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PHYSICIAN ASSISTED SUICIDE UNDER JEWISH LAW

*Steven H. Resnicoff*¹

This Article endeavors to analyze physician-assisted suicide through the prism of *Jewish law*.² Of course, to establish the scope of this inquiry, it is essential to examine the underlying terminology. An understanding of “physician-assisted suicide” requires appreciation of at least three preliminary concepts: suicide; assistance; and physician.

“Suicide” has been defined as “self-destruction; the deliberate termination of one’s own life.”³ Because one obviously must be alive⁴ to commit suicide, the criteria Jewish law uses to determine whether one is

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²The Jewish law principles, priorities, and perceptions to be discussed will no doubt inform the contemporary secular dialogue regarding physician-assisted suicide. Nonetheless, this Article leaves to other works the broader issue as to whether, and if so, how, religious law – *qua* religious law – ought to influence secular law. *See, e.g.*, J. David Bleich, *God Talk: Should Religion Inform Public Debate?*, 29 *LOY. L.A. L. REV.* 1513 (1996). Similarly, this Article leaves for another time an analysis of the practical ramifications, many of which quite unpleasant, of rules that would facilitate physician-assisted suicide.

³BLACK’S LAW DICTIONARY 1434 (6th ed. 1990).

⁴The secular definition of death is subject to a variety of opposing pressures. On the one hand, modern medical interventive procedures provide the apparent ability to preserve life beyond prior expectations. On the other hand, both the demand for organ transplants and the economics of the health care industry (including the costs to insurers of long-term hospitalization) motivate many to argue that although modern technology may effectively preserve a body, the life previously associated with the body has already ended.

truly alive is of obvious interest.⁵ Nevertheless, for a variety of reasons,⁶ This Article is limited to cases in which it is clear the people involved are indeed alive.

The phrase, "the deliberate termination of one's own life," suggests a voluntary and intentional decision by a mentally competent individual. Jewish law perspectives on personal autonomy must, therefore, be explored. The word "termination" arguably implies some physical action. We will see whether Jewish law makes a distinction between passive or active conduct that leads to one's death and, if so, what is considered to be passive as opposed to active behavior.

An "assisted suicide" suggests a suicide in which a third person either facilitates or enables a person to commit suicide. We will survey Jewish law distinctions between one who actively or passively facilitates or enables a suicide; one who prays for someone's death; and one who, out of a mistaken sense of "mercy," commits murder.

⁵There is a considerable body of Jewish law literature as to whether "brain-death" constitutes death. Although the controversy is quite complex, it seems safe to say that the majority of contemporary Jewish law scholars have not accepted "brain death" criteria as definitively establishing death under Jewish law. See Aaron Soloveichik, *The Halakhic Definition of Death*, JEWISH BIOETHICS 302 (J. David Bleich and Fred Rosner, 1978); ABRAHAM S. ABRAHAM, *THE COMPREHENSIVE GUIDE TO MEDICAL HALACHAH* 188 (1996) (citing authorities and stating that someone who is clinically brain-stem dead is not considered dead but, rather, is in the category of a possible *goses* such that tests to verify the diagnosis are forbidden); *Id.* at 191 ("Death is established only when spontaneous respiration, heartbeat and brain function have all ceased."); Fred Friedman, *The Chronic Vegetative Patient: A Torah Perspective*, XXVI J. HALACHA & CONTEMP. SOC'Y 88, 91 (1993) (asserting that most contemporary rabbinic authorities "do not accept 'brain death' as sufficient to define an individual as dead" under Jewish law).

For an excellent discussion of the weaknesses of the brain death criteria, citing relevant scientific research, see J. David Bleich, *Moral Debate and Semantic Sleight of Hand*, 27 SUFFOLK U. L. REV. 1173 (1993). For a defense of the brain death approach and for one perspective of the debate among Jewish law authorities, see MOSHE DOVID TENDLER, 1 RESPONSA OF RAV MOSHE FEINSTEIN 67-97 (1996).

⁶For example, as the text proceeds to point out, suicide involves a deliberate action. All Jewish law scholars would agree that a person capable of performing such a deliberate act is alive. Of course, an inquiry into the criteria of death might still be important to a *secular* discussion of physician-assisted suicide, because secular scholars might permit the element of "deliberateness" to be satisfied through a doctrine allowing the judgment of a competent third party to be *substituted* for that of an incompetent whose life is in question. This Article does not attempt to evaluate Jewish law's view of such an approach.

Secularists might argue there is a special physician-patient relationship which might “empower” either patients and/or physicians to take steps towards assisted-suicide that might not otherwise be permitted. Jewish law recognizes a physician can possibly provide information, such as a diagnosis of a patient’s condition and an evaluation regarding the risks of certain treatment, that is relevant to some assisted suicide issues. Nonetheless, with respect to the provision of assistance to one who wants to commit suicide, Jewish law does not regard a physician as different from any other person.

The Jewish legal system is intellectually sophisticated, flexible, and fact-sensitive. In order to understand and apply it, one must, of course, be familiar with its principal features. Consequently, the beginning part of this Article provides a brief introduction to Jewish law and then examines particular Jewish law principles relevant to “physician-assisted suicide” issues and applies them to specific factual scenarios. Given the intricacy and resiliency of Jewish law, the large variety of human and technological variables, and the delicacy of the questions confronted, this Article should in no way be regarded as providing authoritative Jewish law rulings for actual cases. Persons with such questions should personally and carefully consult with a competent Jewish law authority.

AN INTRODUCTION TO JEWISH LAW

Jewish jurisprudence differentiates between biblical commandments, which are those deemed to have been directly transmitted by the Creator to Moses, and non-biblical rules.⁷ Interestingly, Jewish law does not recognize the literal meaning of a verse in the Bible, the *Torah*, as an authoritative statement of law. Indeed, some verses, when taken literally, are incomprehensible.⁸ Instead, Jewish law maintains that an oral tradition

⁷There are various sources of non-biblical law, including rabbinic law and custom. See generally MENACHEM ELON, *MISHPAT IVRI*; H. CHAIM SCHIMMEL, *THE ORAL LAW*.

⁸For example, the Torah states that on the holiday of *Succot*, referred to by some as the “Feast of Tabernacles,” one must perform a ritual involving the waving of certain plants and fruit. One of these is referred to as a *pri etz hadar*, which literally means “a fruit of the glorious tree.” The Torah does not otherwise specify what type of tree is meant. The oral tradition explains that the verse refers to a particular citron, the *etrog*. Similarly, the Torah uses certain terms without

transmitted to Moses both amplified and interpreted the written Torah.⁹ This oral tradition not only contained specific laws and information but also hermeneutical rules to be used to elucidate the Torah.¹⁰ According to Jewish tradition, there were a variety of purposes, unrelated to our present subject, for the creation of complementary written and oral traditions.¹¹

Religious persecution of Jews, including orders banning the teaching of Jewish law, threatened the preservation of oral law. In response, a concession was made by ancient rabbinic leaders such that a succinct, incomplete form of the oral tradition, the *Mishnah*, was put into writing around the year 188 of the common era.¹² The discussions and debates of early scholars in academics in Babylon and Jerusalem were separately recorded to form, respectively, the Babylonian and Jerusalem Talmuds. The Babylonian Talmud was completed later than the Jerusalem Talmud,¹³ and, because the Babylonian discussions benefitted from knowledge of the Jerusalem Talmud, the Babylonian Talmud is considered more influential.¹⁴

The writing of the Talmuds, however, was also seen as an allowance warranted only by the exigencies of the times. Consequently, the language of both Talmuds is terse and ambiguous. Talmudic discussions typically focus on specific cases, which frequently involve relatively unusual, and

providing their full legal content. For instance, the Torah states that one may not do *melakha* ("work") on the Sabbath, *see, e.g., Exodus 31:14*, or on certain other occasions, but does not clarify what does or does not constitute "work." In addition, although the Torah requires ritual slaughtering of certain animals before their meat may be eaten, nowhere does the written text describe the slaughtering process. Instead, it simply states that animals are to be slaughtered "as I have instructed you," *Deuteronomy, 12:21*, implying that detailed directions had been previously transmitted orally. For a fuller discussion of this topic, *see SCHIMMEL, supra note 7, at 19-31; BORUCH EPSTEIN, TORAH TEMIMAH, on Deuteronomy 12:21.*

⁹See ELON, *supra* note 7, at 1:179.

¹⁰*Id.* at 270; ARYEH KAPLAN, THE HANDBOOK OF JEWISH THOUGHT 181.

¹¹See MAIMONIDES, INTRODUCTION TO THE MISHNAH; KAPLAN, *supra* note 10, at 178-181.

¹²KAPLAN, *supra* note 10, at 187 (citing sources and calculating date).

¹³The Jerusalem Talmud (hereafter referred to as "T.J.") was redacted around the year 350 of the common era, while the Babylonian Talmud (hereafter referred to as "B.T.") was not completed until about the year 500. *See ZECHARIAH FENDEL, CHALLENGE OF SINAI 581.*

¹⁴See MAHRITZ CHIYAT, COMMENTARY ON BABYLONIAN TALMUD, T.B., TAANIT 16a; KAPLAN, *supra* note 10, at 234-235. *See also* ELON, *supra* note 7, at 2:901 (stating that political and other societal factors limited the intellectual investment in the Jerusalem Talmud and asserting that for this reason the Babylonian Talmud is more reliable).

therefore, memorable facts. The mission of a Jewish law scholar is to discern conceptual principles from these paradigms and to use them to reach legal conclusions regarding modern scenarios with quite different facts. Jewish law scholars must not only inspect the thought processes implicit in the questions, answers, and statements of each participant in a given Talmudic discussion, but must also test hypotheses in light of apparently inconsistent debates elsewhere in the Talmud. In addition, Jewish law recognizes a multi-tiered hierarchy of post-Talmudic commentators whose concerns and opinions must be considered as well. Talmudic sources, as construed by subsequent rabbinic leaders, are regarded as the most authoritative statements of Jewish law.¹⁵ Because of various practical constraints, however, this Article cannot identify all of the Talmudic sources relevant to physician-assisted suicide and trace how they have been construed and applied by Jewish law experts. Further, this Article will not attempt to introduce novel interpretations of Jewish law or decisively resolve contemporary debate among Jewish law scholars. Instead, the limited purpose is simply to explain how Jewish law, as understood by most modern authorities, applies to physician-assisted suicide.¹⁶

¹⁵See TOSAFOT YOM TOV, COMMENTARY TO MISHNAH, BERAKHOT 5:4; REBBENU ASHER, COMMENTARY TO T.B., SANHEDRIN 4:6.

