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Death and euthanasia in Jewish law

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WITHDRAWING OR WITHHOLDING NUTRITION, HYDRATION OR OXYGEN
FROM PATIENTS

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Jews are unusually large consumers of medical care. We are quick to call upon the expertise of the physician to cure. Because of medical advances we live longer, and much which might have killed us in an earlier time is now curable. Among the most difficult issues facing the liberal Jew is the issue of medical care at the "end stages of life." The "end stages of life" are no longer well defined. Generally we are familiar with the non-Jewish thought on this issue, but have little knowledge of Jewish thought. Positions held by liberal Jews tend to be reflective of the non-Jewish thinking. This is not difficult to understand. The "popular literature" has had little discussion of the "end stages of life" from a Jewish perspective. Even the most popular periodicals in the Jewish community have carried have hardly concerned themselves with the issue.

This paper will first discuss the reasons why the non-Jewish categories and paradigms for approaching this issue are inadequate for liberal Jews. The paper will define a theology which allows for a liberal Jewish approach to the issue and then apply this theology to the issue of the treatment of Jewish patients in a persistent vegetative state.

Most non-Jewish discussion of the issue of treatment during the "end stages of life" comes from Catholic moral theology. Catholicism argues that God alone is absolute. Life was created and redeemed by God, but life itself is not absolute. Physical life serves as a condition of the fulfillment of other purposes, (the love of God, love of neighbor, etc.). Life should be protected and preserved. Its sovereignty is delegated to humanity, but it is limited and conditional. Some killing is permissible, and indeed, in some instances, required. When then is this sovereignty delegated to humanity?

Christian ethics determined a set of norms which defined when a human being could morally cause an end to life. This led to thinking about killing in moral categories. A concrete example of norms of

killing would be the "Just War Theory" which enunciates the principle that it is always wrong to take an innocent human life directly. This led to the categories of "direct" and "innocent." In the area of bioethics, Christianity has developed the norm of "ordinary vs. extraordinary."

...normally one is held to use only ordinary means-according to circumstances of persons, places, times, and culture-that is to say, means that do not involve any grave burden for oneself or another. A more strict obligation would be too burdensome for most men and would render the attainment of the higher, more important good too difficult. Life, health, all temporal activities are in fact subordinated to spiritual ends.¹

Clearly, from the statement of Pope Pius XII, "ordinary means" are determined by time, place and culture. "Extraordinary means" would be those which are too burdensome or those "which would render the attainment of the higher, more important good too difficult." "Ordinary means" must be both useful (efficacious) and convenient. Much which might have been "extraordinary" a few years ago might today be "ordinary." Much of what might have been burdensome or inconvenient a few years ago might now be convenient.

Another applicable norm of Christianity is "autonomy." The Christian discussion of the taking of life begins with the issue of one's "right" to act in such a way. By what right can a person act to deprive another of life? After all, if life is conditional and not absolute, then there must be instances when an individual can morally act to deprive another of life. If a person has no autonomy and is "owned" by God, than the decision to deprive one of life can only be that of God. If one is autonomous, then he or she takes full responsibility for moral choice, and one then has complete control over one's body.²

These categories and paradigms are inadequate for a liberal Jewish discussion of the issues. Judaism does not understand life as relative. Judaism understands all human life to be of infinite value, i.e.

absolute.³ Life was created by God, but given to humanity. Physical life serves as the earthly medium for the relationship between God and the individual. This relationship manifests itself in the covenant between God and humanity. For the Jewish people, this covenant is expressed through the performance of *mitzvot*. It is not that life serves as a condition of the fulfillment of other purposes, but rather, that life finds its meaning in the expression of the covenant with God. Life is meaningful when it is in relationship. For that relationship to be one of freedom, the sovereignty must be humanity's. God must "give up control" (*kivyakhol*). Ultimately then, determination of when human beings can cause an end to life must be determined by human beings, but within the context of the covenant. Capital punishment, killing in war, killing in self defense and the like, are all examples of taking life in the context of the covenant. Those whose behavior is such that it threatens the continuation of the covenantal relationship with God, or whose behavior is such that it precludes others from performing *mitzvot* are at risk of losing their lives because of the freedom and sovereignty of humanity. The categories of "direct" "innocent" "ordinary" and "extraordinary" have no theological basis in Judaism. So too "quality of life," a category rooted in relativist theology.

