Re-examining progressive halakhah

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New York, 2002

Jewish Law Responds to American Law

urn:nbn:de:kobv:517-vlib-10469

Chapter 5

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Jewish Law Responds to American Law

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Introduction

I begin with three vignettes: The first was a view of a Brooklyn Hasidic community. The streets were busy with the normal activities of commerce and socializing. The men were uniformly dressed in their uncorrupted black suits with flapping *tsitsit* and very broad-brimmed black fedoras. The less-uniformly clothed women exhibited their individuality in different-colored long dresses and sleeves that covered their arms. The *sheitles* tended to be dowdy brown or muted auburn. It was, after all, not Shabbat. Suddenly there was an inharmonious and charming oddity. A young boy, *peot* flapping down from his shaved head, ran through the streets wearing a jacket upon which was boldly emblazoned the name of a favored team, The Mets. The traditions of the eighteenth century, the traditions of the Pale, had met and succumbed to one intrusive element of the twentieth century.

Notes for this section begin on page 168.

The second anecdote is from my own personal experience when I was a student at HUC. It was the early 1950's and a major concern of a part of the student body was in the burgeoning civil rights movement. On one occasion two of us joined two or three black members of CORE and went to Fountain Square to a segregated luncheon restaurant diner and we sat at the counter. By previous agreement we rabbinic students wore *kippot* as we wished to be identified as Jews. My companion sat at the counter and ordered a BLT. It is interesting to note, after the passage of over four decades, that I still recall that it was one of the black companions at that "sit-in" that commented on the incongruity of a *kippah* accompanied by an appetite for *hazer*.

My third remembrance is a more recent one. We have friends in Toledo who belong to the Conservative movement and who are, in their own manner of practice, rather traditional. They do, however, ride to Synagogue. We invited them to have Shabbat lunch with us and they refused. They would not interrupt the return journey to their home for any reason.

Whatever our personal attitude toward Jewish practice and religious observances, these disparate examples make the point, I hope, that individuals of all movements and groups in Jewish life are groping to balance, in some measure, the two dynamic poles of our existence. Much like the electrodynamic tow of the North and South Poles of our globe, our Judaism and our modernity often tug at us from the opposite extremes of our existence.[1] The questions that tumble one upon the other are disturbing. The more difficult answers, to those questions, most likely more difficult because we are in a period of intense social flux, will help us define ourselves as Jews in the modern world.[2]

The questions I raise clearly will reflect my own position and predilections as a Reform Jew. Most certainly, they will be greatly influenced by my inclinations which are deeply concerned that essential Jewish matters should be guided, if not by, *halakhah*, by a halakhic process. There are more traditional definitions of *halakhah*.[3] I freely admit, with a small amount of discomfort, although I use the word *halakhah*, I do not use it in a sense, that establishes absolute authority.[4] Rather, I see *halakhah* as representing a Jewishly particular legal process, which has a dynamic, which does, or perhaps more properly, can respond to changes in society. *Halakhah* is a process which affords to both individuals and society the freedom and the mechanisms to develop new

norms, standards and criteria[5] by which specific practices, customs and activities can react to changes in culture, technology and attitudes of the general society in which we live and interact.[6]

There are those who see a significant decline in the effect of *halakhah* in modern Jewish life. Over four decades ago the doyen of reform Jewish halakhists, Solomon Freehof, wrote about the development of *halakhah*.[7] Although the word *halakhah* does not appear in the book [8] there is a succinct but sufficient description of the development and influence of *halakhah* through the centuries. The conclusion of the volume with regard to the continuance of this vibrant and constructive legal literature expressed pessimism and lack of expectation with regard to the vitality and effect of responsa, on modern Jewish life.[9]

Of particular pertinence to the theme of this chapter, he noted that the "vigor of the responsa literature depends primarily upon the vitality of Jewish religious life. As long as observant Jewish life continues substantially as it has for centuries, and the people adhere to the inherited laws and customs, then the various circumstances of a widespread religious society are bound to produce a constant stream of questions. But as soon as religious life retreats from a certain field of experience, that field immediately disappears from practical religious Law."[10] He correctly noted that "[f]or centuries the responsa of all the lands were dominated by questions of civil law—problems concerning partnerships, contracts, etc. But during the last century such questions have virtually disappeared from the literature. This is simply a reflection of the fact that the Jewish communities are no longer self-contained and self-sufficient, that Jews no longer bring their business disputes to their own Jewish courts, but to secular courts. There are no civil law responsa nowadays, because there are virtually no questions of civil law brought to the rabbis. A vast field of Jewish observance has thus died out, and the responsa literature reflects the change."[11]

Dr. Freehof's melancholy builds to a dolorous conclusion. "If there is further modern shrinkage in observance, there will be further narrowing of the field of responsa."[12] He perseveres in his distressing analysis: "[a]t present, with widespread non-observance, and the shrinkage of rabbinic study, the prospects for substantial continuation of the responsa literature are not promising. For the time being 'there is no voice (to ask) and no one answering'."[13]

Time and Dr. Freehof's prodigious productivity and his own matchless knowledge of responsa have contraverted his judgment concerning the development of *Halakhah* in this era.[14] In the next thirty years his books on responsa tumbled one after another from the printing press. He has made a lasting contribution in a period of history, which has seen an exponential growth in a new area of halakhic literature, reform responsa. In largest measure, Dr. Freehof responded to the need for new answers to old questions in the area of personal and communal religious observance. [15] While the broad domain of religious observance involves more than ritual, for our purposes I would use that term to catalog the vast majority of issues he addressed.[16]

During the four decades since Dr. Freehof essentially pronounced *Halakhah* to be moribund, there has been a new creative dynamism in the halakhic process in all the movements of Jewish religious life. The Orthodox and Conservative movements have created, as has the Reform movement, a growing body of literature which is focused on questions of Jewish law responding to new realities in our world. In largest measure, the Conservative movement has used the mechanism of the Committee on Jewish Law and Standards of the Rabbinical Assembly as its means to address the new ritual and ethical dilemmas.[17] Orthodoxy has, in largest measure, continued the century-old pattern of turning to individual rabbis who have acquired authority based upon their knowledge of Jewish law and their moral leadership.[18]

Not quite tangentially, it must be noted that there has been a constant dynamic tension between *halakhah* and the law of the alien jurisdiction under which the Jewish people lived at different times and in different lands. The Jewish legal scholars have grappled with the bipolar tautness created when attempting to define Jewish law that was constricted by the requirements and exigencies of the prevailing law. Initially, it was determined that "any condition contrary to what is written in the Torah is void."[19] In the second century, reacting to the authority of Roman law, Rabbi Judah limited the rule. "This is the rule, any condition contrary to what is in the Torah is invalid if relating to the a matter of *mamon;* if relating to a matter other than *mamon,* it is void."[20] There has been a further development of this concept of the subordination of Jewish law to the prevailing legal system. In the third century CE, Samuel, one of the two preeminent legal scholars of the Babylonian-Jewish community, acknowl-

edged the necessity and legitimacy of Jews to obey the laws of the various lands in which they lived. This still authoritative principle is *dina de-malkhuta dina;*[21] "the law of the government is the law."[22] This doctrine is applicable only if there is no violation of the principles of justice and equity that are the essentials of Jewish law.[23]

The purpose of this paper is to look at both some of the areas where Jewish law is compelled to accommodate to the law of the state[24] as well as at the few examples of the converse, when American law responds to Jewish law. The issues that will be dealt with are marriage and divorce, arbitration, open or closed adoption, post mortem examinations, and the determination of death. The order of the subject matter has been chosen arbitrarily on the basis of the chronology in which these questions touched the American Jewish community.

I

All religious groups within the United States are required to acquiesce to the supremacy of the civil government with regard to marriage and divorce. All movements within American Jewish life accept the authority of the state to license marriages. Originally, the American law of marriage has its origin in English matrimonial law.[25] Until a little over a hundred years ago there was no system of licensing in most of the states or federal[26] jurisdictions.[27] The various legislative or administrative bodies that instituted the licensing procedures[28] did so during the period that the vast number of eastern European Jews was entering this land. Consequently, it appears there was a general acceptance of the licensing[29] requirement.[30] Nonetheless, there is a tension between Jewish law and the law of the land with regard to the appropriate and acceptable minimal age to enter into marriage.

Legal capacity is a major consideration in all systems of law. For the purposes of this chapter the question of capacity will concern itself only with the age that the law requires for legal capacity to be considered sufficient. At what age can a person enter into a contract? Must a person have reached a specific age in order to act as a witness in a legal dispute or to act as a witness to a legal document? The first question, then, is when does a person move from the legal status of a minor to that of an adult?

An early attempt at definition is found in the Mishnah with regard to the legal capacity of a minor to acquire lost or abandoned property found by that minor.[31] In the discussion concerning the definition of a minor, Samuel gives a circumscribed definition stating that no minor is capable (has the capacity) to acquire such property. R. Johanan contends that the definition of a minor is not one of specific age but rather of financial independence from the household: "a minor who is not maintained by his father is regarded as a major."[32]

Both Jewish law and Anglo-American law distinguish between witnesses to an event or crime and witnesses to an agreement or contract. In spite of the distinction drawn above, in the matter of the capacity of a minor to act as a witness to an action, event or crime, the law follows a more clearly defined pattern.

> A person is incompetent as a witness until he reaches the age of 13. Between the ages of 13 and 20, he is competent as a witness with regard to moveable property, but in respect of immovable property he is competent only if he is found to have the necessary understanding and experience (BB 155b; Yad. Edut. 9:8; Sh.Ar. HM 35:3). From the age of 20, all disqualification by reason of age is removed.[33]

The law concerning the legal capacity to be a competent witness to a transaction is the same as that relating to being competent to enter into marriage. As marriage is a legally binding contract, only parties who have legal competence may enter into it. After the groom has reached the age of thirteen years and one day, he is no longer a minor (*katan*) and may contract a valid marriage.[34] As there is legal capacity to enter into a contract, there is legal capacity to be a witness to such a contract. It is immediately apparent that Jewish law subordinates itself to the statutory law in accord with the principle of *dina de-malkhuta dina*, "the law of the government is the law."[35] This principle of Jewish law, *dina de-malkhuta dina*, is a standard by which *halakhah* measures its own ability to maintain its authority in a non-Jewish environment. Thus, Jewish law accedes to the statutes of the various states with regard to the age required for legal capacity to enter into marriage, to enter into other contracts and to act as a valid witness to a legal transaction.

II

Divorce, in the American legal system, is a creature of state or jurisdictional statute.[36] The power of the legislature to legislate divorce is unlimited except as restricted by the Constitution.[37] Civil divorce procedure raises issues in the Jewish community that are not important for governmental courts that issue orders for a civil divorce but may have an immense consequence for divorcing Jews who may wish to remarry in the future.[38] The Reform movement dealt with the issue by negating the need for a Jewish court.[39] The Orthodox and Conservative movements have struggled with several questions.[40] It is obvious that if a divorcing couple chooses to go to a *Bet Din* to receive a *Get*, there is no essential problem in order to find an equitable method to issue that *Get*. The difficulty for Jewish law rises when the couple does not voluntarily present themselves before a *Bet Din*.[41] The Rabbinical Assembly met the issue head on by issuing a rewritten form of the *Ketubah*, the religious marriage document, to include a requirement that the couple will appear before a *Bet Din* to receive a *Get* in the event that the marriage fails.[42] Recently, there have been efforts on the part of some Orthodox Rabbis to achieve the same end by use of a prenuptial agreement.[43] There is a legally binding arbitration agreement, which expands the potent conditions of the marriage.[44] An exceptional example of a secular jurisdiction attempting to respond to the particular needs of the Jewish community is to be found in a modification of the New York domestic relations law to aid Jewish women in the process of receiving a civil divorce.[45]

III

Arbitration has been the legal process of choice in the Jewish community for some two millennia. It has been noted that there is a judicial process within the Jewish community that is "as old as the Bible itself."[46] The first reference to the appointment of judges was prior to reception of law at Sinai.[47] The first post-biblical regulation dealing with the processes of dispute management provided that all disputes over property required a court of three ordained judges.[48] This requirement for a tri-party court was expanded to all matters in private disputes.[49] Ordination was required to function fully as a judge and ordination was limited

to Israel.[50] Therefore the communities of the Diaspora utilized non-ordained judges,[51] constituting a court of arbiters.[52] This was clearly the pattern for the hundred generations of the European Jewish experience.[53]

A cursory examination of the literature and legal activities of the early Jewish immigrants to the United States reflects an interesting contradiction. The earliest settlers of New England deliberately chose to have their laws reflect Biblical law.[54] Jewish residents of the colonies, and then of the new republic, took their legal difficulties to the founded courts. [55] Was it in the nature of the Jews who crossed the ocean during those early colonial and American centuries?[56] It may have well been that "[a]ccommodation, after all was an integral part of Jewish history and a pervasive theme of Jewish experience."[57] With the arrival of the first wave of the immense Jewish migration which flooded the United States between 1880 and 1914 there was a subtle but significant change. "Among the various immigrant groups for whom internal dispute-settlement procedures were vital for community cohesion, none migrated with as strong a historical commitment to law, and as deep a distrust of alien legal systems,[58] as the Jews of Eastern Europe."[59] While the principle that the law of the state was supreme[60] had been articulated as a basic legal doctrine for centuries, there had been a strong tradition of avoiding to appear before the European national courts. [61] A guiding principle of the European Jewish community was Maimonides' warning that a Jew who turned to Gentile judges, "caused the walls of the Law to fall."[62] His advice to his community, with its echo through the centuries, was clear. He emphasized his concern that justice be sought through arbitration.