In ancient times, there existed a supreme rabbinical court, the "Sanhedrin HaGadol," that was the ultimate Jewish law authority. Nonetheless, this institution was dissolved over 1,500 years ago. Since then, Jewish law has lacked any official procedure for resolving differences in opinions among Jewish law scholars. Informal processes, whereby scholars exchange their views privately or in print, have settled debates over many issues. Of course, the more complex the question, the higher the stakes, and the more ambiguous or scant the Talmudic sources, the more difficult it is to reach universal agreement, especially as to the "details." Thus, there remain important conceptual differences regarding a number of the bioethical issues discussed in this Article. Consequently, in light of the innumerable factual and legal variables that present themselves in a particular case, it is impossible to catalog possible cases and attempt to determine normative Jewish law conclusions for each.

¹⁶Certain procedural requirements must be satisfied before a Jewish court — assuming it had both the authority and the power to act — could punish violators. However, our focus is not on the prospects of actual punishment but, instead, on whether Jewish law prohibits, discourages, encourages, or requires particular types of conduct with respect to physician-assisted suicide.

APPLICATION OF SPECIFIC JEWISH LAW PRINCIPLES TO PHYSICIAN-ASSISTED SUICIDE

This section will articulate the fundamental Jewish law principles pertinent to physician-assisted suicide. The next section will study how these principles apply, in light of various possibly extenuating circumstances, to the case of a competent patient who, because of intractable pain, wants to end her life.

Relevant Jewish Law Principles

When discussing physician-assisted suicide, the most important Jewish law concerns include:

- (1) the rules against murder and suicide -- and the duty to rescue and to preserve life;
- (2) a person's lack of a proprietary interest in his life;
- (3) the general permissibility of medical intervention;
- (4) the special status of a *goses*; and
- (5) the prohibition against giving someone improper advice and enabling someone to violate Jewish law.

Murder and Suicide -- and the Duty to Rescue and to Preserve Life

One source of the prohibition against murder is found in the verse, "If one spills the blood of a man, one's [own] blood will be spilled."¹⁷ Each phrase of the immediately preceding passage, "The blood of your lives will I require; from the hand of every beast will I require it, and from the hand of man, from the hand of a person's brother, will I require the life of man,"¹⁸ provides a related rule. "From every beast will I require it"

¹⁷See, e.g., MAIMONIDES, MISHNAH TORAH, *Laws of Murder and Guarding One's Life* 2:2,3 (citing *Genesis* 9:6).

¹⁸*Genesis* 9:5, translated in J. David Bleich, *Life as an Intrinsic Rather than Instrumental Good: The "Spiritual" Case Against Euthanasia*, 9 ISSUES L. & MED. 139 (1993) [hereafter referred to as "Bleich, LIFE"].

promises punishment to those who incapacitate someone, such as by tying him up, thereby leaving him defenseless to the fatal attack of a wild animal.¹⁹ "From the hand of man" assures punishment to those who hire someone to commit murder for them.²⁰ "The blood of your lives will I require" assigns punishment to those who commit suicide. These pronouncements, which refer to heavenly imposed punishment, apply not only to direct acts of murder or suicide, but also to acts which indirectly cause the loss of life.²¹ Similarly, a variety of verses are cited as sources for the obligation to preserve one's own life and to rescue others.²²

Jewish law accords great significance to these rules, because it places a supreme value on the life of each individual. Thus, in discussing the creation of Adam, the Talmud explains:

[O]nly a single human being was created in the world [at first] to teach that if any person has caused a single soul to perish. Scripture regards him as if he had caused an entire world to perish; and if any

¹⁹*Id.*

²⁰See MAIMONIDES, *supra* note 17.

²¹See, e.g., *id.* at 3:10: "But one who ties up another and leaves him to die of hunger, or ties him in a place in which cold or heat will result in his death ... in any of these [cases] he is not liable for capital punishment [imposed by a rabbinic court], but is still considered a murderer. The One that seeks blood will seek from him the blood which he spilled." See also JUDAH HAHASID, SEFER HASIDIM, 675: "The blood of your own souls I will seek: ... [I]f one goes to a place fraught with danger [e.g., if] during the winter [he treads] on ice which is likely to break [causing his] drowning, or if one enters a ruin which collapses on him, or if one quarrels with a violent man who becomes exceedingly angry [and kills him], these people will be punished, for they caused their own deaths."

²²The verse, "Do not stand idly by your fellow's blood," *Leviticus* 19:16, is cited both as a source for the obligation to save oneself as well as to rescue others. See, e.g., J. David Bleich, *Treatment of the Terminally Ill*, 30:3 TRADITION 51, 79 n.12 (1996). The verses, "Be careful, very careful indeed for your lives," see Moshe Sofer, *Hatam Sofer*, YOREH DEAH 326, and "you shall live by [the commandments] . . ." reinforce an affirmative obligation to safeguard one's life. The verses, "if your fellow is missing something, you shall restore it to him," *Deuteronomy* 22:2, is applied to a duty to save someone's health in T.B. SANHEDRIN 73. At least one early authority, Nachmanides, cites "Thou shalt love thy neighbor as thyself," *Leviticus* 19:18, as a source for a physician's duty to provide medical treatment. See NACHMANIDES, *Torat HaAdam*, II KITVEI RAMBAN 43 (Bernard Chavel). See also ELIEZER WALDENBERG, V TZITZ ELIEZER, *Responsa of Ramat Rachel*, 21 (citing Nachmanides' view).

human being saves a single soul, Scripture regards him as if he had saved an entire world."²³

One cannot kill another person even to save one's own life.²⁴ It does not matter whether the other person is comatose, mentally deranged, physically handicapped,²⁵ or terminally ill.²⁶ Similarly, to save one's own life or that of another, virtually all Jewish laws are suspended.²⁷ For instance, despite the religious centrality of the Sabbath, if necessary to save his life, a person must actively do that which would otherwise violate the Sabbath laws.²⁸ Rabbenu Nissim (traditionally known as the *Ran*), a fourteenth century authority, stated one who, out of a misguided sense of righteousness, fails to desecrate the Sabbath to save his life "is a murderer and is culpable for [losing] his life."²⁹ Rabbi David ben Shlomo ibn Avi Zimra (traditionally known as the *Radbaz*), a sixteenth century leader, commented, "There is no righteousness in his refusal, for it constitutes suicide ... and *HaShem* [God] will hold him accountable for his [loss of] life."³⁰ Moreover, these

²³T.B. SANHEDRIN 37a, as translated in Bleich, *LIFE*, *supra* note 18.

²⁴MAIMONIDES, MISHNAH TORAH, *Foundations of the Torah* 5:1. See also ABRAHAM, *supra* note 5, at 23-24 (citing rules and authorities).

²⁵See, e.g., ELIEZAR FLECKELES, TESHUVAH ME'AHAVA L:53 (there was an affirmative obligation to preserve the life of a child born with animal-like organs and features); WALDENBERG, *supra* note 22, at XIII:88 (the lives of children born with severe birth defects must be preserved just as the lives of any other children); JUDAH THE PIOUS, SEFER HASIDIM 186.

²⁶MAIMONIDES, *supra* note 17, at 2:7: "There is no difference between a person who kills either a healthy person or one who is ill and dying or even a *goses*. In all of these cases, the murderer is put to death."

²⁷The only categorical exceptions are the laws against murder, idolatry, and sexual misconduct. See SHULHAN ARUKH, YOREH DE'AH 195:3, 157:1; MAIMONIDES, *supra* note 24, *Foundations of the Torah* 5:1. See also T.B., SANHEDRIN 84a; Immanuel Jakobovits, *Medical Experimentation on Humans in Jewish Law*, JEWISH BIOETHICS 379 (J. David Bleich and Fred Rosner, 1978).

²⁸See ABRAHAM, *supra* note 5, at 23-24 (citing rules and authorities).

²⁹*Ran*, COMMENTARY to Rabbenu Alfasi (the *Rif*), on T.B., YOMA.

³⁰See YAAKOV WEINER, YE SHALL SURELY HEAL: MEDICAL ETHICS FROM A HALACHIC PERSPECTIVE 4, citing this view of the *Radbaz*. But see Alfred Cohen, *Whose Body? Living With Pain*, J. HALACHA & CONTEMP. SOC'Y 39, 45 (1996) (citing an early dissenting rabbinic view, which Cohen admits is not reflective of normative Jewish law).

rules apply even if a person's life can be only momentarily extended, for each instant of life is of infinite value.³¹

A Person's Lack of a Proprietary Interest in His Life

These rules reflect the belief that life is a responsibility. Man is required to safeguard even his own life, because it is not his "property" to forfeit at will.³² Rather, Jewish law describes man as the Creator's "bailee," charged with living his life to the fullest extent possible.³³ This may possibly explain the propinquity of the Pentateuchal passages proscribing murder and

³¹See Immanuel Jakobovits, *Medical Experimentation on Humans in Jewish Law*, JEWISH BIOETHICS 379 (J. David Bleich and Fred Rosner, 1978):

Life is itself the *summum bonum* of human existence. The Divine law was ordained only "that man shall live by it." ... The value of human life is infinite and beyond measure, so that any part of life - even if only an hour or a second - is of precisely the same worth as seventy years of it, just as any fraction of infinity, being indivisible, remains infinite.

See also Abraham S. Abraham, *Euthanasia*, MEDICINE AND JEWISH LAW 124-125 (Fred Rosner, 1990).

³²Similarly, under Jewish law one is not considered to own one's body. This is one reason why it is generally forbidden for someone to injure oneself, see, e.g., MAIMONIDES, MISHNEH TORAH, *Laws of Wounding and Damaging* 5: 1; SHULHAN ARUKH, HOSHEN MISHPAT 420:31; SHNEUR ZALMAN, SHULHAN ARUKH HA-RAV, *Laws of Bodily Damages* 4. For the same reason, neither a person - through his last will and testament - nor a person's inheritors can donate his body for medical experimentation. See MOSES FEINSTEIN, IGGEROT MOSHE, *Yoreh Deah* IV:59 ("No person is the owner of his body such that he can order what is to be done [after his death] with his body, or even with one of his limbs, for any purpose - not even for the purpose of furthering medical knowledge. *A fortiori*, his children and his other relatives [have no such right]."); IGGEROT MOSHE, *Yoreh Deah* III:140. See also J. David Bleich, *The Obligation to Heal in the Judaic Tradition: A Comparative Analysis*, JEWISH BIOETHICS 18, 19 (J. David Bleich and Fred Rosner, 1978). But see Cohen, *supra* note 30, at 43-44 n.9 (discussing a contrary view).

³³As the Radbaz writes: "a person's soul is not his property; it is the property of the Holy One, Blessed be He, as it is written, 'And the souls are Mine.'" See RADBAZ, (COMMENTARY ON MAIMONIDES,) 18 MISHNEH TORAH, *Laws of the Supreme Court* 18:6 (explaining that this is the reason why a rabbinical court does not impose corporal punishment based on a defendant's admission of guilt). See also WALDENBERG, *supra* note 22, at 29(1); Abraham, *supra* note 31, at 123.

suicide. A similar rationale underlies both rules:³⁴ no one, whether a third party or oneself, is permitted to destroy the life divinely loaned. Quite the contrary, everyone is specifically enjoined to preserve life and to promote the divine purpose thus served.