Traditional Judaism believes that God "owns" the individual. One's life is the possession of God, and thus, even though humanity has the freedom to act in the world, that freedom is limited by the conditions of the covenant, i.e. the *mitzvot*. While God has given humanity freedom, it is a freedom limited by the structure of the *mitzvot*. Liberal Judaism has rejected the idea that God "owns" the individual. It sees the autonomy of the individual freely limited by the individual in order to be in relationship. The individual Jew must then take full responsibility for moral choice, and one then has complete control over her or his body.⁴

Both Traditional Judaism and Liberal Judaism have struggled with the issues of defining death and euthanasia. Both have tried to adapt to modern scientific standards and criteria for determining death. Liberal *halakhists* have accepted various criteria for defining "brain

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death." Some Orthodox *posqim* have accepted "brain stem death" as an appropriate criterion for defining death. Others have adhered to the traditional definition of death as cessation of respiration and heart beat.⁵ Both Liberal and Orthodox *posqim* have rejected the use of active euthanasia.⁶

Neither Liberal nor Orthodox *posqim* have written on the treatment of those in a persistent vegetative state. The *Tzitz Eliezer* does discuss the issue of withholding or withdrawing nutrition or hydration from patients who are terminally ill. He argues that even with respect to a *goses* one cannot withhold nutrition or hydration. How much the more so with one who is terminal, but not expected to die within three days. The published responsa of the CCAR, Rabbi Walter Jacob or Rabbi Solomon B. Freehof do not deal with those in a persistent vegetative state. As the condition of the persistent vegetative state is among the hardest for families, and presents new and difficult issues for Liberal Judaism as it attempts to understand the end stages of life, we ought to address this issue. What must one provide for those in a persistent vegetative state? What is the theological basis for this understanding?

A persistent vegetative state is, for this paper, defined as a state in which the individual has only brain stem function. Brain stem function controls only the autonomic reflexes, but not cognition nor the five senses. Those in a persistent vegetative state have no possibility of ever again regaining cognition or the five senses. Those in a persistent vegetative state cannot eat, drink, respond to pain, sound or other stimuli, or have the possibility of ever responding to these stimuli. Those in a persistent vegetative state receive nutrition and hydration through intravenous or indwelling "feeding" tubes. An individual in a persistent vegetative state is not a *goses*. A *goses* is one who is expected to die within 72 hours. This person in a persistent vegetative state could continue to breath for months or years.

Traditional Judaism would prohibit the withholding or

withdrawing of nutrition or hydration from patients in a persistent vegetative state. If such a patient were in need of a respirator, or had been placed on a respirator, traditional Judaism would permit withholding the use of the respirator (and Moshe Tendler has devised a way for withdrawing the use of an already placed respirator). The reason for the difference between the permissibility of withholding artificial means of respiration and artificial means of nutrition and hydration has to do with the theological understanding of breathing as opposed to eating and drinking. Breathing is understood as a basic criterion of life. It is God's "breathing the breath of life" into *Adam HaRishon* which gives life to all humanity. The inability to sustain respiration independently indicates the inability to live. The respirator does not sustain life, but delays death. It has much the same status as the chopping sound which prevents the *goses* from dying. Removing the sound allows the individual to slip into that peaceful blissful sleep.⁷

While the natural course of events is that one ceases to breath and thus is dead, this is not the case with nutrition and hydration. The inability to eat or drink is not a criterion for determining death. Depriving one of the artificial induction of nutrition and hydration is understood as taking positive steps to kill an individual, not allowing death to occur.

Finally, specifically addressing the issue of intravenous feedings for terminally ill patients, Rabbi Feinstein says that "for an incurably ill patient who had difficulty breathing, I have already stated that one must give him oxygen to relieve his suffering. It is also clear that such a patient who cannot eat normally must be fed intravenously, since such feeding strengthens the patient somewhat even if the patient does not feel anything, (i.e., is comatose). Food is not at all comparable to medication, since food is a natural substance which all living creatures require to maintain life."⁸

Secular medical ethics does not draw a distinction among respiration, nutrition and hydration. All three are necessary for life.

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Without any one of the three, life cannot be sustained. If then there is a moral reason for providing any one of these three, there is a moral basis for providing all three.

