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**Death and euthanasia in Jewish law**

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SUICIDE, ASSISTED SUICIDE, ACTIVE EUTHANASIA  
A *Halakhic* Inquiry

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This paper deals with an excruciatingly difficult moral problem, the circumstances under which killing is permitted and who may terminate a human life.<sup>1</sup> Framed slightly differently, we have the following issues: In the case of a terminally ill person or one who is suffering severe and unremitting pain, would suicide, assisted suicide or voluntary active euthanasia be morally permissible? If so, under what circumstances?<sup>2</sup> The question has more than theoretical interest. Our acts and attitudes will help shape the social matrix of ethical decision making. Our goal is to give advice to Jewish ethicists, health care professionals, patients and their loved ones. In matters of life and death we must exhibit care that we do not undermine precisely the values we hope to support, namely the dignity and sanctity of human life.<sup>3</sup>

While speaking in general terms, it is essential to remember that our subjects are real people and the decisions that they must make about their lives, those they love and those for whom they care. In challenging established societal norms which seek to protect individual human life, one could begin a process which radically alters the way in which society treats the weak and the vulnerable.<sup>4</sup> If we propose an attitudinal shift in the "hard cases" do we change the attitude of individuals and society so as to encourage suicide and lead from a situation where people willingly waive their right not to be killed, under severely limited circumstances, to involuntary active euthanasia based on social worth?<sup>5</sup>

Even naming the action has moral weight. Is suicide the moral equivalent of self-murder, or self-delivery, or voluntary? Is assisted suicide the moral equivalent of being an accomplice to murder, or being an agent of compassion who assists in voluntary death? Is voluntary active euthanasia the equivalent of murder or is it justifiable homicide?<sup>6</sup>

Since this is meant to be a *halakhic* discussion, it is important to ask what texts may be legitimately used to inform the discussion? Phrased slightly differently, the question is what counts as part of the



canon?<sup>7</sup> For this conversation I have utilized not only specifically Jewish texts but the work of ethicists some of whom are Jewish and whose approach has a specific Jewish flavor. In addition I have used ethicists and philosophers who were either secular or Christian to see in what ways they advanced the conversation. An important element that is missing in this paper and in many similar discussion is the woman's voice.<sup>8</sup> Feminist scholars suggest - and I concur - that we must pay much closer to the stories of individual people's lives and not just abstract principles. In deciding what is permissible to do and what is prohibited we must become good listeners. The texts that count are not only the written texts of our traditional or modern literature, but the texts and contexts of people's life. An important aspect of responsa is the fact that they are case specific and in large measure are concerned with the details of an individual case.

#### METHODOLOGY

It is now a truism in bio-ethical literature to say that beginning and end of life issues present us with some of the most difficult ethical dilemmas. New technologies are causing us to rethink the definitions of life and death and what constitutes medical treatment. Our ability to intervene in the process of conception and fetal development with *in utero* surgery and genetic engineering, and our ability to prolong life and death with medications and mechanical devices are the blessing and curse of modern medicine. These developments require a fundamental review of the way in which we make determinations.

Methodology often determines outcome.<sup>9</sup> A liberal *halakhic* approach is more than an attempt to look for lenient precedents within the law. It is essentially an ethical analysis of the structure of Jewish living.<sup>10</sup> Professor David Ellenson in an important article,<sup>11</sup> has identified two methodologies for making "moral choices" -- *halakhic* formalism and covenantal ethics.

*Halakhic* formalism "seeks to identify precedents from the rich literature of rabbinic Judaism in order to extrapolate principles and norms that would yield authentic Jewish prescriptions on specific issues...Viewed in this way, Jewish medical ethics evidence the same methodological concerns and qualities that one would discover in any legal process."

This process as David A. J. Richards has observed displays two major characteristics. The first is that the judge, or the rabbi in our case, "infers from the legal standards applicable to a particular situation, from a body of so-called primary authority. In Jewish law this "body of so called primary authority" includes the Bible and the Talmud which assumes a "statutory" role in the Jewish legal system, and an ongoing process of judicial opinions contained in the responsa and codes that function in a "precedential" way. Here the interpretation of the law offered in the previous case (its holding) is seen to have a bearing on the adjudication of a contemporary case that deals, in the rabbi's opinion, with the same issue of law. A second feature of legal reasoning, related to, but not identical with the first, is that of "reasoning by analogy." Rabbis, in this instance, not only take prior holdings on a comparable issue into account when rendering their decisions, but extend "principles of law found applicable to some set of fact patterns... to other fact patterns which are in relevant respects similar."<sup>12</sup>

Ellenson concludes that the method is "relatively straightforward" and involves "plumbing the depths of Jewish law and discovering there the resources to resolve a perplexing moral issues."<sup>13</sup> *Halakhic* formalism begins by identifying precedents from the literature of classic Judaism in order discover the principles that describe the Jewish norms which apply to a particular situation. Where the foundational law (Bible,



Talmud), the statutory (Codes) and case law (Responsa) are clear the rabbis apply the texts and precedents to the current case in order to arrive at a legal decision. Where the rabbis are faced with situations without precedent in Jewish law, they seek to find within the law, principles which will allow them to draw a proper analogy from one set of circumstances to a very different set of circumstances. It is important to recognize that "The [rabbis]{in this system} are juxtaposing 'the particulars of [their] own case and various *halakhic* precedents and principles, thereby decid[ing] in which category [their] own case falls. Then they must apply these precedents and principles to the situation at hand.'" He warns that similarity of method does not preclude pluralism of response. The precedents can be applied leniently or stringently and there can be disagreement about relevance of precedents in any particular case. "Affirmation of a common methodology in no way ensures a single substantive outcome."<sup>14</sup>

Ethics refers to the standard or yardstick, the general principles we use in making our decisions. Ethics asks the question: What is the morally correct thing to do in any particular situation? Law answers a different question: what is permitted or prohibited by a particular society and what is a person's liability for punishment. Law defines the limits of proper conduct for a citizen of a particular society. Laws may be just or unjust, ethical or unethical. In fact, there are many areas of law where ethics is not a relevant consideration. An ideal society seeks to construct a legal system based on concepts of justice and fairness. In other words, a just society seeks to construct an ethical legal system. If Reform is to recover *halakhah* and to use an *halakhic* method it will need to be one which makes ethics central.

It is important to distinguish our way of interpreting *halakhah* from the traditionalists for a number of reasons, but most notably because we do not share the ideological assumptions which undergird their mode of thought and reasoning.<sup>15</sup> According to the traditionalists, *halakhah* is a system of law that is revealed by God and, therefore, what the *halakhah* prescribes or proscribes is ethical<sup>16</sup> because it is



commanded by God. Since it is commanded by God its obedience is obligatory. The *halakhah* is ideally a crystallization of Jewish ethics. However, we Reform Jews have rejected the authority of the *halakhah*, in part because we deny its divine origin, and in part because as a system it has failed to respond adequately to modernity, the Enlightenment, and emancipation, and the rapid changes brought about by the technological revolution. We have frequently offered a moral critique of the *halakhah*. Its treatment of women is a prime example. In addition the *Shoah* (the Holocaust) and the rebirth of the state of Israel, have put strains on the traditional *halakhic* system. One reason for stagnation in the *halakhic* process is that the *halakhah* is a legal system lacking a legislative process.