On the other hand, man should not assume he understands what the divine purpose is. Instead, man is supposed to regard life as an intrinsically and metaphysically valuable experience, not as a means to an end. Consequently, man is not entitled to evaluate the "quality" of a life by considering what that life may accomplish.³⁵ Indeed, no system of measurements capable of evaluating the quality of a human life exists.³⁶

Rabbi Bleich, a contemporary scholar, supports this proposition by referring to the Talmudic discussion of the following biblical passage: "In those days Hezekiah was sick unto death and the prophet, Isaiah the son of Amoz, came to him and said unto him, 'Thus said the Lord: Command your house, for you shall die and not live.'"³⁷ The phrase "for you shall die and not live" seems redundant however, and according to the Talmud, the verse means, "you shall die in this world and not live in the world to come." Hezekiah asked why he warranted such a harsh sentence,³⁸ and

³⁴This also explains how the same verses are construed to apply to protection of one's own life as to rescuing another's. In addition, note that Maimonides categorizes these laws together under the heading "Laws of Murder and Guarding One's Life."

³⁵See SHLOMO ZALMAN AUERBACH, *MINHAT SHLOMO* 91.

³⁶*Id.* See also *Is Euthanasia Permissible Under Jewish Law*, *JEWISH LAW REPORT* 24 (August 1994). See also Jakobovits, *supra* note 31:

The value of human life is infinite and beyond measure, so that any part of life -- even if only an hour or a second -- is of precisely the same worth as seventy years of it, just as any fraction of infinity, being indivisible, remains infinite. Accordingly, to kill a decrepit patient approaching death constitutes exactly the same crime of murder as to kill a young, healthy person who may still have many decades to live. For the same reason, one life is worth as much as a thousand or a million lives -- infinity is not increased by multiplying it. This explains the unconditional Jewish opposition to deliberate euthanasia as well as to the surrender of one hostage in order to save the others if the whole group is otherwise threatened with death [footnotes omitted].

³⁷*Isaiah* 38:1, translated in Bleich, *LIFE*, *supra* note 18, at 141.

³⁸T.B., *BERAKHOT* 10a.

Isaiah responded by saying it was because Hezekiah had not engaged in procreation. Hezekiah replied, "I saw by means of the holy spirit that wicked children would descend from me." Isaiah retorted, "What have you to do with the plans of the All-Merciful? You should do what you are commanded to do and let the Holy One, blessed be He, do that which is pleasing to Him."³⁹

The obligation to procreate is an affirmative commandment. Loss of the opportunity to live in the world to come is not the prescribed punishment for failure to perform an affirmative commandment. The late Rabbi Chaim Shmuelevitz, a twentieth century scholar, explains that the punishment was so severe because of the reason why King Hezekiah had failed to perform the commandment. Rabbi Shmuelevitz explains that Hezekiah, who the Talmud elsewhere repeatedly and lavishly extols, had improperly impinged upon the province of the Creator by basing his conduct on his own evaluation of the consequences of the commanded action. Consequently, Hezekiah's encroachment into the sphere reserved for Divine decision was regarded as a form of rebellion against the Creator's authority.⁴⁰

Rabbi Bleich argues that this Talmudic lesson regarding the generation of life applies equally with respect to the protection and preservation of life.⁴¹ Indeed, even if a person is so ill that, as discussed below, some Jewish law authorities believe it proper to pray that the Creator take the person's soul and end the person's suffering one is, nonetheless, required to violate the Sabbath, repeatedly if necessary, in an attempt to preserve that life.⁴²

There are legal consequences to the principle that man's life is not his to do with what he wants. In a society ruled by Jewish law, the government would compel a person to fulfill his responsibility to safeguard his health. Thus, in the case mentioned above, where a Jew refuses to violate the Sabbath to save his life, the government would ordinarily compel him to do so. Even in a secularly governed society, most

³⁹Hezekiah's response was to immediately repent and ask to marry Isaiah's daughter.

⁴⁰CHAIM SHMUELEVITZ, *SIHOT MUSSAR* 35.

⁴¹Bleich, *LIFE*, *supra* note 18, at 141-142.

⁴²*See, e.g., AUERBACH, supra* note 35.

authorities rule that a third party's duty to rescue would theoretically demand that the third party try to force the sick person to violate the Sabbath and save his life.⁴³ Thus, despite the biblical prohibition against eating on Yom Kippur, a person must eat if it is necessary to preserve his life. If the person wrongfully abstains, another person should force him to eat.⁴⁴ One must take such steps even if the risk to life is doubtful.⁴⁵ Moreover, one must take these steps even when the likelihood of their success is slight⁴⁶ or even if such success will only preserve life momentarily.⁴⁷ Nevertheless, as explored later on, additional variables may affect *whether* a person has a duty to do specific types of things to preserve his life or the life of someone else in a particular case.

⁴³MAGEN AVRAHAM, COMMENTARY OF SHULHAN ARUKH, *Orah Hayyim*, 328 (6): "if the patient refuses to accept the prescribed treatment [because doing so would desecrate the Sabbath], we compel him to do so."

⁴⁴See ABRAHAM, *supra* note 5, at 10:3, 53 (citing authorities).

⁴⁵See, e.g., AVRAHAM, *supra* note 43, at 328:5; YISROEL MEIR KAGANOFF, MISHNAH BRURAH, SHULHAN ARUKH, *Orah Hayyim* 328:17; ABRAHAM, *supra* note 5, at 10:2, 53. The complete discussion regarding coercion, *infra* notes 135-137 and accompanying text.

⁴⁶T.B., YOMA 83a. See also Rabbi Yaakov Weiner, *Obligation of the Sick to Accept Medical Treatment*, JERUSALEM FORUM ON MEDICINE AND HALACHA (Report #8).

⁴⁷The Talmud states that one must violate the Sabbath even to temporarily preserve the life of one who is soon to die. See T.B. YOMA 85a. Similarly, SHULHAN ARUKH, *Orah Hayyim* 329:4, states "Even if one finds a wounded person with a crushed skull who will continue living only temporarily, one [violates the Sabbath and] saves him."

It is true that, at one point, the Talmud states that the reason why the Sabbath laws are violated to save a person's life is that "we violate one Sabbath so that [the person rescued] can perform the mitzvah of fulfilling many other Sabbaths." T.B., Yoma 85a. Nevertheless, the Talmud concludes that the real reason why this is permitted is that the commandments were given to live by, and not to die by. *Id.* See also WALDENBERG, *supra* note 22, at VIII:28; AUERBACH, *supra* note 35:

[W]e even violate the Sabbath to save an old, sick man ... even though he is deaf and totally insane, and cannot fulfill any commandment, and his life is only a great burden and ordeal for his family members and prevents them from learning Torah and doing commandments, and, in addition to their severe distress, they become impoverished [through the attendant expenses]"

The General Permissibility of Medical Intervention

Given that Jewish law emphasizes the Creator should decide matters of life and death, one might think medical intervention would be perceived as an improper interference with the Divine Will. But this is not the case. The Torah specifically states that, in addition to other liabilities, a tortfeasor must "provide for [the victim's] healing."⁴⁸ This verse is construed as permitting physicians⁴⁹ to provide medical treatment.⁵⁰ Moreover, once such treatment is permitted, it becomes part of the commandment to preserve a person's health and to save a person's life.⁵¹ The obligation to treat applies even to those who are terminally ill and who seem unlikely to live for more than a brief period of time.⁵²

⁴⁸*Exodus* 21:19.

⁴⁹Before secular licensing systems were instituted, rabbinical authorities were responsible for establishing standards to determine who were qualified to practice medicine. See Jakobovitz, *supra* note 31, at 216-217. Dr. Jakobovitz asserts that "[t]he Jewish system, therefore, would appear to represent the oldest, and certainly the longest established, form of regular control over the practice of medicine." *Id.* at 217. Once civil authorities implemented licensing laws, rabbinic authorities recognized persons so licensed as qualified as a matter of Jewish law as well. *Id.* (citing authorities).

⁵⁰ See SHULHAN ARUKH, *Hoshen Mishpat* 336:1. See also T.B., BAVA KAMA 85a.

⁵¹See *id.* ("[I]f [one who is qualified to practice medicine] refrains from [providing life-saving medical treatment], he is a murderer"). See also T.B., SANHEDREN 73a (stating that a physician's duty to treat based on the verses "[d]o not stand idly by your fellow's blood,") *Exodus* 20:13 and ("if your fellow is missing something, you shall restore it to him,") *Deuteronomy* 22:2. The detailed rules regarding matters such as which of several available physicians would be obligated to treat, the right to payment for treatment, and liability for improper treatment exceed the scope of this Article.

⁵²A statement published in Hebrew in 1994 by four leading Israeli authorities, Rabbi Yosef Shalom Eliashiv, Shlomo Zalman Auerbach, Shmuel Ha-Levi Wosznor and S.Y. Nissim Karelitz, reads, in part: "According to the law of the Torah it is obligatory to treat even a patient who, according to the opinion of the physicians, is a terminal, moribund patient with all medications and usual medical procedures as needed." See Bleich, *supra* note 22, at 58 (translating the Hebrew statement). Attached to this statement was a list of medical treatments including "intravenous or gastric feeding, IV fluid replacement, insulin injections, controlled dosages of morphine, antibiotics and blood transfusions." *Id.*

Similarly, a statement dated February 29, 1996, was issued by Rabbi Ahren Soloveichik, an American rabbinic authority, stating, in part: "It is my unmitigated, convinced opinion that a physician must do his utmost to treat terminally ill patients. This is true whether physicians believe that the patient can survive for even an extremely brief period of time, or even if they

Rabbi Bleich asserts Jewish law does not distinguish between “natural” or “artificial” treatments.⁵³ He argues:

God created food and water; we are obliged to use them in staving off hunger and thirst. God created drugs and medicaments and endowed man with the intelligence necessary to discover their medicinal properties; we are obliged to use them in warding off illness and disease. Similarly, God provided the materials and the technology which make possible catheters, intravenous infusions and respirators; we are likewise obligated to use them in order to prolong life.⁵⁴

Rabbi Bleich also maintains that Jewish law makes no distinction between “ordinary,” “extraordinary,” or “heroic” treatment. As a general rule, he argues any treatment that will preserve a patient’s life is required.⁵⁵ Nonetheless, as discussed in the section “Application of Jewish Law Principles to Physician-Assisted Suicide,” there are authorities who disagree, particularly in circumstances involving pain or patient suffering.