Liberal Judaism is uncomfortable with the theology which draws a distinction between respiration and nutrition or hydration, but is equally uncomfortable with the secular medical ethical position. This is clearly seen in the case of the frail elderly. Mrs. Ginsberg, a ninety-two year old nursing home patient is visited daily by her son and daughter. She talks weekly with her grandchildren by telephone. Most liberal Jews would be comfortable with a "Do Not Resuscitate" order for Mrs. Ginsberg. Mrs. Ginsberg does not want to be placed on a respirator. She does not wish to live with the limitations of no longer being able to communicate with her family. She is afraid that if she is placed on a respirator, she will lose all control over her care, and will lose the ability to communicate. On a respirator she will be in a "state of indignity." If she goes into respiratory failure, she wishes to be allowed to die. Death would be within a few hours. As Mrs. Ginsberg gets older, it is more and more difficult for her to eat and drink. She can no longer chew, and swallowing has become difficult. None the less, she is lucid and communicative. She might well be sustained on a feeding tube. Without a feeding tube, she would die within a few weeks. Somehow nutrition and hydration seem different from respiration. Both the length of time between the withdrawal or withholding of therapy and death, and the nature of the death seem to make Jews uncomfortable. While Mrs. Ginsberg is not in a persistent vegetative state, her case does help us to see the difference in the way we experience and react to mechanical ventilation as opposed to mechanically administered nutrition and hydration.

Prior to the twentieth century there were no patients in persistent vegetative states. The various cerebral accidents which lead to this state were untreatable in earlier times. Before to the development of intravenous hydration and nutrition, patients died. Prior to the development of the ventilator patients died. Because there is no

precedent for the treatment of those in a persistent vegetative state, the *halakhah* had to look to other cases from which a parallel could be drawn. Some suggest we find a parallel in the *goses*. This is most unfortunate because the *goses* is clearly not a parallel. The *goses* is expected to die within three days. The *goses* is considered a living being for all purposes. "What is the difference between ill people and *gosesin*? The majority of ill patients live, while the majority of *gosesin* die."⁹ While all patients in a persistent vegetative state will eventually die, they will not of necessity die from this condition unless it goes untreated. Some have attempted to draw a parallel between the *terefah* and the patient in a persistent vegetative state. This too is unfortunate because the *terefah* is a terminally ill patient who will die of his disease. Maimonides, in his *Mishneh Torah*, states "One who murders a *terefah*, even though he eats and drinks and walks about the market, he is exempt from human judgment. All human beings are under the presumption of being healthy and one who murders is put to death unless it is known with certainty that the one murdered was a *terefah* and doctors testify that this illness had no cure and the person would have died from this, if not from something else first."¹⁰ The patient in a persistent vegetative state is not a *terefah* for a persistent vegetative state is not a terminal illness. Where then is a parallel to be found?

One possibility for a parallel might be found in the *Talmud*. "R. Judah said in the name of Shmuel, if the neck bone and the major portion of the surrounding flesh was broken, the body immediately defiles in the tent."¹¹ Maimonides, in his *Mishneh Torah* states, "A dead person does not cause ritual impurity until the soul has departed. Even if one is bleeding to death or a *goses*...If he broke his neck bone and the greater part of the surrounding flesh or if his back were ripped like that of a fish, or if he were decapitated or his belly broken into two parts he is rendered ritually unclean, even if he still trembles in one of his limbs."¹² The *halakhah* joined the individual who was decapitated with the one whose neck bone was broken. Why? What do these individuals have in common? The person who was decapitated is, for all *posqim*, dead. There was no possibility of recovery. While limbs might twitch

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or shake, the rabbis understood this to be a simple muscular reaction, not an indication of any life. While Maimonides did not discuss the moment of the soul's departure and how to determine it, he clearly understood that this twitching headless body was soulless, and thus lifeless. But not so the individual with the broken neck. While it is unlikely that this person would live long, the moment following the accident would not of necessity be the moment of the "departing of the soul." We can imagine the modern case of an automobile accident where one passenger is decapitated, while another has his or her neck shattered and the flesh ripped open. Upon reaching the scene of the accident paramedics would likely begin a triage process. The decapitated individual would be ignored, for there is nothing to be done. The person with the broken neck might well be looking at the paramedic. Eyes stare, though no sound can be made. All voluntary movement is prevented by the spinal cord injury. None the less, the paramedics begin to work. An IV is started, blood pressure is taken, and transportation arranged to the trauma unit. At the trauma unit the patient is placed on a ventilator, a cardiac assist and an EEG is taken. After a few hours brain stem activity ceases, and the family is consulted about the deceased being an organ donor. At the moment of the accident this individual was not dead. The status of this individual was qualitatively different from the status of the decapitated person. The decapitated person was dead. The person with the broken neck was dying. How do we understand this "dying"? What is the common quality of both of these individuals which allows the *halakhah* to see them as the same?