> Jewish law considers it to be commendable at the outset of a trial to inquire of the litigants whether they desire adjudication according to law or settlement by arbitration. If they prefer arbitration, their wish is granted. A court that always resorts to arbitration is praiseworthy. Concerning such a court, it is said: "Execute the justice of peace in your gates."[63] What kind of justice carries peace with it? Undoubtedly, it is arbitration. So, too, with reference to David it is said: "And David executed justice and charity unto all his people."[64] What kind of justice carries charity with it? Undoubtedly, it is arbitration, i.e. compromise.[65]

One of the first efforts to create social order and communal coherence among the thousands of eastern European Jews daily

streaming into New York was the establishment of a *Kehillah* presided over by Rabbi Judah L. Magnes.[66] Of evolving importance to the Jews of New York was a need to respond to the labor disputes in the developing areas of trade and manufacture into which the Jews were now entering. The clothing trades were growing and flourishing during these years and a significant number of both employers and employees were Jewish.[67] Derived from the distress in the community because of the level of wages, as well as dramatic and tragic incidents such as the Triangle Shirtwaist Company fire,[68] there was a series of strikes in the clothing industry. Magnes and the *Kehillah* developed a plan for arbitration within the Jewish community.[69] Simultaneously, Magnes successfully lobbied for reform of the New York ordinance, which encouraged easy revocation of arbitration agreements.[70] In 1919 the Jewish Arbitration Court was established.[71] A year later the New York legislature enacted legislation, which upheld the legality of an agreement between two litigants to abide by the decision of a third, non-judicial, party. [72] The Jewish Arbitration Court[73] dealt with no fewer than fifteen thousand cases between 1919 and 1980.[74]

Arbitration is strongly endorsed by public policy.[75] It is essentially a matter of contractual agreement.[76] It has been clearly determined in U.S. law, that arbitration panels or courts may determine the extent or limitations of the questions of the conflict.[77] Questions of law as well as fact may be submitted to arbitration.[78] The extent of the authority of the arbitrators is determined by the wording of the agreement.[79] Moreover, an arbitration agreement may validly provide for arbitration in accordance with the laws of another jurisdiction.[80] Therefore, where arbitration is conducted under the authority and methods of Jewish law, it will normally be enforced by the law of a state or the United States.[81] A statute of New York law, where a significant portion of the Jewish community adheres to rabbinic authority and law, specifically authorizes rabbinical courts utilizing Jewish law to issue decisive legal rulings.[82]

In spite of this clear directive, some New York State courts have refused to accept the decisions of rabbinic courts.[83] In a case involving custody of a child the court was curt, "The basic principles governing the custody of infants are beyond debate. The state...acts as *parens patriae*."[84] Another New York court affirmed the legal authority of a *Bet Din*, "the rabbinical board is compe-

tent to pass on these questions, to hear witnesses, including petitioner and respondent, and to appraise the value given to the testimony of any witness and to render a speedy determination respecting the rights of the parties. The board can apply the legal, moral and religious law to the dispute between the parties."[85] A more recent dispute in Pennsylvania involving millions of dollars was settled in a rabbinical arbitration court.[86] Clearly, there are cases in which Jewish law can be the law of choice in a dispute in arbitration and that the decision of the arbitrators will be enforced by the secular jurisdiction.

IV

At first thought, legal adoption[87] of children might well be considered as an area where there is no tension between Jewish law and the law of the state. In the most popular sense of the word, adoption is a double *mitzvah*. A childless couple find realization and contentment as they take a child into their home and hearts, thus filling their lives and the child's life with richly fulfilling love.[88] Unfortunately, the reality and the optimistic hope are not fully congruent.[89] Moreover, relating to the theme of this chapter, modern practices of adoption in many American jurisdictions have created important questions for Jewish law.[90] The significant issue is concerned with the question of open[91] or closed [92] adoption. The majority of states have adhered to the closed adoption position.

There is no national law governing the adoption of children in the United States, it is one of the functions of law clearly reserved to the various states.[93] Until this century most adoptions in the U.S. were arranged without the assistance of the state.[94] Massachusetts passed the first comprehensive adoption statute in 1851.[95] The early part of this century saw an acceptance by the various states[96] to actively participate in the adoption process.[97] State involvement effectively gave full and complete power to each of the several jurisdictions. It has been characterized as a legislatively created device.[98]

With the involvement of the states and considering the mobility of the American people, it became necessary to create some uniformity between the statutes of the various jurisdictions. In 1953 the National Conference of Commissioners on Uni-

form State Laws prepared a Uniform Adoption Act.[99] It has been twice amended. The 1971 amendment contains language, which offers the potential for "open" adoption.[100] Nonetheless, only the five states of Alaska, Arkansas, Montana, North Dakota and Ohio have adopted the act. [101] In largest measure, therefore, the adoptive process utilized for the vast majority of Americans who are involved in adopting or being adopted is "closed adoption." The adoption statutes in force today are, in largest measure, variants of the 1851 Massachusetts law. The first requirement is the consent of the parents or there must be a pressing need for the courts to effectuate the adoption procedure without that consent.[102] Adoption, in a traditional "closed adoption" transfers the parental rights of the biological parents to the adoptive parents.[103] Traditional adoptions are not revocable.[104] Most importantly, for the purposes of this paper, traditional adoptions in most states involve statutorily imposed anonymity of the parties, secrecy, and sealed records.[105] It truly is a "tangle of state law."[106]

Adoption as a legal concept and process does not exist in earliest Jewish law.[107] Moreover, it "is not known as a legal institution in Jewish law."[108] The reality with regard to an individual or a couple accepting responsibility for the care, growth and future of a child, however, is not the same as the bald statement of Jewish law. While *halakhah* effectively limits the personal status of a child to that of the natural parents, there is an effective pragmatic mechanism to achieve the same results as in adoption. *Halakhah* permits the appointment of a guardian, an *apotropos*[109] (a guardian in all matters).[110]

A vital concern of traditional Jewish law is the personal biological status of each individual.[111] Of particular and direct concern is the status of the *kohen*, the descendant of the ancient priestly caste for whom certain privileges, prerogatives and restrictions apply.[112] The *kohen* is given primacy in the order of those called to read from the Torah on all occasions that the reading takes place.[113] He also invokes the Priestly Blessing in the Synagogue[114] as well as accepts the redemptive money at the ceremony which celebrates the birth of a first-born male.[115] Of greater importance for the theme of this chapter are the limitations and proscriptions placed upon a *kohen*. The rules prohibiting contact with the dead with the exception of his closest of kin are still in effect.[116] Because of this prohibition there are some that would limit the study of medicine for a *kohen*.[117] Most importantly for the pur-

poses of this study, there are important limitations on whom a Kohen may or may not marry. A *Kohen* is prohibited from marrying an unchaste woman, a proselyte or a divorcee.[118]

There is also a clearly defined list of prohibited marriages for all Jews.[119] The first condition for marriage is that a Jew should marry only a Jew.[120] Families considering adoption face the future difficulty of determining whether their adopted child is a Jew. [121] It follows, then, that if a child is adopted and the child's personal status is not known, he may inadvertently enter into a prohibited marriage upon reaching adulthood, he might even enter unknowingly into an incestuous marriage.[122] Such a marriage would have disastrous legal effect upon any offspring of the marriage.[123]

Recognizing that even the most traditional and conservative halakhists have found methods to modify some areas of Jewish law to respond to new technologies and to adjust to the statutory requirements of the state, is there not a possibility that some of the questions which arise with regard to the status of a "closed" adoptee could be disposed of by utilizing new medical techniques? There is a clear and unequivocal opinion by Maimonides that we can accept the new knowledge given by medical technology to determine halakhic questions.[124] He asserts that later generations are not required to accept the level of scientific knowledge of earlier rabbinic authorities.[125] Moreover, *halakhah* will accept the reliability of blood tests.[126]

As a major stumbling block with regard to closed adoptions is the potential for young people who do not know that they are related by blood to wed, could not newly developed sophisticated blood testing deal with that difficulty? Could not the possible blood relationship between a couple planning to be married be determined and authoritatively deal with that question through DNA testing?[127]

V

The oldest and equally, the most modern areas to be addressed are also the most distressing. They fall under the general rubric of bioethical. Both secular American society and Jewish thinkers have struggled with the excruciating moral challenge in what is now termed bioethics.[128] The questions to be addressed are, how

does Jewish law respond to the dictates of state law dealing with the definitions of death, hastening or delaying death, and post mortem examinations?[129]

New medical technology, undreamed of in the science fiction literature of my youth, has created a new and sometimes uncomfortable tension between the law of the land and *Halakhah*. The search for patterns of societal assent with regard to some of these technologies and the need of society to give order to the processes by which these technologies are utilized has created an uncomfortable dynamic tension. There is a new word to be found in the lexicon of bioethical concerns, *legisogenic*.[130] This word defines the very present process of legally induced, medically inappropriate treatment. An astute observer of the legal burden which accompanies some of the life and death decisions in modern medicine has defined the difficulty.

> Death is a natural process and a uniquely personal experience. If pressed to categorize it, most would probably term the major controversies surrounding it ethical, rather than medical or legal. Nevertheless, there is an increasing trend to ask the courts whether life-sustaining treatment should be withheld from patients who are unable to make this decision themselves. Judges are asked to decide this question, not because they have any special expertise, but because only they can provide the physicians with civil and criminal immunity for their actions. In seeking this immunity, legal considerations quickly transcend ethical and medical judgments.[131]

Halakhah has had to face the same diverse bioethical issues created in these past decades as had secular law. At times there has been harmony and assent between the two systems of law. In some other tormenting issues there has been disagreement.

The first issue became a legal one in this nation with the confluence of several essential legal factors. In a technologically more naive time the legal definition of death had simply been the absence of life. "Death is the opposite of life; it is the termination of life."[132] Now there was a new medical definition of death by the authoritative Harvard Medical School report.[133] This report was the result of innovations in medical technology which have resulted in machines that artificially maintain cardiorespiratory functions. The use of the new sophisticated respirators makes it possible, in spite of total and irreversible loss of the function of the brain, to maintain the operation of the heart and lungs for a limited period of time.[134] It became clear to practicing physicians

that the traditional "vital signs" are not independent indicia of life but are part of an integration of functions in which the brain is dominant. Use of this new medical equipment has led the medical community to consider the cessation of brain activity as the measure of death and compelled a reexamination of the traditional legal and medical criteria for determination of when death occurs.[135] Under the leadership of Harvard Medical School, the medical profession established a multistep test to identify the existence of physical indicia of brain stem activity.[136]

In recent years the general consensus of the legal systems in the United States has been to accept the definition of the Uniform Determination of Death Act.[137] The first statutory recognition of cessation of brain function as a criterion for death was in Kansas in 1970.[138] All fifty states, the District of Columbia, the Virgin Islands, and Puerto Rico now accept some variation on "the complete and irreversible cessation of all functions of the entire brain" as a definition of death.[139]

Dealing, as we are, with the questions that are most basic to our existence, it is not surprising that even within the legal community there has not been immediate or complete acceptance of the Harvard standards for death.[140] Even the acceptance of the standards by state legislatures does not assure uncritical agreement by courts and the populace. Justice Frankfurter is often quoted when he epigrammatically noted that statutory construction is not "a ritual to be observed by unimaginative adherence to well-worn professional phrases."[141] Nonetheless, statutory standards throughout this nation mandate that physicians shall adhere to the criteria of brain death. The new legal standards for determining death placed the traditional definition of death in *halakhah* in an uncomfortable confrontation with the law.

Jewish tradition has come to a definition of death through inductive reasoning. The writers of the Bible did not attempt to define death. The subject is raised in the Gemara as an element of a discussion concerning the value of life in relationship to the fulfillment of biblical mandates. In affirming the sanctity of life, the rabbis agree that the saving of a life has greater religious value than observing the divinely inspired biblical commandment to observe the Sabbath.

Every danger to human life suspends the [laws of] the Sabbath. If debris [of a collapsing building] falls on someone, and it

is doubtful whether or not he is there, or whether he is alive or dead, or whether he is an Israelite or a heathen, one should open [even on the Sabbath] the heap of the debris for his sake. If one finds him alive, one should remove the debris, and if he be dead one should leave him there [until the Sabbath day is over].[142]

The discussion continues: Our Rabbis taught: How far does one search [to ascertain whether he is dead or live]? Until [he reaches] his nose. Some say: Up to his heart: If one searches and finds those above to be dead, one must not assume those below are surely dead ... life manifests itself principally through the nose as it is written: 'In whose nostrils was the breath of the spirit [breath] of life.'[143]

Moses Maimonides, the twelfth-century legal scholar and philosopher, was also a physician. His codification of Talmudic law defined death. "If upon examination, no sign of breathing can be detected at the nose, the victim must be left where he is [until after the Sabbath] because he is already dead."[144] The still authoritative sixteenth-century Jewish code of law, the *Shulchan Aruch*, states: "Even if the victim was found so severely injured he cannot live for more than a short while, one must probe [the debris] until one reaches his nose. If one cannot detect signs of respiration at the nose, then he is certainly dead."[145]

An eminent modern Orthodox analyst of the law, Rabbi J. David Bleich, has confirmed this definition as being authoritative for traditional Judaism.[146] Rabbi Bleich writes extensively on the subject of bioethics. He insists that Jewish law rejects brain death and irreversible coma as definitions of the end of life.[147] He asserts that only when there is total cessation of both cardiac and respiratory activity can we say that one is dead.[148] Bleich totally rejects the position of the Ad Hoc Committee of the Harvard Medical School.

Responding to the new secular definition of death,[149] some rabbinical authorities sought definitions, which could harmonize the ancient and authoritative Jewish definition of death with the new medical understandings. The Rabbinical Council of Israel stated that "the *halakhah* holds that death occurs with cessation of respiration. Therefore one must confirm that respiration has ceased completely and irreversibly.[150] This can be established by confirmation of destruction of the entire brain, including the brain stem, which is the pivotal activator of independent respiration in humans."[151]

This has not muted the basic conflict of ideologies. Among Jewish scholars and ethicists there is a continuing controversy with regard to what should be the acceptable modern definition of death. Reacting to Anglo-American law which describes irreversible cessation of total brain function as a criterion for death,[152] some Orthodox Jewish scholars following the conclusions of M. D. Tendler, a rabbi and bacteriologist, accept only destruction of the entire brain as a Biblical definition of death.[153] Tendler describes physiological decapitation as "complete destruction of the brain with loss of integrative, regulatory and other functions."[154] Thus, he concludes, "total and irreversible cessation of brain stem function equals destruction of the brain."[155] Another noted Orthodox authority, Rabbi Joseph Soloveichik, Director of the Department of Law at the Hebrew Theological College, categorically denies that only loss of brain function equals death.

Jewish law recognizes the presence of any vital function, including heart action, as indicative of at least residual life. Termination of such life by means of "pulling the plug" or otherwise constitutes an act of homicide. Moreover, a sharp distinction must be drawn between partial and total destruction of the brain. The authors[156] state that the Harvard criteria signify that "when the criteria have been fulfilled, there is widespread destruction of the brain" and that "time must often elapse before morphologic evidence of cellular destruction can be detected." This cannot be equated at all with the state of capitation. Jewish law cannot be cited in support of brain death legislation presently before the legislatures of various states. Jewish law cannot condone the removal of life support systems from any patient in whom any vital sign is present.[157]

To date the conflict between the standards and procedures for the declarations of death based upon the commonly accepted Harvard criteria and those of differing religious traditions, including that of Jewish law, has been addressed by only one state. New Jersey recognizes death as the modern neurological evidence of irreversible cessation of all functions of the entire brain, including the brain stem.1[158] Equally, New Jersey permits an exemption to individuals who reject the definition of death derived from the brain death standard and maintain that death shall be defined on the basis of cardiorespiratory criteria if done so on the basis of a conscientious objection predicated on reli-

gious belief.[159] To date there have been no cases before either New Jersey or federal courts testing this statute.