The Special Case of the “*Goses*”

Under Jewish law, a person close to death may have a special status as a *goses*. The experience of being a *goses* is referred to as *gesisah*. According to Jewish law, a very large majority of those who become a *goses* die within seventy-two hours.⁵⁶ Thus, if someone sees that an immediate relative is a *goses* and then loses contact with that relative for seventy-two hours, the Jewish laws regarding mourning apply because it

believe that the patient is brain dead ...” *Id.*

⁵³*Id.* at 59: “Any distinction between ‘natural’ and ‘artificial’ means of treatment is without precedent in Jewish law.” Rabbi Bleich argues that this position is supported by Maimonides’ Commentary on the Mishnah.

⁵⁴*Id.* at 61.

⁵⁵*Id.*

⁵⁶See MOSHE FEINSTEIN, IGGEROT MOSHE, *Hoshen Mishpat* II:75 (arguing that if someone deemed to be a *goses* lives more than 72 hours, it is more likely that the person never was a *goses* than that the person was from the small minority of *gosesim* that survive more than 72 hours). *But see* RABBENU ASHER, COMMENTARY 3:97, ON T.B., MOED KATAN (*gesisah* lasts 3 or 4 days).

is assumed the *goses* has died.⁵⁷ Similarly, although Jewish law does not allow a widow to remarry unless there is proof that her prior husband has died, some authorities rule testimony that the prior husband was a *goses* seventy-two hours earlier is sufficient to permit her to remarry in the absence of more direct evidence.⁵⁸

With respect to most aspects of Jewish law, a *goses* is just like any other person,⁵⁹ and thus, the punishment for killing a *goses* is the same as that for killing a non-*goses*.⁶⁰ However, there are two specific rules regarding *gosesim* that have given rise to an important debate both as to the underlying conceptualization of *gesisah* as well as to specific rules regarding *gesisah*. First, it is generally forbidden to touch a *goses*; because, in light of his condition, such touching might hasten the *goses*' death.⁶¹ Second, as Rabbi Moses Isserles (traditionally known as the *Rema*) states, one may remove "anything that prevents the departure of the soul, such as a clanging noise [e.g., the sound of a nearby woodchopper] or a grain of salt that is on his tongue ... since such acts do not quicken death but merely remove an impediment to death."⁶²

According to a number of authorities, the laws regarding *gesisah* reflect the belief that a person who exhibits certain symptoms is so weak in the three days immediately preceding his death that any unnecessary

⁵⁷SHULHAN ARUCH, YOREH DEAH 339:2.

⁵⁸See, e.g., SHMUEL BEN URI, BEIT SHMUEL COMMENTARY ON SHULHAN ARUKH, EVEN HAEZER 17:18, 94 (citing authority). But see YEHEZKEL LANDAU, DAGUL MERVAVAH COMMENTARY ON BEIT SHMUEL, SHULHAN ARUKH EVEN HAEZER 17:94.

⁵⁹See SHULHAN ARUKH, YOREH DEAH 339:1 ("A *goses* is considered alive for all matters"). See also MISHNAH, SEMAHOT 1:1; MAIMONIDES, MISHNAH TORAH *Laws of Mourning* 4:5.

⁶⁰See, e.g., YOSEF BEN MOSHE BABAD, MINHAT HENUKH, commandment 34 ("Even if [the Prophet] Eliyahu would come and tell us that a particular person will live only an hour or a moment, still the Torah does not distinguish between one who kills a lad who would live many years or one who kills an old man who had little more to live ...").

⁶¹See SHABTAI KOHEN (the *Shach*), COMMENTARY ON SHULHAN ARUKH, YOREH DEAH 339:1. The *goses* is likened to a candle whose flame is about to expire. If one places a finger on it, it is extinguished. T.B., SHABBAT 151b.

⁶²The source of this rule is a statement published by the thirteenth century scholar, Rabbi Judah HaHasid, in his work SEFER HASIDIM, at 723 "[I]f a person is dying and someone near his house is chopping wood so that the soul cannot depart, one should remove the chopper from there."

touching or movement could hasten that death and is, therefore, prohibited. On the other hand, medical intervention that could prolong the patient's life is not only permitted but required⁶³ to the same extent as it would be required with respect to a person who is not a *goses*.⁶⁴ After all, there is no Talmudic source that suggests the commandments to save someone's life do not apply to a *goses*. The absence of such a Talmudic source is especially noteworthy given that the Talmud clearly requires that the Sabbath be violated to rescue even those who face imminent death. As to such rescues, the Talmud mentions no basis for differentiating *gosesim* from others who are about to die. Indeed, the particular Talmudic examples may, in fact, deal with people who are *gosesim*.⁶⁵

The scholars who believe it is important to extend the life of a *goses* must explain why the *Rema* permits⁶⁶ the discontinuance of certain actions

⁶³See, e.g., YAAKOV RECHER, SHEVUT YAAKOV I:13; SHLOMO EGGER, GILYON MAHARSHA, on SHULHAN ARUKH, YOREH DEAH 339:1; WALDENBERG, *supra* note 22, at 28; ABRAHAM S. ABRAHAM, NISHMAT AVRAHAM *Orah Hayyim*, 329:4(11), (citing sources); YOREH DEAH 339:2 (“[S]o long as it is not clear that the [*goses*] is definitely dead, he is called a live person for all purposes, and a physician is obligated to treat him in every way that is possible and appropriate ... even if there is only a small chance that the patient will remain alive and even if the patient may stay alive for only a short while”).

⁶⁴See section Application of Jewish Law to Physician-Assisted Suicide as to possible limitations on the obligation to preserve life.

⁶⁵For instance, the Talmud states that it is permissible to violate the Sabbath by digging out a person on whom a wall had fallen even after initial digging revealed that the person had a crushed skull, that he would die extremely soon and that continued digging would only momentarily extend his life. T.B., YOMA 85a. This law, memorialized in SHULHAN ARUKH, ORAH HAYYIM 329:4, certainly seems to be describing a person who would surely die within 3 days. Consequently, according to any authorities who do not require the precise symptoms specified by the *Rema*, see *infra* note 70, this person with a crushed skull would seem to be a *goses*. Moreover, it seems quite possible that this person with a crushed skull might also have the *Rema's* symptoms.

⁶⁶In his earlier work, DARKEI MOSHE, *Yoreh Deah* 339(1), the *Rema*, apparently approvingly, cites an authority forbidding someone to commence such an action. In his commentary to the SHULHAN ARUKH, YOREH DEAH 339:1, the *Rema* does not seem to retreat from this position. Instead, he appears to focus on a third party who did not initiate the action and states that such a party may put a stop to it. Rabbi Waldenberg indicates that a person responsible for the wrongful commencement of the action may be obligated to terminate the action. See WALDENBERG, *supra* note 22, at 89.

that prevent a *goses* from dying. There seem to be two basic approaches.⁶⁷ The first approach restricts the *Rema's* rule to actions that do not medically affect the *goses'* condition but, instead, are merely believed, perhaps mistakenly, to have a metaphysical effect that may keep the *goses* alive. This position contends that while the religious obligation to preserve life requires resort to established medical therapy, it does not require use of nonscientific practices (*segulot*).⁶⁸ The second approach appears to argue that the *Rema's* rule only applies to the very end of the *gesisah* period, when a person's soul is trying to escape the body.⁶⁹ The Talmud suggests there is pain at the moment of death.⁷⁰

The *Rema*⁷¹ identifies the symptoms of *gesisah* as involving the bringing up of secretions in the throat because of certain severe chest

⁶⁷Some commentators use language which purports to provide a third approach which distinguishes between procedures that strengthen the body, which are required, and those that "merely" preserve the status quo, which the *Rema* supposedly proscribes. The problem, however, is that preserving a patient's life is an important feat and, according to the authorities whose views this part of the text discusses, any established medical procedure that preserves life is required. At least one author seems to conflate this apparently illegitimate distinction -- between treatments that enhance one's condition versus those that "merely" preserve one's life -- and the apparently legitimate distinction between scientific and nonscientific practices described in the following text. See, e.g., WEINER, *supra* note 30, at 31 ("Medical treatment strengthens the body and prevents a *goses* from deteriorating towards death; (compared, for example, to salt on the tongue which only metaphysically prevents the soul from departing, but which has no physically ameliorative effect on the body, such as strengthening it").

⁶⁸Bleich, *supra* note 22, at 69-70.

⁶⁹See, e.g., WALDENBERG, *supra* note 22, at 89(14). One might think this position to be problematic. After all, the *Rema* refers simply to a *goses* and seems to set forth his rule regarding the entire period of *gesisah*. If special rules are to apply only at the end of the period of *gesisah*, it would seem essential for the *Rema* to enumerate criteria for determining when *gesisah* is about to end. Rabbi Weiner's position, which combines the two approaches mentioned in the text, may implicitly answer such objections. Weiner argues not only that the effect of the actions identified by the *Rema* are metaphysical rather than medical but that, even if initiated at an earlier part of the *gesisah* period, the actions have their metaphysical impact at the end of *gesisah*. The actions are therefore prohibited at any time during *gesisah* because of their ultimate effect. See Rabbi Yaakov Weiner, *Insights on the Treatment of the Terminally Ill*, JERUSALEM FORUM ON MEDICINE & HALACHA (Report #5).

⁷⁰See Bleich, *supra* note 22, at 51 n.47 (discussing T.B., YOMA 20b).

⁷¹*Rema*, SHULHAN ARUKH, EVEN HAEZER 121:7 and HOSHEN MISHPAT 211:2.

problems.⁷² Some authorities seem to suggest a person is not a *goses* unless he exhibits these particular symptoms.⁷³ Even if a person has symptoms of *gesisah*, he is not a *goses* unless his condition is irreversibly⁷⁴ terminal, and death is likely within three days. According to this view, it seems if a person is expected to live more than three days, it is not assumed he is so weak that needless touching will hasten his death. Of course, if physicians conclude touching someone who is sick could hasten death, touching would be prohibited, even if the person did not exhibit the symptoms of a *goses*. Where someone is a *goses*, however, Jewish law forbids such unnecessary touching even without a particularized medical diagnosis that such touching could be fatal.

There is some debate among contemporary rabbinic scholars as to whether someone can be considered a *goses* when that person could live more than three days only through modern medical intervention, such as

⁷²Commentators disagree as to the *Rema's* meaning. Rabbi Bleich, for instance, translates the *Rema* as referring to a patient who "brings up secretion in his throat on account of the narrowing of his chest." Bleich, *supra* note 22, at 63. In a phone conversation with this author, Bleich described the secretions as saliva and stated that "the *goses* experiences difficulties in swallowing." Another contemporary writer, however, identifies the secretion as phlegm and states that the *goses* experiences problems in breathing. See WEINER, *supra* note 30, at 25. See also Friedman, *supra* note 5, at 99 ("The current pathophysiological explanation would be a person who is asphyxiating his own secretions which accumulate in the airway").

