

No one can answer these questions for any but himself. No hospital ethics committee can impose its values and norms upon all patients and rest assured that its collective wisdom leads to the right decision. No religion can pretend to provide God's answer or the only resolution.⁴ Nevertheless, the wisdom of the sages can provide elements of a value system, logic, and guidance which can ease the anxiety and uncertainty of the decision-making process and remove the edge of guilt which may arise from that process.⁵

²A fact all the more important in light of the criminalizing of efforts to transfer assets to gain Medicaid qualification as set forth in the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-91, Title II, § 217, 110 Stat. 1936, 2008 (1996) (amending 42 U.S.C. § 1320a-7b(a) to provide that the knowing and willful disposition of assets "in order for an individual to become eligible for medical assistance . . ." is subject to criminal penalty).

³A heart or kidney transplant to save a life could be viewed differently from a corneal transplant which improves the quality of life. The issues surrounding the removal of a kidney - where both the donor and donee can remain alive but at risk - and of a corneal transplant - where the donee's life is not at risk - are distinct. In turn, both differ from the issues surrounding a heart transplant which is possible only upon donor death.

⁴Discussion of the wide diversity of religious approaches is beyond the scope of this article. Major religious influences in the United States alone - Catholic, Protestant, Islamic, and more - can provide learning and support for individuals. For an introduction to such diversity see *A TIME TO BE BORN AND A TIME TO DIE, THE ETHICS OF CHOICE*, Part III, *Drawing Guidance from Our Traditions*, (BARRY S. KOGAN, ed., 1991) [hereinafter *A TIME TO BE BORN*]. See also KEVIN D. O'ROURKE & PHILIP BOYLE, *MEDICAL ETHICS: SOURCES OF CATHOLIC TEACHINGS* (2d ed. 1993).

⁵Personal resolution on moral, religious, or any other base may be more important than legal resolution. Questions of criminal and constitutional law surrounding assisted suicide were addressed in *Washington v. Glucksberg*, 65 U.S.L.W. 4669 (U.S. June 26, 1997) (No. 96-110), and *Vacco v. Quill*, 65 U.S.L.W. 4695 (U.S. June 26, 1997) (No. 95-1858). These decisions establish that there is no constitutional right to assisted suicide. *Washington* and *New York* statutes criminalizing such behavior were held consistent with the Due Process Clause (*Glucksberg*) and the Equal Protection Clause (*Vacco*). These decisions, despite their legal imperatives, will have no effect on the pain of the decision-making process. Their impact on individual actions remains to be seen.

Many have dealt with these issues on a personal level. When I was twenty-four the question was put to me: "Should we let her go or should we operate and buy a few days, maybe more?" I had no foundation upon which to base a decision other than my instincts. Despite the passage of over thirty years that decision remains a part of my life. Today, I am aware of sources that would have provided guidance for, and eased the burden of, my decision. These sources are found in the laws of Torah and their interpretations over a period exceeding two thousand years. This article seeks to provide the reader with an introduction to these sources and to suggest some answers found within them.⁶ To better appreciate the significance of the laws discussed below a short digression into history and nomenclature may be of assistance.

The Torah is the bedrock source of Jewish Law. It is often referred to as the Five Books of Moses, the Pentateuch, the Tannach, or even the Bible. To Christians it is usually referenced as the Old Testament which includes the books of Genesis, Exodus, Leviticus, Numbers, and Deuteronomy. The Torah was developed from approximately the fifth century B.C.E. and became a recognized sacred text circa 400 B.C.E.⁷

The Hebrew word *Torah* literally means instruction though to some it is considered revelation. The Torah itself is a sacred object. Torah is the original source of how one's life should be led and its laws are directed to this concept. It is erroneous to consider Torah as synonymous with "law" rather than a means of instruction, revelation, and scripture whose commandments will, if followed, provide a complete way of life. For these reasons, in both the liturgy and in song, the Torah is sometimes referenced as "the tree of life."

According to Jewish tradition the Torah contains 613 *Mitzvot*, commandments or laws, which are to be followed. Many of these 613 are religious in nature, but a substantial number, known as the *Halachah*, address what we now describe as civil law and criminal justice.⁸ The Torah, of course,

⁶A straightforward discussion of many of the issues presented in this paper, including application of principle to hypothetical cases in a manner familiar to generations of lawyers and law students, can be found in FAITEL LEVIN, *HALACHA, MEDICAL SCIENCE AND TECHNOLOGY* (1987). See also Rabbi Alfred Cohen, *Whose Body? Living With Pain*, XXXII J. HALACHA & CONTEMP. SOC'Y. 39 (Fall 1996) for a more "traditional" recent analysis of end-life decisions. Cohen presents conflicting sources and explanations of law. For example, he asks whether the Gemara allows one to bring an end to life through its teaching that in the town of Luz no one ever died. It seems that old people of Luz, when life had become intolerable, simply went outside the city walls and then died. *Id.* at 40. Despite this, and other examples, he concludes that the answer to his question is "no."

⁷Secular sources suggest that it may be dated from as early as the 16th Century B.C.E. Some religious sources believe it was given to Moses at Mt. Sinai (which would probably date to the time of Ramses II - approximately 1304-1237 B.C.E.). For religious reasons B.C.E. (Before the Common Era) and C.E. (Common Era) are used by Jewish scholars and others in lieu of B.C. and A.D. respectively.

⁸Jewish ethical practices can be derived in a traditional manner described as "halakhic formalism" (reasoning from the precedents) or a more modern approach described as a "covenantal" approach based more on a determination of humanistic

required interpretation and application.⁹ This process began with the "oral law" or *Mishnah* developed by a group of Rabbis known as the Tannaim and culminating in its redaction by Rabbi Yehuda HaNasi. This process took place from the 4th century B.C.E. to approximately 200 C.E. The terse interpretations, laws, and principles of the Mishnah were more fully explained in the "written law" or *Gemara* which was created by a second group of Rabbis known as Amoraim from approximately 220 - 500 C.E. Their work is now known as the *Talmud*¹⁰ and is seen in two versions: the Babylonian and the Palestinian.¹¹ In addition, interpretation and commentary upon the Torah was developed in the *Midrash*. A key difference between Mishnah and Midrash is that the latter includes direct quotation of Torah/scripture.¹² Of course, collected works of law and interpretation that are more than 1,500 years old need further explication if they are to be applied to modern problems. This explication is found in "Responsa" literature. Responsa were initially the work product of Rabbinical scholars at Torah Academies in Babylonia from 500 - 1,000 C.E. These scholars would discuss the answers to questions sent to them from throughout the world and respond with a collective and authoritative force.

elements as contained in the same basic texts. See DAVID H. ELLENSON, *How to Draw Guidance from a Heritage: Jewish Approaches to Mortal Choices* in A TIME TO BE BORN, *supra* note 4, at 219. See also Daniel H. Gordis, *Wanted - The Ethical in Jewish Bio-Ethics*, 4(3) GENERATION 43 (Dec. 1994) (discussing flaws in halachic formalism). Either approach can cross lines of orthodoxy and lead to contradictory conclusions. Though the more modern methodology is more likely to result in a "liberal" interpretation of "law," this is not a foregone conclusion.

Transliteration of the Hebrew term is proper in at least three spellings: Halakah, Halacha, and Halachah.

⁹To the extent that it contains "law" the Torah can, perhaps, be analogized to the United States Constitution as the supreme law of the land, absent the ability to amend.

¹⁰Technically this term refers to only the Gemara, but to understand it requires that one also understand the Mishnah as the two, together, present a more complete tapestry.

¹¹The Rabbis lived primarily in these two distinct areas of the world. The Babylonian is the more comprehensive and is usually the version referred to when speaking of Talmud. Indeed, if the Palestinian version is meant, it is usually referenced as such. The Palestinian Talmud was completed c. 375-90 C.E., while the Babylonian Talmud is generally recognized as being completed c. 500 C.E. The most commonly available English translation is that of the Soncino Talmud; the most recent English translation is that of the Steinsaltz edition - a work still in progress.

¹²The distinctions between Midrash and Mishnah are set forth in GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW*, section 21 (1973). Midrash are explications of Torah (Biblical) text in story, maxim, and aphoristic forms. Modern authorities also rely on the works of renowned rabbinical scholars such as Moses Maimonides (1135-1204 C.E.), known as Rambam, who contributed the COMMENTARY ON THE MISHNEH and the massive MISHNEH TORAH; and Joseph Karo (1488-1575 C.E.), known as Maran, who contributed the major codification of Jewish Law known as the BET YOSEF and its condensed version, the SHULCHAN ARUCH. Both Maimonides and Karo, because they were Jews, were forced to flee from Spain. Karo was taken from Spain by his family in 1492 when all Jews were expelled from that nation. Maimonides ultimately resided in Egypt and Karo in Palestine.

This tradition is carried on to the present day through various Rabbinical organizations.¹³

To understand the application of Jewish Law to issues of death and the dying process one must first be aware of the importance of life, and saving life (*pikuach nefesh*), in Jewish thought. Judaism "attribut[es] . . . infinite value to human life. Infinity being indivisible, any fraction of life, however limited its expectancy or its health, remains equally infinite in value."¹⁴ The Mishnah teaches that creation began with a single human being to "teach you that to destroy a single human soul is equivalent to destroying an entire world; and that to sustain a single human soul is equivalent to sustaining an entire world."¹⁵ This core value of the Jewish tradition, combined with the traditional belief that God decrees the time of death for each person on earth,¹⁶ has led a modern English Rabbi to conclude that: "On the whole, in the Jewish tradition, we don't die well. We rage and we storm. None of us needs that verse, 'Do not go gentle into that good night' (Dylan Thomas). For us, life, *chayyim*, is the great blessing."¹⁷

To save a life, including one's own, any religious law can be violated. Even the Sabbath can be broken to save a life.¹⁸ Every life is precious and every life is equal¹⁹ as none can say that another's blood is redder.²⁰ This does not mean,

¹³One beauty of Jewish Law is that, as the common law, it has the capacity to revisit and reinterpret its sources so that it can always bring a fresh perspective to resolve new problems. The Torah itself provides the authority necessary to interpret and apply its laws. THE ORTHODOX FORUM: RABBINICAL AUTHORITY AND PERSONAL AUTONOMY, 127 (Moshe Z. Sokol, ed. 1992). Just as the Constitution changes as it is what the Supreme Court says it is, so too the Torah.