VI

Religion and government not only attempt to define the moment of death, but when death is artificially prolonged, they must attempt to regulate how and when death is permitted. One of the most disturbing and distressing questions of our era is, when can one remove a patient, artificially maintained on life support systems, from that technologically supported existence and permit total death?[160] Even the phraseology of the question utilizing the term "total death" implies that there are or may be circumstances where a person is in an intermediate stage between life and death. Peter Singer's ethically stimulating book[161] challenges the commonly accepted definitions of death. The examples offered are spiritually and morally painful. They bring together the triad of ethical concerns, the legal processes and the humane conscience of people pondering the ultimate verities of life and death as they face an agonizing triangle of moral uncertainty. Singer cites the case of twenty-one year old Joey Fiori who had an accident in 1971. He has been in a medically maintained persistent vegetative state for over twenty years. His mother has petitioned the Commonwealth of Pennsylvania to remove him from his feeding tube but the State Superior Court refused to respond to her request. Singer poses the question, is a non-cognizant, non-responsive, non-thinking but functioning body, alive?[162]

Lord Jakobovits offers a vividly dramatic example of the new ability to maintain some life functions, which expands on Singer's troubling question.

> In an effort to prove that the heart can continue to beat long after the brain has completely ceased to function, an operation was performed where a pregnant sheep was decapitated, maintained by artificial ventilation for several hours and then successfully delivered of a healthy lamb. There can be no argument that the sheep was dead, since it had been decapitated. Medically and halakhically, a dead sheep cannot contain a viable fetus, but this is what happened.[163]

Singer gives examples involving human beings that point to the ethical and legal difficulties that develop from our new tech-

nological abilities. In April 1993 a twenty-eight-year-old woman was shot and declared brain dead. She was seventeen-weeks pregnant and placed on life support equipment. Three-and-a half-months later a baby boy was taken from her "dead body" by Cesarean birth. Restating Lord Jakobovits' amazement that medically and halakhically a dead woman cannot contain a viable fetus, but that is what happened; a dead woman was delivered of a live baby.[164]

Responding to the new technologies and the painful moral exigencies that derived from the now extant medical abilities, the Hemlock Society was formed in 1980 to campaign for the right of a terminally ill person to choose voluntary euthanasia its justification is in the book *Final Exit*.[165] The motto of the Hemlock Society is: "Good Life, Good Death."[166] Men and women facing an agonizing terminal illness, coupled with the often accompanying erosion of family welfare, began to contemplate what was termed a suicide that was "rational and reasonable."[167]

Secular American society has struggled excruciatingly with the moral challenge in what is now termed bioethics[168] for over four decades. Since the early 1970s there have been an accelerating number of cases involving the law in the attempt to give legal potency to individuals and families facing the life and death conundrums created by accident or illness.[169] The best-known examples are probably the well-publicized cases of Karen Quinlan[170] and Nancy Cruzan.[171] The twenty years on the legal road from the 1976 *Quinlan* to the 1997 Supreme Court decisions on doctor-assisted suicide[172] have been torturous and painful.

The "seminal decision"[173] in this field is *In re Quinlan*.[174] Karen Ann Quinlan suffered brain damage and lapsed into a coma when she spontaneously and inexplicably stopped breathing.[175] As tests showed some brain activity, she could not be declared to be legally dead and was maintained on a respirator.[176] After an extended period in which she was maintained in this vegetative state, her father requested that the court authorize her physicians to cease life support.[177] The court responded affirmatively and held that a patient's right to refuse treatment is an element of the right of privacy.[178] Where a patient is legally incompetent, a guardian may exercise that right.[179]

A year later Joseph Saikewicz, a sixty-seven- year old severely retarded patient, developed incurable leukemia.[180] His physicians were prepared to attempt to prolong his life with chemo-

therapy but his guardian requested that he not be treated.[181] The court ruled that the pain of the treatments to Saikewicz would outweigh the benefits.[182] The ruling was based on the presumption that if Saikewicz were competent he would have requested cessation of treatment.[183]

Subsequently, the New York Court of Appeals joined two cases[184] with similar questions. Both involved guardians of incompetent patients who objected to the continued use of medical treatments or measures to prolong the lives of the patients whose diagnosis offered no reasonable possibility of recovery. Brother Fox was an eighty-three-year-old member of a Catholic religious order who was being maintained on a respirator while in a chronic vegetative state.[185] The facts dealing with the request to remove Brother Fox were attested to by his religious superior who testified that Fox had taught ethics, had been aware of the *Quinlan* case, and stated that he would not want his own life extended by extraordinary measures.[186] The court relied on that testimony to find that Brother Fox had made his determination with regard to the refusal of treatment while he was conscious and rational, and found that to be a legitimate request.[187] The court quoted the trial court's decision. "His stated opposition to the use of a respirator to maintain him in a vegetative state was 'unchallenged at every turn and unimpeachable in its sincerity.'"[188]

The companion case dealt with John Storer who was a profoundly retarded fifty-two-year-old with terminal cancer.[189] His mother, who was also his legal guardian, refused consent to administer blood transfusions as they would only prolong his discomfort and would be against his wishes if he were competent.[190] The court noted that physicians could not be held to have violated either legal or professional responsibilities when responding to the right of a competent patient to decline medical treatment.[191] Brother Fox had been competent when he articulated his wish to refuse treatment; Storer was not; mentally he was an infant.[192] The court emphasized the right of an incompetent to medical treatment as well as the limitations placed upon parents and guardians. "A parent or guardian has a right to consent to medical treatment on behalf of an infant. The parent, however, may not deprive a child of lifesaving treatment, however well intentioned."[193]

Two years later a California case[194] expanded the moral dimensions by focusing not on the request of the patient or a

guardian but on the action of a physician. Clarence Herbert was a fifty-five-year-old who lapsed into a permanent coma following surgery.[195] At the request of the family the physicians removed the patient from a respirator and discontinued intravenous feeding.[196] Following Herbert's death the physicians were charged with murder and indicted by a trial court.[197] The Court of Appeals interposed a writ dismissing the action on the grounds that withholding life support was a passive omission and there was no duty to treat the patient as there was a lack of consent.[198] In *Cruzan* the court agreed that the due process clause would give a competent adult the right to reject medical treatment but it avoided ruling on the other issues.[199] Some courts have taken the position that lifesaving procedures cannot be ordered for a competent adult who refuses treatment on a religious basis.[200]

Eminent bioethicists who engage in spirited debate have taken and still maintain polar positions in response to the matched, agonizing moral questions of the right of human beings to permit life to cease and to shorten life by hastening death and actively terminating life. Leon Kass argues strenuously against the concept that there is a right to hasten death through assisted suicide or euthanasia.[201] Ronald Green responds directly by affirming the right of competent individuals to make decisions with regard to their own existence.[202] Ronald Dworkin, also an eminent jurisprudential thinker, has defined the issue for those who would grant individuals the right to determine the time to end pain.

> The life of a single human organism commands respect and protection, no matter in what form or shape...[203] 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.[204]
>
> Death has dominion because it is not only the start of nothingbut 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.[205]

Dworkin's analysis implies that society has the moral as well as the legal right to permit removal of life support mechanisms. To this extent it is in agreement with the legally acceptable norms

articulated by the report of the President's Commission for the Study of Ethical Problems in Medicine.[206]

A New Jersey court attempted to face up to the ethical conundrums imposed upon society when life is merely existence.[207] Claire C. Conroy was an eighty-four year old who suffered from organic brain syndrome.[208] Miss Conroy died prior to the hearing of the superior court.[209] The court noted that "Conroy's death has rendered the issues that underlie this appeal moot.[210] "Nevertheless, [the court] conclude [d] that the importance of the issues presented by this appeal requires their resolution notwithstanding their mootness."[211] Following the court's statement of its holding it turned to the ethical questions that beset it.[212]

> The ethical question implicit in the decision whether to discontinue life-sustaining measures has traditionally been expressed by the distinction between "ordinary" and "extraordinary" treatment. The standard definition of these terms is given as follows: Ordinary means all medicines, treatments, and operations which offer a reasonable hope of benefit and which can be obtained and used without excessive expense, pain, or other inconvenience. Extraordinary means are all medicines, treatments and operations which cannot be obtained or used without excessive expense, pain or other inconvenience, or if used, would not offer a reasonable hope of benefit.[213]

In response to the fact pattern of this case the court refused to determine the issue of removing a patient from life support system equipment. "The present appeal is not the proper vehicle by which to resolve this issue, and we expressly decline to do so."[214] Nonetheless, it approvingly quoted from the report of the President's Commission that strongly suggests that there could well be situations in which the court would permit such action.[215]

The moral and legal issues presented by increasing requests for removal of terminal patients from life support equipment accelerated. In a 1986 Massachusetts case,[216] Paul Brophy, age 45, suffered extensive brain damage and lapsed into a permanent coma as the result of a burst blood vessel near his brain.[217] His family requested that he be removed from a feeding tube but the hospital and the physicians refused their request.[218] In a Solomonic decision the court ruled that the feeding tube could be removed but that the physicians and the hospital could not be compelled to assist. [219] While Massachusetts had not then adopted the Uniform Rights of the Terminally Ill Act[220] the

court's decision paralleled its provision[221] which was designed to "address situations in which a physician or health-care provider is unwilling to make and record a determination of terminal condition, or to respect the medically reasonable decision of the patient regarding withholding or withdrawal of life-sustaining procedures, due to personal convictions."[222] Brophy was moved to another medical facility that acceded to the request of the family.[223] He died shortly thereafter.[224]

That same year a California court extended the parameters of the ethical questions.[225] Elizabeth Bouvia was a twenty-eight-year-old quadriplegic suffering from cerebral palsy.[226] She was bedridden in a hospital and suffered constant pain.[227] She petitioned the court to remove her feeding tube but the trial court refused.[228] The Court of Appeals reversed that court and authorized her to do so,[229] on the basis of the right of a patient to control her own body.[230]

This painful and distressing debate has become a part of the popular ethical challenges that are constantly thrust before us. A former correspondent for the *New York Times* wrote most poignantly about the emotional tautness that results from watching a loved one complete life in constant pain. "My cousin Florence Hosch finally died the Wednesday before Christmas, about a thousand days after she had wished to."[231]

The best-known American exponent of hastening death through euthanasia and assisted suicide is Dr. Jack Kevorkian.[232] He has been an active participant in assisted suicides and has been indicted several times in Michigan for violating that state's law banning assisted suicides.[233] Reacting to the third acquittal of Dr. Kevorkian on assisted-suicide charges in Michigan, the delegates at the American Medical Association voted to continue the group's policy opposing such action on the part of a physician.[234] During the same period of time that Dr. Kevorkian has been active both in advocating changes to the legal status of physicians who assist patients in committing suicide, and in assisting some individuals to commit suicide,[235] ballot initiatives to legalize physician-assisted suicides were before voters in several jurisdictions. Defeated in California[236] and Washington,[237] one such initiative was passed in Oregon[238] but a federal judge struck it down because it failed to ensure equal protection under the law.[239] The law was subsequently rewritten and again was approved by the voters of that state.[240] This action followed the

dual Supreme Court decisions on assisted suicide.[241] In the *Washington* case, the Court said that states were free to pursue "the earnest and profound debate about the legality and practicality"[242] of the issue. The significant portion of the electorate that supported such initiatives offers promise that the issue will continue to be ardently debated.

The parliament of Australia's Northern Territory was the first western legislature to enact legislation giving terminally ill adults the right to actively end their lives.[243] The legal right was short-lived. Australia's federal parliament reacted with speed and struck down the territory's voluntary euthanasia law.[244]

In this country there was a recent, important and notable decision. The United States Court of Appeals, Ninth Circuit, sitting *en banc* upheld the decision[245] of a U.S. district court judge who held that "a competent, terminally ill adult has a constitutionally guaranteed right under the Fourteenth Amendment to commit physician-assisted suicide."[246] Responding to the question of whether individuals have the liberty to "determine the time and manner of one's death" the court quoted Justice O'Connor's concurring opinion in *Cruzan*[247] where she questioned whether there exists a rationale for government to enter into the realm of a person's "liberty, dignity, and freedom."[248] In a pointed reference to *Casey*[249] the Ninth Circuit reiterated a fundamental message, "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[250] The court extended the liberty interest and protection beyond those who are competent to make an informed decision in this critical matter. "Our conclusion is strongly influenced by, but not limited to, the plight of mentally competent, terminally ill adults. We are influenced as well by the plight of others, such as those whose existence is reduced to a vegetative state or a permanent and irreversible state of unconsciousness."[251] While infants and minors were not specifically included in the court's statement, it is reasonable to infer that they are a part of the class intended to be covered in the opinion. Scraping the heels of the Ninth Circuit decision was the even more recent judgment of the U.S. Second Circuit in *Quill*, subsequently reviewed by the Supreme Court.[252] Physicians brought an action to declare unconstitutional two New York statutes penalizing assistance in suicide. The basic argument of the physicians was:

> [I]t is legally and ethically permitted for physicians to actively assist patients to die who are dependent on life sustaining treatments .... Unfortunately, some dying patients who are in agony that can no longer be relieved, yet are not dependent on life-sustaining treatment, have no such options under current legal restrictions.[253]

The court rejected the due process-fundamental rights argument of the plaintiffs and reaffirmed that there is no state in the Union that grants a right to assist in suicide.[254] Because the court could not discern a valid distinction between the passive assistance allowed in removing life support systems and the active assistance in prescribing lethal medication, it determined that the New York statutes were in violation of the Constitution's equal protection clause.[255]

In a provocative and innovative concurrence Judge Calabresi accepted the judgment of the court but not its reasoning.[256] He contends that:

> [W]hen a law is neither plainly unconstitutional ... nor plainly constitutional, the courts ought not to decide the ultimate validity of that law without current and clearly expressed statements, by the people or by their elected officials, of the state interests involved. It is my further contention, that, absent such statements, the courts have frequently struck down such laws, while leaving open the possibility of reconsideration if appropriate statements were subsequently made.[257]

His analysis pointed out that the rationale for the assisted suicide prohibition had been undermined when suicide and attempted suicide were no longer considered to be crimes.[258] It may be inferred that Judge Calabresi's analysis was an attempt to influence the U.S. Supreme Court in the appeal which was certain to follow the New York decision. Immediately following the two United States Court of Appeals decisions in *Compassion in Dying v. Washington*[259] and *Quill v. Vacco*,[260] the *New York Times* presented a major examination of the issues now confronting the American juridical system in right-to-die cases.[261] "Last week's decision by a Federal appeals court striking down a 19th century New York criminal law against aiding or abetting suicide has thrust a new question to the top of the nation's legal agenda: Do terminally ill patients have a constitutionally protected right to choose physician-accelerated death?"[262] The article was directed to alternate legal theories that might be presented to and considered by the

Supreme Court, but then concluded, "[i]f the Supreme Court wants to address the right-to-die issue without invoking its abortion precedents, Judge Calabresi's analysis shows the way. Even if the Justices decide not to take these two cases, the issue is certain to come back to them—again and again."[263]

The Supreme Court responded to the challenge offered by the Second and Ninth Circuit Courts of Appeals by stepping into the breach. The Court, however, did not close the breach. In *Washington v. Glucksberg*,[264] Chief Justice Rehnquist's unanimous opinion for the Court was forthright and unequivocal. "The question presented in this case is whether Washington's prohibition against 'caus(ing)' or 'aid(ing)' a suicide offends the 14th Amendment to the United States Constitution. We hold that it does not."[265] Concurring opinions, however, would appear to leave a legal door ajar for states to craft changes in the statutes as well as future claims that there is a right to such an action. Justice Souter echoed the opinion of Judge Calabresi's concurrence in the Second Circuit Court of Appeals opinion, *Quill v. Vacco*,[266] "[w]hile I do not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time."[267]

In responding to the similar issues presented in *Vacco v. Quill*,[268] Chief Justice Rehnquist, again writing for a unanimous Court, reiterated the position that "the question presented by this case is whether New York's prohibition on assisting suicide therefore violates the equal protection clause of the 14th Amendment. We hold that it does not."[269]

Justice O'Connor hesitated to close the door on the issue. "But respondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the New York and Washington laws at issue here."[270]

Justice Breyer practically invited new legislation in his concurring opinion.