⁷³Rabbi Bleich, for instance, states that the *Rema's* description is a "necessary criterion of *gesisah*." *Id.* at 63. Rabbi Ahron Soloveichik writes, "The situation of a *goses* does not even have to be considered since today very few, if any, patients manifest the symptoms of a *goses*." *Id.* at 58. The late Rabbi Moshe Feinstein, however, is ambiguous whether someone could be a *goses* even if he does not have the symptoms described by the *Rema*. Rabbi Feinstein states that he has heard that most physicians are unfamiliar with the signs of *gesisah*. Nevertheless, Rabbi Feinstein neither recites the symptoms identified by the *Rema* nor refers physicians to the *Rema's* words in the SHULHAN ARUKH. Instead, Rabbi Feinstein asserts that members of local Jewish burial societies are familiar with such symptoms because they are often around people who are dying (perhaps because these same people frequently visit the sick). Rabbi Feinstein suggests that physicians could learn these symptoms, too, if they would spend time with patients who were near death. See FEINSTEIN, *supra* note 56. Consequently, it is possible that Rabbi Feinstein's position is that anyone whose clinical profile, as observed by those who are experienced with people who are dying, conclusively indicates that he will die within three days is a *goses*.

⁷⁴YAAKOV BAR SHMUEL, SHUT BEIT YAAKOV 59, as cited by Bleich, *supra* note 22, at 81-82 n.27.

by the use of a respirator.⁷⁵ Those who say such a person is not a *goses* cite the Jewish laws regarding mourning and remarriage mentioned above. Those laws must have assumed a *goses* would have died within three days despite medical intervention.⁷⁶ Otherwise, the possibility of medical intervention extending the person's life beyond three days would have precluded the woman's remarriage without more substantial proof of the husband's death. According to this view, if a person is only a *goses* when it seems clear he will die within three days despite all available medical technology, the number of modern cases involving *gosesim* seems relatively small.⁷⁷

Other Jewish law authorities appear to regard *geisah* as a painful period of dying which is not to be prolonged, even by well-established medical intervention.⁷⁸ One recent influential scholar, the late Rabbi Moshe Feinstein, would apply this rule even to a comatose *goses* and even if attending physicians claim the *goses* experienced no pain. Rabbi Feinstein asserted that, "as the soul detaches itself from the body, a *goses* experiences a severe metaphysical pain which physicians may simply be unable to detect."⁷⁹ Indeed, only by positing the existence of such pain could Rabbi Feinstein explain why the *Rema* would permit the removal of obstacles to a *goses*' death. According to Rabbi Feinstein, if there was no

⁷⁵See, e.g., Bleich, *supra* note 22, at 64. Rabbi Bleich argues that Rabbi Moshe Feinstein agree with him on this point. *Id.* at 82 n.31. Cf. Abraham Steinberg, 4 ENCYCLOPEDIA HALAKHATIT REFUIT 371, n.149 (stating that he heard from Rabbi Shlomo Zalman Auerbach that, in light of the ability of modern technology to keep patients alive for more than three days, it is often not possible to characterize a particular patient as a *goses*); ABRAHAM S. ABRAHAM, 4 NISHMAT AVRAHAM 138 (reporting that contemporary scholar Rabbi Y. S. Eliashiv stated that he considers a vegetative, respirator-dependent patient to be a *sofek-goses* (possibly a *goses* and possibly already dead) and therapy should not be withheld). *But see* G.A. RABENOWITZ, 3 HALAKHA AND REFUAH 102 (arguing that in light of modern technology, a person may be a *goses* even though he survives for many more than 3 days). Steinberg, *supra* note 75 and Fred Friedman, *supra* note 5, at 100-101.

⁷⁶See Bleich, *supra* note 22, at 64.

⁷⁷The number of *gosesim* is especially small according to those who believe that a person can only be a *goses* if she exhibits the specific symptoms cited by the *Rema*.

⁷⁸See YAAKOV BAR SHMUEL, *supra* note 74; FEINSTEIN, IGGEROT MOSHE, *Yoreh Deah* II:174(3).

⁷⁹*Id.*

special pain, the general commandment to preserve a person's life would obligate the person to place obstacles in the path of a *goses*' death. The absence of any Talmudic source stating a *goses* feels metaphysical pain is, however, problematic for Rabbi Feinstein's position.

The Prohibition Against Giving Someone Improper Advice and Against Enabling Someone to Violate Jewish Law

Rabbinical sources interpret the verse, "[b]efore the blind, do not place a stumbling block,"⁸⁰ as providing a biblical prohibition, referred to as "*lifnei iver*," against giving improper advice or enabling another to violate Jewish law.⁸¹ The verse does not merely refer to someone who is physically blind, but also to someone who is "blind" due to intellectual ignorance or inadequate religious sensitivity as to the proper way to act.⁸²

A person transgresses this prohibition if he wrongfully advises another to commit suicide, or intentionally fails to preserve her own health, and such counsel causes the violation.⁸³ Thus, a physician who successfully persuades a patient to wrongfully shorten her life in order to permit her organs to be used for someone else would violate this prohibition. Similarly, a person violates this rule if he makes it possible for another to commit a sin that would not have been performed without such help.⁸⁴ For instance, assume the only way a person is willing to commit suicide is by using a special suicide device owned only by one particular physician. If that physician makes the device available to the patient and the patient uses it to commit suicide, the physician violates the rule against *lifnei iver*.

There are essentially four views regarding an assistant's possible culpability in cases in which the person could have committed suicide without the assistance.⁸⁵

⁸⁰*Leviticus* 19:14.

⁸¹See generally MICHAEL J. BROYDE, *THE PURSUIT OF JUSTICE & JEWISH LAW* 53-66 (1996).

⁸²See, e.g., SEFER HAHINUKH, Commandment 232.

⁸³See also YOSEF BAR MOSHE BABAD, *MINHAT HINUKH*, on Commandment 232 (failure to convince someone not to commit a sin is a violation of *lifnei iver*).

⁸⁴See SHULHAN ARUKH, *YOREH DEAH* 151:1.

⁸⁵See BROYDE, *supra* note 81, at 59-60.

- (1) some authorities state the assister is still guilty of the biblical *lifnei iver* rule;⁸⁶
- (2) others say the assistance constitutes only a rabbinic violation;⁸⁷
- (3) still others say it is only a rabbinic violation if the assister did not, pursuant to another Jewish law provision, have the obligation to prevent the person from committing a sin;⁸⁸ and
- (4) some say the assister has violated no rule, biblical or rabbinic.⁸⁹

These approaches would be relevant, for example, to cases in which a person wants to overdose on certain prescription drugs and a physician provided such drugs for that purpose.

Application of Jewish Law Principles to Physician-Assisted Suicide

This section examines how the Jewish laws discussed apply to the case of a competent person who wants to die because he or she is experiencing great suffering.⁹⁰ There are five principal issues to be explored regarding the person in pain:

- (1) may she or anyone else do an affirmative act to end her life;
- (2) may someone encourage or assist such an act;
- (3) may she or anyone else hasten her death by passive conduct;
- (4) may someone encourage or assist such passive conduct; and
- (5) may or must someone coerce her to accept medical treatment.

⁸⁶JOSEPH KARO, SHULHAN ARUKH, YOREH DEAH 151:1.

⁸⁷RABBENU NISSIM, COMMENTARY on T.B., AVODAH ZARAH 6b.

⁸⁸SHABTAI KOHEN, COMMENTARY on SHULHAN ARUKH, YOREH DEAH 151:1.

⁸⁹*Rena*, SHULHAN ARUKH, YOREH DEAH 151:1.

⁹⁰A detailed discussion regarding the significance under the Jewish law of emotional distress is beyond the purview of this paper. Consequently, unless otherwise noted, the text's references should be construed as referring to physical pain. Those interested in an introduction regarding the issue of emotional distress should see Moshe Tendler and Fred Rosner, *Quality and Sanctity of Life in the Talmud and the Midrash*, 28:1 TRADITION 18, 23-26 (1993). See also FEINSTEIN, *supra* note 32, II:174(4) (ruling that it would be prohibited to take an organ from a decedent's cadaver to save the life of a prospective organ donee because of the emotional distress of the decedent's surviving relatives); and comments thereon in Bleich, *supra* note 22, at 86 n.56.

Affirmative Acts to Terminate Life

Suppose a competent person wants to die because she is experiencing great physical pain.⁹¹ Even if she is a *goses*, normative Jewish law would prohibit any affirmative act to terminate her life. Likewise, even those authorities who do not allow affirmative actions to prolong the life of a *goses* would agree.⁹²

⁹¹It should be noted, however, that modern advances indicate pain can be effectively controlled in most instances. See, e.g., Albert Einstein, *Overview of Cancer Pain Management*, PAIN MANAGEMENT AND CARE OF THE TERMINAL PATIENT 4 (Judy Kornell, 1992) ("adequate inventions exist to control pain in 90 to 99 percent of patients"); Burke J. Balsch and David Waters, *Why We Shouldn't Legalize Assisting Suicide, Part II: Pain Control*, <http://www.nrlc.org/euthanasia/asisuid2.html>. Hopefully, additional, aggressive pain palliation research will even further reduce the number of people who experience significant pain.

⁹²Even those who, in different contexts, consider the extent of a person's suffering as legally significant do not argue that suffering justifies affirmative actions to terminate one's life. See, e.g., FEINSTEIN, *supra* note 78, at 174(3) ("But doing an act to hasten the death [of a *goses*] is proscribed ... even though [the *goses*] is suffering and doing so would constitute murder violating the injunction 'Thou shalt not kill' and would [render a person] subject to capital punishment ..."); Tendler and Rosner, *supra* note 90, at 18.

Although the view in the text surely represents normative Jewish law, it is important to note that some argue there is support for a contrary position among early Jewish law authorities. Such alleged support appears in a few of the commentaries regarding King Saul's death, see I *Samuel* 31:1-6; II *Samuel* 1:1-16, and is not necessarily inconsistent with the Talmudic discussion of Chanina ben Teradion's death.

Saul's forces were losing a battle with the Philistines, when he realized that the Philistines had surrounded him and that he could not escape. Fearing imminent capture, he asked his arms-bearer to kill him. The arms-bearer refused, whereupon Saul fell on his own sword, which may have killed him. Although Scripture relates that an Amalekite youth later told King David that he found Saul near death and killed Saul at Saul's request, commentators disagree whether the youth was telling the truth. They suggest he may simply have been trying to make himself seem important by claiming to have put Saul out of his misery. In any event, commentators assume that unless there were some specific legally acceptable justification, Saul's initial act of falling on his sword would have been blameworthy.

