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New Horizons on the Subject of Medical Ethics

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I. Introduction

The very distinguished Professor Dov Hyman, Chairman Chaim Kahn, Esq., Professor Jonathan Halevy, Drs. Ram Yishai, Avraham Steinberg and Mordechai Halperin, ladies and gentlemen.

Our Sages have said that a convocation of the righteous is beneficial both for themselves and for the world. I greet all those who have gathered here, our worthy guests from abroad, and the residents of Jerusalem and the State of Israel, whose occupation is the occupation of the righteous, in the original sense of the term, namely, seeking virtue and performing it with skill and faith.

I am neither a physician nor the son of a physician, but I have discovered that what is common to your and my profession is primarily what I have just referred to: the pursuit of righteousness. An intimation of this is found in the words of one of the great halachic masters of thirteenth century Spain and the founder of a settlement in the Land of Israel, Rabbi Moshe b. Nachman, Ramban, who, like many halachic authorities of the medieval period, was also a physician by profession. These words are contained in his book, *Torat ha-Adam*, which deals, among other things, with the laws pertaining to the physician and to healing in the halachic system. After discussing the statement of the Sages that the physician is given permission to heal, and, even more so, is obligated to heal, Ramban goes on to say: "Perhaps the physician will say, 'Why do I need this anguish? Perhaps I will err and kill someone unintentionally.' Therefore, the Torah gave him permission to heal (*Torat ha-Adam*, Chavel ed. pp. 41-42)."

In this connection, Ramban makes an instructive analogy between the physician treating a patient and the judge presiding over a court, upon whom the Talmud places the great responsibility of using his judicial function to find truth and justice. The Talmud concludes: "Perhaps the judge will say, 'Why do I need this anguish?' Therefore, it is stated, 'And He [God] is with you in judgment' (*Chronicles II* 19:6; Rashi comments: 'For He is with your hearts, for your hearts sway with ... their arguments'). A judge can rule only in accordance with what his eyes see (Rashi: 'He should strive to rule according to justice and truth.')."

The work of both the physician and the judge requires a great deal of conscientious effort, and it is incumbent on them to take this "anguish" upon themselves to heal the sick and to render judgment, in order to do justice and strive for the truth. This task was always common to the physician and the judge, and has recently become more and more intertwined in regard to the vital and momentous subject of medical ethics. It is from this perspective that we come to the subject of my talk: **New Horizons in Medical Ethics.**

These new horizons entered the Israeli legal and medical world as a result of the adoption of the Basic Law: Human Dignity and Freedom in March 1992. Its

provisions have a legal-constitutional character, as its title - Basic Law - indicates, and these have a far-reaching and crucial effect on the subjects that will be dealt with in our conference. I need only point to the provisions which establish the duty to protect human life, bodily integrity and dignity, and the right to prevent their infringement (sections 2-4), the right to personal privacy and confidentiality and the prohibition of entering private property without consent (section 7, sub-sections 1-2). In addition, when there is a clash between any of the provisions of the law, the resolution is to be found on the basis of "the values of the State of Israel, that it be directed towards a worthy purpose, and not exceed what is necessary (section 8)." What are these values? The answer is given in the section which states the objective of the law (section 2): "The values of a Jewish and democratic State."

Surely, it goes without saying that each one of the terms that we have just mentioned, and one may add many others, are of great significance and profound content.

In my further remarks, I wish to focus on this point. There has recently been an extensive discussion concerning all of these issues in the Israeli Supreme Court in the noted decision in the case of *Shefer v. the State of Israel*. It was my privilege to write the opinion in this case, with which my colleagues who sat with me concurred. It has become an integral and binding part of the legal-medical corpus of the State of Israel, and it is given here in its entirety.

II. The Decision of the Supreme Court in the Shefer Case:

Civil Appeal 88/506

Yael Shefer v. State of Israel

Supreme Court of Israel

Sitting as a Court of Civil Appeal

Before Deputy President M. Elon and Justices Y. Maltz and H. Ariel

Decision

Deputy President M. Elon:

Opening Remarks

1. The subject before us is a difficult one, a very difficult one. It reaches the depths of man's values and ethics and the heights of philosophical thinking of generations past and present. The issue involves the cultural and spiritual make-up of our society. It is for these reasons that we have postponed giving our opinion in this case, in order to fully examine the

nature and essence of these values. We have thereby fulfilled the command: "Be deliberate when sitting in judgment (*Ethics of the Fathers* 1:4)."

"Against your will you are created, and against your will you are born; against your will you live and against your will you pass on (*id.*, 4:22)." Such was stated in the teachings of the Sages. It is hard to imagine that there is any dispute concerning the first two - creation and birth. We here deal with the latter two which point to the substance of the issue to be determined.