¹⁴IMMANUEL JAKOBOVITS, JEWISH MEDICAL ETHICS 276 (1959). Lord Jakobovits was the Chief Rabbi, British Commonwealth of Nations, from 1966 to 1991. (All references to "Jakobovits" are to Lord Jakobovits unless specifically indicated as referring to his son, Dr. Yoel Jakobovits).

¹⁵*Sanhedrin* 4:5 as translated in THE NEW UNION PRAYER BOOK FOR THE DAYS OF AWE: GATES OF REPENTANCE 5 (1978) [hereinafter GATES OF REPENTANCE].

¹⁶As seen in the High Holy Day liturgy: "On Rosh Hashanah it is written, and on Yom Kippur it is sealed: How many shall pass on, how many shall come to be; who shall live and who shall die," but recognizing that repentance, charity, and prayer can change the decree. *Id.* at 108-9.

¹⁷JULIA NEUBERGER, ON BEING JEWISH 129 (1996).

¹⁸The *Mishnah* provides that "every danger to human life suspends [the laws of] the Sabbath." The exceptions are murder, incest/adultery, and idolatry.

¹⁹This principle can have great effect upon a variety of medical decisions as diverse as who can receive an organ transplant when resources are limited to whether triage is a proper medical practice. See *Choosing Which Patient to Save*, (Responsa No. 75), in AMERICAN REFORM RESPONSA, 247 (Walter Jacob, ed., 1983) [hereinafter RESPONSA]. The Talmud and Mishnah teach that creation began with a single human being so that none could assert a superior lineage or claim that heredity was responsible for their own character flaws. GATES OF REPENTANCE, *supra* note 15, at 5.

²⁰This well-known term comes from a Talmudic discussion in *Pesachim* 25b where a man comes before Rava and says: "the governor of my city has given me the alternative

however, that heroic measures must be taken to extend life where death is near. How Jewish law defines death, and how and when it permits steps that allow death or save life, are the focus of this article.²¹

II. DEFINING DEATH

The need to define death arises primarily as a result of advances in the area of organ transplant procedures. An insightful analysis of the conflict between a classical, religious based definition of death and a modern, science based definition suggests that:

Our traditional understanding of death, defined by the cessation of both breathing and heartbeat, is as old as human history. It is a definition which is both highly intuitive and easy to accept. The definition of brain death, on the other hand, is based on science, and counter-intuitive. Thus, it may be more problematic to those who, through religiosity, have embraced the sacred in lieu of the profane.²²

For Jews

a precise definition of death becomes of crucial importance because only the presence of the criteria of death which are recognized by Halakhah relieves the physician of his obligation . . . to preserve life. . . . From the perspective of Jewish law, there are a number of halakhic and ethical questions which can be formulated regarding the permissibility of this [heart transplant procedure] or similar procedures. Chief among these is the halakhic definition of death, since for medical reasons the donor's heart must be removed without delay if the operative procedure is to be successful.²³

that either I kill [a certain person] or the governor will kill me. What shall I do?" Rava answered: "Be killed rather than kill. What makes you think that your blood is redder than his?"

²¹Interpretation of Jewish Law often depends upon one's level of religious observance. There are three primary divisions or levels of religious practice and interpretation of Jewish Law - Orthodox, Conservative, and Reform. Within each there are further divisions and extremes such as rigorously orthodox Hassidic groups and ultra reform Humanistic Jews. The basic sources remain the same for all levels of Jewish thought and there is a fairly high degree of consistency in the approach to medical questions, death, and dying. Although some distinctions are evident in the text, this article does not seek to differentiate based on these approaches.

²²Joseph J. Fins, *Across the Divide: Religious Objections to Brain Death*, 34(1) J. RELIGION & HEALTH 33 (Spring 1995). The reference to the sacred and profane is predicated on MIRCEA ELEADE, *THE SACRED AND THE PROFANE* (1987).

²³J. DAVID BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS*, Ch. XVI, at 375-76, *Establishing Criteria of Death* (1977). For discussion regarding the definition of death in terms of medical principles and rabbinical sources see Abraham Steinberg, *The Definition of Death*, in *MEDICINE AND JEWISH LAW* 137-67 (Fred Rosner, ed. 1990).

Unless brain death can be viewed as death under the halachic definition, any doctor who performs a heart transplant could be viewed as in violation of his obligation to save life. In addition, highly regarded authority perceives a definition based on brain death as one which has substantial moral overtones in that it rejects the value of the life of a person who is permanently comatose.²⁴ The combination of Jewish legal and moral analyses has led to substantial conflict among scholars.

This conflict emerges in a wide variety of circumstances. A recent case in Israel has put many of the issues into an emotional crucible and fascinating perspective. The question before the court was whether a caesarean section could be performed on a brain dead woman in order to deliver the baby. The ultimate decision, in accord with the wishes of the husband, was in the negative. However, the case appears to have spawned substantial debate among halachic authorities.²⁵

Until the 1980s the primary Jewish thought was that a heartbeat or respiration, not brain death, governed the determination. Various authorities assert that under Talmudic law breathing was taken as the primary definer of life and its cessation marked the moment of death.²⁶ The classical definition is predicated on a Talmudic discussion which indicates that the law of the Sabbath can be broken to preserve a human life.²⁷ The illustration is that of a building which falls upon a person and that, in an effort to save the life, the debris must be removed even if it is highly probable that the trapped person is dead. Once it is established with certainty that death has taken place, no further violation of the Sabbath is permitted. The determination of death is made by freeing debris until the nose is reached so that respiration can be determined. Various commentators then establish how this discussion reveals a definition

²⁴For example, in his dissent to the Report of the New York State Task Force on Life and the Law, Rabbi Bleich (an Orthodox Rabbi) argued that "adoption of a brain death statute is nothing other than a moral judgment to the effect that there is no human value which augurs in favor of the preservation of the life of an irreversibly comatose patient." J. David Bleich as quoted in Fins, *supra* note 22, at 34.

²⁵As reported in Edward Recihman, *The Halachic Definition of Death in Light of Medical History*, 1993(4) TORAH U-MADDA J. 148, 162-63. This article presents a comprehensive yet concise statement of relevant Halachah to the present day. It also provides an interesting review of the relation of early Judaic reasoning to that of geographically and time relevant Greco-Roman thought with focus on the work of Galen (130-200 C.E. who is described as the forefather of western medicine until modern times). As to the Talmudic approach to the medical issue posed by the subject case, *see also infra* note 37 and accompanying text.

²⁶*See* ALEX J. GOLDMAN, JUDAISM CONFRONTS CONTEMPORARY ISSUES 214 (1978); JAKOBOVITS, *supra* note 14, at 277.

²⁷*Yoma* 85a, discussed in BLEICH, *supra* note 23, at 376 f. Bleich also notes the paramount importance of respiration through the Talmudic response to the question of how much rubble has to be removed. The answer is that as the "spirit of life" is in the nostrils, the nose must be uncovered regardless of whether debris removal begins at the feet or the head.

of death based on the absence of both cardiac and respiratory function. Any hastening of death, any effort to induce the stopping of respiration or cardiac function, no matter how soon impending death would otherwise occur, is not to be tolerated under Jewish law.²⁸

In response to the negative effects generated by the classical approach, some modern scholars have made imaginative use of precedent to argue that defining death as predicated on brain death is halachically sound. These approaches, if ultimately accepted, will permit physicians to take full advantage of modern medical technology to save lives while, simultaneously, permitting that same technology to terminate needless suffering of one person and perhaps save the life of another. The modern approach utilizes a formalistic analysis of Halachah in combination with an understanding of the human body which did not exist when the Talmud was written.

According to Halachah, death is evidenced not only by the absence of respiration and cardiac activity, but there must also be no movement of the limbs. As noted in a discussion of the Council of the Chief Rabbinate's decision regarding brain death, a person can be considered dead, despite convulsive movements of the body, by analogy to decapitation.²⁹

Extrapolation from these concepts, and utilization of other Talmudic sources, permits a definition of death based on the absence of brain function in a manner consistent with current medical thought.³⁰ The reasoning is remarkable.

In a recent text³¹ it is argued that various Rabbis, most notably Moses (Moshe) Feinstein who authored a Responsum on heart transplants, begin with concepts of decapitation and end with recognition of brain death. Rabbi Feinstein, who steadfastly supports the classical respiration based definition of death, also states that if "by injecting a substance into the vein of a patient, physicians can ascertain that there is no circulation to the brain—meaning no connection between the brain and the rest of the body—that patient is legally dead in Judaism because he is equivalent to a decapitated person."³² Rosner,

²⁸Such an act would be viewed as murder. FRED ROSNER, *MODERN MEDICINE AND JEWISH ETHICS* (2d rev. ed. 1991) [hereinafter *MODERN MEDICINE*]; ABRAHAM S. ABRAHAM, *MEDICAL HALACHAH FOR EVERYONE* 141 (1980). Rosner provides a more specific and complete traditional definition of death as an "absence of spontaneous respiration and heartbeat in a patient with no bodily motion." FRED ROSNER, *MEDICINE IN THE MISHNA TORAH OF MAIMONIDES* 225 (1984).

²⁹INSTITUTE OF JEWISH LAW, NEWSLETTER *Does Jewish Law Recognize Brain Death as Absolute Death?* 9-10 (March 1990) [hereinafter *NEWSLETTER*].

³⁰Much of the debate began with work of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death including its effort to relate irreversible coma to death. See *A Definition of Irreversible Coma*, 205 J. AM. MED. ASS'N. 337-40 (No. 6, Aug. 5, 1968), discussed in *MODERN MEDICINE*, *supra* note 28, at 263. For alternative definitions see Steven I. Friedland, *The Health Care Proxy and The Narrative of Death*, 10 J.L. & HEALTH 95, 120 (1995-96).

³¹*MODERN MEDICINE*, *supra* note 28, at 269-71.