> The Court describes it [physician assisted euthanasia] as a 'right to commit suicide with another's assistance.' But I would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a 'right to die with dig-

> nity.' But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined.[271]

The Supreme Court in *Cruzan*[272] determined that the critical element in the legal arguments concerning the constitutional right to be allowed to die was dependent upon the competent expression of a wish by the subject not to be maintained in a vegetative state.[273] Jewish law follows a different path.

There is a reference to assisted suicide in Biblical literature but not to euthanasia. It is related as tragic response to a specific incident, not as a resolution to a lingering, painful illness.[274] Biblical reasoning clearly emphasizes the continuing obligation to heal and prolong life. The obligation to save the life of an endangered person is predicated upon the Levitical verse, "nor shall you stand idly by the blood of your fellow."[275] The most eloquent statement of this principle was made with reference to the belief that all humankind was derived from the same primal ancestor.

> For this reason was man created alone, to teach thee that whosoever destroys a single soul of Israel, scripture imputes [guilt] to him as though he had destroyed a complete world; and whosoever preserves a single soul of Israel,[276] scripture ascribes [merit] to him as though he had preserved a complete world.[277]

This principle, however, does not obligate humans to assist others in the process of healing. From the point of view of biblical Judaism, there is hubris in the activity of man in seeking and utilizing medical knowledge. Human interference in the God-ordained process of birth, growth, decline and death may be seen as betraying faithful fulfillment of the commandments. A literal reading of a text in Exodus places all authority and capacity to heal in the hands of God. "I will not bring upon you any of the diseases that I brought upon the Egyptians, for I am the LORD your healer."[278] The Talmudic basis giving physicians the extended responsibility to interpose themselves in situations requiring medical assistance and introduce medical technology is derived from a passage dealing with compensation for personal injury. "When men quarrel and one strikes the other with stone or fist, and he does not die but has to take to his bed—if he then gets up and walks outdoors upon his staff, the assailant

shall go unpunished, except he must pay for his idleness and his cure."[279] Whatever the initial intent of the verses, the Talmud expands the rationale and comments, "The School of R[abbi] Ishmael taught: [The words] 'And to heal he shall heal'[280] [is the source] whence it is derived that authorization was granted [by God] to the medical man to heal."[281]

Basic to Jewish law is the principle that there must be a clear distinction between suicide[282] and passive termination of life as well as active and voluntary euthanasia. All three terms share in one basic principle. Human beings have the ability to hasten death. In this context, euthanasia is a word derived from the Greek linguistic elements *eu* plus *thana(os)* to mean to induce a gentle and easy death.[283] The parallel Hebrew term is *mitah yafah*, a pleasant death.[284] This term is first used in a discussion of a judicial execution. As an extension to the Levitical exhortation that one should "love your neighbor as yourself,"[285] it was determined that a condemned criminal should be executed mercifully.[286] The authoritative Talmudic commentator Rashi redefines "nice death" to mean "that he should die quickly."[287] An astute liberal rabbinic scholar links these concepts to assist us in understanding euthanasia.

> The connection between time and suffering brings us to the issue of euthanasia. Were the dying person not suffering, were that person perfectly comfortable, in possession of his/her faculties, the issue would never arise! Suffering causes it to arise. Every human being, after all, every day and every moment, moves toward the grave; if life be free from suffering and full of delight, who would think of speeding there? Euthanasia presents itself as an option only when a person is dying and suffering and there seems no possibility of reversing the first condition or palliating the second. The two elements of euthanasia, then, are death, death which is imminent, and suffering, suffering which cannot be controlled.[288]

The Conservative rabbinate has taken a firm position opposing assisted suicide. Rabbi Elliot Dorff, rector at the University of Judaism, wrote a responsum on behalf of the Committee on Jewish Law and Standards of the Rabbinic Assembly, which resolutely affirms the traditional stance. After an exhaustive discussion of the moral, legal and psychological rationales involved in this painful question, the conclusion is lucid and absolute. A Jew may not commit suicide, ask others to help in committing suicide, or assist in the suicide of someone else.

Withholding or withdrawing machines or medications from a terminally ill patient, however, does not constitute suicide and is permitted. In my view, but not in [the view of a minority member of the committee] one may also withhold or withdraw artificial nutrition and hydration from such a patient, for that too falls outside the prohibitions of suicide and assisted suicide.[289]

There is a tendency in many modern Orthodox Jewish ethics and legal studies to assert as a truism that Judaism is unalterably opposed to euthanasia. "One may not hasten death .... To shorten the life of a person, even a life of agony and suffering, is forbidden ... [I]t is equivalent to murder."[290] This is a direct response to the stricture in the biblically mandated specification of medical ethics. "And provide that he be healed, yes, healed."[291] This leads to the peremptory denial of any form of euthanasia. A prominent scholar of our time has stated this position with vigor. "The practice of euthanasia - whether active or passive - is contrary to the teachings of Judaism. Any positive act designed to hasten the death of the patient is equated with murder in Jewish law ... No matter how laudable the intentions of the person performing the act of mercy-killing may be, his deed constitutes an act of homicide."[292]

An early and oft-quoted example of refusal to accelerate death by euthanasia is that of Rabbi Hananiah ben Teradyon, the second- century martyr who was executed by the Romans in 135 C.E. by burning him at the stake for violating the edict prohibiting the teaching of Jewish law. As the flames were enveloping him his students called out, "Open thy mouth [they said] so that the fire enter into thee [and put an end to his agony]. He replied, 'Let Him who gave me [my soul] take it away, but no one should injure himself [i.e. hasten his own death.]."[293] A modern commentator reminds us that this was a refusal on his part to commit suicide but that Rabbi Hananiah[294] permitted the executioner to remove impediments that were delaying his death.[295]

In another tractate of the Talmud the principle is enunciated with clarity, "a dying person (*goses*) is considered as a living being in all respects."[296] The text elaborates, "one may not bind his jaws, nor plug up his openings, nor place a vessel of metal or an object that cools on his navel until he dies, as it is written (in Ecclesiastes)[297] 'Before the silver cord (i.e. spinal column) is snapped asunder.'"[298] Moreover, one may "not close the eyes of a dying person. One who touches it or moves it is shedding

blood. Rabbi Meir used to cite an example of a flickering light. As soon as a person touches it, it goes out. So too, whoever closes the eyes of the dying it is as if he has taken his soul."[299]

The prohibition against hastening one's death is reiterated and emphasized in another Talmudic tractate. The Mishnah states, "one may not close the eyes of a corpse on the Sabbath, nor on weekdays when he is about to die, and he who closes the eyes [of a dying person] at the point of departure of the soul is a shedder of blood (i.e. a murderer because he hastens death.)"[300] The Gemara continues the inquiry, "Our Rabbis taught: He who closes [the eyes of a dying man] at the point of death is a murderer. This may be compared to a lamp that is going out. If a man places his finger upon it, it is immediately extinguished."[301] There is a minority dissenting opinion from Rabbi Simeon Ben Gamliel, which is analogous to termination of treatment. "If one desires that a dead man's eyes should close, let him blow wine into his nostrils and apply oil between his two eyelids ... then they close of their own accord."[302]

Maimonides insisted that a dying person must be regarded as a living being in every respect. "It is not permitted to bind his jaws, to stop the organs of the lower extremities, or to place metallic or cooling vessels upon his navel in order to prevent swelling .... One should wait awhile, perhaps he is only in a swoon."[303] The respected legal codification of the fourteenth century, the *Arba'ah Turim*,[304] prohibits any hastening of death. "Any act performed in relation to death should not be carried out until the soul has departed."[305]As there is disagreement concerning whether one can sanction or facilitate the hastening of death, there is also no agreement that there is no religious obligation to hinder the end of life. The Talmud clearly states that if a person is in the throes of death, and is thus in the legal state of a *goses*, one should stop praying for recovery that the sufferer might know the serenity of death.[306] An often-cited example is that of Rabbi Judah Ha-Nasi, Judah the Prince. He was in agony on his deathbed. The Talmud, reflecting a belief in the possible immediate efficacy of prayer, approvingly tells the tale of his final moments. His soul was prevented from leaving his body because of the ardent and fervent prayers of his students.[307] Rabbi Judah's maidservant, not obsessed with theological considerations nor restrained by legal credentials, abruptly threw an earthen vessel to the ground. The crashing sound distracted the praying rabbis

and the soul was then given the opportunity to flee the body and find rest.[308] Other rabbinic authorities assert that no effort can be withheld from attempting to prolong life. To emphasize the importance of this principle, it is stated that even the sanctity of the Sabbath may be desecrated in order to preserve a life.[309] With the exception of the three immoral and heinous infractions of murder, idolatry and sexual offenses, preservation of life takes precedence over all other Jewish principles.[310] Until very recently the attitude of both orthodox and liberal rabbis was that termination of treatment was not permitted.[311]The exigencies of modern life and the pressures created by new medical technologies have caused some modification in the thinking of some rabbis. A reform rabbi asks the fundamental questions when he speculates about those who would choose the hour of their own death. "Increasingly, the time and circumstances of death are no longer entrusted either to chance or to God; unlike every age before, people are planning, preparing, and controlling the circumstances of their death.[312] Equally, there are those who doubt the certainty of those who would affirm ancient principles without doubt and those who would assert modern standards without hesitancy. "The decision is individual but the context is more than personal. The autonomy [to end ones life] is genuine but it is exercised in terms of realities as real as one's self."[313] A creative and authoritative thinker in the orthodox movement, Daniel Sinclair, principal of Jew's College of London, has indicated that *halakhah* permits patients to predetermine their limitations of medical care when faced with a terminal illness.[314] He cites an Israeli case[315] where a dying man's gift was cited in support of a decision to honor the advance directives of a woman not to have her life maintained by artificial means.[316] He noted that "the court cited the Talmudic dictum[317] that 'it is a religious obligation to carry out the instructions of a dying man.'"[318]

Is it possible to affirm that there is a clear difference between the passive acceptance of death and an act, which hastens death which can only be morally judged to be assisted suicide. How does one differentiate when a medication, which is intended as a palliative, accelerates the process toward death? A Jewish physician has written:

> Let me acknowledge that I would prescribe morphine to ease the pain, even though that would probably hasten death ... My primary intent is to give comfort ... but the agent of death is not the

> disconnected respirator; it is the disease .... But I have not assisted in a suicide. How different the situation is when persons suffering with fatal illnesses ask and receive help in taking their own lives.[319]

At the same time a radical theological activist with great influence, Rabbi Alvin Reines, has written:

> A Reform Jew has a moral right to commit suicide. ... If a person assists, that is, aids and abets a Reform Jew to commit suicide at the request (which, of course, necessarily implies consent) of the latter, the former has behaved morally. (An example of assisting a person to commit suicide is the case where a physician, at the request of the person hands her/him a needle filled with a fatal substance with instructions on how to use it, and she/he then injects her/him-self.)....If a person takes a Reform Jew's life at the request of the latter, then the former has performed a moral act. Another name for such an action is "voluntary euthanasia."[320]

A direct and immediate response to the lenient and permissive theology of Reines is that of Zlotowitz and Selzter, both influential thinkers in the liberal Reform Jewish movement. "It must be therefore stated at the outset that, in keeping with historic Jewish tradition which affirms life, Reform Judaism does not condone the deliberate taking of one's life by someone who is of sound mind."[321]

The distinction between the passive acceptance of death and the active termination of life is a critical one in Jewish law.[322] When the parents of the child whose existence was being artificially maintained sat with the physician and the Jewish chaplain, their inchoate response to the facts and options being offered to them through their miasma of pain had to deal with this essential issue:[323] was the child really dead? Would the removal of the medical support apparatus kill their child? Would their agonizing decision kill their child? If they allowed the hospital to remove their child's organs for transplant, would that action kill their child?

These ethical issues are tangential to the moral problem presented in the case of the infant whose existence was continued by artificial means. Nonetheless, there is a correlation with the essential moral dilemma that faced the parents of the child when they sat with the physician and the hospital chaplain. The distinction between passive acceptance of death and the active ter-

mination of life is a critical issue in Jewish law. One must concede that there is not total unanimity with regard to the moral stance of Jewish thinking with regard to this technologically induced critical ethical issue. Nonetheless, in the prevailing and more widely accepted Jewish view, the voluntary removal of medical life sustaining equipment would constitute the hastening of death. But what if the hastening of one person's inevitable death could save the life of other people?