The Talmud reports that there was a famine in all of the land of Israel for three years and that one of the reasons for the famine was the fact that Saul had not been eulogized. See T.B., YEVAHOT 78b. At first blush, this report is puzzling, because Jewish law provides that a person who commits suicide is not to be eulogized. SHULHAN ARUKH, YOREH DEAH 345:1. Many solutions have been suggested. Some contend that Saul feared not only that the Philistines would torture him, but that, because of such torture, he would accede to his torturers' demands to perform idol-worship. Doing so would constitute a *Chillul HaShem*, a desecration of God's Name. According to this view, suicide is justified to avoid *Chillul HaShem*. See, e.g., WEINER, *supra* note 30, at 5 (indicating that this was the view of the fourteenth century scholar, Rabbi Yom Tom Ishbili, known as the *Ritva*). Another approach states that Saul's action was warranted

by his fear that other Jews would foolishly lose their lives trying to rescue him. *See Id.* (citing Shlomo Luria, YAM SHEL SHLOMO on T.B., BAVA KAMA 8:59). A third view is that Saul was not justified in what he did but that post-mortem rituals, such as eulogies, are not withheld from those who kill themselves while under duress. Accordingly, while the threat of imminent capture and torture did not excuse Saul's conduct, it prevented him from losing the right to a eulogy. *See, e.g.,* WALDENBERG, *supra* note 22, at VIII:29.

None of the preceding explanations state that active suicide is justified simply to avoid threatened suffering. However, a fourth approach arguably does. This is the approach taken by two fourteenth century scholars, Rabbi David Kimchi, known as the *Radak*, and Nachmanides. Both of these scholars rely on the Midrash Rabbah, on *Genesis* 34:13. The Midrash Rabbah is an ancient text that, rather than discussing the oral tradition in a manner organized by subject, comments on Scripture on a verse by verse basis.

In his own commentary to I *Samuel* 31:4, the *Radak* states:

Saul did not commit a sin when he killed himself. He knew he was anyway going to die in the battle because [the Prophet] Samuel had told him so ... In addition, he saw that archers had spotted him and that he was unable to escape them. It was good that he killed himself rather than have the uncircumcised [*i.e.*, the Philistines] make sport of him.

On page 7 of his book, *YE SHALL SURELY HEAL: MEDICAL ETHICS FROM A HALACHIC PERSPECTIVE* (1995), Rabbi Yaakov Weiner, a contemporary writer, states that the *Radak*, "under conditions of certain humiliation, disgrace and torture, ... permits the shortening of life." Rabbi Weiner says that the *Radak* "enhances our understanding of the statement of ... [Rabbi Chanina ben Teradion], who told his students that 'It is *better* [*mutav*] that the One Who gave the soul should take it.'" (Emphasis in original) *Id.* Rabbi Weiner argues that Rabbi Chanina did not say that it was prohibited for him to open his mouth and hasten his death, but merely that, for some unstated reason -- applicable to a special person such as Rabbi Chanina and not to others - it was better, preferable, that Rabbi Chanina not do so.

Nevertheless, Weiner's interpretation is not particularly persuasive. He adduces no evidence for the proposition that the Hebrew word *mutav*, as used in the Talmud, was intended to signify only a preference rather than an obligation. In addition, by being somewhat less literal in his translation of the *Radak*, he avoids reference to the "uncircumcised." Yet the *Radak's* use of that word arguably supports the position that Saul's case was unique because Saul feared a *Chillul HaShem* would result from the fact non-Jews would make sport of the Jewish king.

Nachmanides writes that committing suicide was "permitted" to Saul because he feared torture. *See* NACHMANIDES, *WRITINGS OF THE RAMBAN* 84 (Heb., Chavel, 1964). This same word, "permitted," is used by Rabbenu Asher ben Yehiel (the *Rosh*), a Fourteenth Century scholar, in his Commentary (no. 94) to the Babylonian tractate, Moed Katan. A major Jewish law code, the SHULHAN ARUKH, YOREH DEAH 345:3, states that a person, such as Saul, who commits suicide because of duress is entitled to a eulogy. Rabbi Moshe Rivkes, in his Seventeenth Century commentary on the Shulhan Arukh, the Beer HaGoleh, indicates that Nachmanides is the source for this law. Consequently, if Nachmanides' use of the word "permitted" is interpreted to mean that it was a perfectly appropriate thing for Saul to do, one could argue that suicide would be similarly acceptable for someone suffering from uncontrollable pain.

Her suffering would not alter the basic Jewish law approach as described in Relevant Jewish Law Principles stating that matters of life and death are to be determined by God.⁹³

As proof for the position that a person cannot take an affirmative act to hasten her death regardless of her suffering, various rabbinic authorities⁹⁴ cite a Talmudic passage describing the execution of Rabbi

In his *ALTERNATIVES IN JEWISH BIOETHICS*, pp. 54-58, Noam J. Zohar provides a fascinating discussion of Saul's death and of various explanations as to why he should have been eulogized. Zohar spends considerable time on Nachmanides' view while, ironically, not mentioning the *Radak*. Zohar points out that the former Chief Rabbi of Cairo, Rabbi R. A. ben-Shimon applied the Shulhan Arukh's rule to a sick woman who, being driven by intractable pain, committed suicide by throwing herself out of the window of a building. Zohar asserts that: We can, then, conclude with confidence that condemnation of such suicide is hardly the only voice in the Halakhic tradition; nor is such condemnation entailed by the tradition's basic values."

Zohar's assertion deserves comment. For example, his use of the word "condemnation" is unclear. Rabbi Waldenberg's approach, that Saul's conduct, while wrong, did not forfeit his right to customary post-mortem procedures is, as Zohar elsewhere acknowledges, following a well-known [analytical] model." *Id.* at 55. Rabbi ben-Shimon's ruling with respect to the woman who committed suicide could just as easily be understood as consistent with Rabbi Waldenberg's approach as with the Zohar attributes to Nachmanides. Furthermore, in light of the substantial body of rabbinic authority that proscribes the affirmative taking of one's life merely to avoid pain, it is uncertain whether Nachmanides (or the *Rosh*) meant the word "permitted," as Zohar thinks, to totally justify such conduct. In addition, even if Nachmanides or the *Rosh* did mean that Saul's conduct was entirely permitted, their position may have been based, at least in part, to the special circumstances, as identified by other commentators, surrounding Saul's death.

⁹³A number of authorities explain that Jewish law believes that life, even a life with suffering, is in a person's own best interests. To support this proposition, they cite a Talmudic passage regarding a *Soteh*, a woman accused of adultery under certain specific circumstances. In the times of the Temple, a *Soteh* might be required to drink a certain potion. *Numbers* 5:11-31. If guilty, she would die – but not always immediately. The Talmud explains that if, unrelated to the adultery, the woman had other merits, the potion would cause a degenerative, lingering death. Although this condition would presumably involve physical and emotional pain, it was nonetheless considered a reward in contrast to immediate death. See, e.g., Bleich, *LIFE*, *supra* note 18, at 141, (citing *Psalms* 118:18), (this "sentiment ... is reflected in the words of the Psalmist: 'The Lord has indeed punished me, but He has not left me to die'"). See also AUERBACH, *supra* note 35; ABRAHAM, NISHMAT AVRAHAM, *Yoreh Deah* 339(4). Of course, it may be that a particular person's suffering could exceed the pain involved in a *Soteh's* lingering death. If so, the case of the *Soteh* would not prove that continued life coupled with excessive pain would be a boon.

⁹⁴See, e.g., MOSHE SOFER, HATAM SOFER, *Yoreh Deah* 326, as cited by WEINER, *supra* note 30, at 24; WALDENBERG, *supra* note 22, at 29.

Chanina ben Teradion, who was burned alive by the Romans. Rabbi Chanina's students implored him to end his suffering quickly by opening his mouth and allowing the flames to enter. He replied, "It is better that He who gave [me my soul] should take it rather than I should cause injury to myself."⁹⁵

If one convinces a person to commit suicide when that person would otherwise not commit suicide, one violates the biblical rule against *lifnei iver*. So, too, does one who enables a person to commit suicide by providing assistance which that person could not otherwise obtain. According to a number of authorities, even if the person could manage to kill herself without such assistance, helping her do so would violate rabbinic law at least.⁹⁶

Similarly, it would be murder if a third party acted to affirmatively end her life, even if she begged him to do so, and he believed that, in light of her great suffering, she would be better off dead. Rabbi Jacob Zevi Mecklenburg, a nineteenth century scholar, derives this from a close examination of the verse cited above: "The blood of your lives will I require; from the hand of every beast will I require it, and from the hand of man, from the hand of a person's brother, will I require the life of man."⁹⁷ What is the purpose of the final phrase, "from the hand of a person's brother, will I require the life of man?" A proscription against fratricide would seem to follow logically from the prohibition against ordinary homicide. According to Jewish law's oral tradition, if a rule can be logically derived, there is no need for it to be explicitly stated in the Pentateuch. Consequently, this biblical passage must communicate some additional message. Rabbi Mecklenburg argues the apparent surplusage is necessary to outlaw an act of killing even when the act is motivated by

⁹⁵T.B., AVODAH ZARA 18a. Interestingly, the end of this same story seems superficially to contradict the rule proscribing affirmative acts to terminate the life of one who is in great pain. Unfortunately, an analysis of the story and the various explanations offered by Jewish law authorities exceeds our scope.

⁹⁶See BROYDE, *supra* note 81, at 59-60.

⁹⁷*Genesis* 9:5, as translated by Bleich, LIFE, *supra* note 18.

“brotherly love,” *i.e.*, by a misguided desire to mercifully end the life of a person suffering from excruciating pain.⁹⁸

This is true even if the sufferer is also a *goses*. As Rabbi Yehiel Epstein, a nineteenth and early twentieth century authority, points out:

Even if we see that the *goses* suffers greatly from his *gesisah* and that it is good for him to die, nevertheless it is prohibited for us to do anything that will hasten his death. The world and all that fills it belongs to the Holy One, blessed be He, and such is His wish ...⁹⁹

Even the late Rabbi Moshe Feinstein, rules leniently in allowing people suffering intractable pain to passively refuse to preserve their lives, states:

Doing an act to hasten the death [of a *goses*] is proscribed ... even though [the *goses*] is suffering and doing so would constitute murder violating the injunction ‘Thou shalt not kill’ ... A person incurs the death penalty if he kills someone suffering intractable pain out of a sense of mercy, even though [the deceased] asked him [to do it].¹⁰⁰

Indeed, according to many authorities, one is required to save a sufferer’s life, even if the sufferer is a *goses* and even if one must violate the Sabbath to do so.¹⁰¹

What if there are reasons, other than pain, why a person wants to die? Jewish law arguably recognizes a few reasons for which one might justifiably commit suicide, such as to avoid being forced to commit

⁹⁸JACOB ZEVI MECKLENBURG, HAKETAV VEHA KABBALAH 20 (5th ed. 1946), cited by Bleich, LIFE, *supra* note 18, at 139-140. See ABRAHAM, *supra* note 5, at 193.

⁹⁹ARUKH HA-SHULHAN, YOREH DEAH 339:1. See ABRAHAM DANZIG, HOKHMAT ADAM 151:14 (“[I]t is prohibited to cause [a *goses*] to die more quickly even if he has been a *goses* for a long time and ... [he] and his relatives are suffering a great deal ...”).