Maimonides uses the term *sheteitzei nafsho* as the designation of death. The departure of the soul becomes the moment of death, and the definition of a corpse a "soulless body." This "soulless body" differs from the animated body in that it no longer can be in relationship with God. The soulless body can no longer perform *mitzvot*. The theological significance of death is that the covenant between God and this previously animated person now must be enacted in some other plane (perhaps the *olam habah*). There are many categories of individuals who cannot perform *mitzvot* and who live in a state of an unfulfilled covenant.

Infants, who cannot yet perform *mitzvot*, the profoundly retarded, anencephalic newborns, comatose patients, and patients in a persistent vegetative state are all in a state where it is impossible to perform *mitzvot* and thus, to participate in the covenant. There is, however, a difference among categories. Some have the potential of performing *mitzvot*. Others of these categories have no possibility of ever being able to perform *mitzvot*. The new born will grow and learn. Prayer, study, *tzedakah* and travel to Israel may all become a part of life. The profoundly retarded may at some time have some self consciousness and express, even silently, a prayer. The comatose patient may hear the *shema* and internally respond. Not so the patient in a persistent vegetative state. This patient lacks all brain function other than brain stem function. There can be no cognition nor any experience of the five senses. Not only can this patient not perform *mitzvot*, there is no potential for ever performing *mitzvot*. In a sense we can say that this patient no longer has a soul. Like the decapitated or the one with the broken neck bone, this one cannot, and never will again perform *mitzvot*. The very basis for the relationship with God through the covenant, the very source of meaning in life is now gone.

This new category of existence, a breathing body which has no potential for the performance of *mitzvot*, is disturbing. How ought we behave toward such a patient? We have clear obligations toward this patient, as we do to all human beings, dead or alive. Recognizing the basic dignity (*kavod*) of the individual, we must treat this new category of person with honor and care. We cannot mutilate it nor can we derive benefit from it, (with the possible exception of *piquah nefesh*). While clearly this category is different from a corpse, it is also different from a *goses* or a *terefah*. While there may be an obligation to provide hydration and nutrition to a *goses*, there is no obligation to provide ventilation to such a patient. Ventilation would not prolong life, but rather, prevent the dying process from proceeding. The need for artificial ventilation defines a point at which the dying process has reached an irreversible point for the *goses*. For the patient in a persistent vegetative state theological death has already occurred. The

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permanent, irreversible inability to perform *mitzvot* gives this person the same theological status as the decapitated person or the one with the broken neck bone. Just as there is no obligation to provide any form of medical treatment to either of these individuals, so there is no obligation to provide treatment to the patient in the persistent vegetative state. Nutrition, hydration and artificial ventilation may be withheld or withdrawn.

Notes

1. Pope Pius XII "The Prolongation of Life", An Address to an International Congress of Anesthesiologists, 24 November 1957, *The Pope Speaks* 4 (1957) pp. 395-396. Quoted in Lisa Sowle Cahill, "Respecting Life and Causing Death in the Medical Context", in J. Pohier and D. Mieth, eds., *Suicide and the Right to Die*, Edinburgh, 1985.
2. For a full discussion see "Perspectives from Catholic Theology" by Reverend Edward J. Bayer, S.T.D. in Joanne Lynn, MD., *By No Extraordinary Means*, Bloomington, 1986, pp. 89-98.
3. See especially Fred Rosner, *Modern Medicine and Jewish Ethics*, New York, 1991, pp. 274ff.
4. Much of this theology comes from Eugene B. Borowitz. His *Renewing the Covenant*, Philadelphia, 1991, has been particularly influential in my thinking.
5. See Rosner, pp. 263-277.
6. The liberal Jewish sources discuss these issues in various responsa. The key sources are *Reform Responsa For Our Time* #17, *American Reform Responsa* #76, 77, 78 and 79 (note also the discussion following #78), *Questions and Reform Jewish Answers* #156, 159, and 160. Traditional Jewish sources include *Tzitz Eliezer* 14, 80. The *Tzitz Eliezer* summarizes the positions of others, and presents his own position.
7. *Shulhan Arukh, Yoreh Deah* 339:1.
8. Moshe Feinstein quoted in Rosner, p. 240.
9. *b. Qiddushin* 71b.
10. *Mishneh Torah, Hilkhoh Rotzeah* 2:8
11. *b. Hullin* 21a.
12. *Mishneh Torah, Hilkhoh Tumat HaMet* 1:15