³²*Id.* at 270-71.

together with Rabbi M. Tendler, thus conclude that death can occur, Judaically, before all organs cease functioning. They assert that the focus on whether life exists in the person buried under the debris is irrelevant to modern medicine which can monitor all functions. In Talmudic times respiration defined death, but today the issue is confirmation of death.³³

This approach, in turn, leads to the concept of "physiologic decapitation" as an acceptable definition of death in Judaism without regard to cardiac function.³⁴ The reasoning can be summarized as:

1. cardiac function is not a significant factor in defining death in early sources;
2. early sources recognize that cellular death does not occur at the same time as human death - comparing to discussion of death throes and a twitching of a lizard's tail from ancient writings;
3. decapitation is recognized as death under Talmudic law;
4. complete destruction of the brain can be considered physiological decapitation;
5. loss of spontaneous breathing ability is a crucial determinant of death under Talmudic law and no such respiration is possible without brain function;
6. patients who have all appearance of lifelessness and no longer breath spontaneously are Talmudically dead; therefore
7. irreversible total destruction of the brain fulfills this definition.³⁵

Rosner argues that under this approach, and taking into account the realities of clinical medicine, the only viable definition of death is that of brain death.³⁶ Various other examples from Jewish law are recited to support this controversial conclusion. For example, the definition of death in the authoritative *Shulchan Aruch* provides that persons whose necks have been broken or whose bodies are torn on the back like fish are considered dead. The reason for this, it is urged, is that in such cases there has been a severing of the connection between the body and the brain. This means that Halachah recognizes brain death.³⁷

³³Reasoning to allow modern methods to confirm death is all the more important in light of Talmudic discussion mandating that a grave be watched for seventy-two hours after burial because a person was once mistakenly buried alive. BLEICH, *supra* note 23, at 384, relying on *Semahot*. This, and other dangers, call for a period of time to pass, usually thirty minutes, after the end of respiration and cardiac function before a person can be declared dead under Jewish law. Such delays could have substantial effects upon the ability to transplant.

³⁴MODERN MEDICINE, *supra* note 28, at 271.

³⁵*Id.* at 271-72 (quoting E. J. Veith, et. al., *Brain Death: I. A Status Report of Medical and Ethical Considerations*, 238 J. AM. MED. ASS'N. 1651-55 (1977)).

³⁶*Id.* at 272. Moreover, "The classic 'respiratory and circulatory death' is in reality brain death." *Id.* at 272-73.

A more straightforward approach, rejecting rigid halachic formalism though not Halachah, simply declares that to rely on rabbinic sources which speak only of respiration and circulation says "nothing about the rabbis' view of brain death."³⁸ The reason for this is that rabbinic texts address only that which was known to the rabbis. There is, therefore, no reason to believe that they would have rejected electroencephalograms had they known about them.³⁹

Jewish law and scholarship, just as American, has not yet reached a firm conclusion in regard to brain death.⁴⁰ The struggle to define death is all the more difficult as its moral, legal, and medical aspects are not necessarily compatible. Jewish law and examples standing for centuries are being revisited to aid in the resolution of this modern issue. As examples of law, logic, morality, and necessity the Halachah may be useful to the United States medical and legal communities without regard to any religious foundation. Though the modern view and interpretation proffered by Rosner and others may be the better reasoned for the twenty-first century, it must be recognized that: "A definitive consensus of halachic authorities has not yet been reached regarding the point at which a person is held to be dead in the case of brain-stem death with the heart still beating."⁴¹

³⁷MODERN MEDICINE, *supra* note 28, at 273. Additional support is provided based on (1) a fifteenth century Rabbi who observed that if there is no respiration through the nose, as an organ of servitude to the brain, then none of the Rabbis had any doubt that life had departed from the brain, and (2) the well-known precedent of the death of a pregnant woman where her unborn child may be alive. An immediate cesarean is prohibited because we cannot recognize the precise moment of death in that the woman might only be in a coma and the operation could kill her. On the other hand, if death was certain, as by an accidental decapitation, an immediate cesarean is required in an effort to save the life of the child. *Id.* at 273-74, discussing SHULCHAN ARUCH, *Orach Chayim* 330:5.

³⁸Gordis, *supra* note 8, at 45.

³⁹*Id.* This approach would enable heart transplants and be consistent with medical understanding of death. *Id.*

⁴⁰The current debate is quite contentious. See Robert H. Schulman, letter to the editor, 29(2) TRADITION 102 (Winter 1995).

⁴¹ABRAHAM S. ABRAHAM, THE COMPREHENSIVE GUIDE TO MEDICAL HALACHAH, 173 (1990) [hereinafter ABRAHAM, GUIDE]. The absence of consensus is evident when the conclusions of scholars such as Rosner are compared to those of Bleich. Bleich, after extensive discussion and despite his keen understanding of modern medical advances, asserts that "Brain death and irreversible coma are not acceptable definitions of death insofar as Halachah is concerned. The sole criterion of death . . . is total cessation of both cardiac and respiratory activity." BLEICH, *supra* note 23, at 391. This position was more recently reiterated in a criticism of the Chief Rabbinate's decision; See also NEWSLETTER, *supra* note 29, at 10.

III. ORGAN TRANSPLANTS

The traditional approach to defining death now causes a direct conflict between the sanctity of life and the body and the duty to preserve life.⁴² Organ transplant decisions often raise conflicts with mandates of Jewish law which, unless resolved, would preclude many forms of organ transplant.

Some scholars, to conclude that organ transplants are halachically valid, assert that the principle of saving life supersedes all competing biblical prohibitions.⁴³ Other Jewish authorities attain this objective by recognition of brain death as the marker of death even where a heartbeat remains. For example, a decision of the Council of the Chief Rabbinate of Israel permits heart transplants, thereby rejecting the traditional belief that such a procedure is a double murder.⁴⁴ The basic premise of the decision is that death occurs upon the complete and final cessation of respiration. Since independent respiration is dependent upon a functioning brain stem, the destruction of the brain and brain stem must indicate the presence of death.⁴⁵ Thus, the heart may be kept alive for purposes of a transplant through the use of a respirator to supply oxygen as the heart is not dependent upon brain function.

Another approach is predicated on a combination of semantics, logic, and avoidance techniques which reflect an ultimate simplicity: An organ transplant from a dead person, which fulfills a living function, adopts the characteristic of life, is alive, hence not dead, and therefore is not prohibited.⁴⁶ In essence, this approach is that the organ is returned to life thereby rendering laws related to death irrelevant.⁴⁷

⁴²To allow organ transplant procedures a number of other halachic principles also have to be overcome including those prohibiting taking benefit from the dead, the need for immediate, respectful burial of a deceased with no disfiguring of the body, and reducing the time necessary before the absence of respiration can be taken as a positive indication that death has come. Suffice to say, in many cases, these barriers have been overcome.

⁴³FRED ROSNER & MOSHE D. TENDLER, PRACTICAL MEDICAL HALACHA 88 (3d ed. 1990).

⁴⁴This decision, translated into English, is found in Yoel Jakobovits, *Brain Death and Heart Transplants: The Chief Rabbinate's Directives*, 24 TRADITION 1(4) (Summer 1989) and is discussed in NEWSLETTER, *supra* note 29, at 9.

⁴⁵Not all Jewish authorities agree. A definition of death that mandates not only the end of respiration, but also cessation of cardiac activity and movement is still recognized by many who would, therefore, reject heart transplants. *Id.* at 10.

⁴⁶This analysis is provided by Rabbi Issar Yehuda Unterman, the former Chief Rabbi of Israel, and is discussed in many texts including MODERN MEDICINE, *supra* note 28, at 284, where it appears that the statement originally applied to justify a corneal transplant. Extension of this principle to other organ transplants would represent a logical progression supporting all transplants provided only that they were not the cause of the donor's death.

⁴⁷This reasoning supports corneal transplants even among many Orthodox scholars. See also *infra* note 51 and accompanying text.

From a practical perspective, Jewish law initially defined death in a manner consistent with medical knowledge and societal needs as they existed centuries ago. A primary scholar and codifier of Jewish law, Maimonides, was a physician. For centuries a definition predicated on respiration and cardiac function was effective and consistent with medical knowledge.

When medical knowledge advanced into the realm of brain function as a definitive basis for marking death, while organ transplant procedures were simultaneously creating living miracles, it became essential for the rabbis to redefine death. Failure to do so would have meant that Jewish law would compel loss of life when life could be saved. This result would violate a core value of Judaism. Unable to accept such a result, Jewish law redefined its priorities, reordered its logic, and made organ transplants available. Although the Torah's role as a "tree of life" may have begun as a means for each of us to live in harmony with God and with others, its meaning today also can provide a physical element. Its proper interpretation makes life itself possible and aids us in determining when and how life can end.

Diverse authority suggests that the concept of saving a life, *pikuach nefesh*, is of such significance as to override virtually all biblical laws that would otherwise prohibit organ transplants.⁴⁸ The great weight given to this principle is also consistent with the recognized principle that there is no obligation to "resurrect the dead."⁴⁹ Rosner and Tendler thus conclude that a variety of medical procedures are halachically permitted including:

1. Bone marrow donations for transplant. Here the danger to the donor is small whereas the benefit to the donee is high as absent such treatment death is likely.
2. Cadaver organ donations because they can save a life. Where the donation is voluntary all questions of dishonoring the dead are removed and any question of deriving benefit from the dead is set aside.⁵⁰
3. Kidney and blood donations from living donors are permitted despite the injunctions against placing one's life in danger. One can place himself into possible danger where doing so will save another from certain death.⁵¹

⁴⁸This is consistent with analysis of scripture by Maimonides and others that, for example, "and thou shalt restore it to him" *Deut. 22:2* references the restoration of health rather than only property. See ROSNER & TENDLER, *supra* note 43, at 87.

⁴⁹BLEICH, *supra* note 23, at 289.

⁵⁰Similar issues surrounded the question of corneal transplants before a consensus was reached permitting such transplants. Indeed, a donation to an eye bank is permitted as the likelihood of immediate use of the cornea is great enough to consider the recipient as "at hand."

⁵¹*Id.* at 87-89. Within the Orthodox community, however, there is substantial belief that a corneal transplant is permitted only when the cornea can be immediately implanted into the donee. This view rejects the use of eye banks.

Similar results are recognized by Rabbi Solomon B. Freehof. In a Responsa written in 1968, he addressed the question of transplanting parts of a dead body into a living person.⁵² As a foundation for this Responsa, Freehof observes that nothing may be done to hasten death in order to harvest an organ and recognizes that tests as to the definition of death will become strict. The issue in this Responsa is not the definition of death, but the morality and legality - under Jewish law - of using the organs of the dead. The conclusion reached, that such transplants are permitted, is not without difficulty as there are inherent contradictions in the law. These contradictions must be reconciled if such transplants are to be permitted.

At the outset it is noted that the Talmud permits the use of any material for healing other than those associated with idolatry, immorality, and bloodshed.⁵³ The significance of this broad allowance of healing materials is clarified by Maimonides who writes that one who is in danger of death who is told, by his physician, that he can be cured by an object or material forbidden by Torah, must nevertheless "obey the physician and be cured."⁵⁴ This concept is further codified in the *Shulchan Aruch*.⁵⁵ As organ transplants from the dead do not involve any of the forbidden materials, it would seem that there is no obstacle to transplantation. The difficulties lie in other principles: the body of the dead may not be used to benefit the living, and the duty to bury the entire body.