A way to renew the *halakhic* process within a liberal context must begin by an explicit delineation of the methodological assumptions which undergird our work. David Ellenson's identification of "covenantal ethics" is a productive starting point. This method also cuts across denominational lines. Eugene Borowitz, a major Reform theologian, and Yitz Greenberg, a liberal Orthodox thinker, and Rabbi Daniel Gordis, a professor at the University of Judaism (Conservative), have made beginnings at spelling out this method. Among the principles which define this method are the following: One begins by examining Jewish texts to discover what it means to be human and the nature of humankind's relationship to God. Gordis calls this a theological anthropology. Humankind is both created in the image of God and serves as God's partner in the ongoing work of creation. This relationship of partnership is called *brit* or covenant and it entails obligations (*mitzvot*). The covenant is a loving relationship which may be described using the language of marriage. In such a loving relationship human freedom is not overwhelmed by divine will. Such a relationship is characterized by mutuality and respect for the integrity of each partner.<sup>17</sup> It is the dialogue and dialectic of the relationship which enables a person to become more fully human by recognizing the absolute worth of his/her personhood because it is in the image of the divine. In this model the



experience of God is genuine and revelation is genuine, but for the liberal Jewish thinker - following the model of Buber - only the ground of Jewish duty is revealed i.e., the presence of God. In the I-Thou moments of our personal and communal lives we experience the divine presence. From the intimacy of the relationship we intuit what is required of us.<sup>18</sup> The specifics of Jewish duty (*mitzvot*) are the human response to the experience of the divine. Yitz Greenberg adds that in our partnership with God we are encouraged to become more like God by mastering our environment. Further, the covenantal model takes Jewish tradition seriously, because the religious classics of Judaism are the accumulated wisdom of the Jewish people, which are authoritative by virtue of their testifying to the genuine struggle of the Jewish people to live within the covenantal relationship. To utilize the texts is to take one's stance as part of the continuing drama of Jewish history. It offers a specific locus for our being by placing us within a community. Our autonomy is limited by our willingness to bring our individual will under the scrutiny of collective wisdom and collective responsibility. It means we do not have to invent our Jewish selves nor do we exist in a lonely vacuum, but we are part of living community. With this method individuals have the right to exercise a great deal of control over their own lives. In such a system quality of life questions become as valid as quantity of life questions.

Finally a system of covenantal ethics must also have a concept of a just society. Central to the formulation of such a concept are the historic experiences of the Jewish people as slaves in Egypt. Our tradition constantly calls upon us to identify with the weak and the powerless so that they may be liberated from the economic, social, political, and spiritual fetters which prevent their fully becoming *b'tzelem elohim* (in the image of God).<sup>19</sup> The *Shoah* also creates a moral imperative to prevent the dark forces which reside within the human soul from overwhelming our divine potential.<sup>20</sup> The *Shoah* is a warning which cannot be ignored. Jewish and human life become all the more sacred when faced with the smoking ovens. Further, the re-establishment



of the State of Israel raises the hope that a renewed *halakhah* can yet establish a state infused with a covenantal ethics of human worth, justice and peace.<sup>21</sup>

Finally the *halakhic* formalists make the rabbi-decisor the ultimate judge of what is ethical and unethical. Within the covenantal model the rabbi serves as advisor and not decisor. Our model is one of shared decision making. The final arbiter is to use Borowitz's rich phrase, "the Jewish autonomous self" where self, tradition and community have been allowed to interact.

Elliot Dorff, in a significant paper on the central issues raised by this paper,<sup>22</sup> specifically rejects the covenantal method as a way of making *halakhic* decisions. He writes:

Nevertheless I think that this approach is wrong headed. My view ultimately rests upon three factors: (a) my appreciation of the *strengths* of a legal approach to the moral issues in life and the corresponding weakness of the suggested alternative: (b) my conviction that personal responsibility can be retained in a properly understood *halakhic* system; and (c) my confidence that *when properly understood*, legal methods can enable Jewish law to treat realities as new as contemporary medical phenomena.

At least from a Reform theological perspective, which desires to re-invest the tradition with authority, a new understanding of our reading of the texts is necessary. Only then we will be able to offer advice that is clearly derived from a coherent reading of the tradition.

While a case can be made that in Reform responsa we follow the *halakhic* formalist method, I wish to argue that it is the covenantal method that we implicitly use and we should consider it the normative method for Reform *halakhic* decisions. Its advantage is to proceed from a Reform Jewish understanding of what it means to be human and the



appropriate role of the individual in decision making. Clarification of these prior issues will determine what precedents in Jewish law will be given priority.

#### HUMAN DIGNITY AND THE SANCTITY OF HUMAN LIFE

Having set out a methodological framework, I wish to proceed with a consideration of the permissibility of suicide, assisted suicide and active voluntary euthanasia within a covenantal reflection on *halakhah*. This paper challenges the prevailing *halakhic* opinion opposing suicide, assisted suicide and active voluntary euthanasia.<sup>23</sup> It is my conclusion that under certain conditions, with appropriate safeguards, terminally ill patients<sup>24</sup> can morally take their own life, be aided to take their own life, or waive their right not to be killed. The doctrine of the sanctity of human life is rooted theologically in the concept that humankind was created *b'tzelem elohim* (in the image of God). Human dignity and worth are connected to the concept of *imitateo Dei* and biological life may be forfeited for good and sufficient reasons.<sup>25</sup>

For example, Maimonides identifies humankind's uniqueness and the God-like quality as residing in the superior intelligence of the human soul:

The vital principle of all flesh is the form which God has given it. The superior intelligence in the human soul is the specific form of the mentally normal human being. To this form the Torah refers in the text, "Let us make a human being in Our image and after Our likeness" (Gen.1:26). This means that the human being should have a form that knows ... Nor does (this) refer to the vital principle in every animal by which it eats drinks, reproduces, feels and broods. It is the intellect which is the human soul's specific form. And to this specific form of the soul the Scripture phrase "In Our image, after Our likeness" alludes.<sup>26</sup>

Rabbi Irving Greenberg, a leading modern Orthodox thinker, whom David Ellenson identifies with the covenantal method, writing specifically in a bio-ethical context, defines the covenantal model using the metaphor of the partnership model. It is a partnership in the perfection of the world which takes seriously human value and dignity. Human freedom is real and not illusory. Greenberg emphasizes the human power working in concert with God to perfect the world. The greater the patient's say in those matters which affect the patient's life, the more God-like is the patient.<sup>27</sup> Using Genesis 1 and 3 Leon Kass, a leading bio-ethicist, argues:

Man has special standing because he shares in reason, freedom, judgment, and moral concern, and, as a result lives a life freighted with moral self-consciousness. Speech and freedom are used among other things to promulgate moral rules and to pass moral judgments, first among which is that murder is to be punished in kind because it violates the dignity of such a moral being. We note a crucial implication. To put it simply, the *sanctity* of human life rests absolutely on the *dignity* - the god-like-ness - of human beings.<sup>28</sup>

Ronald Dworkin a leading legal theorist writes:

The life of a single human organism commands respect and protection, then, no matter in what form or shape, because of the complex creative investment it represents and because of our wonder at the divine or evolutionary processes that produce new lives from old ones, at the processes of nation and community and language through which a human being will come to absorb and continue hundreds of generations of culture and forms of life and value, and finally, when mental life has begun and flourishes, at the process of internal personal creation and judgment by which a person will make and remake



himself, a mysterious inescapable process in which we will each participate and which is therefore the most powerful and inevitable source of empathy and communion we have with every other creature who faces the same frightening challenge. The horror we feel in the willful destruction of a human life reflects our shared inarticulate sense of the intrinsic importance of each of these dimensions of investment.<sup>29</sup>

Anyone who believes in the sanctity of human life believes that once a human life has begun it matters, intrinsically, that that life go well, that the investment it represents be realized rather than frustrated. Someone's convictions about his own critical interests are opinions about what it means for his *own* human life to go well, and these convictions can therefore best be understood as a special application of his general commitment to the sanctity of life. He is eager to make something of his own life, not simply to enjoy it; he treats his own life as something sacred for which *he* is responsible, something *he* must not waste. He thinks it intrinsically important that he live well, and with integrity....