VII

It would appear that there is no or little legal opposition in secular law to the authority of a coroner to order an autopsy.[324] Where there is opposition to an action of a coroner, it is not to the performance of the autopsy. The conflict is based, as in *Brotherton v. Cleveland*,[325] on the action of the coroner in removing a body part from the deceased in violation of the wishes of the deceased and/or the wishes of the family members.[326] Following the autopsy, "the coroner permitted Steven Brotherton's corneas to be removed and used as anatomical gifts."[327] While one of the issues with which the court dealt was the constitutionality of the Ohio statute which allows a coroner to remove the corneas of an autopsy subject without consent,[328] there was no consideration of the right of the coroner to perform an autopsy. *Per contra*, where the circumstances are such as to warrant a coroner's inquiry, as in the case of a child who dies under suspicious circumstances, there is an undisputed statutory duty to perform an autopsy to determine the cause of death.[329]

The function of the medical examiner in deaths in which abuse may have played a part: [C]onsists of (1) determining the cause and manner of death to a reasonable degree of certainty; (2) providing expert evaluation of the presence, absence, nature, and significance of injuries and disease; (3) collecting and preserving evidence; (4) correlating clinical and pathologic findings; and (5) presenting expert opinions in the proper forums.[330]

The autopsy is a critical component in determining the cause of death. A major function of the autopsy performed by the medical examiner is to differentiate between the mechanism of death and the manner of death. The mechanism is a lethal physiologic derangement through which the cause of death acts.[331] The man-

ner of death is the fashion in which the cause of death arises. "The manner of death is an opinion separate from the cause of death."[332] All child abuse deaths are homicidal, the killing of one human being by another. Defining it as homicide, however, does not determine the actuality of criminality. Criminal culpability is determined by the criminal justice system. Jewish law is uncomfortable with post mortem examinations. "Judaism requires that a corpse be accorded every sign of respect ... Physical assault upon the body is, *a fortiori*, forbidden in death as well as in life."[333] The prohibition against violating a body is based upon a biblical verse that refers to the treatment of a body of an executed criminal, " you must not let his corpse remain on the stake overnight, but must bury him the same day. For an impaled body is an affront to God."[334] The logic of Rabbi Ishmael's hermeneutic rule[335] applies. If the rule is applicable for a criminal who is executed for a capital crime, it can be deduced *a fortiori* that it should be applied to others who have not been convicted of heinous offenses.

The Talmud has two instructive references to autopsies. One incident involved the question of whether a corpse could be exhumed and examined to determine whether the deceased was an adult or a minor at the time of death. This examination was requested to determine the disposition of an estate. The petition was denied as the knowledge to be gained would only relate to the disposition of an estate and would not aid in the principle of *pikku'ah nefesh*,[336] the saving of a life.[337]

In the Talmud it is clearly stated that an autopsy may be performed on the victim of a murder in order to establish whether the victim was alive at the time of the assault. If he was not alive at the time of the assault, no charge of murder could be brought against the assailant.[338] This is somewhat different from the statutory regulations governing the coroner, which give authority to examine a body only where there is an unexplained or suspicious death.[339] It is worth noting, moreover, that if there is a disagreement between the provisions of Jewish law and the requirements of the governmental legal system, Jewish law would respond positively to the requirements of the state.[340]

The critical element in the response of Jewish law to the authority of the coroner to perform an autopsy is not in the Jewish attitude toward post mortem examinations. Rather, it is in the operative relationship, which exists between Jewish and govern-

mental law in which Jewish law is subordinate to the law of the land. In the third century C.E., Samuel, one of the two preeminent legal scholars of the Babylonian-Jewish community, acknowledged the necessity and legitimacy of Jews to obey the laws of the various lands in which they lived. This still authoritative principle is *dina de-malkhuta dina*, "the law of the government is the law."[341] Parenthetically, it must be admitted that this principle is not as clear when relating to the intensely difficult moral questions that arise in the matters of brain death or organ donation. The differentiation between the response to post mortem examinations and the definitions of death and the process of giving organ donations relates to the simple reality that the post mortem examination is upon the body of one who is already dead. The other issues impact upon the living.

Dorff and Rosett see the doctrine of *dina de-malkhuta dina* as essentially annulling Jewish law in a situation where it must yield, because of the governing power of the law, to the secular authority. "Samuel's principle effectively abrogates Jewish law in the areas to which it is applied."[342] Elon views it as an accommodation to secular authority not because Jewish law may not be applicable but because it must accede to the regulations of the governing authority.[343] "Abraham b.(en) David (Rabad), a halackhic authority of the twelfth century C.E., laid down as a general proposition that whenever there is a lacuna in the law, it may be filled by resort to non-Jewish law."[344] Thus, the question of resisting the authority of the coroner's determination to perform an autopsy where the law mandates such a procedure would not be raised under the rubric of Jewish law.[345]

The question, which motivated this study, has non-conflicting contradictory answers. Has there been an influence of Anglo-American law upon Jewish law? Has American law been influenced, in any measure, by Jewish law? The response is a clear yes and no! It is obvious that there has been a congruent attempt by both systems of law to deal with the same new ethical and moral dilemma derived from advances in medical technology which confront us. Equally, in those areas of Jewish law which parallel secular law such as marriage and divorce, Jewish law has had to find ways to accommodate to the authoritative secular law. At the same time mechanisms, primarily arbitration, have been accepted by secular law to permit Jewish law to operate in areas of legal conflict.

Of greater import, in response to the question of the interrelationship of Jewish law and American law, has been the revivification of Jewish law in every aspect of American Jewish life. It is not an accident of modern history that the subject of *halakhah* has been given greater academic importance within all the streams of Jewish religious observance. One could well expect this emphasis in the orthodox community; one might anticipate greater stress on *halakhah* in adherents of the conservative movement. Of greater importance to me is the newly strengthened thrust of traditional *halakhic* norms upon the antinomian tendencies of the reform philosophy. *Ken Yirbu!*

Notes

1. "[W]e have had the experience of feeling our souls split—between our commitment to Judaism and our commitment to American life, between the pull of tradition and the insistence of the modern world, between our ties to our family and our need to play out our emerging selves." Harold Kushner, "Forward" to Milton Steinberg, *As a Driven Leaf*, New York, 1987.
2. "Elisha [ben Abuya] said reflectively ... That is the fantastic intolerable paradox of my life, that I have one question for what I possessed initially—a belief to invest my days with dignity and meaning, a pattern of behavior through which man might most articulately express his devotion to his fellows." *Id.* at 474.
3. See 7 *Encyclopaedia Judaica*, 1972, vol. 7, p. 1156. "The word *'Halakhah,'* ..the legal side of Judaism...embraces personal, social, national and international relationships, and all the other practices and observances of Judaism." See also *Random House Dictionary of the English Language*, New York, 1967, p. 637. It defines *halakhah* as "1. The entire body of Jewish law and traditions comprising the laws of the Bible, the oral law as transcribed in the legal portion of the Talmud, and subsequent legal codes amending or modifying traditional precepts to conform to contemporary conditions. 2. A law or tradition established by the *halakah*."
4. "Like other legal systems, the *halakhah* is composed of different elements, not all of equal value, since some are regarded as of Sinaitic origin others of rabbinical." *Encyclopaedia Judaica* 1157, " Sources of Authority."
5. But see 1 J. David Bleich, *Contemporary Halakhic Problems*, KTAV, New York, 1977, p. xiv. He states that "[t]he divine nature of Torah renders it immutable and hence not subject to amendment or modification." He further states that "[a]lthough the Torah itself is immutable, Sages teach that the interpretation of its many laws and regulations is entirely within the province of human intellect. Torah is divine but, *'lo ba-shamayim hi* – it is not in the heavens (Deut. 30:12) is to be interpreted and applied by man."
6. "These sentiments [of the Rabbinical Assembly] bespeak a lack of recognition of the fact that *halakhah* possesses an enduring validity which, while

applicable to changing circumstances, is not subject to change by lobbying or by the exertion of pressure in any guise or form. Nor may independently held convictions, however sincere, be allowed to influence our interpretation of *halakhah*. Normative Judaism teaches that *halakhah* is not derived from any temporal 'worldview' or 'social situation' but expresses the transcendental worldview of the Divine Lawgiver." Ibid., 83.

7. Solomon B. Freehof, *The Responsa Literature*, Jewish Publication Society, Philadelphia, 1955.
8. There is no reference to *halakhah* in the index. The equivalent term utilized is "rabbinic literature." Ibid., 13.
9. Ibid., 268 ff.
10. Ibid., 269.
11. Ibid.
12. Ibid., 270.
13. Ibid., 271.
14. A preeminent orthodox halakhist also comments upon this change in attitude toward halakhah in The United States. Bleich, op. cit., vol. 2, p. xi. It has been said that the page of a Gemara represents in capsule form the long history of Jewish exile. " The *Mishnah* was composed in *Erez Yisra'el;* the text of the Gemara which follows was written in Babylonia; Rashi's commentary hails from France; the *Tosafot* are the product of French and German schools; the marginal glosses represent Polish and Lithuanian scholarship; and finally, the blank space of the margins represent the American contribution to talmudic scholarship. Fortunately, this categorization of the American contribution is no longer correct. *Akhshar dara;* this generation has attained a level of Torah scholarship which far surpasses the fondest anticipations of a previous age."
15. His seminal works dealing with reform Jewish practice are the two volumes of *Reform Jewish Practice,* Union of American Hebrew Congregations, New York, 1955. They thus predate *The Responsa Literature* by two years. It is instructive to note his themes for those volumes. They include marriage and burial customs, synagogue architecture and ornamentation, women and children's participation in the religious services as well as relationships with Christians. Dr. Freehof notes: "[Reform Judaism] has not been creative in such great fields of Jewish law and practice as the dietary laws and the laws of Sabbath observance. This difference can hardly be accidental. The dietary laws and the laws of Sabbath observance, once so vital to Jewish life, have already dropped away from the lives of almost all Jews in the western world. There is still a small percentage of Jews which fully observes them, and a somewhat larger percentage which partially observes them, but at best, they play only a minor role in the actual living of modern Jews." Solomon B. Freehof, *Reform Jewish Practice,* Vol. 2, p. 4.
16. In largest measure the responsa dealt with those areas which parallel the issues found in three of the four sections of the *Shulhan Arukh: Orah Hayyim* which deals with the observance of the Sabbath and the Festivals, *Yorea Deah* which concerns mourning customs, and *Even ha-Ezer,* which deals with marriage and divorce.
17. For lists of approved responsa decisions of the Law Committee as well as official correspondence containing Law Committee rulings, see "The Sum-

mary Index of the Committee on Jewish Law and Standards" in *The Rabbinical Assembly*, New York, 1994. There are halakhically developed responsa dealing with such diverse subjects as biomedical issues, conversion, intermarriage, marriage and divorce, mourning and funerals, *kashrut*, women, as well as those dealing with holiday and festival observance.

18. J. David Bleich, *Contemporary Halakhic Problems*, 1977-1999 (a work of 6 volumes); *Responsa of Rav Moshe Feinstein: Translation and Commentary*, David Tendler (tr.), New York, 1998; *Crossroads: Halacha and the Modern World*, Zomet, Gush Etzion, 1987.
19. M. Baba Metzia 7:11.
20. Ketubot 56a.
21. It is explicitly mentioned four times. Nedarim 28a; Gittin 10b; Baba Kama 113a; Baba Basra 54b-55a.
22. Menachem Elon, *Jewish Law: History, Sources, Principles*, Jewish Publication Society, 1994, vol. 1, p. 59 1994. The legal rationale given by various later authorities for the source of the binding force of the king's law was that this binding force flows from an agreement between the people and the king, under which the people yield up to the king their prerogatives in all matters falling within the king's law, while the king obligates himself to preserve and protect the people. This rationale applies to every form of government, and certainly to one chosen by the people."
23. Ibid., 72.
24. "In theory the Jewish legal system [during the middle ages] was regarded as self-sufficient, but in practice the Jewish courts and jurists (i.e., the halakhists) did not entirely disregard legal rulings and enactments emanating from non Jewish sources." Jacob Katz, *Exclusiveness and Tolerance*, 1961, p. 53.
25. See State *ex rel.* Fowler v. Moore, 46 Nev. 65, 207 (1922).
26. "An act of Congress providing that the power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States has been construed as operating as a delegation of authority to control marriages." Simms v. Simms, 175 U.S. 162 (1899).
27. Examples abound of court cases, which assert the power of a legislature to issue a license to officiate at a marriage to an officer designated by statute. *See* Brewer v. Kingsberry, 69 Ga. 754 (1882). There were, as well, cases asserting that the officiant must be in full compliance with the authorizing statute. *See* People v. Schoonmaker, 119 Mich. 242 (1917).
28. "The state has the sovereign power to regulate marriages." Henderson v. Henderson, 199 Md. 449 (1952).
29. "Marriage is a civil contract entered into by a male and a female not under such disability as to render the ceremony void…the marriage must be duly solemnized. Besides the agreement of the parties there must be a license and a ceremony performed by an authorized person before witness…without a license and a ceremony there is no marriage." People v. MacDonald, 24 Cal. App. 2d 702 (1938).
30. "Rabbis should not officiate without a state license, for when they perform *kiddushin* they are considered to act as officers of the state who give the union standing in civil law." *Rabbi's Manual*, Central Conference of American Rabbis, New York, 1988, p. 246.
31. M. Baba Metziah 1:5.

32. Baba Metziah, 12a-12b.
33. *Encyclopaedia Judaica*, vol. 16, p. 586.
34. Kid. 50b.
35. See Elon, op. cit., note 22.
36. "There is no common-law right of divorce. Divorce is purely a matter of statute." Jelm v. Jelm, 155 Ohio St. 226 (1951). See also Larsen v. Ericson, 222 Minn 363 (1946)(stating that " [i]n the United States, all divorce jurisdiction is statutory"). People *ex rel*. Doty v. Connell, 9 Ill.2d 390 (1956); Bernatavicius v. Bernatavicius, 259 Mass. 486 (1927).
37. Coleman v. Coleman, 32 Ohio St.2d 155, 161 (1970).
38. The *Get* is considered to be a bill of divorcement but it is, more properly, an authorization to remarry. "Thus do I see free, release thee, and put thee aside, in order that thou may have permission and the authority over thyself to go and marry man though may desire. No person may hinder thee from this day onward, and thou art permitted to every man." *Encyclopaedia Judaica*, vol. 6, p. 131.
39. "Reform congregations recognize civil divorce as completely dissolving the marriage, and permit remarriage of the divorced persons." Freehof, *Reform Jewish Practice*, vol. 1, p. 99.
40. A major difficulty is the *Agunah*, a "married woman who for whatsoever reason is separated from her husband and cannot remarry, either because she cannot obtain a divorce from him or because it is unknown whether he is still alive." *Encyclopaedia Judaica*, vol. 2, p. 429 . Rabbi Emanuel Rackman, an eminent leader in the orthodox community, has attempted to ameliorate this difficulty by establishing a unique Bet Din which convenes only for the purpose of granting women whose husbands refuse to grant them a religious divorce an annulment in lieu of a *Get*. This action has him "embroiled in a bitter dispute that has pitted him against virtually the entire spectrum of the Orthodox rabbinate." Nadine Brozan, "Annulling a Tradition: Rabbis Stir Furor by Helping 'Chained Women' to Leave Husbands," *N.Y.Times*, Aug. 13, 1998.
41. A most unusual example of a traditional halakhic method for dealing with a recalcitrant woman who refuses to accept a *get* was recently reported in the news. "Mrs. [Chayie Singer…filed suit last month in Supreme Court in Manhattan against the Union of Orthodox Rabbis of the United States and Canada; the Bed Din Zedek of America, a rabbinical court, and five individual rabbis … She is seeking $13 million in damages…[Mrs. Sieger said,] I got a letter from Chaim's attorney, Abe Konstam, stating, 'As you are aware, a rabbinical divorce has already been granted.' Without informing her, the rabbis had used the Heter Meah Rabonim, which was introduced centuries ago to give men whose wives are mentally incapacitated, unconscious or unwilling to accept a *get* the right to take a second wife. It is not technically a Jewish divorce but is a way of releasing a man in an untenable situation from the bonds of marriage. It requires the signatures of 100 rabbis in three countries attesting to the woman's inability to accept the *get*." Nadine Brozan, " Women Sue Rabbis, Alleging Betrayal in Divorce Cases," *N.Y. Times*, December 14, 1998.
42. "*Hatan* and *kallah* agreed that should there be any contemplation of the dissolution of this marriage, or in the event of its dissolution in the civil courts, they will respond to the summons each may make to the other to appear

before the *Beit Din* of the Rabbinical Assembly and the Jewish Theological Seminary of America or its representative. They are committed to abide by its rulings and instructions, so that they both may live according to the laws and teachings of our sacred Torah." *Ketubah*, in Rabbinical Assembly, 1990.