Logic dictates that taking an organ from the dead to save another provides a benefit to the other and is, therefore, prohibited. Such a prohibition would run counter to the principle that life must be preserved. Freehof's resolution is to scrutinize the Hebrew word for benefit (*hana-a*) and recognize that it can be interpreted not as a general term, but as one demanding "satisfaction" as in the sense of satisfaction derived from food. No such benefit exists and, therefore, no benefit from the dead is gained. This may not be as counter-intuitive or creative as Unterman's view that the organ is alive, but it works equally well.

As to the need to bury the entire body, there is a notable dearth of precedent. The earliest precedent appears to be a Responsum of David ibn Zimri (1479-1589) regarding the use of the flesh of mummies for healing purposes.⁵⁶ Freehof (a Reform Rabbi) relies on two Responsa written by Moses Feinstein

⁵²RESPONSA, *supra* note 19, at 291, Responsa No. 86, *Surgical Transplants*. Additional responsa, in the same text, treat *Using the Blood of the Dead* (Responsa No. 83) and *Use of the Cornea of the Dead* (Responsa No. 85). Responsa No. 84, *Transplanting the Eyes of Deceased Persons*, was written by Israel Bettan and concludes that: "removal of the eyes of a deceased person in order to restore sight to the blind is not an act of mutilation, which is forbidden, but an act of healing and restoration, which in Jewish law takes precedence over almost all other religious injunctions." *Id.* at 288.

⁵³*Id.* Responsa No. 86, at 292 quoting *Pesachim 25a*.

⁵⁴*Id.*

⁵⁵RESPONSA, *supra* note 19, at 292

⁵⁶*Id.* at 294. This practice was apparently common in medieval times. It, of course, places little light on the modern issues surrounding organ transplantation.

who is described as a prime Orthodox author of Responsa. Here we see reasoning similar to that of Unterman though in the context of a bone transplant - "when a part of a body is taken by a surgeon and put into a living body, it becomes part of a living body; its status as part of the dead which needs to be buried is now void."⁵⁷ Moreover, a fascinating distinction is drawn between the fact that when the operation occurs there is no *hana-a* for the patient, only misery. The *hana-a* comes when the transplant comes to life. At this point it is alive and all issues as to deriving benefit from the dead are irrelevant.⁵⁸

The reasoning summarized above applies with equal force to heart transplants. The primary issue regarding such a transplant, which differentiates it from some others, is the need for the presence of halachically recognized death. Another issue, raised by Rabbi Unterman, is that the likelihood of survival after the transplant must exceed that of potential failure. This thought runs counter to the principle that fatally sick persons, in danger of death, can undertake dangerous treatment even if the risk exceeds the benefit. The rationale for this limiting factor, which is not uniformly recognized, is that the donee's heart is removed before the transplant at which time the presumption that one is alive and has a "hold on life" (*chezkat chayyitim*) is ended. This loss necessitates that there be a greater likelihood of success.⁵⁹ It is also necessary to be sure that there is always medical life and that at no time was the donee legally dead. A failure to guarantee the absence of death would devastate the capacity of Jewish law to permit heart transplants as implanting a new heart after death would be to resurrect the dead - an act of which only a higher authority is capable.⁶⁰

Finally, the theory that heart transplants comprise a double murder (the recipient whose heart is removed cannot be legally alive, and the donor whose heart is removed before he is halachically dead)⁶¹ must be resolved. Based on his interpretation of the Feinstein Responsa, Rosner concludes that as the obstacles to transplant raised by Feinstein have been removed, Feinstein "would probably sanction cardiac transplantation provided the donor is definitely deceased at the time his heart is removed."⁶² Regardless of whether Rosner correctly interprets the position of Feinstein or others, the conclusion that Jewish law permits heart transplants in order to save life - *pikuach nefesh* -

⁵⁷*Id.* at 295.

⁵⁸*Id.*

⁵⁹ MODERN MEDICINE, *supra* note 28, at 289-90. The support comes, at least in part, from reasoning regarding whether a chicken, with no apparent heart, could be viewed as kosher within the meaning of the dietary laws. How is that for reasoning by analogy!

⁶⁰*Id.* at 292.

⁶¹*Id.* (noting the authority of Moshe Feinstein).

⁶²*Id.* at 293. The obstacles are largely related to the need for the donor to be dead under Jewish law and that there be a reasonably good chance that the procedure will succeed. As both can now be assured, the Rosner interpretation appears to be valid.

is valid. As noted,⁶³ it is consistent with Ezekiel 11:19 and 36:26 that "And a new heart will I give you, and a new spirit will I put within you, and I will take away the stone heart out of your flesh, and I will give you a heart of flesh." This figurative and spiritual passage seems to be a precursor of modern medical miracles.

The analyses of these scholars is fine and no doubt result oriented. It is as brilliant as it is practical. The approach, utilizing ancient sources, redefinition, and close logic is consistent with centuries of Talmudic reasoning approaches that have allowed otherwise restrictive concepts to become modernized. Though extreme Orthodox voices may differ, these views are consistent with a wide body of otherwise diverse Jewish thought.⁶⁴

IV. "CHOOSE LIFE"⁶⁵ - MEDICAL DIRECTIVES, EUTHANASIA, SUICIDE

This section will assert that Jewish law:

1. Under ordinary circumstances prohibits suicide;
2. Allows a person to instruct doctors and health care professionals to let them die *i.e.*, to demand compliance with DNR (do not resuscitate) and similar directives; and
3. Allows what is sometimes described as "passive euthanasia" by which an impediment to death can be removed, but precludes any form of "active" euthanasia or assisted suicide.

Where a basic principle is: "choose life" and the traditional toast is "L'Chayyim" - "To life," one must ask whether the three "rules" summarized above are consistent with a philosophy, and to some extent a legal system, in which life is the paramount value. They are.

These rules may also be consistent with the suggestion that although there may be a right to die,⁶⁶ there is no duty to die. Once the door to assisted suicide is opened the capacity of persons to convince others that they have reached a point where death is a moral, fiscal, or emotional imperative is too easily reached. The right then becomes a personal duty. That such a process is possible cannot rationally be denied. The jump from any form of medically authorized

⁶³MODERN MEDICINE, *supra* note 28.

⁶⁴For example, kidney (from both living and dead donors), bone-marrow, skin, and cornea transplants - under competent authority - are all viewed as valid in a recent and highly regarded text. See ABRAHAM, GUIDE *supra* note 41, at 172-73. Reform Judaism has long accepted the propriety of organ transplants. The Rabbinical Assembly, representing Conservative Judaism, approved an organ transplant Resolution in May, 1990 based on a number of factors including "consideration for the health and welfare of others is at the heart of Jewish ethic." In 1995, after consultation among leading Orthodox Rabbis in New York and Israel, a heart transplant from Alison, a young victim of a terrorist bombing, was permitted to save the life of another person in Israel.

⁶⁵"I have put before you life and death, blessing and curse. Choose life - if you and your offspring would live - " *Deut.* 30:19.

⁶⁶See Friedland, *supra* note 30, at 125 and cases cited therein.

killing to mass murder is small. For many, including but by no means limited to Jews, this lesson has been too well learned.⁶⁷

A. Suicide

Jewish law, consistent with Catholic teachings and the views of many other faiths, condemns intentional suicide.⁶⁸ This condemnation is based on the biblical prohibitions against murder⁶⁹ and that "surely the blood of your lives will I require. . . ."⁷⁰ For purposes of Jewish law, intentional suicide is defined in the Talmud through illustration:

It is not he who climbed to the top of a tree [nor a roof] and fell down and died, as these may have been accidents. Rather, a willful suicide is one who calls out: "Look, I am going to the top of the roof or to the top of the tree, and I will throw myself down that I may die." When people see him go up to the top of the tree or roof and fall down and die, then he is considered to have committed suicide willingly."⁷¹

⁶⁷ See RONALD M. GREEN, *Good Rules Have Good Reasons: A Response to Leon Kass*, in *A TIME TO BE BORN*, *supra* note 4 at 147, n. 2 citing ROBERT J. LIFTON, *THE NAZI DOCTORS* (1986), for development of how medically authorized "mercy killing" related to programs of mass extermination. Green's article, together with the article to which he is responding, Leon R. Kass, *Death With Dignity and the Sanctity of Life*, in *A TIME TO BE BORN*, *supra* note 4, at 117, present a somewhat conflicting and most interesting discussion of issues surrounding euthanasia. Though beyond the scope of this article as they do not rely upon Jewish law as such, they are well worth reading. For example, Green questions whether there may be a place for a new social form that would enhance one's ability to bring his own life to an end through the misuse of medications provided by a doctor. Green observes:

physicians may help supply the means by which these individuals seek to end their own lives. In these cases, physicians are not killers, but neither can they be described as merely withholding therapy. Their conduct might be described as . . . involving steps taken to clear socially imposed obstacles to individual autonomy. . . . I deeply fear the subtle or not-so-subtle forms of pressure that might be applied to individuals to convince them "heroically" or "courageously" to end their own lives. In our culture, we surely do not need talk of any "duty to die."

GREEN, *supra* note 66, at 153. Jewish law imposes no duty to die and tolerates no effort to persuade a person to hasten his or her own death.

⁶⁸ Suicide is perceived as a moral crime and a perversion of life. J. SIMCHA COHEN, *TIMELY JEWISH QUESTIONS, TIMELESS RABBINIC ANSWERS: CONTEMPORARY HALACHIC ISSUES*, 98 (1991) relying on Radbaz, *COMMENTARY ON RAMBAM, Laws of Sanhedrin* 18:6.

⁶⁹ *Exod.* 20:13, *Deut.* 5:17.

⁷⁰ *Gen.* 9:15. According to Talmudic law this passage references one who strangulates himself. See Fred Rosner, *Suicide in Jewish Law*, 18(4) *J. PSYCH. & JUDAISM* 283, 284 (Winter 1994).

⁷¹ *MODERN MEDICINE*, *supra* note 28, at 254.

Subsequent scholars, including Maimonides, provide virtually identical definitions.