Someone who thinks his own life would go worse if he lingered near death on a dozen machines for weeks or stayed biologically alive for years as a vegetable believes that he is showing more respect for the human contribution to the sanctity of his life if he makes arrangements in advance to avoid that, and that others show more respect for his life if they avoid it for him. We cannot sensibly argue that he must sacrifice his own interests out of respect for the inviolability of human life. That begs the question, because he thinks dying is the best way to respect that value. So the appeal to the sanctity of life raises here the same crucial political and

constitutional issues that it raises about abortion. Once again the critical question is whether a decent society will choose coercion or responsibility, whether it will seek to impose a collective judgment on matters of the most profound spiritual character on everyone, or whether it will allow and ask its citizens to make the most central personality-defining judgments about their own lives for themselves.<sup>30</sup>

In contrast Leon Kass, in opposing the right of people to choose to kill themselves or to be killed, recognizes the "indignities and dehumanizations" that modern medical technology often imposes on the end of life and agrees that they ought to be removed. But he further argues:

Dignity in the face of death cannot be given or conferred from the outside but requires a dignity of soul in the human being who faces it.... Dignity as predicable of all human beings... is ... to tie dignity to those distinctively human features of human animals, such as thought, image-making, the sense of beauty, freedom, friendship, and the moral life, and not the mere presence of life.... Courage, moderation, righteousness and other human virtues are not solely confined to the few. Many of us strive for them with partial success, and still more of us do ourselves honor when we recognize and admire those people nobler and finer than ourselves... Adversity often brings out the best in a man; and often shows best what he is made of. Confronting our own death - or the deaths of our beloved ones - provides an opportunity for the exercise of our humanity, for the great and small alike. Death with dignity, in its most important sense, would mean a dignified attitude and virtuous conduct in the face of death.<sup>31</sup>



Kass' description of courage in the face of death is important but it represents only one of the choices that one can make. Judaism does not make a virtue of suffering. In the face of incalculable pain, grievous sin, or indignity, death is a possible or even preferred moral choice.<sup>32</sup>

Daniel B. Sinclair in his important book, *Tradition and the Biological Revolution*, after a careful study of the relevant *halakhic* material concludes:

Jewish law does not adopt the notion of sanctity of human life, at least not in its strong form. This notion is, in fact, based upon a theological concept, namely the sacred awe engendered by the very experience of being alive.... In the Jewish tradition it is generally accepted that life in itself is not endowed with intrinsic holiness; rather, holiness is a state to be achieved by dint of sustained effort.<sup>33</sup>

Characteristic of the human dignity and sanctity of life, implicit in the concept of being created in the image of God, is a large measure of autonomy.<sup>34</sup> As mentioned earlier in the paper a more complete analysis of the concept of what it means to be human is necessary, however, the above cited passages provide a theological mood which offers a patient-centered model of medical care which requires shared decision-making.

#### PERMISSIBLE KILLING <sup>35</sup>

In Judaism individual human life is highly valued, but that is determined in a number of different ways. In Judaism there is a right to life, or it may be better stated, a right not to be killed. May this right be waived and if so under what conditions? The killing of an innocent at his/her own hands, or by others, is not strictly prohibited but neither is it permitted without good and sufficient reason.<sup>36</sup> Even a guilty life is taken only after the most rigorous of legal procedures.<sup>37</sup> If saving a

single human life takes precedence over *Shabbat*<sup>38</sup> then taking a human life requires more than a casual reason. If saving one human life is equivalent to saving the whole world<sup>39</sup> and taking a human life is like destroying the whole world, extreme care must be taken if we are to approve positive actions to bring life to an end.

The medical technological revolution has changed both the definition of death and the way in which we think about it.<sup>40</sup>

Death has dominion because it is not only the start of nothing but the end of everything, and how we think and talk about dying... shows how important it is that life end *appropriately*, that death keeps faith with the way we want to have lived. We cannot understand what death means to people - why some would rather be dead than existing permanently sedated or incompetent, why others would want to "fight on" even in terrible pain or even when they are unconscious and cannot savor the fight, why so few people think that whether they live or die once they fall permanently unconscious does not matter to them at all - we cannot understand any of this, or much else that people feel about death, unless we turn away from death for a while and back to life.<sup>41</sup>

It is the *aggadah*, the sacred narrative of a person's individual life, that plays a significant role. The responsa literature is composed of questions and answers about individual cases. While the responsa have precedential significance, and describe the specific conditions under which the decision has arisen, no two cases are identical and the specifics of a particular case under consideration are determinative. If this is true, then the *halakhah* ought to be a crystallization of the *aggadah*. A covenantal approach to *halakhic* decision-making must understand the spiritual biography of the individual.



The most recent arguments concerning the definition of death ask whether brain death criteria, as generally accepted in the medical profession, are adequate.<sup>42</sup> Some have argued that a persistent vegetative state constitutes death and, therefore, the removal of life support does not constitute killing. Robert M. Veatch, in a provocative article, raises significant questions about the "whole brain definition of death" and suggests a new definition of death which allows for individuals to choose their definition of death.<sup>43</sup>

In general, discussions of end stage medical care in Judaism have centered around the concept of the *goses*, the immediately dying patient i.e. moribund patients expected to die within 72 hours.<sup>44</sup> A *goses* is fully alive and nothing can be done to hasten death. Hastening the death of a *goses* is murder.<sup>45</sup> More recently Daniel Sinclair and Elliot Dorff have used the concept of the *terefah* as a category to discuss end stage medical care.

The classical definition is provided by Maimonides in reaction to the exemption of the killer of a *terefah*. The person is not liable to capital punishment on the grounds that the victim is 'already dead'. Maimonides definition runs as follows: 'It is know for certain that he had a fatal organic disease and physicians say that his disease is incurable by human agency and that he would have died of it even if he had not been killed in another way..<sup>46</sup>

It is clear that Maimonides places an incurably ill person into another category. In some sense that person's life is compromised and his/her death by human hands is not murder.

The fundamental concept in the definition of a human *terefah* is, therefore, the inevitability of death<sup>47</sup> in contrast to the *goses* who is alive in every respect. The person's biography therefore is crucial. Let us consider the case of the death of King Saul.<sup>48</sup> When mortally wounded in battle he requests that his armor-bearer kill him, but the

armor-bearer refuses. Saul and the armor-bearer commit suicide to prevent torture and humiliation by the Philistines. The Biblical text neither condemns Saul nor his armor-bearer. While some of the subsequent rabbinic discussion argues that Saul, as king, is to be considered a special case; it is clear that his biography and person require an end with dignity. The act, in fact, preserves his dignity. Potential abuse seems to justify suicide. As we apply this to the question of the terminally ill, when continued medical care is no longer effective and there is no hope of recovery or even of amelioration, we must ask whether continued medical treatment does not constitute abuse or torture? It is Saul who initiates the request for help in killing himself. While this was a situation with no opportunity for reflection, we may correctly assume that Saul's decision was based on the fact that he was mortally wounded and that the maintenance of biological life was not in his best interest.

A second version of the story appears in II Samuel 1.<sup>49</sup> Here Saul is presented as too weak to kill himself and an Amalekite agrees to kill him, asserting that he could not have survived in any case. While David punishes the Amalekite for killing Saul, David's act seems to be more concerned with the political ramifications than the legitimacy of the act itself. This passage describes an act of active voluntary euthanasia. The Amalekite justifies his act both on the fact that Saul is dying and that Saul requests him to do so.<sup>50</sup> It is clear that the Amalekite believes he has done the correct thing.