43. The text that follows has no statement of authorship. "Prenuptial Agreement, Husband's Assumption of Obligation. I, the undersigned husband to be, hereby obligate myself to support my wife to be in the manner of Jewish husbands who feed and support their wives loyally, If, God forbid, we not continue domestic residence together for whatever reason, then I obligate myself, as of now, to pay to her $....per day (indexed to the consumer price index as of December 31st following the date of our marriage) for food and support (*parnasa*) for the duration of our Jewish marriage, which is payable each week during the time due, under any circumstances, even if she has another source of income or earnings. Furthermore, I waive my *halakhic* rights to my wife's earnings for the period that she is entitled to the above-stipulated sum. However, this obligation shall terminate if my wife refuses to appear upon due notice before a *Bet Din* for purpose of a hearing concerning any outstanding disputes between us, or in the event that she fails to abide by the decision or recommendation of such *Bet Din*. I execute this document as an inducement to the marriage between myself and my wife to be. The obligations and conditions contained herein are executed according to all legal and halachic (*sic*) requirements. I acknowledge that I have effected the above obligation by means of a *kinyan* (formal Jewish transaction) in an esteemed (*chashuv*) *Bet Din*.

    I have been given the opportunity, prior to executing this document, of consulting with a rabbinic advisor and a legal advisor.
44. The text that follows has no statement of authorship. Only the pertinent sections are quoted. Should a dispute arise between the parties after they are married, Heaven forbid, so that they do not live together as husband and wife, they agree to refer their marital dispute to an arbitration panel, namely, the *Bet Din* of....for a binding decision. Each of the parties agrees to appear in person before the Bet Din at the demand of the other party. The decision of the panel, or a majority of them, shall be fully enforceable in any court of competent jurisdiction. (c) The parties agree that the Bet Din shall apply the equitable distribution law of the State/Province of...., as interpreted as of the date of this agreement, to any property disputes which may arise between them, the division of their property and to questions of support. This agreement constitutes a fully enforceable arbitration agreement. The parties acknowledge that each of them have been given the opportunity prior to signing this agreement to consult with their own rabbinic advisor and legal advisor.
45. "In any decision made pursuant to this subdivision the courts shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subsection six of section two hundred and fifty three of this article, on the factors enumerated in paragraph (d) of this sub-division." N.Y. Dom. Rel. Law § 236B:5 (McKinney 1992). §253 (6) limits "barriers to remarriage" to situations where a *get* is withheld. *See* Michael Broyde, The Pursuit of Justice and Jewish Law 139 (1996).
46. *Rabbinical Courts: Modern Day Solomons*, 6 Colum. J.L. & Soc. Probs. 49, 50 (1970).

47. Ex. 18:13-27.
48. M San. 1:1.
49. Ibid., 1:1, 3:1.
50. San. 14a " R. Joshua b. Levi said: 'There is no ordination outside Palestine.' What is to be understood by, 'There is no ordination?' Shall we assert that they have no authority at all to adjudicate cases of *kenas* outside Palestine? But have we not learned, 'The *Sanhedrin* has competence both within and without Palestine?' This must therefore mean that ordination cannot be conferred outside Palestine."
51. The need to establish this quasi-judicial authority in the Diaspora was resolved by the Talmudic rabbis in Babylon. Our rabbis taught:" Monetary cases are decided by three, but one who is a recognized *Mumheh* may judge alone. R. Nahman said: One like myself may adjudicate monetary cases alone. And so said R. Hiyya." The following problem was consequently propounded: Does the statement "one like myself" mean that as I have learned traditions and am able to reason them out, and have also obtained authorization, so must he who wishes to render a legal decision alone , but that if he has not obtained authorization, his judgment is invalid? Come and hear! Mar Zutra, the son of R. Nahman, judged a case alone and gave an erroneous decision. On appearing before R. Joseph he was told: If both parties accepted you as their judge, you are not liable to make restitution. Otherwise, go and indemnify the injured party. Hence it can be inferred that the judgment of one, though not authorized, is valid. Rav said: Whosoever wishes to decide monetary cases by himself and be free from liability in cases of erroneous decision, should obtain authorization from the Resh Galuta. And Samuel said the same thing San 4b ff. See also R. Judah Lowe (1520- 1609): "In some countries and in some communities they turn justice into wormwood. They have set up ignorant men as authorities, men who know not the meaning of justice and law. It has reached a point where those who are qualified, the real scholars, see with their own eyes the perversion of justice ... and they are helpless even in redressing the cause of an orphan or a widow ... The true sages have no opportunity to correct the vile conditions of this generation, for those in power tell them 'you are not our *Ab Bet Din* that we need be obliged to listen to you.' It is indeed more difficult to bear their yoke than the yoke of the gentiles. For when they sense that there be one who does not respect them and does not want to recognize their authority, they seek to subdue and oppress and persecute him with every kind of persecution ... It is indeed a virtuous deed to show contempt for such men. The hands of Esau ordained them." Ben Zion Bokser, *From the World of the Cabbalah*, New York, p. 39.
52. Arbitration is encouraged in various Talmudic sources and utilization of the court system is discouraged. M. Baba Metzia 20, Moed Katan 18 as well as Sanhedrin,t , 2b–3a, 3b, 6a–6b.
53. David M. Shochet, Jewish Court in the Middle Ages , New York, 1931. Israel Goldstein, *Jewish Justice and Conciliation*, New York, 1981.
54. The settlers in colonial New England "deliberately chose as their governing legal systems the laws of the ancient Hebrew." BERNARD MEISLIN, JEWISH LAW IN AMERICAN TRIBUNALS 1 (1976).
55. Morris Schappes, *A Documentary History of the Jews of the United States*, Jewish Publication Society, Philadelphia, 1971, p. 20.

56. "The American Jew was not ghettoized. He was not separated by an act of state from his fellow man. He desired to be an American in spirit. Concerned for integration, he sought it and attained it." Jacob Rader Marcus, *Memoirs of American Jews*, 1955, vol. 1, p. 15.
57. Jerald S. Auerbach, *Justice Without Law*, 1983, p. 73.
58. "Perhaps the most important reason for their inhibition from going to the courts for the vindication of their grievances was their lack of confidence that non-Jewish judges were possessed of the ability to understand in a meaningful way – to pierce through the 'veil' of – the particularly Jewish character or background of the subject matter which was the core of their differences with the other party to the controversy." Simon Agranat, "Preface" to Goldstein, note 53, xvi.
59. Auerbach, op. cit., note 57, p. 76.
60. *Dina de-malkhuta dina*, "the law of the government is the law." Elon, op. cit., vol. 1, note 22.
61. Auerbach, Op. Cit., note 57p. 77; Shochet, Op. Cit., note 53, p. 96.
62. Yad Hil. San. 26:7.
63. Zechariah 8:16.
64. II Sam. 8:15.
65. Yad, Hil. San. 22.4.
66. "Magnes developed a plan for neighborhood rabbinical judges to answer questions of ritual and mediate minor disputes. Their participation in dispute settlement was intended to restore a traditional rabbinical function, but it could not restore the rabbinate to its traditional place in the Jewish community. The rabbis resolved a restricted sphere of ritual issues for a dwindling constituency." Auerbach, Op. Cit., note 57, p. 79.
67. "Jews have shown a special preference for the clothing trades. According to official reports, three-fourths of the workmen in these trades in New York are Jews…The instability of the Jewish unions has been ascribed to the Jew, who has in inborn desire to be 'his own boss.' …The clothing trade in its beginnings requiring little capital, the development of the clothing industry in New York within recent years has been marked, in contrast with the general trend of the time, by a tendency toward small-scale production." "Trade-Unionism," *Encyclopaedia Judaica*, vol. 12, p. 217 .
68. Robert St. John, *Jews, Justice and Judaism* , New York, 1959, p. 269.
69. Auerbach, op. cit., p. 80.
70. B.H. Hartogenesis, *A Successful Community Court*, 12 J. Amer. Jud. Soc. (1929).
71. Goldstein, op. cit., p. 88
72. New York State Arbitration Law and Civil Practice Act 1920
73. The title of the court was changed to Jewish Conciliation Court in 1930 and was later amended to Jewish Conciliation Board of America. Goldstein, Op. Cit., p. xvii.
74. Ibid., xvii.
75. Riess v. Murchison, 384 F.2d 727, 734 (9th Cir. 1967); Sewer v. Paragon Homes, 351 F. Supp. 596, 598 (D. V.I. 1972).; *In re* Columbia Broad. Sys., Inc., 205 N.Y.S.2d 85, 89 (Sup. Ct. 1960).
76. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

77. Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1068 (2d Cir. 1972) (stating "[w]here federal law is applicable, it should be implemented in such way as to make arbitration effective and not to erect technical and insubstantial barriers," and "[w]here parties have elected to submit their differences to arbitration, courts should not by hair-splitting decisions hamstring its operation"). *But See* Franks v. Franks, 1 N.E.2d 14, 15 (Mass. 1936) (stating "[c]ompliance with statute regarding arbitration is jurisdictional requirement to validity of final award"). Hous. Auth. of New Orleans v. Henry Ericsson Co., 2 So.2d 195, 200 (La. 1941) (stating "[g]enerally a submission to arbitration under a statute must conform to statute in every essential particular").
78. Lundgren v. Freeman, 307 F.2d 104, 109 (9th Cir. 1962); Acme Cut Stone Co. v. New Center Dev. Corp., 281 Mich. 32 (1937).
79. Funk v. Funk 6 Ariz. App 527, 531 (1967). ; Maxwell Shapiro Woolen Co. v. Amerotron Corp., 158 N.E.2d 875, 880 (Mass. 1959).
80. Wachusett Spinning Mills, Inc. 183 N.Y.S.2d 601, 603 (App. Div. 1959).
81. New York case law recognizes the authority of Jewish law by analogy as it is a foreign system of law. "A foreign arbitration is valid and will be enforced where the parties voluntarily appear, where opportunity for a hearing is given, where the arbitrators are shown to have been appointed and to have acted in a manner valid under the laws of the place of arbitration, and where no prejudice or fraud is shown." Coudenhove-Kalergi v. Dieterle, 36 N.Y.S.2d 313 (Sup. Ct. 1942).
82. " A Board of rabbinical arbitrators selected by husband and wife to settle their marital and financial disputes may apply legal, moral and religious law to the dispute between the parties as to recovery of an alleged sum lent by the wife to her husband." Berk v. Berk, 171 N.Y.S.2d 592, 593 (Sup. Ct. 1957).
83. "Whatever position the Jewish law may take today regarding the probating of wills and settling of estates, the civil law of the State of New York must be applied and is the only law this court can consider." *In re* Will of Jacobovitz, 295 N.Y.S.2d 527, 531 (Sur. Ct. 1968).
84. Agur v. Agur, 298 N.Y.S.2d 772, 776 (App. Div. 1969).
85. *Berk*, 171 N.Y.S.2d at 592-93.
86. Steve Levin, *Disputes Resolved in Jewish Courts*, *Pittsburgh Post-Gazette*, Aug. 10, 1997.
87. "Legal process …in which a child's legal rights and duties toward his natural parents are terminated and similar rights and duties toward his adoptive parents are substituted." *Black's Law Dictionary*, 1979, (ed. 5th), p. 45.
88. "[Adoption] … whereby a person takes another person into the relation of a child and thereby acquires the rights and incurs the responsibilities of parent." *In re* Adoption of Robert Paul P., 63 N.Y.S.2d 233, 236 (1984).
89. "The most reliable and recent data comes from 1992…The number of adoptions reported was 127,441 [of which] two thirds were adopted by stepparents or relatives…the other third, or about 43,000 [are adaptable]…and less than 2 percent of unmarried pregnant women are placing their babies for adoption." Laura Mansnerus, *Market Puts Price Tags on the Priceless: In Search of a Child*, N.Y. Times, Oct. 26, 1998, at A14.
90. Ibid. "A tangle of state law has made adoption all but impossible to navigate without professional help. Disparate provisions govern, among other things, lawyers roles, residency requirements and birth mothers' consent."

91. "'Open adoption' is one in which final judgment incorporates parties' pre-adoption written agreement that the child will have continuing contact with one or more members of his or her biological family after adoption is competed." New Jersey Div. of Youth and Family Servs. v. B.G.S., 677 A.2d 1170, 1177 (1996).
92. Tammy M. Somogye, *Opening Minds to Open Adoption*, 45 Kan. L. Rev. 619 (1997).
93. U.S. Const. amend. X.
94. John M. Stoxen, *The Best of Both "Open" And "Closed" Adoption Worlds: A Call for the Reform of State Statutes*, 13 Notre Dame J. Legis. 292 (1986).
95. Burton Z. Sokoloff, *Antecedents of American Adoption, in* 3 The Future Of Children 17 (Richard E. Behrman ed., 1993).
96. "Adoption has been characterized a status created by the state acting as *parens patriae*." 2 Am. Jur. 2d *Adoption* § 1 (1986).
97. All States had enacted adoption statutes by 1931. Stoxen, *supra* note 95, at 298.
98. Lisa Diane G., 537 A.2d 131, 132 (R.I. 1988).
99. Unif. Adoption Act, 9 U.L.A. 15 (1969).
100. "(2) all papers and records pertaining to the adoption whether part of the permanent record of the Court or of a file in the [Department of Welfare] or in an agency are subject to inspection only upon consent of the Court and all interested persons; or in exceptional cases, only upon an order of the Court for good cause shown; and (3) except as authorized in writing by the adoptive parent, the adopted child if [14] or more years of age, or upon order of the court for good cause shown in exceptional cases, no person is required to disclose the name or identify of either an adoptive parent or an adopted child." *Id*. at § 16.
101. Alaska Stat. §§ 25.23.005 to .240 (Michie 1974); Ark. Code Ann. §§ 9-9-201 to -224 (Michie 1977); Mont. Code Ann. §§ 40-8-101 to -202 (1957); N.D. Cent. Code §§ 14-15-01 to -23 (1971); Ohio Rev. Code Ann. §§ 3107.01-.19 (Banks-Baldwin 1995).
102. Joan Heifetz Hollinger, *Adoption Law, in* 3 The Future of Children, *supra* note 96, p. 43.
103. *See* 3 Ibid. p. 49.
104. *See* 3 Ibid. p. 50.
105. *See* Sokoloff, *supra* note 96, p. 21.
106. Mansnerus, *supra* note 89.
107. "The evidence for adoption in the Bible is so equivocal that some have denied that it was practiced in the biblical period." *Encyclopaedia Judaica*, vol. 2, p. 298.
108. 2 Ibid., p. 301.
109. *Encyclopaedia Judaica*, vol. 3, p. 217.
110. M. Git. 5:4.
111. "And they assembled all the congregation together on the first day of the second month, and they declared their pedigrees after their families." Num. 1:18 and Gunther Plaut, *The Torah: A Modern Commentary*, Union of American Hebrew Congregations, New York, 1981, Num. 1:18: "And on the first day of the second month they convoked the whole community, who were registered by the class of their ancestral houses."