¹⁰⁰See FEINSTEIN, *supra* note 78. See also ABRAHAM, *supra* note 5, at 193-194 (citing rules and authorities); Tendler and Rosner, *supra* note 90, at 18, 20.

¹⁰¹YAAKOV REICHER, SHUT SHEVUT YAAKOV 2:13; MEIR KAGANOFF, BIUR HALAKHA ORAH HAYYIM 329, *s.v.* Eleh; HAYYIM AZULAI, SHULHAN ARUKH, ORAH HAYYIM 329(4); TOSEFOT, COMMENTARY on T.B., NIDAH 44b. See also ABRAHAM S. ABRAHAM, NISHMAT AVRAHAM, *Yoreh Deah* 339:2.

idolatry.¹⁰² Fortunately, because these grounds do not commonly arise and because they do not relate to a person's status as a *patient* of a physician, we will not survey them here.

Encouragement or Assistance of Affirmative Acts to Terminate Life

A person who convinces or enables someone to commit a suicide that would not have otherwise taken place violates the biblical rule against *lifnei iver*. Even if the suicide would otherwise have taken place, a person who provides such encouragement or assistance would at least, according to many authorities, violate rabbinic law. In any event, a person who takes her own life is always liable for suicide.

One who convinces a person to actively terminate another's life when the person would not have otherwise have done so violates the prohibition against *lifnei iver*. Similarly, one who enables a person to affirmatively terminate another's life when the person could not otherwise have done so violates *lifnei iver*. Even if the person could have done so without such assistance, one who provides the assistance would, according to many authorities, at least violate rabbinic law.¹⁰³ Of course, in any event, the person who actively ends another's life is guilty of murder.

In addition to the proscriptions against convincing, assisting, or enabling another to commit murder, a person has a specific obligation to attempt to rescue another whose life is at stake. A person who sees another drowning, has an obligation to try to save him, either by swimming in after him or by hiring somebody else to do so.¹⁰⁴ According to many authorities, this duty to rescue even applies to saving someone trying to

¹⁰²See generally SIDNEY GOLDSTEIN, *SUICIDE IN RABBINIC LITERATURE* 27-50 (1989) (reviewing various possibly exonerating circumstances). See also Kohen, *supra* note 88.

¹⁰³See BROYDE, *supra* note 81, at 59-60.

¹⁰⁴See, e.g., Aaron Kirschenbaum, *The Good Samaritan: Monetary Aspects*, XVII J. HALACHA & CONTEMP. SOC'Y 83 (1989).

commit suicide.¹⁰⁵ Obviously, someone who assists an affirmative suicide or a murder fails to fulfill the obligation to rescue.

Passive Conduct to Hasten the Death of a Person in Great Pain

There is considerable debate among Jewish law authorities pertaining to whether a person experiencing pain is entitled to passively refuse life-preserving medical treatment. No one seems to have explicitly stated that someone has a right to refuse a risk-free, painless medical treatment that is fully expected to cure the condition. Instead, differences of opinion arise when one or both of the following factors are present: the patient is terminally ill and the treatment will merely prolong the patient's temporary and extremely painful condition; and the treatment is not well-established, is painful, is risky, and/or is not likely to succeed.

Treatment That Will Only Temporarily Prolong A Patient's Painful Condition

Some authorities believe that only in truly exceptional cases will the degree of pain excuse someone from the duty to prolong life.¹⁰⁶ Others seem less reluctant in ruling that terminally ill patients experiencing great pain can refuse treatment that will only prolong an agonizing existence. As a practical matter, this debate is only relevant in those instances in which the pain is medically uncontrollable. Where it is controllable, it should, of course, be controlled.

Those who appear less reluctant often rely on the Talmudic discussion of the final illness of Rabbi Yehuda HaNasi, known as "Rebbe," the

¹⁰⁵See, e.g., YOSEF BEN MEIR MIGASH, SHUT RI MIGASH 186; YITZCHOK BEN SHUSHET, SHUT RIVASH 48; SCHNEUR ZALMAN, SHULHAN ARUKH HARAV, HOSHEN MISHPAT *Laws of Bodily Damages* 4; FEINSTEIN, *supra* note 32, at II:174; WALDENBERG, *supra* note 22, at 15, 45 (citing authorities), YITZCHOK WEISS, MINHAT YITZCHOK V:8. *But see* YOSEF BEN MOSHE BABAD, MINHAT HINUKH, Commandment 337.

¹⁰⁶See, e.g., Bleich, *supra* note 22 (arguing that such refusal would be justified only in a rare instance in which intractable pain were so great that the person affected would be willing to give up all of her wealth in order to escape it).

compiler of the Mishnah. Rebbe was suffering greatly,¹⁰⁷ and the other Rabbis as well as Rebbe's devoted female servant, well-known for her devotion and intelligence, prayed around the clock for Rebbe's complete recovery.¹⁰⁸ As time passed, however, Rebbe's servant saw the prayers were not to be fulfilled. Although Rebbe remained alive, he suffered excruciating pain. Finally, the servant concluded it would be better for Rebbe to die and she prayed for his demise.¹⁰⁹ But she soon saw her prayer would not be accepted as long as the Rabbis continued their unabated prayers for Rebbe's recovery. Therefore, the servant threw an urn from the roof of the academy to the ground, smashing it and startling the rabbis, causing a brief halt in their prayers. At that moment, Rebbe died.¹¹⁰

Many commentators cite the conduct of Rebbe's servant as evidence that someone who sees another who is greatly afflicted, with no meaningful prospect for alleviating or curing the pain, should pray for that person's death.¹¹¹ However, not all commentators agree one should pray for

¹⁰⁷This episode is discussed in T.B., KETUBOT 104a.

¹⁰⁸She prayed: "The immortals [*i.e.*, angels] desire Rebbe [to join them] and the mortals [*i.e.*, the Rabbis] desire Rebbe [to remain with them]; may it be the will [of God] that the mortals overpower the immortals." See Tandler and Rosner, *supra* note 90, at 22.

¹⁰⁹She changed her prayer to: "May it be the will [of God] that the immortals overpower the mortals." See Tandler and Rosner, *supra* note 90, at 22.

¹¹⁰T.B., KETUBOT 104a.

¹¹¹See, *e.g.*, Ran, COMMENTARY ON T.B., NEDARIM 40A; AUERBACH, *supra* note 35, at 73; Bleich, *supra* note 22, 56, 59 (stating own view and quoting statement by Rabbi Ahron Soloveichik); Abraham, *supra* note 31, at 125 (citing authorities). There are additional Talmudic examples apparently showing approval of praying for the death of someone who is suffering uncontrollably. See, *e.g.*, T.B., BAVA METSIA 84 (after Reish Lakish died, Rabbi Yochanon was greatly depressed, and the rabbis prayed for his death); T.J., SABBATH 19:2 (Rabbi Ada bar Ahava accidentally mutilated his son during circumcision in such a way that the son would not be able to marry; to save his son from disgrace, he prayed that the boy die and his prayer was answered).

The authorities seem to think that if a third party can pray for one's death, certainly the person who is suffering can pray for her own death. See also T.B., TAANIT 23a (Honi the Circle-Drawer awoke from a seventy-year sleep, suffered severe emotional distress and prayed for death).

another's death even under these circumstances.¹¹² In addition, at least one authority, Rabbi Haim Palaggi, states that persons who might have an improper bias, such as those responsible to care for the patient, should certainly not pray for the patient's death.¹¹³

Rabbi Moshe Feinstein, however, states the cited Talmudic episode not only justifies praying for a person's death but also calls for the rejection of life-sustaining medical treatment for terminally ill patients experiencing excruciating pain who are likely to live less than a few weeks. If treatment can only temporarily prolong a life of agony, Rabbi Feinstein argues non-treatment is appropriate,¹¹⁴ while emphasizing that no affirmative act to terminate a patient's life is permissible. Similarly, Rabbi Shlomo Zalman Auerbach considers a patient's pain and suffering in ruling it is permissible for a person to refuse surgery that, even if successful at saving her life, would cause permanent and life-long paralysis.¹¹⁵

Some of the authorities who agree with the Feinstein-Auerbach approach, take it even a step further. While Feinstein and Auerbach would generally call for the use of medical technology to provide hydration, nutrition, and oxygen to terminally-ill patients even for patients who

¹¹²See, e.g., WALDENBERG, *supra* note 22, at 49, *Kuntres Even Yaakov, Perek 13* (one should not pray for someone else's death).

¹¹³HAIM PALAGGI, HIKKEKEI LEV, *Yoreh Deah 50, discussed in Bleich, supra* note 22, at 56-57.

¹¹⁴See FEINSTEIN, *supra* note 78.

¹¹⁵AUERBACH, *supra* note 35 (arguing, however, that it would be preferable for the patient to choose treatment). Ironically, Rabbi Auerbach begins by stating that we have no measuring stick with which to evaluate life and that we would repeatedly transgress the laws of Sabbath to save the life of someone who is suffering, is totally incompetent, and who could fulfill no commandments. Nevertheless, in rendering his ultimate ruling that allowed the patient to refuse the prospective surgery, he counts as a relevant factor the negative qualitative features associated with the life of one who is paralyzed.

experience unrelenting pain,¹¹⁶ some contemporary authorities are said to permit rejection of these services as well.¹¹⁷

There seem to be two principal ways of perceiving the conceptual framework for the Feinstein-Auerbach approach. One possibility is that it generalizes the *Rema's* rule for removing obstacles that prevent a *goses* from dying.¹¹⁸ For instance, Feinstein believes there is metaphysical pain associated with the process of *gesisah*. Consequently, a terminally ill person who has little time to live and who is experiencing unmanageable pain may seem quite similar to a *goses*.¹¹⁹ With respect to a *goses*, a few authorities have suggested that the removal of a respirator would be permissible, because the respirator is perceived as merely preventing the patient's death rather than as providing physiologically enhancing treatment.¹²⁰ Similarly, Feinstein forbids initial use of such machines to prolong the life of a terminally ill patient who suffers from severe, intractable pain.¹²¹ Once the machine is attached Feinstein believes disconnection would be an improper affirmative act. If it became disconnected, however, Feinstein would not necessarily require reconnection.¹²² To avoid a debate whether disconnection is an

¹¹⁶Rabbi Auerbach states that this should be provided even against the patient's will. Rabbi Feinstein requires that it be made available and that efforts be made to convince the patient to accept the treatment. See Zev Schostak, *Ethical Guidelines for Treatment of the Dying Elderly*, XXII J. HALACHA & CONTEMP. SOC'Y 62, 83 (1991) See also Tendler and Rosner, *supra* note 90, at 26-27 n.8; Friedman, *supra* note 5, at 105.

¹¹⁷See Schostak, *supra* note 116, at 83-85 (discussing the various views). But see Bleich, *supra* note 22, at 70-77 (explaining, analyzing and criticizing the Feinstein-Auerbach approach).