While there is a general condemnation of suicide in Jewish tradition, it is permitted when continuing to live violates a fundamental principle of what life is all about. It is not only permitted but considered praiseworthy. Martyrdom is designated *qidush hashem* (sanctification of the divine name).

On one occasion four hundred boys and girls were carried off for immoral purposes. They divined what they were wanted for and said to themselves, "If we



drown in the sea we shall attain the life of the future world." The eldest among them expounded the verse "The Lord said, I will bring again from Bashan, I will bring again from the depths of the sea" (Psalm 68:23). "I will bring again from Bashan" - from between the lion's teeth. "I will bring again from the depths of the sea" - those who drown in the sea. When the girls heard this they all leaped into the sea. The boys then drew the moral for themselves, saying, "If these for whom this is natural act so, shall not we for whom it is unnatural?" They also leaped into the sea. Of them the text says, "Yea, for thy sake we are killed all the day long; we are counted as sheep for the slaughter" (Psalm 44:23).<sup>51</sup>

Sidney Goldstein points out that "this passage contains some interesting problems.

1. Their possible involvement in sin was not immediate, i.e., no one was threatening or demanding that they do immoral acts at the moment they decided to take their lives.
2. They appeared to have some hesitation as to whether their act would be considered meritorious, as indicated by their discussion prior to their drowning themselves."<sup>52</sup>

They preferred death to a life which required them to live in a way which was inconsistent with their life plan. The prospect of being subject to conditions of torture and immorality justified their drastic act. In certain cases of unremitting pain and a terminal illness, which has diminished the person's ability to fulfill their understanding of what it means to be created in the image of God, an act of suicide or assisted suicide or active voluntary euthanasia would not only be permitted, but might be seen as praise-worthy. While one can admire the courage of one who struggles against pain and disability, there is also admiration for

those who allow their deaths to make a statement about their lives. Knowing when the struggle is over takes great wisdom. The case of R. Hanniah b. Teradion is instructive.

R. Hanniah b. Teradion was arrested by the Romans and, wrapped in a Torah, was burned at the stake. His disciples said: "Open your mouth so that the fire enters you." He replied, "Let Him who gave me [my soul] take it away, but no one should injure oneself." The executioner then said to him, "Rabbi, if I raise the flame and take away the tufts of wool from over your heart, will you cause me to enter into the life to come?" "Yes" he replied "then swear to me[he urged]." He swore to him. He thereupon raised the flame and removed the tufts of wool from over his heart, and his soul departed speedily. The Executioner then jumped and threw himself into the fire. And a *bat qol* exclaimed: "Rabbi Haninah b. Teradion and the Executioner have been assigned to the world to come." When Rabbi heard it he wept and said, "One may acquire eternal life in a single hour, another after many years."<sup>53</sup>

This passage has been subject to a great deal of analysis and is often used to demonstrate that active euthanasia is not permitted. What we have here is a situation of assisted suicide where the person is unable to act for certain emotional or moral reasons but is able to permit another to help him. The executioner is granted immediate eternal life for his act of mercy. In fact one can read this passage to suggest that relief of suffering which hastens death is not only permitted but meritorious, so meritorious that the executioner is immediately ushered into eternal life.

On the day when Rabbi died the Rabbis decreed a public fast and offered prayers for heavenly mercy. They, furthermore, announced that whoever said that Rabbi was dead would be stabbed with a sword. Rabbi's



handmaid ascended the roof and prayed: "The immortals desire Rabbi [to join them] and the mortals desire Rabbi [to remain with them]; may it be the will [of God] that the mortals may overpower the immortals." When, however, she saw how often he resorted to the privy, painfully taking off his *tefillin* and putting them on again, she prayed: "May it be the will [of the Almighty] that the immortals may overpower the mortals." As the Rabbis incessantly continued their prayers for [heavenly] mercy she took up a jar and threw it down from the roof to the ground. [For a moment] they ceased praying and the soul of Rabbi departed to its eternal rest.<sup>54</sup>

This is also a famous and much discussed passage. The fact that it is *aggadic* and the fact that maid cared deeply for Rabbi makes it especially instructive. Careful analysis will show that she acted out of compassion, but in defiance of rabbinic prohibition. She comprehends that Rabbi's disciples had lost sight of their master's needs and were consumed with their own.<sup>55</sup> Their prayers were an extraordinary powerful artificial life support. In throwing the pot and interrupting the prayers she performed a positive act. In effect she killed him. There is a preference in Judaism and in general medical ethical literature to suggest that what makes her act morally acceptable is that it was indirect and she removed an impediment to dying rather than hastened his death.<sup>56</sup> Psychologically it is easier to deal with indirect rather than direct action and the concept of allowing to die has greater appeal than killing. The distinction is often difficult to maintain. The maid's act clearly terminated his life. There is not disapproval of the action. We should further note that the rabbis' prayers become a form of abuse and torture for while they kept him alive they no longer constituted therapy in any meaningful sense.

Sinclair in his analysis of the *terefah* comes to a noteworthy conclusion:

It would appear that where the indirect termination of the life of a critically ill patient would result in the saving of a viable life, as is the case of organ transplants or the allocation of scarce medical resources Jewish law would, in principle, legitimate such an act, provided that an institutional framework existed for assessing the effect of such a deed upon the moral fabric of society and for administering discretionary punishments. In all cases involving the killing either directly or indirectly of a *terefah*, the killer would be exempt from the death penalty and his fate would be decided by extrajudicial bodies. These bodies would have at their disposal a whole range of sanctions, including death. Presumably, where proof was brought to the effect that the death of a *terefah* has been brought about in an indirect fashion for the sake of saving a viable life, those involved in the relevant acts would not be subject to any sanction.<sup>57</sup>

Sinclair's suggestion that killing be allowed for sake of *piquah nefesh* is very interesting. It means that he believes that one life can be sacrificed for the sake of another life. While he still wishes to maintain the distinction between direct and indirect means, the issue of intent is important.<sup>58</sup>

The Talmud,<sup>59</sup> in discussing capital punishment, uses Leviticus 19:18 "Love your neighbor as yourself" to argue that one should chose for the condemned criminal a *mitah yafah*, an easy death. Rashi defines a *mitah yafah* as a rapid death or one that does not humiliate the



condemned. If we are to view condemned criminals as our neighbors and compassionately provide them with a rapid and non-humiliating death, what, then, is our obligation to innocent life which is suffering terrible pain and a humiliating death?<sup>60</sup>

#### INSTITUTIONAL AND SOCIETAL SAFEGUARDS

The model for modern medical care, as it is increasingly practiced and as it ought to exist ideally, is shared decision-making.<sup>61</sup> Patients have the right, in consultation with competent medical authorities, to determine their own course of treatment. In Judaism great weight is given to the preservation of health and seeking cures for illnesses and preserving life. Medical expertise is highly respect and is to be followed except for good and sufficient reasons.