112. "All the rights and privileges of the *Kohen*, as well as the prohibitions apply among Orthodox Jews today." *Encyclopaedia Judaica*, vol. 13, p. 1089.
113. *Shulkhan Arukh, Orah Hayyim* 23: 9.
114. *Kitzur Schulhan Arukh Even ha-Ezer* 100:1.
115. *Shulkhan Arukh, Hoshen Mishpat* 164:1.
116. Ibid., 202:1.
117. "Even nowadays, a priest is prohibited from becoming ritually defiled. The highest grade of such defilement occurs if a *kohen* touches a dead body or is present under the same roof with a dead body. Therefore, a *kohen* should not study to become a male-nurse [or physician]." Abraham Steinberg, *Medical-Halachic Decisions of Rabbi Shlomo Zalman Auerbach (1910-1995)*, Assia, Jan. 1997, at 37.
118. *Kitzur Schulchan Aruch.*
119. *Rabbi's Manual*, p. 235.
120. "There are t hree [persons] who drive the *Shekhinah* from the world...[the second is]he who cohabits with the daughter of a gentile." Bleich, Op. Cit., 2, p. 268 (quoting *Zohar, Shemot* 3b).
121. "The Halakhah with regard to the children of a union between a Jew and a non-Jew is well established. The child acquires the religious status of the mother." Ibid., 103. *See also Kiddushin* 68b. "Your son by an Israelite woman is called your son, but your son by a heathen is not called your son [but her son.]"
122. "The general prohibition against incest with one's 'near of kin' (Lev. 18:6) has been held to be limited to the following degrees on consanguinity: parents (18:7); mother-in-law (20:14); stepmother (18:8); sister and half sister (18:9)..." *Encyclopaedia Judaica*, vol. 8, p. 1316 .
123. "According to *Halakhah*, a bastard is defined as a child born of an adulterous or incestuous relationship and may marry only a person of similar birth or a convert. A *mamzer* [bastard] is forbidden to marry a Jew of legitimate birth." Bleich, Op. Cit., vol. 1, p. 159.
124. "[Sages] did not make pronouncements based upon traditions derived from the prophets, which they had in those matters, but rather because they had knowledge on these subjects in terms of the general level of knowledge of those generations, or they became aware of those opinions from those who were knowledgeable in those generations." Dov I. Frimer, "Establishing Paternity By Means of Blood Type Testing," *Assia*, May 1989, p. 22.
125. Moses Maimonides, *Guide to the Perplexed*, (Chaim Rabin tr.), 1947.
126. "We would not need a 100% reliability of blood test results. Inasmuch as a 'majority' is sufficient (e.g. 'a majority of a woman's sexual unions are [held to be]with her husband'), the *halachah* would accept reliable blood test results together with other evidence, whether positive or negative, which have a greater than 50% degree of reliability." Frimer, Op. Cit., p. 27.
127. This would not make determinations with regard to such questions as personal status as a *kohen*. It would, however, eliminate the potential for incest.
128 Van Rensselaer Potter, *Bioethics*, New York, 1971.
129. Alan M. Sokobin, "A Child Was Killed: Shaken Baby Syndrome; A Comparative Study: Anglo-American Law and Jewish Law; Legal, Moral and Ethical Issues," University of Toledo Review, 1998, vol. 29.

130. Marshall Kapp, "Treating Medical Charts near the End of life," Ibid., p.. 524. (1997).
131. George J. Annas, "The Incompetent's Right to Die: The Case of Joseph Saikewicz," Hastings Center Report, 1978, vol. 8, Feb, p. 21.
132. Evans v. People, 49 N.Y. 86, 90 (1872).
133. "Report of Ad Hoc Committee of Harvard Medical School to Examine the Definition of Brain Death," JAMA, 1968, vol. 205, p. 337.
134. Immanuel Jakobovits, "Halakhic Debate on Brain Death," 41 *Le'ela*, 1996, p. 29 .
135. *Report of President's Commission for Study of Ethical Problems in Medicine and Biomedical and Behavioral Research on Defining Death*, 1981; Compton, "Telling the Time of Human Death by Statute," Wash. & Lee Law Rev, 1974, vol. 31, p. 521; Alexander M. Capron & Leon R. Kass, "A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal," U. Pa. Law. Rev., 1972, vol 121, pp. 87, 87-92.
136. "Report of Ad Hoc Committee of Harvard Medical School to Examine the Definition of Brain Death," p. 134.
137. Unif. Determination of Death Act § 1, 12A U.L.A. 593 (1996).
138. 1970 Kan. Sess. Laws ch. 378, § 1 (codified as amended at KAN. STAT. ANN. § 77-204 (1995).
139. Thirty-two states, the District of Columbia, and the Virgin Islands have statutorily adopted the Uniform Determination of Death Act. UNIF. DETERMINATION OF DEATH ACT, 12A U.L.A. 589 (1996). *See* ARK. CODE ANN. § 20-17-1010 (Michie 1995); CAL. HEALTH & SAFETY CODE § 7180 (West 1997); COLO. REV. STAT. ANN. § 12-36-136 (West 1997); DEL. CODE ANN. tit. 24, § 1760 (1996); D.C. CODE ANN. 1981 § 6-2401 (1997); GA. CODE ANN. § 31-10-16 (1997); IDAHO CODE § 54-1819 (1997); IND CODE § 1-1-4-3 (1997); KAN. STAT. ANN. § 77-204 to 77-206 (1996); ME. REV. STAT. ANN. tit. 22 §§ 2811 to 2813 (West 1997); MD. CODE ANN., HEALTH-GEN. § 5-202 (1997); MICH. COMP. LAWS ANN. §§ 33.1031 to 33.1034 (1997); MINN. STAT. ANN § 145.135 (West 1997); MISS. CODE ANN. §§ 41-36-1, 41-36-3 (1997); MO. ANN. STAT. § 194.005 (West 1996); MONT. CODE ANN. § 50-22-101 (1996); NEB. REV. STAT. §§ 71-7201 to 71-7203 (1996); NEV. REV. STAT. § 451.007 (1995); N.H. REV. STAT. ANN. §§ 141-D1, 141-D2 (1996); N.M. STAT. ANN. § 12-2-4 (1997); N.D. CENT. CODE § 23-06.3-01 (1997); OHIO REV. CODE ANN. § 2108.30 (Banks-Baldwin 1997); OKLA. STAT. ANN. tit. 63, §§ 3121 to 3123 (1997); OR. REV. STAT. § 432.300 (1995); PA. STAT. ANN. tit. 35, §§ 10202 to 10203 (1996); R.I. GEN LAWS § 23-4-16 (1996); S.C. CODE ANN. §§ 44-3-450, 44-43-460 (1997); S.D. CODIFIED LAWS § 34-35-18.1 (Michie 1997); TENN. CODE ANN. § 68-3-501 (1997); UTAH CODE ANN. §§ 26-34-1, 26-34-2 (1997); VT. STAT. ANN. tit. 18, § 5218 (1997); V.I. CODE ANN. tit. 19, § 869 (1996); W. VA. CODE §§ 16-10-1 to 16-10-4 (1997); WIS. STAT. ANN. § 146.71 (1997); WYO. STAT. ANN. §§ 35-19-101 to 35-19-103 (1997). Alabama has adopted the Uniform Brain Death Act. UNIF. BRAIN DEATH ACT, 12 U.L.A. 63 (1996). *See* ALA. CODE § 22-31-1 (1996). Twelve states and Puerto Rico have adopted statutes which include a variation on the "cessation of all functioning of the brain" among other indices of death, especially when a patient's cardiac or respiratory functions are supported by artificial means. *See* ALASKA ADMIN. CODE tit. 9 § 68.120 (1997); CONN. GEN. STAT. ANN. 19a-279h (West 1997); FLA. STAT. ANN. § 382.009 (West 1997); HAW. REV. STAT. § 327C-1 (1997); IOWA CODE ANN. § 702.8

(1996); KY. REV. STAT. ANN. §446.400 (Banks-Baldwin 1997); LA. REV. STAT. ANN. § 9:111 (1997); N.J. STAT. ANN. § 26:6A-3 (1997); N.C. GEN. STAT. § 90-323 (1996); P.R. LAWS ANN. tit 18, § 731a (1994); TEX. HEALTH & SAFETY CODE ANN. § 671.001 (West 1997); VA. CODE ANN. § 54.1-2972 (Michie 1997). In five states, despite inaction by the state legislature, the courts have determined death to occur in a manner consistent with the Uniform Determination of Death Act. *See* State v. Fierro, 603 P.2d 74 (Ariz. 1974); *In re* Longeway, 549 N.E.2d 292 (Ill. 1990); Commonwealth v. Golston, 366 N.E.2d 744 (Mass. 1977); People v. Eulo, 472 N.E.2d 286 (N.Y. 1984); *In re* Bowman, 617 P.2d 731 (Wash. 1980).

140. In decisions where a court could not find nor apply a definition of brain death, the courts have generally been willing to uphold the conviction of an accused that caused the brain death of a victim. *See* Commonwealth v. Golston, 366 N.E.2d 744 (Mass. 1977), *cert. denied*, Golston v. Massachusetts, 434 U.S. 1039 (1978).
141. Felix Frankfurter, "Some Reflections on the Reading of Statutes,"Colum. L Rev. 1947, vol. 47, pp. 527, 529.
142. Yoma 83a.
143. Yoma 85a.
144. Yad, Hil. Shabbat 2.19.
145. Shulhan Arukh, Orah Hayyim, 330.5.
146. J. David Bleich, *Time of Death in Jewish Law*, New York, 1991.
147. Fred Rosner, "On Death and Dying," *Assia*, Jan. 1991, p. 42.
148. Ibid.
149. *President's Report.*
150. "Completely and irreversibly" conforms with the "Report of the Ad Hoc Committee of Harvard Medical School."
151. 151. Tanhumim , 1986, vol. 7, p. 187; Yoel Jakobovitz, "Brain Death and Heart Transplants," *Tradition*, Summer 1989, p. 24.
152. P. Byrne et al., *Brain Death—An Opposing Viewpoint*, 242 JAMA 1985 (1979).
153. M.D. Tendler, *Reply to Letter on Jewish Law and the Time of Death*, 240 JAMA 109 (1978).
154. Ibid.
155. Ibid.
156. Aaron Soleveichik, *Jewish Law and Time of Death*, 240, JAMA 109 (1978).
157. Ibid.
158. N.J. STAT. ANN. §26:6A-3 (1997)
159 N.J. STAT. ANN. §26:6A-5 (1997)(religious exemption clause).
160. Sokobin, Op. Cit.
161. Peter Singer, *Rethinking Life and Death: The Collapse of Our Traditional Ethics*, New York, 1994.
162. Ibid., 63.
163. Jakobovits, Op. Cit.
164. Singer, Op. Cit., p. 11.
165. Derek Humphry, *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying*, Boston, 1991.
166. Ibid., 180.
167. Ibid., 13.
168. Potter, Op. Cit.
169. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 270 (1990).

170. Quinlan, 355 A.2d 647 (N.J. 1976).
171. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990). Nancy Cruzan was seriously injured in an automobile accident. *Id.* at 265. Her injuries placed her in a vegetative state. *Id.* Her parents sought to have her removed from life support, allowing her to die. *Id.* at 267. The court asserted that the Constitution does permit someone "to refuse lifesaving hydration and nutrition." *Id* at 279. In Nancy Cruzan's case, however, the court did not permit her removal from life support, because her parents failed to meet a "clear and convincing evidence standard," that removal was what Nancy wished. *Id.* at 284.
172. The Supreme Court ruled in two separate opinions that state prohibitions on doctor-assisted suicide do not violate the equal protection clause of the Fourteenth Amendment if rationally related to legitimate government interests. *See* Washington v. Glucksberg, 117 S. Ct. 2258 (1997); Vacco v. Quill, 117 S.Ct. 2293 (1997).
173. *Cruzan*, 497 U.S. at 270 (discussing *In re Quinlan*, 355 A.2d 647 [N.J. 1976]).
174. 355 A.2d 647 (N.J. 1976).
175. Ibid., 654.
176. Ibid., 654-655.
177. Ibid., 656.
178. Ibid., 662-664.
179. Ibid., 671.
180. Superintendent of Belchertown St. Sch. v. Saikewicz, 370 N.E.2d 417, 420 (Mass. 1977).
181. Ibid., 419.
182. Ibid., 430.
183. Ibid., 432.
184. Eichner v. Dillon, 426 N.Y.S.2d 517 (App. Div. 1980); *In re* Storar, 420 N.E.2d 64 (N.Y. 1981).
185. *Storar*, 420 N.E.2d at 67.
186. Ibid., 68.
187. Ibid., 70.
188. Ibid., 68.
189. Ibid.
190. Ibid.
191. Ibid.
192. Ibid., It was estimated that he had a "mental age of about 18 months."
193. Ibid., 73 (citations omitted).
194. Barber v. Superior Ct., 147 Cal. App.3d 1006 (1983).
195. Ibid., 1010.
196. Ibid., 1011.
197. Ibid., 1011-1012.
198. Ibid., 1022.
199. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 260, 261 (1990).
200. Brooks, 205 N.E.2d 435 (Ill. 1965). *See also In re* President & Directors of Georgetown College, 331 F.2d 1010, 1015 (D.C. Cir. 1964) (Burger, J. dissenting).
201. 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*, (Barry S. Kogan, ed.), 1991, p. 128.