In a Responsa concerned with relief of pain, Freehof notes virtually in passing, "suicide is definitely forbidden by Jewish law."⁷² This conclusion is founded on three essential principles: suicide constitutes a denial of Divine creation; of the immortality of the soul; and of the atonement of death.⁷³ Posed differently, Torah commands that God alone has the power and authority to create life and to take it.⁷⁴ The prohibition against suicide relates directly to the command of *pikuach nefesh*. This mandate to save life can be waived only under extreme circumstances such as self defense and war. It is broad enough to encompass one's own life.⁷⁵

The importance of this command is reflected in a brief discussion addressing the question of whether a Jewish physician must give a lifesaving blood transfusion to one who, as a Jehovah's Witness, refuses such a transfusion even though that decision could have fatal consequences.⁷⁶ The analysis suggests that the physician should, if possible, refer the patient to another doctor who will heed the patient's wishes. Where this is not possible, however, the doctor must transfuse.⁷⁷ The rationale for this conclusion begins with Exodus 21:19, Leviticus 19:16, and Deuteronomy 22:2.⁷⁸ This grouping of scripture can be

⁷²RESPONSA, *supra* note 19, at 254, *Relieving Pain of a Dying Patient*, Responsa No. 76.

⁷³MODERN MEDICINE, *supra* note 28, at 259. In support, the authors reference multiple sections of the Talmud as well as the scholarly opinions of Rabbis Unterman and Jakobovits. Rosner, *supra* note 70, adds that some view a person who commits suicide as worse than a killer as there can be no atonement and reaffirm that suicide violates the body which is the property of God. The act of suicide also offends the belief in reward and punishment so that a suicide leaves that person with no place in the world to come. *Id.* at 284.

⁷⁴"I deal death and give life; I wounded and I will heal." *Deut.* 32:39 (As translated in THE TORAH, A MODERN COMMENTARY (1981). "Behold, all souls are Mine; as the soul of the father, so also the soul of the son is Mine, the soul that sinneth, it shall die." *Ezekial*, 18:4 (As translated in the HOLY SCRIPTURES (1955) (The Jewish Publication Society of America)).

⁷⁵Thus, we are taught that if two persons are traveling on a journey far from another town with water enough for only one, then the one who possesses the water is to use it all as it is better for that one to live than for both to die. The Talmudic discussion, in *Baba Metzia* 62a, concludes that Rabbi Akiba came and taught (the majority rule): "Your life takes precedence over his life."

⁷⁶ROSNER & TENDLER, *supra* note 43, at 164.

⁷⁷The inherent inconsistency of allowing another doctor to take over and permit the loss of life, but demanding that if the Jewish doctor remains on the case he must act to save the life, is unexplained. A respected authority, Rav. Eliezer Waldenberg, takes a position that negates this inconsistency. He asserts, at least as to Jews but likely to all humankind, that one is not permitted to forgo treatment that might prolong life, regardless of pain. In such cases medical treatment should be imposed even against the patient's wishes. Cohen, *supra* note 6, at 48.

⁷⁸ROSNER & TENDLER, *supra* note 43, at 164, assert that the three sections combine to impose a duty of best efforts upon the physician. Reaching this conclusion is no easy

collectively interpreted to indicate that to refuse giving the transfusion would be an act bordering on murder.⁷⁹ A related concern, though not set forth in the discussion, is that allowing the patient to choose death in this manner would amount to suicide. Whether that suicide would be deemed "intentional" is at least debatable in that the patient may believe that a more favorable outcome is possible through divine intervention. This approach would negate any intent to die thereby bringing the decision outside the halachic definition of suicide.⁸⁰

The emphasis on intent, despite the fact that specific circumstances surrounding a death may logically compel a suicide conclusion, is an important reflection of underlying values and concerns. These values are reflected in the liturgy and traditions regarding burial, prayer, the period of mourning, and related practices. A suicide victim cannot be buried in a Jewish cemetery. The various rites of mourning which honor the dead, ranging from a eulogy to the rending of garments, are not applicable to a suicide. On the other hand, rites intended to benefit the family are maintained. Actual invocation of these penalties is extremely rare. The rabbis will use every available means and rationale to rule that death was accidental rather than a suicide.

These values are so important that there is, in effect, a presumption of accidental death rebuttable only by the most compelling evidence. The quality of the necessary evidence is illustrated by the fact that if a person declares "I am going to kill myself," that person must first be warned of the consequences of the action. If the person then goes into the next room after which a shot is heard and the body discovered, it will still be ruled an "accident." Only if the act is observed will the evidence suffice to support a conclusion of suicide.⁸¹

task as the sources do not do so in a direct manner. The passages, as translated in THE TORAH, A MODERN COMMENTARY, *supra* note 74, provide:

Exod. 21:19 - [a person injured in a fight, who must take to bed] "if he then gets up and walks outdoors upon his staff, the assailant shall go unpunished, except that he must pay for his idleness and his cure."

Lev. 19:16 - "Do not deal basely with your fellows. Do not profit by the blood of your neighbor. I am the Lord."

Deut. 22:2 - [as to another's animal gone astray] "if your fellow does not live near you or you do not know who he is, you shall bring it home and it shall remain with you until your fellow claims it; then you shall give it back to him."

⁷⁹The authors' recognize that this approach could have legal consequences and they, therefore, caution that such a decision should be made only after consultation with both halachic and legal authorities. ROSNER & TENDLER, *supra* note 43, at 164.

⁸⁰A benefit of this approach is that it limits potential conflict between religious beliefs by allowing the patient to exercise a religious based choice without concern for the suicide prohibition. The potential for death would, nevertheless, mandate that a Jewish doctor reject the patient's wishes. Thus, a conflict remains. The doctor would be required to elevate Jewish beliefs above those of other religions. A failure to effectuate a transfer which would permit the patient's wishes to prevail, regardless of reason, would require that Jewish law take precedence. The implications of this result are significant as they bear directly upon religious belief and the free exercise of religion.

⁸¹The need for warning and the illustration were provided by Rabbi Daniel Roberts, Temple Emanu-El, Cleveland, Ohio.

Moreover, by definition, persons under great stress and children are incapable of intentional suicide.

Although the Torah and subsequent writings reference numerous Jews as having committed suicide, these persons are not usually praised for their courage or actions.⁸² That some of these persons are recognized as martyrs does not necessarily justify their suicides. However, to the extent that such suicides took place under great physical or mental stress, they are excused and the persons would be entitled to all rites associated with death and burial.⁸³ It remains clear that Judaism regards suicide as a criminal act which is strictly forbidden.

A key question, which could not have been asked until only a short time ago, is whether a refusal to allow resuscitation is permissible. The concerns posed by this question are related to, but distinct from, suicide, assisted suicide, and euthanasia. Here we face two issues: the patient's right to execute a "DNR" order and, regardless of the answer to that aspect of the question, the medical professional's obligation to obey the DNR.

B. The DNR Conundrum

A do not resuscitate order implicates two distinct groupings: the person who signs the order and thus expresses a specific desire and those who are required to respect the order. The second grouping also has two categories: the family or other representatives of the order signer and the medical staff faced with the actuality of nonintervention to allow death. Both Leviticus and the Talmud teach that one is not permitted to stand idle while another's life is in jeopardy.⁸⁴ In deciding cases such as those presented by DNR orders, the conflict between modern principles of individual autonomy and traditional societal group values crystallizes.⁸⁵ The two forces are not reconcilable.

Assuming that a heartbeat could be restored, it is evident that from the perspective of the patient a decision has been made to shorten life.⁸⁶ This is a

⁸²Examples include: Samson, King Saul, the lesser known Ragesh (Second Book of Maccabees), the Talmudic discussion of the mass suicide of hundreds of boys and girls who died rather than be forced into immoral acts (*Gittin* 57b), and the more well known fanatics at Masada. For extensive discussion of suicide as illustrated from the Bible through to modern Rabbinic writings see Rosner, *supra* note 70.

⁸³Also justifying suicide is the need to prevent adultery, idolatry, or murder.

⁸⁴*Lev.* 19:1, *Sanhedrin* 73a.

⁸⁵Similar issues arise in connection with the use of Living Wills. See generally A. Jeff Ifrah, *The Living Will*, 24 J. HALACHAH & CONTEMP. SOC. 121 (1992). The range of opinion regarding living wills, particularly as related to alzheimer patients, is well explored in correspondence of four leading authorities - Rabbi Jakobovits and his son, Dr. Yoel Jakobovits, Rabbi David Cohen, and Rabbi Moses Tendler, in DEAR CHIEF RABBI 184 (Jeffrey M. Cohen, ed. 1995).

⁸⁶At least one alternative explanation is possible. A person may execute a DNR order not because of a desire to shorten life, but in the case of cardiac arrest where CPR may not prolong life, the person seeks to avoid a futile flogging.

declared decision and would be, or at least could be, viewed as a suicide. Jewish law precludes any shortening of life. Even a shortening of seconds is prohibited. The requirement exists without regard to modern day concerns as to the "quality" of the life that would be extended.⁸⁷

The patient could avoid the stigma of "suicide" only if he or she is suffering so greatly as to be considered no longer able to act freely. Yet it is difficult to view the signing of a DNR order as an action made under this form of compulsion. If it were signed under compulsion, as defined by the common law, the DNR order, a form of contract, would be invalid under the law of virtually all states.

It is well recognized that no person has the right of ownership over his or her own life or soul. A proper conclusion is that the patient violates Halachah by signing a DNR order.⁸⁸ It is possible to recognize this conclusion yet enforce a DNR order. "People should not agree to sign DNR orders. But in the event they do, perhaps bystanders are not obligated to expend an effort to save people who do not wish to extend their own lives."⁸⁹ The reasoning in support of such contradictory results may be outside the parameters of the logic of American law, but it is well within the norm of the unique way of thinking reflected in halachic analysis.

Analysis can begin with recognition of the fact that neither family nor medical professionals can conclusively determine whether the order was executed while legally competent yet under the type of duress which would halachically negate the anathema associated with suicide. Regardless of their opinions, the medical professionals - physicians, nurses, emergency personnel, and others - may be faced with an independent decision.⁹⁰

Much of the reasoning surrounding all issues of life and death, including those reflecting medical practice, are initially predicated on recognition that the Sabbath must be violated to save life. This rule may, however, be subject to some exceptions. There is Talmudic discussion of whether the law of the Sabbath must be broken to save the life of a convicted murderer so that he may live until the time for his legal punishment (at the time, death) came to pass. Opinion was divided. The Mishnah Berurah suggests that the mandate to extend life applies only to those concerned with the quality of life and that a

⁸⁷ Absent a DNR order it has been noted that, as a general principle, resuscitation procedures must be started where the patient is not beyond all hope of the restoration of spontaneous life functions. There is some authority which negates the need for heroic measures under such conditions if the result would be to merely prolong the agony of a terminal stage of life. Jakobovits as quoted in DEAR CHIEF RABBI, *supra* note 84, at 132. Others advocate a more liberal view which recognizes quality of life as a defining factor. See *infra* note 132 and accompanying text.