Suicide represents a special problem because most suicides are depressed.<sup>62</sup> There are those who argue that there is no such thing as rational suicide. In addition, there is the legitimate concern that if permission is granted to terminally ill patients to commit suicide, others not terminally ill will be more likely to commit suicide or that people who are old and infirm will feel that they must "do the right thing" and take their own life. My plea with respect to suicide is that we place it in the category of "decriminalization" or, in *halakhic* terminology, placed into the category *lekhathilah - bediavad* (an act not valid in the first instance but valid after the fact). Decriminalization rather than legalization<sup>63</sup> is my preference. There is a difference between "may" and "should". I wish to maintain a negative presumption which must be overridden. We must maintain a strong preference for life over death. On the other hand, this will enable us to be more compassionate in our assessment of those who believe that their impending death should be a *mitah yafah* which Rashi defines as speedy with a minimum of humiliation. By rethinking our attitude we in fact might find that we are given an opportunity to explore the meaning of life and therefore of death with the terminally ill. If we are serious about self-determination as a characteristic of being *b'tzelem elohim*, then we must find ways to help make mortal choices in



a considered way. Assisted suicide and voluntary active euthanasia require permission first from the person wishing to die and those who are expected to assist or perform the act. Therefore, they allow and require elaborate procedures to assure the act is consistent with one's understanding of the sacred quality of their personhood. One of the most difficult aspects of permitting acts of killing is to assure that they are in fact voluntary and in keeping with the total biography of the person. This requires the sustained involvement of a physician, who knows the patient well, consultation with family members and a rabbi, who has had serious conversations with the individual.<sup>64</sup> The patient's case needs to be presented to a panel of physicians who must agree on the medical facts involved and, from a Judaic perspective, a *Bet Din* should also be convened.<sup>65</sup> These are limitations on the autonomy or self-determination of the patient as there is also an important community interest in preserving life. The issues of informed consent and competence are very important.<sup>66</sup> Advance directives can play a significant role as they are supposed to instruct medical professionals and enable surrogate decision-making, and they would also constitute a part of the *aggadic* record which is essential to the covenantal approach. Such documents, in addition to the legal forms, ought to be like ethical wills which describe the person's most important values. It is our goal to provide a comprehensive picture based not just on persons as patients or when faced with a terminal illness but when they were best able to express themselves.

My suggestion has a number of common elements with the following procedure which Brock recommends before a patient would be allowed to terminate life or be assisted in the endeavor.

1. The patient should be provided with all relevant information about his or her medical condition, current prognosis, available alternative treatments and the prognosis of each.
2. Procedures should ensure the patients's request for euthanasia is enduring (a brief waiting period could be



required) and fully voluntary (an advocate for the patient might be appointed to ensure this).

3. All reasonable alternatives to improving the patient's quality of life and relieving any pain or suffering must have been explored.

4. A psychiatric evaluation should ensure that the patient's request is not the result of a treatable psychological impairment such as depression.<sup>67</sup>

### CONCLUSIONS

Death is part of the meaning of life. How one dies ought to be consistent with how one lived one's life. In most case we do not have choices about the way we die. Judaism values the pursuit of health and the preservation of life as very important *mitzvot*. Arguments against capital punishment in Judaism exhibit an extreme theological resistance, even to the termination of the life of one who has committed a capital offense. Therefore, extreme caution must be taken that permission given in "hard cases" does not become a slippery slope through which people will be encouraged to "do the right thing" and terminate their lives or ask others to do it for them. However it is also clear in Judaism that biological life, while an important value, is not a supreme value which overrides all other considerations. Therefore, in extreme situations, the termination of human life is not considered a sin, but is in fact praiseworthy. The determining factor is whether the termination of life is consistent with the preservation of the person as a being created *b'tzelem elohim*. In other words, does the continuation of biological life violate the sacred character of the individual's life? Therefore, the *aggadah*, the sacred narrative of a person's life, becomes part of the *halakhic* decision-making process. Ideally the person, family, physician, and rabbi<sup>68</sup> will be involved in the initial decision. The decision would

be reviewed by impartial medical and rabbinic experts. The decision-making seems cumbersome, but is necessary to avoid conflict of interest and rash decisions. This might be a permissible limitation on autonomy.

For a terminally person in unremitting pain:

1. Suicide would be seen a morally permissible act when undertaken to preserve the sacred quality of a person's life, i.e. consistent with a person's biography. As noted above care must be taken to prevent suicide which is the result of temporary depression.
2. Assisted suicide is permitted when the decision is rational and can be demonstrated as consistent with the person's own biography.
3. Active voluntary euthanasia is permitted when the person has waived his/her right not to be killed and it is consistent with the person's biography.

#### Notes

1. The use of the term "killing" is deliberate. Avoiding euphemisms makes the moral seriousness of the issue clear.
2. By framing the question in this way my goal is to limit the parameters of the discussion to a single class of cases. However, this is no easy task because terms such as "terminally ill," "dying" or even "end stage medical care" have a certain ambiguity. It is beyond the scope of this paper to define these terms, but definitions are essential. While this essay is meant to be a general *halakhic* discussion of the issue of suicide, assisted suicide, and active voluntary euthanasia, actual decisions are made on a case by case basis. This is a theme to which I return in the body of the paper.
3. Arguments against sanctioning suicide, assisted suicide and active voluntary euthanasia invoke the concept of the "slippery slope" or the "wedge." Ethically one must always attempt to deal with unintended consequences. How does our desire to help an individual in a particular situation create circumstances that will harm others e.g. if we sanction suicide for a severely handicapped person who finds life intolerable, do we inadvertently pressure other handicapped persons to "do the right thing" and take their own lives? Do we not encourage society to consider them a burden rather than an ethical responsibility?



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4. Jewish responsibility to the weak and the vulnerable in society is a significant focus of Torah legislation and prophetic critique of Israelite society. Rabbinic literature using the concept of *imitatio Dei*, emphasizes that the just society is one in which those who are weakest are protected, cared for and granted dignity. See the section "Foundation of Jewish Ethics" in *Contemporary Jewish Ethics* edited by Menachem Kellner New York, 1978 pp. 125-161. See Lev. 19:1 ff "Say to the congregation of Israel you shall be holy for I the Lord your God am holy." Deut. 10:18 "He executes justice for the fatherless and the widow, and loves the sojourner, giving him food and clothing. Deut. 24:19-21 "When you reap your harvest in your field, and have forgotten a sheaf in the field, you shall not go back to get it; it shall be for the sojourner, the fatherless, and the widow; that the Lord your God may bless you in all the work of your hands. When you beat your olive trees, you shall not go over the boughs again; it shall be for the sojourner, the fatherless, and the widow. When you gather the grapes of your vineyard, you shall not glean it afterward; it shall be for the sojourner, the fatherless, and the widow." Deut. 27:19 "Cursed be he who perverts the justice due to the sojourner, the fatherless, and the widow. And all the people shall say, Amen." Ps. 146:9 "The Lord watches over the sojourners, he upholds the widow and the fatherless; but the way of the wicked he brings to ruin." Jer. 22:3 "Thus says the Lord: Do justice and righteousness, and deliver from the hand of the oppressor him who has been robbed. And do no wrong or violence to the alien, the fatherless, and the widow, nor shed innocent blood in this place."

5. "First, the abortion parallel. In the 1960's, legalized abortion was proposed for the "hard cases," which were defined in different ways by different people. But, today, few can deny that, however defined, abortion is not limited to the "hard cases." In fact, rape, incest, gross genetic defect, and preservation of the mother's life make up less than 5% of the 1.5 million abortions performed annually in the United States. Rosenblum and Forsythe, "The Right to Assisted Suicide: Protection of Autonomy or an Open Door to Social Killing" *Issues in Law and Medicine*, Vol. 6 #1, 1990, 26. This journal has a very strong "right to life" orientation. However, the issue it raises is of real importance. A significant concern in the literature is the "slippery slope." In many ways this is the most difficult aspect of the issue to discuss. A central concern is not only the impact on individuals but on society as a whole. Does approval of suicide, assisted suicide or voluntary active euthanasia in certain specific, ethically justified, cases make the weak more vulnerable? Is our commitment to the sanctity of human life diminished when we condone the killing of innocent people? Is the connection between the *Shoah* and euthanasia so inexorable, that it makes any endorsement of "the right to die" a path to mass murder? Does the "rational" decision of a person to end his/her life translate into an obligation on the part of others to do the "right thing" and end their lives?