¹¹⁸See, e.g., Abraham, *supra* note 31, at 129 (appearing to implicitly make this argument); *Is Euthanasia Permissible Under Jewish Law?*, JEWISH LAW REPORT 25 (Aug. 1994); FRIEDMAN, *supra* note 5, at 100 n.28.

¹¹⁹Interestingly, Rabbi Feinstein emphasizes that the justification for refusing life-preserving treatment is only because of pain and is not to be confused with an overall "quality of life" analysis. He explains that the life of a mentally incompetent person or one in a permanent vegetative state must be prolonged so long as the person is not experiencing pain. See FEINSTEIN, IGGEROT MOSHE, *Hoshen Mishpat* II:74(1); Bleich, *supra* note 22, at 71.

¹²⁰See WALDENBERG, *supra* note 22, at 89. See generally Chaim David HaLevi, *The Disconnection of a Terminally Ill Patient from an Artificial Respirator*, 2 TECHUMIN 297 (1981).

¹²¹See FEINSTEIN, *supra* note 78.

¹²²See FEINSTEIN, IGGEROT MOSHE, *Yoreh Deah* III:132.

impermissible affirmative act, some authorities have suggested that the machines be controlled by automatic timers which, when time ran out, would be the equivalent of a disconnection. A patient's status could then be re-evaluated to determine if the timer should be reset.¹²³

There are a number of problems with the analogy to a *goses*. First, the Feinstein-Auerbach approach is squarely at odds with many authorities who believe medical intervention is required even to save the life of a *goses*. Second, how much pain would the terminally ill patient have to be experiencing in order to be compared to a *goses*? Third, how short a period of time must the terminally ill patient have to live before she is compared to a *goses*? Fourth, how confidently can a person quantify her pain or predict when she will expire?

Moreover, is it really persuasive to argue that the fact one can pray for death means one can refuse treatment? Those who disagree with the Feinstein-Auerbach position, for instance, argue that while one is alive, one has the duty to perform commandments, including the commandment to prolong life. Praying for death is not inconsistent with fulfillment of this duty because a person can always ask the Master of the Universe to release her from her duty. However, until and unless such prayer is affirmatively answered, the duty must nonetheless be done.¹²⁴

Bleich suggests a different way to understand the Feinstein-Auerbach approach based on inherent limits as to what a person is required to do to fulfill a biblical commandment. Jewish law characterizes biblical commandments as either negative or affirmative. Jewish law requires one to forfeit all of one's wealth to passively avoid violation of a negative commandment,¹²⁵ and requires use of no more than 20 percent of one's

¹²³See WALDENBERG, *supra* note 22, at 89.

¹²⁴See, e.g., Bleich, *supra* note 22, at 56 and 59 (stating own view and quoting statement by Rabbi Ahron Soloveichik); WALDENBERG, *supra* note 22, at XV:40.

¹²⁵See SHULHAN ARUKH, ORAH HAYYIM 656:1. Even if the refusal to take life-preserving treatment would be considered a violation of a negative commandment, such refusal would be passive. As the text states, one need only forfeit all of one's wealth in order to avoid a passive violation. The duty to avoid an *affirmative* violation of a negative commandment, however, would be even greater. Suppose, for example, that a person borrowed property and had the borrowed property, together with all of his own property, in his house. Assume the person had no insurance. On the Sabbath, some third person set a fire that did not threaten anyone's life but threatened all of the property. The owner of the house would not be permitted to extinguish the

wealth to fulfill an affirmative commandment.¹²⁶ In a different context, when asked whether Jewish Law was permitted to take an organ from a cadaver to make a life-saving transplant against the wishes of the deceased's surviving relatives, Feinstein replied in the negative. He stated such treatment of the corpse would presumably cause the surviving relatives to suffer more emotional distress than would the loss of their entire fortunes.¹²⁷ There is considerable debate as to whether the duty to prolong one's life and/or to save another's life is a negative or affirmative commandment.¹²⁸ Nonetheless, Feinstein may be justifying a person's right to refuse medical treatment in cases involving excruciating pain on the assumption the patient would be willing to give up their entire fortune, rather than suffer a prolonged period of time.¹²⁹ If so, however, Bleich questions how often this assumption would be correct, particularly in light of improved palliation procedures.¹³⁰

The Nature of the Treatment Refused

Some of the authorities that disagree with the Feinstein-Auerbach approach which generally permits terminally ill patients to refuse treatment because of their pain may, nonetheless, find such refusal to be justified in individual cases based on the nature of the treatments involved. Thus, a

fire even though he would not only lose the value of all of his own property, but he would become financially liable for the borrowed property as well. Consequently, the comparison between all of one's wealth and the extent of one's pain and suffering seems relevant, if at all, only to a passive violation such as through a refusal of life-preserving therapy.

¹²⁶*Id.*

¹²⁷FEINSTEIN, *supra* note 78, at 174(4). See Bleich, *supra* note 22, at 86 n.56 (raising possible objections to Rabbi Feinstein's analysis that are unrelated to physician-assisted suicide).

¹²⁸Bleich, *supra* note 22, at 73-77 and associated footnotes. While the duty to save others may be an affirmative commandment, the duty to save oneself, according to some authorities, is technically derived from a different source and may constitute a negative commandment.

¹²⁹Feinstein seems only to state that a patient has the right to refuse treatment only when the treatment would merely extend the patient's life for a relatively short period of time. See, e.g., FEINSTEIN, *supra* note 78. Professor Michael Broyde has pointed out to me orally that if Bleich is correct and Feinstein's position is based on whether the patient would be willing to forego all of his wealth in order to escape intractable pain, the fact that the patient's life would only be temporary extended rather than extended for a significant period of time seems to be irrelevant.

¹³⁰Bleich, *supra* note 32, at 76.

person is not generally obligated to submit to “unproven” experimental treatments.¹³¹ Indeed, a person may not even be allowed to take some medications because of the attendant risks.¹³²

Other factors considered by scholars in evaluating whether medicines are permissible or required to eat, although they would otherwise be non-kosher, or whether they are permissible or required to take on the Sabbath, although medicines are sometimes prohibited on Sabbath, include: whether the desired effect of the treatment is physiological or metaphysical; and whether the effect is to ameliorate the patient’s painful symptoms or merely to prolong the patient’s present condition.¹³³

Encouragement or Assistance of Passive Acts to Hasten Death

A person who convinces someone to refuse treatment when the refusal is wrongful violates the biblical rule against *lifnei iver*. Similarly, enabling someone to wrongfully refuse treatment when she could not otherwise have done so, violates the *lifnei iver* rule. Even if the refusal would have been accomplished without a person’s involvement, the provision of such encouragement or assistance would, according to many authorities, at least violate rabbinic law.¹³⁴ Of course, someone who so encourages or assists a wrongful refusal of treatment also fails to perform his duty to rescue one in danger. In this case, a “rescue” might have been accomplished by providing competent counseling or adequate analgesics.

Under the Feinstein-Auerbach approach, which treats the subjective state of mind of the person who is sick as a critically important factor, it may be very difficult for a third party to properly evaluate whether a

¹³¹See YAAKOV EMDEN, MOR UKTZIAH 328; Cohen, *supra* note 30, at 49. See generally J. David Bleich, IV CONTEMPORARY HALAKHIC PROBLEMS 203-217.

¹³²As to what extent a person may risk her life by taking experimental treatment or to reduce pain. See, e.g., WEINER, *supra* note 30, at 75-81; FEINSTEIN, *supra* note 56, at 73(9) (allowing surgical removal of patient’s testicles in prostate cancer in order to reduce pain. The author argues that reduction in pain would prolong patient’s life); ABRAHAM, *supra* note 5, at 53; Cohen, *supra* note 30, at 49.

¹³³See generally WEINER, *supra* note 30.

¹³⁴See BROYDE, *supra* note 81, at 59-60.

particular person's refusal of treatment is or is not justified under Jewish law.

Coercive Treatment

Assuming a patient is obligated by Jewish law to accept a particular treatment, is a third party, such as an attending physician, required to use verbal or physical coercion, if necessary, to ensure that the treatment is accepted? There essentially are two questions. The first question is whether a third person has the duty to coerce a patient to fulfill the patient's obligation to preserve his own life. Although Jewish courts had such authority, Jewish law scholars debate whether *individuals* have such a right.¹³⁵ The second question is whether a third person, who under Jewish law has an independent obligation to save the patient's life, may use coercion to fulfill that independent obligation. Most authorities seem to assume the theoretical answer to this question is not only that the third person may, but if necessary, must use such coercion.

Nevertheless, some argue coercion could easily be counter-productive, because of the adverse psychological impact it may have on the patient.¹³⁶ Furthermore, medical uncertainty regarding the effectiveness or attendant risks of a proposed therapy frequently relieve a patient of any obligation to submit to the treatment and relieve a third person from any duty to administer it. Consequently, although coercion is a theoretical possibility, it is often not a practical choice.

Even if a person would be commanded to employ coercion, the concomitant costs of performing the commandment could be high. The physician might face professional sanctions and malpractice liability.¹³⁷ To

¹³⁵Contrast, e.g., ARYEH LEIB, KITZOT HAHOSEH, HOSHEN MISHPAT 3:1 (arguing that only courts could coerce individuals to perform affirmative commandments) with YAAKOV, NITVOT HAMISHPAT, HOSHEN MISHPAT 3:1 (contending that individuals had the right to coerce other individuals to perform such obligations).

¹³⁶See, e.g., FEINSTEIN, *supra* note 56, at 73(5).

¹³⁷See Jakobovits, *supra* note 31, at 381 ("[The physician's] obligation to save life and health ... is altogether independent from the patient's wishes or opposition. The conscientious physician may even have to expose himself to the risk of malpractice claims in the performance of this superior duty."); FEINSTEIN, *supra* note 32, at *Yoreh Deah* IV:54(2) ("Even if through this rescue the physician will become obligated to spend a great sum of money to pay for the [medical] equipment and other medications, he is obligated to do so.").

evaluate whether the physician would be required to sustain such financial costs, one would have to evaluate various factors. In addition to any possible monetary burden, the use of coercion -- at least the use of physical coercion -- would raise the prospect of possible criminal sanctions as well. This, as a practical matter, might well exceed the personal sacrifice the Torah imposes.

CONCLUSION

Unlike nonreligious legal systems, Jewish law assumes the existence of an omnipotent, omniscient, and benevolent Creator whose purposes cannot always be fathomed. Jewish law also assumes a network of relationships between and among the Creator and all human beings. As a result of these assumptions, there is purpose and responsibility in every instant of life, for the individual and for the community, even though the purpose is not always readily apparent.

Jewish law imposes specific responsibilities on individuals to safeguard their own lives and to help others. The extent of these obligations, however, are not unlimited. The continued debate pertains to the nature of these limitations.