⁸⁸ These and related issues are discussed in COHEN, *supra* note 68, at 93-98.

⁸⁹ *Id.* at 97.

⁹⁰ The distinct concerns of the family are beyond the scope of this Article.

convicted murderer had no such ideals. Where a person had no pity on his own life, no violation of the Sabbath is required in order to save him.⁹¹

The extension of logic is that if the patient is not concerned with prolongation of his own life, then prolongation by others is not merited in violation of the laws of the Sabbath. This rationale, though not uniformly accepted, begins the thought process necessary to allow medical professionals to obey a DNR order. The importance of the rationale, without regard to its overall acceptance when initially set forth, is that it has greater application to modern medicine than to issues of its time. This does not, however, circumvent the obligation of not standing idly by while another's life is in jeopardy.

Additional distinctions are necessary to flank this obligation. Doing so, as in other areas of Jewish law, requires a form of logic which may be uncomfortable to those trained in the common law tradition. This reasoning utilizes four distinct steps:

1. From illustrations draw a premise or principle;
2. Observe this premise or principle as representing a set of "positive" indicia;
3. Ascertain a group of other factors or illustrations, often based on matters or classifications omitted from the initial predicates, which support an opposite or "negative" premise or principle; and
4. Utilize this negative premise or principle to govern and support a desired outcome.

The following examples illustrate the effectiveness and beauty of this approach.

Analyses of the examples in which one must seek to save the life of another reveal that in each instance the danger is imposed upon the person by outside force or other conditions which suggest a lack of culpability. Examples include the non-swimmer who falls into the sea, one attacked by animals, and one attacked by thieves. The implication is that if the victims' own actions stimulated the danger then, perhaps, there is no biblical mandate to rescue.⁹²

This conclusion is further supported by Rabbinical analysis surrounding the right to pray for the death of one who is suffering greatly. If one is permitted to pray for the death of such a person, it would seem that there is no duty to save that person from a life-threatening situation. To at least one respected scholar it appears that should a DNR order be established "those who witness cardiac arrest, inclusive of professional medical personnel, do not violate Halachah by withholding CPR to extend such a person's life."⁹³

A somewhat novel argument has been made to support the right of the patient to sign a DNR order. If accepted, this line of argument would further justify compliance with such orders by medical professionals. From both song

⁹¹COHEN, *supra* note 68, at 96 relying on *Biur Halachan, Orech Chayyimim* 329.

⁹²*Id.* at 97.

⁹³*Id.* relying on the *Mishan Berurah, Minhat Hinuch*, and Rav Baruch Epstein.

and Bible study we are aware that "There is a time to die."⁹⁴ The Bible does not, however, state that "there is a time to live." A reason for this is that when the time to die arrives, it is not the time to extend life. Thus, it is improper to resuscitate a terminal patient who has died.⁹⁵

Any conclusion that Jewish law accepts the moral validity of a DNR order in terms of the maker's right to execute such a document as well as the medical professional's right to obey it, is subject to challenge. The moral efficacy of DNR orders is rejected by a highly regarded halachic decisor.⁹⁶ Nevertheless, strong authority supports a moral and halachic right to obey a DNR order. That doing so may represent advancing an improper decision of the DNR order maker is illustrative of the inherent conflicts and paradoxes of any legal system dominated by cultural values. Jewish law is not immune from such conflict. Indeed, this type of conflict is a necessary part of the evolution of the law as its ancient examples are applied to modern medical issues. It has been said of American law that "Law must be stable and yet it cannot stand still."⁹⁷ This is equally true of Halachah.

C. Euthanasia

Every book of the Torah includes at least one reference to the prohibition upon killing or murder.⁹⁸ Whether the sixth commandment is interpreted as "Thou shalt not kill" or as "Thou shalt not murder" is of no consequence in this context. The basic question thus becomes whether euthanasia is a form of killing or murder within these prohibitions or whether it can be addressed in a less restrictive context.

Euthanasia or "mercy killing" is generally regarded as a procedure of inducing death painlessly.⁹⁹ It is often associated with relieving a terminally ill person from the severe pain of that illness. Assisted suicide is sometimes equivalent to euthanasia in its end objective: death to end pain. A distinction is found in the fact that euthanasia need not be dependent upon the wishes of

⁹⁴*Ecclesiastes* 3:2.

⁹⁵Byron L. Sherwin, *Euthanasia as a Halachic Option*, 18(4) J. PSYCH. & JUDAISM 299, 305-6 (Winter 1994), relying on the *Sefer Hasidim*.

⁹⁶HaGoan R. Pinchus Scheinberg as noted by COHEN, *supra* note 68, at 98.

⁹⁷This quotation, attributed to Roscoe Pound, appears above the bench in the Moot Court Room of the Cornell Law School. Its relevance to this subject has, after thirty-five years, given me the opportunity to use it.

⁹⁸The citations, starting with *Gen.* 9:6 are set forth in MODERN MEDICINE, *supra* note 28 at 203-4.

⁹⁹Principles of euthanasia are not new. Such practices existed in early Greek history (the term is derived from the Greek), were endorsed by Aristotle and Plato, and were advocated in their voluntary form by Sir Thomas More. See RESPONSA, *supra* note 19, at 261, *Euthanasia*, Responso No. 78.

the patient and can be accomplished independent of those wishes.¹⁰⁰ Assisted suicide requires the express consent of a person who wishes to die. Moreover, euthanasia is a term that relates specifically to pain while assisted suicide need have no regard to pain and can occur for any reason desired by the person seeking death.¹⁰¹

This article addresses concepts of euthanasia and assisted suicide in the context of chronically ill persons who are suffering substantial pain and those who are terminally ill. There can be honest moral debate as to the propriety of hastening death in such cases. No such debate can be found in regard to the mislabeled concept of "eugenic" euthanasia: the killing of less than perfect infants, those diagnosed with hereditary disease, persons suffering from mental disability, or persons who are just different or otherwise undesirable. Such forms of "euthanasia," carried to their extreme in the 1940s in Europe and more recently in some African and European nations, are morally reprehensible and categorically beyond any rational definition of euthanasia. Eugenic euthanasia is murder, period.

On a sliding scale, the next most offensive form of euthanasia would be one in which a person hastens the death of another as distinct from removing impediments to death as the natural end of life. The former is categorized as active euthanasia and the latter as passive euthanasia. Jewish law prohibits active euthanasia but allows euthanasia in its passive form. Drawing the line between the two is difficult in a world of advanced medical science.¹⁰² For

¹⁰⁰This is not to say that euthanasia is inconsistent with a patient's desire. It is only to say that where intent has been manifested by the patient, the end of life is more consistent with concepts of assisted suicide. Whether euthanasia or assisted suicide should be legalized in the United States is a subject of considerable debate and legislative interest. See, e.g., CAL. PENAL CODE § 401 (West 1996); 720 ILL. COMP. STAT. ANN. 5/12-31 (West 1996); MICH. STAT. ANN. § 28.547(127) (Law. Co-op 1996); WASH. REV. CODE ANN. § 9A.36.060 (West 1996). See also *supra* note 5.

¹⁰¹A person seeking to commit suicide can often be viewed as being in great pain though it may be psychological rather than physical.

The definitions and distinctions expressed in this paragraph are the author's working definitions. They are largely consistent with legal definitions, but make no effort to use statutory or decisional law. Statutory definitions are illustrated by 720 ILL. COMP. STAT. ANN. 5/12-31 (West 1996) (defining 'inducement to commit suicide' as "any act done with the intent to commit suicide and which constitutes a substantial step toward commission of suicide.").

Physician assisted suicide differs from euthanasia. "In assisted suicide, one person contributes to the death of another, but the person who dies directly takes his or her own life." Whereas, "[a]ctions that intentionally cause death are often referred to as active euthanasia, or simply as euthanasia." NEW YORK TASK FORCE ON LIFE AND THE LAW WHEN DEATH IS SOUGHT, 82-83 (1994).

¹⁰²The line may be even harder to draw as between active euthanasia and suicide. Jewish law permits medication to ease pain even if there is a potential that it will cause death. Where a patient takes an overdose to end life, rather than to alleviate pain, it could be considered suicide or "active-voluntary" euthanasia. Though many would consider this suicide, some do not. See Sherwin, *supra* note 95, at 300. See GREEN, *supra* note 67.

example, the disconnection of a respirator could be deemed an improper act to hasten death or an act which only removes an impediment to death.

Abraham suggests that three overriding principles govern the Jewish position regarding euthanasia:

1. The only time that one can kill another is when the other is a potential murderer - so that killing anyone whose existence is not a threat to the life of another is murder;
2. One does not possess absolute ownership over one's own body - there is a duty to return body and soul to God; and
3. Life, for any period of time, is of infinite value.¹⁰³

After some discussion of the Rabbinic literature permitting the discontinuation of prayer to extend life, Abraham raises the distinction between such an approach and a more active interference with life. Here the view of Rabbi Moshe Feinstein is succinctly stated: it is forbidden to try to prolong the life of a dying person if this adds to pain and suffering, but to shorten life, even one of agony and suffering, is forbidden. Regardless of motive, in part because it is not for us to question the ways of God, any effort to shorten life is murder.¹⁰⁴ On this approach we see an amalgam of religious and legal thinking in which it is difficult, if not impossible, to separate the component parts.

Similar analysis of traditional law posits four reasons for rejection of active euthanasia:

1. An individual's life is not his or her own, but belongs to God and only God has the right to take life;
2. Jewish law is not concerned with the quality of life - each moment of life is sacred;
3. Individuals are prohibited from inflicting self-injury including the ultimate injury of death; and
4. There is no agency for wrongful acts and, since murder is a wrongful act, one cannot act as an agent to accelerate the death of another.¹⁰⁵

Although the formulations differ slightly, the core reasons for rejection of active euthanasia are remarkably consistent in light of the fact that they rely on ancient sources subject to varying interpretation. Underlying the reasoning is what appears to be a deep seated moral value that has long been a part of Jewish tradition even without regard to law.