6. The ambiguities inherent in the terminology as well as the ethical situation are discussed by Joseph A. Edelheit "The Ambiguity of Suicide and the Right to Die" *Machshavot: A Journal of the Chicago Board of Rabbis* Summer 1992 pp.5-10. The historical analysis of suicide in Droge and Tabor's book *A Noble Death: Suicide and Martyrdom Among Christian and Jews in Antiquity* provides an understanding of how contemporary attitudes developed. Sidney Goldstein's work *Suicide in Rabbinic Literature* provides a detailed discussion of the *halakhic* attitude toward suicide.



7. I recognize that in fact they are two different questions. However, it is my belief, as will be discussed in the section on methodology, that the way in which we do *halakhah* must be broadened. Non-*halakhic* texts and general Jewish and philosophical ethical discussion should be given greater weight in creating a hermeneutic for reading *halakhic* texts.

8. Carol Gilligan *A Different Voice* Cambridge MA, 1982. Karen Lebacqz "Feminism and Bioethics: An Overview" *Second Opinion*, Vol. XVII, #2 1991, pp. 11-27.

9. In another context see the very interesting debate between Craig Evans and Jacob Neusner on the nature of the Mishna and the role of the messianic speculation during Mishnaic times. Craig A. Evans "Mishna and Messiah 'in Context': Some Comments on Jacob Neusner Proposals: *JBL* Vol. 112, #2 Summer, 1993 pp 267-289 and Jacob Neusner "The Mishna in Philosophical Context and Out of Canonical Bounds" *JBL* Vol. 112, #2 Summer 1993, pp. 281-304. Methodology is extremely important and often determinative. However, it is true that people using similar methodologies may come to different conclusions or that people using different methodologies may in fact arrive at similar if not identical conclusions. See Ellenson "How to Draw Moral Guidance from a Heritage: Jewish Approaches to Mortal Choices" in *The Ethics of Choice: A Time to be Born and a Time to Die*, ed. Barry S. Kogan, New York, 1991 pp. 219-32.

10. Harold Schulweis, "The Character of Halakhah Entering the Twenty-First Century" *Conservative Judaism*, Vol. XLV, #4 Summer, 1993, pp. 5-13, an appeal to the Conservative Movement calls for an ethical reflection on the *halakhic* process to redeem it from irrelevance.

11. Ellenson, *Op. Cit.*

12. Ellenson p. 221 citing David A. J. Richards, *The Moral Criticism of the Law*, Encino and Belmont, CA, 1977 p. 28.

13. *Ibid.* p. 321.

14. *Ibid.*

15. Meta-*halakhic* issues are often ignored or explicitly denied by traditional decisors. In Reform *halakhah* the gap between traditional precedents and the final decision needs to be filled with analysis of why the meta-*halakhic* (read ethical) is essential to the determination of the decision. In Reform Judaism, we are hermeneutically bound to the principle that God cannot command the unethical. The issue of revelation is significant because our rejection of verbal revelation allows greater latitude both of method and substance yet it threatens the integrity of the systems as law. Guidance in strict sense is affirmable on the basis of wisdom and authenticity but governance is more difficult to affirm. But framing the issue in terms authority and autonomy is unproductive. The case for *halakhah* in Reform will be made on the basis of its ability to create a way to live a sanctified life which preserves the Jewish people and contributes to human dignity.



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16. Reform Judaism operates with an ethic which is independent of the *halakhah* and functions as a hermeneutical device to critique the *halakhah*.

17. David Hartman *A Living Covenant: The Innovative Spirit in Traditional Judaism*, New York, 1985 pp. 272-273.

18. It is the relationship of the individual to the historical experience of the community which is crucial. Implied in being Jewish, is the connection to the covenant. The whole discussion is relevant only to someone who is willing to live within a covenantal framework.

19. These concepts are particularly important when making decisions about life and death. We are dealing with individuals each of whom is of infinite worth but we do not deal with them in isolation, for how we treat them reflects on the society as a whole.

20. Eugenics, euthanasia for mentally retarded, murder of homosexuals as preludes to the mass destruction of Jews serve as a warning. Some argue that these acts in and of themselves are sufficient to oppose assisted suicide or voluntary euthanasia. The "slippery slope" is too steep to risk the inevitable fall.

21. The potential for the full development of a judaically based law (I deliberately avoided the use of the word *halakhah* here for a number of reasons not germane to this paper.) in Israel is an exciting possibility fraught with many difficulties and significant questions. Some *halakhists* argue that certain acts would be permitted in a Jewish state operating with the Jewish understanding of the sacredness of human life which would not be permitted in non-Jewish societies where the protections against abuse are not as great. While I am not at all sure that this is true, it does again serve as a warning that if we permit the termination of life in some extreme circumstances, we may inadvertently diminish the protection of weak, vulnerable and innocent life.

22. Elliot N. Dorff "A Jewish Approach to End-Stage Medical Care", *Conservative Judaism*, Vol. XLIII, #3 Spring, 1991, p. 5. The *halakhic* method pursued in Elliot Dorff's paper has much in common with the covenantal method. I believe that in liberal *halakhic* circles the methods overlap either explicitly or implicitly.

23. The overwhelming opinion of *halakhic* authorities, Reform, Conservative, and Orthodox, opposes euthanasia whether in the form of suicide, assisted suicide, or physician initiated. The following statements from Reform responsa are representative. Israel Bettan in 1950 wrote, "The Jewish ideal of the sanctity of human life and the supreme value of the individual soul would suffer incalculable harm if, contrary to the moral law, men were at liberty to determine the conditions under which they might put an end to their own lives and the lives of other men." *American Reform Responsa* p. 263. A finer distinction between removing impediments rather than hastening death may be summarized in the statement of Solomon B. Freehof in 1969 "To Sum up: If the patient is a hopelessly dying patient, the physician has no duty to keep him alive a little longer. He is entitled



to die. If the physician attempts actively to hasten the death, that is against the ethics of Jewish law. In the case described, the term used in the question, 'hasten death,' is perhaps not correct, or at least should be modified. The physician is not really hastening death; he has simply ceased his efforts to delay it." *American Reform Responsa*, p. 260 Finally in a 1980 responsum Walter Jacob and the CCAR Responsa Committee state, "We would not endorse any positive steps leading toward death. We would recommend pain killing drugs which would ease the remaining days of a patient's life. We would reject any general endorsement of euthanasia, but where all 'independent life' has ceased and where the above mentioned criteria of death {sic. brain death} have been met further medical support systems need not be continued."

In a number of cases we may be dealing with a semantic difference between the concept of "doing" and "allowing to happen." A fundamental question remains, if we can relieve suffering for a terminally ill patient who is aware that this will kill him/her and grants permission is this an immoral act? Is there any moral difference between not starting a respirator or removing a respirator? Do we show greater respect for the sanctity of human life in permitting continued suffering or eliminating that suffering at the authorized request of the sufferer?

24. I have avoided offering a definition of terminal illness. For my purposes a terminal illness is one which inevitably lead to death and for which medical treatment has been exhausted. Progressive chronic diseases such as Alzheimer's disease raise important questions. They rob people of their personhood and their ability to function independently. Is dementia pain for the demented or only for those who love that person? I am particularly sensitive to people with AIDS. (See Yoel H. Kahn's sermon *Choosing the Hour of Our Death* *CCAR Journal* forthcoming). I am opposed to involuntary euthanasia as a violation of the sanctity of human life. A person has a right not to be killed. That right might be waived. I am sympathetic to those, who faced with such a diagnosis, have chosen to end their life. However, the major thrust of this paper concerns those for whom death is certain and pain intractable. Pain management is an art and one at which physicians have become more adept which increasingly relieves the suffering of the dying. I believe the human will to survive and cling to life will limit the number of people who will choose death. However, choosing to die rather than suffer the loss of one's personhood can be a moral act.