202. Ronald Green, "Good Rules Have Good Reason: A Response to Leon Kass," *The Ethics of Choice; A Time to Be Born and a Time to Die*, p. 147.
203. Ronald Dworkin, *Life's Dominions: An Argument About Abortion, Euthanasia and Individual Freedom*, New York, 1993, p. 84.
204. Ibid., 215.
205. Ibid., 199.
206. *President's Report.*
207. *In re* Conroy, 464 A.2d 303 (N.J. 1983).
208. Ibid., 304. Organic brain syndrome is a "syndrome resulting from diffuse or local impairment of brain tissue function." *Melloni's Illustrated Medical Dictionary*, 1979, p. 347.
209. *Conroy*, 464 A.2d at 304.
210. Ibid., 305.
211. Ibid.
212. Ibid., 312.
213. Ibid., quoting G. Kelly, *Medico-Moral Problems*, 1958, p. 129.
214. *Conroy*, 464 A.2d at 313.
215. *President's Report.*
216. Brophy v. New Eng. Sinai Hosp., Inc., 497 N.E.2d 626 (Mass. 1986).
217. Ibid., 628.
218. Ibid., 628-629.
219. Ibid., 638. There is an irony in this decision and an interesting difficulty with the moral and legal conundrum created by it. New England Sinai Hospital, a Jewish Hospital, and its ethics committee found itself bound by their interpretation of the restrictions in Jewish law which resisted removing the life support equipment. By acceding to the wishes of the family to move Paul Brophy to another facility they sanctioned the violation of the Noachide laws which are legally binding on non-Jews by Jewish law. The Rabbis held that while Jews are subject to the full panoply of Biblical legislation, all non-Jews are obligated to observe six basic humane regulations. "Man may not worship idols; he may not blaspheme God; he must establish courts of justice; he may not kill; he may not commit adultery; and he may not rob" Plaut, a note 112, at 71. By passively permitting the staff of another medical center to violate the proscription not to kill, the hospital may be thought to have facilitated a violation of that basic Noachide law by a gentile. *See* Michael Broyde, *Assisting In A Violation of a Noachide Law*, 8 JEWISH L. ASS'N STUD. 11 (1996).
220. UNIF. RIGHTS OF THE TERMINALLY ILL ACT, 9B U.L.A. 609 (1987).
221. Ibid., § 7.
222. Ibid.
223. "Appeals Exhausted, Firefighter to be Moved to Die," *Associated Press*, Oct. 14, 1986.
224. "Comatose Man Dies," *Newsday*, Oct. 14, 1986 at 14.
225. Bouvia v. Superior Court, 225 Cal. Rptr. 297 (1986).
226. Ibid., 299.
227. Ibid., 300.
228. Ibid., 298.
229. Ibid., 298-299.

230. Ibid., 300. "A person of adult years and in sound mind has the right in the exercise of control over his own body to determine whether or not to submit to lawful medical treatment." *Id.* (quoting Cobb v. Grant, 502 P.2d. 1 [Cal. 1972]).
231. Dudley Clendinen, "When Death Is a Blessing and Life Is Not," *New York Times*, Feb. 5, 1996, A11.
232. "See *Jury Acquits Kevorkian in Common-Law Case*," Ibid., May 15, 1996, A14.
233. People v. Kevorkian, 534 N.W.2d 172 (Mich. Ct. App. 1995), *appeal denied*, 549 N.W.2d 566 (Mich. 1996), *cert. denied*, Kevorkian v. Michigan, 117 S. Ct. 296 (1996).
234. "A.M.A. Keeps Its Policy against Aiding Suicide, " *N.Y. Times*, June 26, 1996, B10.
235. Justin Hyde, "Doctors Group Opposes Assisted Suicide: The State Medical Society Doesn't Want a Ban on It, But Jack Kevorkian Helped Prompt the Policy Change," *Grand Rapids Press*, May 5, 1997, B3.
236. Sandi Dolbee, "Right-to-Die Measure Rejected by State Voters," *San Diego Union-Tribune*, Nov. 4, 1992, A3.
237. Jane Gross, "The 1991 Election: Euthanasia," *N.Y. Times*, Nov. 7, 1991, B16.
238. Oregon Death with Dignity Act, Or. Rev. Stat. §§ 127.800-.897 (1997). The Oregon Supreme Court in a decision relating to the wording of the title to be used on the ballot for the "Oregon Death with Dignity Act" abridged and synopsized the proposed law. "The proposed measure creates a statutory regime that permits an adult resident of Oregon, who has been diagnosed as suffering from an incurable and irreversible disease that will, in the reasonable medical judgment of two physicians, cause that person's death within six months, to obtain and take lethal medication. The choice of the incurably ill person must be voluntary and informed, not the product of psychiatric or psychological disorder or of depression that is impairing the person's judgment." Kane v. Kulongoski, 871 P.2d 993, 995 (Or. 1994).
239. Lee v. Oregon, 891 F. Supp 1429 (D. Or. 1995).
240. David Garrow, "The Oregon Trail," *N.Y. Times*, Nov. 6, 1997, A27.
241. Washington v. Glucksberg, 117 S.Ct. 2258 (1997); Vacco v. Quill, 117 S.Ct. 2293 (1997).
242. Glucksberg, 117 S. Ct. at 2275.
243. "Around the World," *Detroit News*, Feb. 22, 1996, A1.
244. "Euthanasia Law Struck Down in Australia, " *N.Y. Times*, Mar. 27, 1997 A15.
245. Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.*, Washington v. Glucksberg, 117 S.Ct. 2258 (1997)
246. Ibid., 797.
247. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).
248. *Compassion in Dying*, 79 F. 3d at 799 (quoting *Cruzan*, 487 U.S. at 278 [O'Connor, J., dissenting]).
249. Casey v. Planned Parenthood, 505 U.S. 833 (1992) (upholding the right of privacy in a woman's choice to have an abortion).
250. *Compassion in Dying*, 79 F. 3d at 799 (quoting *Casey*, 505 U.S. at 851).
251. Ibid., 816.
252. Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), *rev'd*, Vacco v. Quill, 117 S. Ct. 2293 (1997).
253. Quill, 80 F.3d at 721.

254. Ibid., 724 (referencing Yale Kamisar, *Are Laws against Assisted Suicide Unconstitutional?*, 23 HASTINGS CTR. REP. 32 [1993]).
255. Ibid., 726.
256. Ibid., 731 (Calabresi, J., concurring).
257. Ibid., 738 (Calabresi, J., concurring).
258. Ibid., 739 (Calabresi, J., concurring).
259. 79 F.3d 790 (9th Cir. 1996).
260. 80 F.3d 716 (2d Cir. 1996).
261. David J. Garrow, "The Justices' Life-or Death Choices," *N.Y. Times*, April 7, 1996, E6.
262. Ibid.
263. Ibid.
264. 117 S. Ct. 2258 (1997)
265. Ibid., 261 (alteration in original).
266. 80 F.3d at 731 (Calabresi, J., concurring).
267. Glucksberg, 117 S. Ct. 2258, 2293 (Souter, J., concurring).
268. 117 S. Ct. 2293 (1997).
269. Ibid., 2296.
270. Washington v. Glucksberg, 117 S. Ct. 2302, 2303 (1997) (O'Connor, J., concurring).
271. Ibid., 2311 (Breyer, J., concurring).
272. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).
273. Ibid.
274. I Samuel 31:4. Saul begged his armor-bearer to kill him but was rebuffed and fell upon his own sword. *Id*. The most famous act of suicide and assisted suicide in Jewish history was the mass self-immolation of the garrison of Masada in 73 C.E. as reported by Josephus. The husband/father in each family group first killed his family and was then assisted in suicide by a companion. Flavious Josephus, "The Works of Josephus,"(William Whiston trans.), 1987, . 8. 769.
275. Leviticus 19:16.
276. The phrase "'of Israel' is absent in some texts." Sant 37a.
277. San 37a.
278. Exodus 15:26.
279. Exodus 21:18.
280. Exodus 21: 19 (a literal translation.)
281. Baba Kamma 85a.
282. There is a distinction in Jewish law between willful suicide and one induced by mental illness. Only when there is clear and unequivicable evidence of intent is the suicide considered to have been of sound mind. The Talmud states the principle with clarity. "Who is a suicide of sound mind? It is not so regarded if a man climbed a tree or a roof and fell to his death, but only where he states, 'I am climbing the roof or the tree and I am going to throw myself to my death,' and one sees him acting accordingly … a man found strangled or hanging from a tree or cast upon a sword is regarded as a suicide of unsound mind." *Tractate Semachot, in* TALMUD, *supra* note 20, at 2:2-3. *Semachot* (joys) is named with ironic humor. It is the classic rabbinic text on death and mourning. It is appended to the Babylonian Talmud. The fourteen-chapter text begins with the legal status of a dying person and asserts

that the dying must be considered as living in every respect. A suicide is termed *shekhiv me-ra*, which denotes a person who is so severely ill as to be facing imminent death. *See* 1 ELON, *supra* note 22, at 1877.

283. *Oxford English Dictionary*, Oxford, 1089, p. 444 .
284. "R[abbi] Nahman said in Rabbah b[en] Abbahu's name: Scripture says, 'Love thy neighbor as thyself': Choose an easy death for him." San 45a.
285. Leviticus 19:18.
286. San 45a.
287. Commentary to San 45a.
288. Leonard Kravitz, "Euthanasia," *Death and Euthanasia in Jewish Law: Essays and Responsa*, (Walter Jacob & Moshe Zemer eds), Pittsburgh, 1995, p. 11 ff.
289. Elliot N. Dorff, "Teshuvah on Assisted Suicide," *Conservative Judaism*, Summer 1998, pp. 3ff.
290. Abraham S. Abrahams, *The Comprehensive Guide to Medical Halachah*, Jersualem, 1990, p. 177.
291. Exodus 21:19.
292. Fred Rosner, *Modern Medicine and Jewish Ethics*, New York, 1991, p. 211.
293. A.Z. 18a.
294. Hananiah was a second-century C.E. rabbinic scholar. He was executed by the Romans during the Hadrianic repression of Jewish life in Judea. Hanania, when arrested, admitted that he was teaching Torah in violation of the emperor's edicts. "He was sentenced to be burnt at the stake ... he was burnt at the stake wrapped in the *Sefer Torah* [a scroll on which was written the Five Books of Moses] which he had been holding when he was arrested. In order to prolong his agony tufts of wool soaked in water were placed over his heart so that he should not die quickly...It is stated that the executioner (*quaestionarius*), moved by his sufferings, removed and increased the heat of the fire." *Encyclopaedia Judaica*, vol. 7, p. 1254.
295. David Feldman, "The End of Life," *Hippocrates*, May/June 1988, p. 24.
296. Semahot 1.1.
297. Ecclesiastes 12:6.
298. Semahot 1.2.
299. Ibid., 1:4.
300. Shab. 37a.
301. Ibid.
302. Ibid.
303. Fred Rosner and J. David Bleich, *Jewish Bioethics*, New York, 1979, p. 262.
304. Jacob ben Asher (1270?-1340) *Turim*.
305. *Turim Yoreh Deah*, 339.
306. Ned. 40a.
307. Ket. 104a.
308. Ibid.
309. Yoma 85a.
310. San 74a.
311. Israel Bettan in W. Jacob, *American Reform Responsa*, New York, 1983, p. 263.
312. Yoel H. Kahn, "On Choosing the Hour of Our Death," *Reform Jewish Quarterly*, Summer 1994, p. 65.
313. Eugene Borowitz, *Choices in Modern Jewish Thought*, New York, 1983, p. 271.

314. Daniel B. Sinclair, "Patient Self-Determination and Advance Directives," 8 *Jewish Law Association Studies*, vol. 8, 1994, p. 173.
315. C.A. 759/92 (T.A.), Zadok v. Beth Haelah, P.M. (unpublished).
316. Sinclair, Op. Cit., p. 180.
317. Ket. 70a.
318. Sinclair , Op. Cit., 181.
319. Harvey L. Gordon, *Assisted Suicide, Bio-Ethics: Program/Case Study*, Union of Am. Hebrew Congregations, Summer 1994.
320. Alvin J. Reines, "The Morality of Suicide: A Surresponse," *Journal of Reform Judaism*, Winter 1991, p. 74.
321. Bernard Zlotowitz and Sanford Seltzer, "Suicide as a Moral Decision," *Journal of Reform Judaism*, Winter 1991, p. 66.
322. Ibid.
323. See supra text accompanying notes 4-13.
324. Board of Comm'rs v Bond, 88 Ind. 102 (1882).
325. 923 F.2d 477 (6th Cir. 1991). For a situation with an almost identical fact pattern, see Whaley v. County of Tuscola, 58 F.3d 111 (6th Cir. 1995).
326. Ibid.
327. Ibid.
328. Ohio Rev. Code Ann. §§ 2108.01-.09 (Banks-Baldwin 1995).
329. Ohio Rev. Code Ann § 313.121 (Banks-Baldwin 1997).
330. Michael Graham, "The Role of the Medical Examiner in Fatal Child Abuse," *Child Maltreatment*, (James A. Monteleone & Armand E. Brodeur eds.), New York, 1994, p. 431.
331. Ibid. 433.
332. Ibid.
333. Bleich, Op. Cit., p. 162.
334. Deuteronomy 21:23.
335. "Inference from minor to major, or from major to minor." *The Authorized Daily Prayer Book*, (Joseph H. Hertz trans. rev. ed.), London, 1959, p. 43.
336. See *Pikku'ah Nefesh* supra note 283.
337. Baba Basra 154a f.
338. Hullin 11b.
339. Ohio Rev. Code Ann. § 313.12 (Banks-Baldwin 1997).
340. The state also accommodates religious beliefs in performing an autopsy. If an autopsy is contrary to the deceased's religious beliefs, but is a "compelling public necessity," the coroner must wait forty-eight hours before performing the procedure. This waiting period is designed to allow the relatives of the deceased to petition for an injunction against the autopsy. Ohio Rev. Code Ann. § 313.131 (Banks-Baldwin 1997).
341. Elon, Op. Cit., vol. 1, supra note 22.
342. Elliot N. Dorff and Arthur Rosett, A Living Tree: *The Roots and Growth of Jewish Law*, New York, 1988, p. 516.
343. Elon, Op. Cit., vol. 1, p. 71.
344. Ibid.
345. The principle of *dina de-malkhuta dina* would not be operative in matters of defining death or in questions of organ donation. There is no conflict with regard to organ donation as it is not a statutory requirement. In the future there may be a dispute between secular law and Jewish law if the two sys-

tems of law focus in on the agonizing moral conundrum. As has been noted, the decisive definition of death is still in the process of determination in both the Anglo-American legal system as well as in Jewish law.