The more difficult questions concern passive euthanasia. Here the line drawing is potentially arbitrary and confusing. There may be differences

¹⁰³Abraham S. Abraham, *Euthanasia*, in *MEDICINE AND JEWISH LAW* (Fred Rosner, ed., 1992) 124-25 [hereinafter Abraham, *Euthanasia*]. See also JAKOBOWITS, *supra* note 14.

¹⁰⁴Abraham, *Euthanasia*, *supra* note 103, at 126, relying on *RESPONSA IGGROT MOSHE, Yoreh De'ah* 2:174. Abraham also observes that a doctor must make all efforts to resuscitate a patient not in the final stages of death. ABRAHAM, *GUIDE*, *supra* note 41, at 180.

¹⁰⁵Sherwin, *supra* note 95, at 304, relying on a number of traditional sources.

between withholding extreme lifesaving procedures and withholding food or water. Similar differences may exist in regard to antibiotics, insulin, blood, or oxygen. Relying on Jewish law, Abraham, a medical doctor, indicates that food, drink, insulin, blood, and oxygen must be provided.¹⁰⁶ Where there is no known treatment and no means to relieve suffering there is no need to prolong life.¹⁰⁷ Rather, one should provide only supportive care and allow nature to take life in the normal course of events. This line of reasoning is consistent with the treatment provided through hospice care.

From his understanding of Halachah, perhaps tempered by his medical experience, Abraham reaches a series of generalized principles that appear to summarize the basic position of Jewish law:

1. Life sustaining measures such as food, drink, and oxygen must be provided regardless of how this is to be accomplished;
2. Non-terminal patients must be treated as any other patient and full resuscitative measures taken to prolong life even if only for a short time;
3. Terminally ill patients who are close to death are treated as any other patient in terms of sustenance and general care; but if arrest takes place or other complications require major procedures, then:
 - a. If the arrest is an expected natural occurrence, one need not resuscitate and it may be wrong to do so. No desperate measures which will add to agony should be undertaken; but
 - b. If the arrest is not expected and arises from a cause unrelated to the underlying disease, full treatment must be given unless this will cause suffering above that due to the original disease.

The logic of this position is forceful. Basic sustenance cannot be denied as this violates essential precepts of Jewish law. Adding to pain and suffering to prolong a life which is ordained to a speedy death is also prohibited. Under appropriate circumstances no extreme measures need be taken and

¹⁰⁶Dr. Abraham, in consultation with one of his teachers, Rabbi Slim Auerbach, points out that dialysis had to be continued for a comatose, respirator dependent patient who had been resuscitated because she had been on such a program and therefore, for her, it was normal. On the other hand, surgery was not required for a man with only a few days to live and where surgery could result in immediate death. Here the surgery, which could also have resulted in gaining some period of life, was not required by Jewish law because it was risky, would add to the patient's pain, and the patient did not want the surgery. Abraham, *Euthanasia*, *supra* note 103, at 129-30. There is an express prohibition against removal of natural hydration and of feeding for a terminal patient to hasten death because such steps are considered cruel. Where they are not cruel, they may be tolerated. See Sherwin, *supra* note 95, at 306, relying on *Sanhedrin* 77a, Maimonides, MISHNEH TORAH, and the *Sefer Hasidim*.

¹⁰⁷Abraham, *Euthanasia*, *supra* note 103, at 130-31.

resuscitation efforts may even be improper.¹⁰⁸ These general lines, drawn less than a decade ago, are consistent with somewhat earlier discussion.

A summation of the halachic perspective is provided by Israel Bettan in his Committee report answering a question posed by the Central Conference of American Rabbis in 1948 as to whether the Conference should support proposed legislation legalizing euthanasia.¹⁰⁹ The report, which was adopted by the Conference, recognized that religious doctrine mandates acceptance of the lot apportioned regardless of the extent of affliction this creates. The story of Job illustrated the point. From there the report moved to the death by burning of Rabbi Channaniah ben Teradyon. It was the practice of the Romans to place a wet sponge over the heart to delay death and increase suffering. When asked by the executioner as to whether the sponge should be removed, the Rabbi rejected this assistance as it would have hastened death: "It is best that He Who hath given the soul should also take it away; let no man hasten his own death."¹¹⁰

Discussion of Rabbinic law follows to remind us of the divine nature of life and its sanctity and that to abridge life by even a second, in any direct and positive manner, is equal to the shedding of blood.¹¹¹ This body of liberal Jewish scholars rejected active euthanasia and retain this position to the present day. Nevertheless, the report noted a distinction in regard to the facilitation of a peaceful death through the use of indirect means.

Classical Rabbinic law permits the elimination of noise and the withholding of stimulants. That which retards the natural process to delay death is artificial and can be removed.¹¹² This sanctioning of steps to allow death to take its

¹⁰⁸To this extent these principles are consistent with enforcement of a DNR order. See *supra* notes 84-97 and accompanying text. The positions can come into conflict. Any such conflict should be resolved in favor of death.

¹⁰⁹RESPONSA, *supra* note 19, at 261, *Euthanasia*, Responsa No. 78.

¹¹⁰*Id.* at 262 quoting Avoda Zara 18a.

¹¹¹Modern writers continue to rely on this classical example. See Yaacov Haber, *Euthanasia by the Book*, 5(1) GENERATION 23 (Jan. 1995). Haber argues that the real issue is not to define death, but to define life. Euthanasia is rejected, in part, because from a spiritual perspective it eliminates the capacity to fulfill God's commandments or to seek repentance. He states, for example, that "no experiments have been able to prove that a person in a comatose situation is incapable of doing *teshuva*." *Id.*

¹¹²There is some question as to whether even passive euthanasia can be permitted before a person is considered to be in a state of *goses*. This Hebrew term refers to imminent death which is generally defined under Jewish law as within seventy-two hours. A person is in a state of *goses* only when that person is "highly unlikely," by medical standards, "to survive more than three days." BARRY CYTRON & EARL SCHWARTZ, *WHEN LIFE IS IN THE BALANCE* 143 (1986). Thus, Rabbi Jakobovits limits his approval of euthanasia to the *goses* period. Within this time frame "Jewish law sanctions the withdrawal of any factor-whether extraneous to the patient himself or not-which may artificially delay his demise in the final phase." MODERN MEDICINE, *supra* note 28, at 208, quoting I. Jakobovits, *The Dying and Their Treatment in Jewish Law: Preparation for Death and Euthanasia*, 2 HEBREW MED. J. 251 ff. (1961).

course is inapplicable to the physical requirements essential to sustain life even as to one whose condition is hopeless and whose pain is great.¹¹³ The difficulty in permitting even passive euthanasia is exhibited, perhaps unintentionally, in the report's closing paragraph:

The Jewish ideal of the sanctity of human life and the supreme value of the individual soul would suffer incalculable harm if, contrary to the moral law, men were at liberty to determine the conditions under which they might put an end to their own lives and the lives of other men.¹¹⁴

This paragraph makes several imperatives clear: suicide is prohibited; one cannot aid another in the commission of suicide; and active euthanasia is prohibited.¹¹⁵ Passive euthanasia, on the other hand, "does not put an end" to life. Rather, it allows life to end. The difference is real.

In the Conference discussion of this Report, Rabbi Freehof suggested that the Conference could say: "You may refrain from doing anything that will prolong a miserable life," "but to do something to terminate life is forbidden by Jewish law."¹¹⁶

Although not stated in his analysis, the starting point for this conclusion is found in the principle that "one in a dying condition is considered a living being in all respects."¹¹⁷ Perhaps the best example of both the distinction between active and passive euthanasia and Rabbinical sanctioning of passive euthanasia is the Talmudic discussion of the death of Judah the Prince. Freehof summarizes this discussion by observing that the prayers seeking to extend Judah's life were interfering with his death and so his beloved servant threw

¹¹³There is substantial consensus that removal of hydration and food would not be tolerated by Halachah, but that removal of a respirator remains questionable. *But see infra* notes 127-29 and accompanying text. It must also be noted that in an extreme situation medicine could be given to ease the pain even if there was a strong likelihood that doing so would cause death so long as the intent was alleviation of pain rather than causation of death. See RESPONSA, *supra* note 19, at 253, *Relieving Pain of a Dying Patient*, Responsa No. 76.

¹¹⁴RESPONSA, *supra* note 19, at 263, Responsa No. 78.

¹¹⁵Nevertheless, there is a line of reasoning which extends from the traditional acceptance of passive euthanasia into at least grudging acceptance of active euthanasia as individual choice. In part this is because Talmudic law may draw a distinction between an act hastening the death of one in *goses* (terminally ill) and an act directed to one who is *terefah* (terminally ill due to irreparable organ damage). As one in *goses* may possibly recover to shorten that life is murder, but a *terefah* cannot recover and, therefore, the act may not be murder. Thus, it is said that various sources "indicate the viability and the defensibility of a 'minority' view supporting voluntary euthanasia when the primary motive is to alleviate pain and suffering among the terminally ill." Sherwin, *supra* note 95, at 313. The distinction utilized is questionable in terms of medicine, logic, and Jewish law.

¹¹⁶*Id.*

¹¹⁷SHULCHAN ARUCH, *Yoreh De'ah*, section 339.

down an object from the roof to disturb the prayers and, at that time, death occurred.¹¹⁸

A similar approach is found in a Responsum from the late 1700s which authorized the termination of prayer to permit the death of a woman dying of a "lingering" disease. Although nothing could be done to shorten her life, it was permissible to stop praying and allow death to intervene.¹¹⁹ Similarly, the law of the *Shulchan Aruch* provides that one may not even remove a pillow from under the head as this could hasten death.

Other sources support this form of analysis. The Talmud makes clear that since a *goses* is regarded as living, nothing may be done to hasten death. Thus one may not bind the jaws, or move him, or place him on sand or salt, or close his eyes. The analogy is to a flickering flame in a lamp that is going out. If one places a finger on it, it is immediately extinguished. Even the small act of closing the eyes could slightly hasten death.¹²⁰ But one can, as recognized by Isserles (known as Rema) in his explanation of the *Shulchan Aruch*, remove a hindrance to death:

if there is anything which causes a hindrance to the departure of the soul, such as the presence near the patient's house of a knocking noise, such as wood chopping, or if there is salt on the patient's tongue, and these hinder the soul's departure, it is permissible to remove them from there because there is no act involved in this at all but only the removal of the impediment.¹²¹

Nevertheless, not all of the Conference members supported the Report. Some believed taking a position to be premature and others raised theological, philosophical, moral, and practical questions.¹²² One, Dr. Samuel Atlas, argued

¹¹⁸Various versions of this story can be found. In many it is believed that the maidservant, who is highly respected, threw down a jar so that the noise would distract Judah's followers from their prayers. It is also said that the noise of the prayers, as well as the power of the prayers, prevented Judah's *nefesh* (soul) from departing. When the prayers stopped, the *nefesh* was able to leave. This permitted Judah to die in peace.