25. As anyone who had studied both recent responsa and medical ethical literature knows the question of what constitutes biological life is much debated. Robert M. Veatch "The Impending Collapse of the Whole-Brain Definition of Death" *Hasting Center Report* 23, #24, 1993, pp. 18-24. Fred Rosner *Modern Medicine and Jewish Ethics*, New York, 1986, pp. 241-254.

26. *Mishneh Torah, Hilkhoh Yesodei Ha-Torah* 4:8 See Jacob Neusner, *The Glory of God is Intelligence*, Salt Lake City, 1978 p. 2ff.

27. Irving Greenberg, "Toward a Covenantal Ethic of Medicine" in Levi Meir, *Jewish Values in Bioethics*, New York, 1986, pp. 124-29.

28. Leon R. Kass "Death with Dignity and the Sanctity of life" *The Ethics of Choice A time to Be Born and A time To Die*, p. 128. Kass argues very strenuously here and in his "Is There a Right to Die?" *Hasting Center Report*, Vol. 23, #1, January-February, 1993, pp. 34-43, against the concept



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that there is a right to die or that either assisted suicide or active voluntary euthanasia are permitted. See Ronald Greens response "Good Rules Have Good Reason: A Response to Leon Kass in *The Ethics of Choice A Time to Be Born and A Time To Die* pp. 147-56.

29. Ronald Dworkin, *Life's Dominions: An Argument about Abortion, Euthanasia and Individual Freedom*, New York, 1993 p. 84.

30. *Ibid.* 215-26 Similarly Dan W. Brock identifies self determination as a significant criterium for making mortal decisions. He defines self determination as "people's interest in making important decisions about their lives for themselves, according to their own values or conception of a good life, and being left free to act on those decisions. Self-determination is valuable because it permits people to form and live in accordance with their own conception of a good life at least within in the bounds of justice and consistent with others doing so as well." *Life and Death Philosophical Essays in Biomedical Ethics*, Cambridge, England, 1993, pp. 205-206

31. Leon Kass "Death with Dignity and the Sanctity of life", pp. 132-34.

32. See below.

33. Daniel B. Sinclair, *Tradition and the Biological Revolution*, Edinburgh, 1989, p. 81.

34. An interesting and frightening passage in *The Art Scroll Commentary* on Joshua, (ed. Reuven Drucker, Brooklyn, 1982) links the value of human life to the concept of creation in the divine image with behavior and not merely biological life. On one level the passage clearly supports the concept that biological life may be forfeited under certain circumstances and therefore rejects any absolutist concept of the sanctity of human life. It raises a serious warning that when we either offer moral or other criteria which permit the killing of individuals (or in this case "nations") we come dangerously close to the "slippery slope."

Since the Torah places infinite value on each individual by definition, the value of several persons cannot exceed the value of one. One infinity and one thousand infinities are equally large. Yet the *Book of Joshua* chronicles the wholesale slaughter of the Seven Canaanite Nations. How can the Torah countenance, let alone command such destruction of human life? How can this campaign of extermination be reconciled with the principle of sanctity of human life? The answer is that a life has value only insofar as it bears the imprint of the Divine. Man was created in the image of God and it is this *image* which confers value upon the substance of his body. If an individual is irrevocably entrenched in behavior which denies the very being and authority of the Divine he reverts to a mere clod of chemicals.

35. I wish to emphasize that the use of word "killing" is deliberate. We must always be aware of the moral seriousness of a decision to terminate human life. While Jewish law and many ethicists make a moral distinction between killing and allowing to die, I am convinced that first of all, in many cases, the distinction is not really clear, for example, the notion of double effect where one gives pain medication in sufficient doses to relieve pain but at the same time one actually hastens death. Since the intent was the relief of pain, not killing the patient, it is morally permissible, but giving a deliberately lethal dose of the pain-killer is ethically wrong. The concept of *shev v'al ta'aseh* (sit and do nothing) requires re-examination.

36. Abortion raises a number of the same issues. While the status of the fetus is not that of a *nefesh* "juridical person," it is clear that its status as a potential life is not morally trivial. Most authorities limit permissible abortion to cases where there are direct or indirect threats to the mother's life or health. Where authorities permit the abortion of a severely handicapped fetus, it is done for maternal reasons. It is the mother's quality of life which is at stake. Some liberal authorities have argued that a severely impaired fetus has a right not to be born. The danger of the slippery slope exists in these cases as well where perfection is seen as the ideal. How much handicap is sufficient to waive the fetus' right to be born? I always think about a wonderful young man in my congregation with Downs Syndrome who is one of the sweetest people I know and a young boy who is profoundly deaf. In spite of some limitations they bring great joy and beauty to the world.

37. Capital punishment is a case in point. It is clear that both the Torah and later rabbinic literature permit capital punishment. The judicial restrictions against enforcement, which develop mostly after Jewish courts no longer have the authority to impose capital punishment, make it clear that even killing a guilty person is not done without some moral reservations.

38. *M. Sanhedrin* 4:5

39. *B. Yoma* 85a; *Shabbat* 132a

40. Avram Reisner in his response to Elliot Dorff in describing natural death, indicates how far, in many cases today, we are from such a concept, and, therefore, places certain mechanical devices such as heart-lung machines, respirators, dialysis machines and some transfusions in the category of "impediments to dying". He, like most Jewish authorities, wants to maintain the ethical distinction between removing impediments to dying and killing. There is a danger here that such a way of thinking will in fact dilute the moral seriousness of these issues.

What constitutes natural death? The cessation of the integrated biological functioning of an organism due to natural causes. Perhaps surprisingly, all deaths have one proximate cause - the deprivation of oxygen to the cells. The mechanisms that lead to a shortage of oxygen and the death of a cell may differ considerably, but whether the heart ceases to circulate the blood due to mechanical failure or whether the lungs cease to maintain the oxygen levels in the blood or whether either of these follow upon a breakdown of instructions from the brain stem (brain death as it must be defined by the



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*halakhah*), the proximate cause remains the same. Yet not all deaths are the same in our moral accounting. We recognize some deaths as untimely, and others as natural.

Death by violence is culpable not because the death is intrinsically different from a natural death but because of the agent and the untimeliness. Death by famine and disease (not caused by specific human design) is intolerable but not culpable because the agent is "an act of God" but the death remains, in our minds, untimely. Death of old age is neither intolerable nor culpable since it is timely and attributable to the nature of our creation. The permission granted in the Torah for a physician to heal, according to the primary *midrash* of (*rapo yerape*) is, in the first instance, granted with regard to injuries in the first category. Of healing in the second category there existed some debate; perhaps these afflictions should be taken to be God's will, but Jewish law and tradition ruled firmly that here, too, we are required to act to the extent of our ability. The third category was never before susceptible to our ministrations. Nor is it evident that it should be or ever will be meaningfully within our ken. This, ultimately, is God's calculation. This, it seems to me, is the theological rationale behind removing impediments to death - and not primarily the relief from pain (which is the rationale behind praying for death). We try in all our dealings, including healing and including death, to act in that way which corresponds to God's will.

The diagnostic problem remains. How do we determine that a particular death is "natural" and timely, according to God's will and plan? The answer must reside within medicine.