¹¹⁹Responsa, *supra* note 19, at 263, Responsa No. 78.

¹²⁰See general discussion and authority cited in MODERN MEDICINE, *supra* note 28, at 205-7.

¹²¹*Id.* at 207 quoting REMA ON SHULCHAN ARUCH, *Yoreh De'ah* 339:1. Some would go further, but they appear to represent aberrant views that have not received general acceptance.

¹²²An Orthodox position, consistent with those who take a restrictive view of euthanasia under Jewish law, is expressed by Rabbi Bleich. He argues that:

The practice of euthanasia-whether active or passive-is contrary to the teachings of Judaism. Any positive act designed to hasten the death of the patient is equated with murder. . .

The physician must make use of any medical resources which are available. However, he is not obligated to employ procedures which

that according to the *Pirkei Avos*¹²³ even one hour of repentance was worth more than the whole future life and that, therefore, it is wrong to deprive even a hopelessly sick person of the opportunity for repentance.¹²⁴ Dr. Atlas also developed a thesis that any distinction between Halachah applicable to those dying from an organ deficiency and those dying of natural causes (*terefa* and *goses* respectively) no longer has medical validity.¹²⁵ He concludes, therefore, that the rationale of Maimonides would apply to preclude euthanasia.¹²⁶

More recently a group of Reform Rabbis addressed what may be the most difficult of the questions both in terms of Halachah and emotion: can artificial life support systems be turned off when they alone are keeping a terminal patient alive?¹²⁷ The traditional Rabbinic distinctions and precedents are, of course, unchanged. This allowed the Rabbis to recast the question into one of when the "turning point" at which "independent life" has ceased comes into existence. This question can be answered only by a return to the first issue presented in this Article: the definition of death. The Responsa notes that despite a division among Orthodox Rabbis (in 1980) as to whether Jewish law can accept the definition of the 1968 Harvard Medical School ad hoc committee report, significant Orthodox scholarship allows a respirator to be turned off to determine whether there is independent breathing.¹²⁸ Bearing in mind that Reform Judaism represents a more "liberal" branch of scholarship, this review of law is possibly an effort to gain Orthodox support. The ultimate conclusion is not surprising: "when circulation and respiration only continue through

are themselves hazardous . . . nor is the physician or patient obligated to employ a therapy which is experimental in nature.

Id. at 211 quoting J.D. Bleich, *Judaism and Healing* (1981).

¹²³A highly regarded text which is often referenced as the ethics of the fathers or the sages guide to living.

¹²⁴RESPONSA, *supra* note 19, at 267, Responsa No. 78. This approach parallels a case history presented in Abraham, *Euthanasia*, *supra* note 103, at 126-27 in which the patient initially indicated that his last two years of life were a living death of no value. After discussion about visits from his grandchildren during this time frame, the patient remained silent after being asked whether those years were worth living.

¹²⁵*Goses*, discussed *supra* notes 112 and 115, references a death which is medically certain to occur within three days due to natural causes. *Terefa* references a terminal patient but without a specific time frame for death. Some authority suggests a one year limit for *terefa* status. In addition, such a person must be dying due to an "organ deficiency" which is a term perceived as distinct from natural causes.

¹²⁶RESPONSA, *supra* note 19, at 268, Responsa No. 78. There is also argument based on David's order that the Amalekite be killed for the slaying of King Saul, at Saul's request, after his failed suicide attempt. *Id.* at 269.

¹²⁷RESPONSA, *supra* note 19, at 271, Responsa No. 79. This Responsa represents the collective wisdom of several of the most highly regarded modern scholars within the Reform movement: Walter Jacob, Leonard Kravitz, W. Gunter Plaut, Harry Roth, Rav. A. Soloff, and Bernard Zlotowitz.

¹²⁸*Id.* at 273 relying, for this position, on Moses Feinstein.

mechanical means, . . . then the suffering of the patient and his/her family may be permitted to cease, as no "natural independent life" functions have been sustained."¹²⁹

This conclusion is fully consistent with even far more strict interpretations of Halachah. It is premised on the absence of circulation and respiration which has always been recognized as an appropriate definition of death. The only difficulty is that this Responsa allows medical tests to judge the existence of respiration and cardiac activity. The methodology of confirming death, as distinct from the definition of death, could be rejected under a strict Orthodox regimen.

The logic of this Responsa, inductively, deductively, and as an application of Halachah, is sound. Moreover, it makes clear that concern for the family is a value of significance. Perhaps most important, it removes the moral and religious based stigma that might otherwise inflict pain upon a family who finally allows the inevitable.

D. Assisted Suicide

Any "liberal" approach to passive euthanasia or defining death must not become a base for supporting any form of assisted suicide. Assisted suicide is directly related to, and an extension of, active euthanasia. The Talmud requires a physician to heal which, by definition, denies the physician the right to actively assist in the patient's death.¹³⁰ The prohibition against active euthanasia applies with even greater force against assisted suicide regardless of whether the assisting person is a physician or one lacking any medical training.

This is not to say that there is unanimous rejection of suicide or even assisted suicide. At least one line of respected Judaic analysis supports assisted suicide. Michael Kahan argues that suicides such as that of Samson, although a military feat serving a higher purpose than his own death, was, nevertheless, suicide. He concludes that in the context of Jewish law each person should be permitted to reach his or her own conclusion.

Let us consider the example, say, of my self-hastened death (given that I know I am near death anyway according to medical opinion) so that one of my vital organs can be used to prolong the life of an otherwise healthy person. Have I been like Samson? Or is it better to emulate Rabbi Hanina ben Teradyon . . . to make the fateful decision?"¹³¹

¹²⁹*Id.*; An approach similar to Responsa Nos. 78 and 79 is that of Rabbi Eliezer Waldenberg as summarized in MODERN MEDICINE, *supra* note 28, at 208-9.

¹³⁰BASIL F. HERRING, JEWISH ETHICS AND HALACHAH FOR OUR TIMES 79 (1984), relying on *Bava Kama* 85a.

¹³¹*Legalizing Suicide: An Exchange* 61(6) CONGRESS MONTHLY 15, 16 (Nov./Dec. 1994). Rabbi Teradyon, who lived in approximately the second century, publicly defied a Hadrianic decree forbidding religious teaching. See note 110 and accompanying text.

This view, expressed in connection with whether the state should legalize assisted suicide, represents a small minority of Jewish law authorities.¹³² It is also consistent with the position of a developing Secular Jewish Humanistic movement.¹³³

The vast majority view rejects both suicide and assisted suicide although the current literature addressing assisted suicide is often conclusory: since suicide is prohibited, assisted suicide is prohibited. "There is no question here [end life decision-making] of 'assisted suicide,' [sic] that euphemism for murder or suicide, which is always forbidden."¹³⁴ Similarly, a Canadian Rabbi, Reuven Bulka, strenuously asserts that "Kevorkianism" is unequivocally violative of Jewish law.¹³⁵ His reasoning begins with a Jewish saying, not based on any Halakah, that "One who destroys oneself wittingly has no share in the world-to-come."¹³⁶ From there he observes that scripture, Talmud, and Maimonides all conclude that a suicide is a form of murder and, indeed, can be worse than murder as there is no way to repent and seek forgiveness. Moreover, for fear of taking one's own life, many otherwise acceptable activities are prohibited.¹³⁷

With this explanation as foundation, Bulka moves to a short analysis of the medical issue. Exodus demands that doctors heal and this mandate is carried forward in Talmudic law as illustrating a mandate from God. The mandate is "to heal, not to kill. A physician who cannot heal, for whatever reason, including that the illness has advanced far beyond healing, has no right to take life, any more than any individual has the right to take life."¹³⁸ The logic flow is precise: (1) physicians are granted permission to heal; (2) suicide is forbidden

(The spelling difference (Channaniah versus Harina) is a common result of transliteration.)

¹³²A similar result is suggested through subordinating this prohibition to the demands of *Kiddush Hashem*, the equivalent of "quality of life," rather than by rejecting the prohibition against suicide. This approach extends the teaching that there are times when the sanctification of life and God is best served by the surrender of life as occurred in Warsaw when ninety-six girls and women killed themselves rather than fall into the hands of the Nazis. Yoel H. Kahn, *On Choosing the Hour of Our Death*, XLI(3) C.C.A.R.J. 65 (Summer 1994). Other examples are set forth *supra* note 82.

¹³³This organization supports assisted suicide under specific conditions and safeguards. See Martin L. Kotch, *Aid in Dying*, XXiii (3/4) HUMANISTIC JUDAISM 12 (Sum./Aut.1995) and the *Leadership Conference Issues Statement*, at 13. Neither Professor Kotch nor the Conference rely on Halachah.

¹³⁴Cohen, *supra* note 6, at 41.

¹³⁵Reuven P. Bulka, *Kevorkianism-Judaic and Logotherapeutic Reactions*, 19 J. PSYCH. & JUDAISM 127 (1995).

¹³⁶*Id.* at 128.

¹³⁷*Id.* at 128-29. One may rightfully wonder whether high-risk activities such as sky-diving violate Halachah.

¹³⁸*Id.* at 130.

and no one has the right to assist another in such a forbidden activity; and (3) a doctor who assists a suicide violates fundamental Jewish law and the right to heal that was granted by God.

This approach, consistent with the recognized secular command of the Hippocratic oath: "Do no harm," is judaically compelling. Whether in the modern world it is as technologically or morally compelling is a question best left to the individual.

V. CONCLUSION

Core values of the Jewish heritage are life and family, not death. An interpretation of Halachah which permits a broad definition of passive euthanasia without lapsing into acceptance of active euthanasia or its more evil cousin, assisted suicide, is consistent with these values. Also consistent with these values and the Jewish tradition is a modern definition of death which recognizes advances in medical technology that were beyond the knowledge or imagination¹³⁹ of those who created the vast body of Rabbinic law. This approach will not only ease the suffering of families, it will allow organ transplants to save the lives of others and to thereby achieve *t'kun olam*, the repair of the world.

L'Chayyim!

¹³⁹Even a Jules Verne, Issac Asimov, Frederik Pohl, or Orson Scott Card of the fifth century would not likely have imagined the medical technology of the late twentieth century.