If timely death - the ultimate death of God's choice - will not be meaningfully affected by our ministrations, we need only see if our medicine is able or futile. Here is the law of treatment of the dying rephrased. By doing everything possible medically, biologically, to treat the life systems of the critical patient, while removing impediments to death, items or procedures that interfere with the natural shut-down of the body's major systems in death, we allow ourselves to see if, indeed, God has ordained the closure of this life, while we do not cede at all our roles as healers and nurturants. Avram Israel Reisner "A Halakhic Ethic of Care for the Terminally Ill", *Conservative Judaism*, Vol. 43, #3, 1991 pp. 58-59.

41. Dworkin, *op. cit.* p.199.

42. Reform Judaism accepts brain death criteria, see Walter Jacob, "Euthanasia", *American Reform Responsa*, New York, 1983, p. 272. There is an ongoing argument in the Orthodox community See Fred Rosner, *Modern Medicine and Jewish Ethics*, Hoboken, 1986 pp. 241-254.

43. "An individual who has sustained irreversible loss of consciousness is dead. A determination of death must be made in accordance with acceptable medical standards. However, no individual shall be considered dead based on irreversible loss of consciousness if he or she, while competent, has explicitly asked to be pronounced dead based on irreversible cessation of all functions of the entire brain or based on irreversible cessation of circulatory and respiratory functions. Unless an individual has, while competent, selected one of these definitions of death, the legal guardian or next of kin (in that order) may do so. The definition selected by the individual legal guardian or next of kin shall serve as the definition of death for all legal purposes." Veatch, "The Impending Collapse of the Whole-Brain Definition of Death" *Hastings Center Report*, # 23, 1993, p.23.

44. See the discussions by both Dorff and Sinclair for all of the relevant citations and ethical distinctions.

45. A person on the deathbed (*goses*) is like the living in every regard.. One does not bind his cheeks or stop his orifices... One does not save him or wash him.. until the moment he dies. Whoever touches and moves him, that one commits murder. Rabbi Meir would compare him to a candle which is flickering; should a person touch it, it immediately goes out. (*Shukhan Arukh, Yoreh Deah* 339.1 as cited by Avram Israel Reisner "A Halakhic Ethics of Care for the Terminally Ill", *Conservative Judaism*, Vol. 40, #3, 1991, p. 56.

46. *Hilkhoh Rozeah* 2.8; Sinclair *Op. Cit.* p.20

47. Sinclair *Op. Cit.* p.21.

48. I Samuel 31:1 Now the Philistines fought against Israel; and the men of Israel fled before the Philistines, and fell slain on Mount Gilbo'a. And the Philistines overtook Saul and his sons; and the Philistines slew Jonathan and Abin'adab and Mal'chishu'a, the sons of Saul. The battle pressed hard upon Saul, and the archers found him; and he was badly wounded by the archers. Then Saul said to his armor-bearer, "Draw your sword, and thrust me through with it, lest these uncircumcised come and thrust me through, and make sport of me. " But his armor-bearer would not; for he feared greatly. Therefore Saul took his own sword, and fell upon it. And when his armor-bearer saw that Saul was dead, he also fell upon his sword, and died with him. Thus Saul died, and his three sons, and his armor-bearer, and all his men, on the same day together. And when the men of Israel who were on the other side of the valley and those beyond the Jordan saw that the men of Israel had fled and that Saul and his sons were dead, they forsook their cities and fled; and the Philistines came and dwelt in them. On the morrow, when the Philistines came to strip the slain, they found Saul and his three sons fallen on Mount Gilbo'a. And they cut off his head, and stripped off his armor, and sent messengers throughout the land of the Philistines, to carry the good news to their idols and to the people. They put his armor in the temple of Ash'taroth; and they fastened his body to the wall of Beth-shan.



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49. II Samuel 1:1-10 "After the death of Saul, when David had returned from the slaughter of the Amalekites, David remained two days in Ziklag; and on the third day, behold, a man came from Saul's camp, with his clothes rent and earth upon his head. And when he came to David, he fell to the ground and did obeisance. David said to him, Where do you come from? And he said to him, I have escaped from the camp of Israel. And David said to him, How did it go? Tell me. And he answered, The people have fled from the battle, and many of the people also have fallen and are dead; and Saul and his son Jonathan are also dead. Then David said to the young man who told him, How do you know that Saul and his son Jonathan are dead? And the young man who told him said, By chance I happened to be on Mount Gilboa; and there was Saul leaning upon his spear; and lo, the chariots and the horsemen were close upon him. And when he looked behind him, he saw me, and called to me. And I answered, Here I am. And he said to me, Who are you? I answered him, I am an Amalekite. And he said to me, Stand beside me and slay me; for anguish has seized me, and yet my life still lingers. So I stood beside him, and slew him, because I was sure that he could not live after he had fallen; and I took the crown which was on his head and the armlet which was on his arm, and I have brought them here to my lord."

50. See the discussion of Samuel Atlas, in Walter Jacob (ed.), *American Reform Responsa*, pp. 266-267.

51. *B. Gittin* 57b.

52. Sidney Goldstein, *Suicide in Rabbinic Literature*, New York, 1989. p. 43.

53. *B. Avodah Zarah* 18a-b.

54. *Ketubot* 104a.

55. The patients best interests take precedence over others when it comes to medical treatment.

56. There is good reason ethically to suggest in most cases that indirect acts or the removal of impediments is preferable. However, we are dealing with extremes and we are also dealing with situations where the distinctions are less clear, but the outcome is no less conclusive. The termination of human life is never morally trivial.

57. Sinclair *Op. Cit.* 62-63.

58. Brock argues convincingly that there is little distinction between killing and allowing to die. Intent is crucial. The same act or omission is moral or immoral depending upon intent. One who acts in the patients' best interests rather than his or her own has committed a moral act. One who acts in his/ her own interest commits an immoral act. Brock *Ibid.* pp. 162-65 Dorff *Ibid.* p. 15 argues that "we do nothing to hasten death and thereby co-opt the prerogative of God to determine such matters.." He maintains the distinction between sustaining life and prolonging death. The usual source of most Jewish medical ethicists is that Judaism permits only passive euthanasia defined as

removing impediments to dying.

59. *B. Sanhedrin 45a* and Rashi ad. loc.

60. It is essential for this paper that we are dealing with a competent patient who has either chosen to exercise his/her own right to die or has explicitly waived his/her right not to be killed.

61. *Ibid.* p. 55 ff. Dorff while arguing that "individual Jews do not, under Jewish law, have the same degree of autonomy they increasingly enjoy under American Law, ... nevertheless ... individual Jews do determine considerable elements of their health care." Dorff *Ibid.* p.12

62. This flies in the face of the traditional *halakhah* which defines "a culpable suicide, subject to *halakhic* penalties is one carried out through responsible choice, with intent definitely stated by the perpetrator and clearly understood by the listener." Goldstein *Ibid.* p.14

63. I recognize that there are significant problems with the terminology. My bias is not to allow, rather than to recommend, acts of killing in extreme situations.

64. This could either be the family rabbi - especially if he or she had ongoing involvement with the patient - or a specially trained rabbi. It would be advisable, in either case, that the rabbi have training in acquiring knowledge about an individual life plan. I believe that the skill necessary to elicit oral history would be important in this case.

65. Approval would, therefore, carry Judaic weight. The *Bet Din* would be in a position to weigh the Judaic considerations. This could have a powerful impact on this situation. I recognize a number of practical, psychological and potential legal difficulties.

66. Dan W. Brock has a detailed description of a model of informed consent and of shared decision making in his book *Life and Death* pp. 21-54, 55-79.

67. Brock *Ibid.* pp. 225-226.

68. Ideally these are all people who know and love this person who could be expected to support what is consistent with the person's biography and his/her best interests. However, checks and balances are required because of the seriousness and irreversibility of the decision.