"Against our will" we sit in judgment of the case before us. The angel of justice stands over us and commands: Decide! Even in controversies such as these, a judge must adjudicate so that the patient may know his rights and be aware of his duty to make a request or to take action; so that the doctor may know what may and what may not be done, and what are his professional responsibilities; and so that all those who treat the sick may understand their rights and obligations.

"Against our will" we adjudicate all this, for we aren't quite sure that we have sufficiently mastered these fundamental issues, and that we have all the necessary information and knowledge. Nonetheless, we shall have something to say in our judgment and voice our opinion.

In any event and notwithstanding all this, we are not free from fulfilling our judicial duty and we must probe, weigh and state our opinion.

The following will be our method: After we define the issue of the case (sections 2-4), we will explore the Basic Law: Human Dignity and Freedom which enumerates many of the fundamental rights - protection of human life, bodily integrity and dignity, and the prohibition of their infringement; the right to personal liberty; and to privacy of the individual - that serve as a cornerstone and a foundation for our case. Then we will go on to deal with the purpose of the Basic Law mentioned above, which is "to protect the dignity and freedom of the individual and to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state," and to arrive at a synthesis of these diverse values (section 1 of the Basic Law). We will explore the use of the balancing principle (section 8 of the Basic Law) which is the way to arrive at the appropriate and correct solution when there is a confrontation between the supreme values embodied in the Basic Law (sections 5-10). After that, we will carefully analyze in detail the stance of a Jewish state on this issue (sections 11-38) and that of a democratic state (39-53). We will then turn to the Court's decisions on this issue prior to the passing of the Basic Law: Human Dignity and Freedom (sections 54-56), after which we will arrive at a synthesis between the values of a Jewish and democratic state on our specific issue (sections 57-60). We will then

discuss the specific details and problems which arise in our case (sections 61-62) and decide the case at hand (sections 63-65).

The Subject of the Appeal

2. Yael Shefer was born on February 26, 1986 to Telila and Yair Shefer who are members of the Maron HaGolan Kibbutz. The family has another daughter who is older than Yael. When she was about one year old and her health had deteriorated, Yael was diagnosed as having a genetic and fatal disease known as Tay Sachs. Her condition further deteriorated, and on November 28, 1987, she was admitted to the government hospital in Safed. On August 3, 1988 Yael submitted, via her mother as natural guardian, a request that the Tel-Aviv-Yafo District court issue the following declaration:

Yael, via her mother as natural guardian, is entitled, when and if her health condition shall worsen due to developing pneumonia or any other illness for which she (Yael) will need help breathing and/or the administering of medications intravenously, or in any other fashion - except pain-killers to relieve her of her pain - to refuse to accept the above-mentioned treatments, which shall not be administered against her will.

The District Court (The Hon. Judge Matza) denied the request on August 8, 1988 which led to the appeal before us. When Yael was about three years old she died from her disease.

The discussion of the issues involving the deceased Yael is now purely theoretical. Usually, we do not issue opinions for the sake of "pure learning." However, there is no rule without exceptions, and one of these is a case like the one before us. For in such cases, the decision must be made without delay as the nature of the matter dictates, and the reasoning which fully explicates the issues to enunciate the law on the subject will then be applied when the issues should come up again. This point has already been made, on a similar but unrelated issue, by the Supreme

Court of the United States, in Justice Blackmun's well-known opinion regarding abortions:

The usual rule in federal cases is that an actual controversy must exist at the stages of appellate or certiorari review, and not simply at the date the action is initiated.

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of non-mootness. It truly could be capable of repetition, yet evading review....

We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justifiable controversy, and that termination of her 1970 pregnancy has not rendered her case moot (*Roe v. Wade*, 93 S. Ct. 705, 712 (1973)).

3. We now return to the details of our case.

Tay-Sachs disease, from which Yael suffered -

Is a genetic disease which causes neurological disorders and degeneration the central nervous system.

At the age of six months, there begins general motor weakness, which further develops due to the disease and is followed by a quick psychometric regression.

As the disease continues, the patient is subject to epileptic seizures, blindness and deafness, generally becoming deaf between 12 and 18 months of age.

After that, the patient falls into a coma (known in common parlance to be as a "vegetable") and dies before reaching three years of age.

This disease is terminal, and the patient is likely to develop other diseases related to breathing and require assistance in breathing (the opinion of Prof. Andre De Pariz, exhibit 1 of plaintiff's exhibits).

Dr. Dora Segal-Coopershmidt, Assistant Administrator of the hospital's pediatric ward commented on Yael's treatment:

7. It should be pointed out that the treatment Yael receives does not require her staying in the hospital. It is more supportive than medical, (the administering of Ribotril and alimentation by feeding tube) and can be done continuously and correctly in her Kibbutz. Her hospitalization up until now has been carried out at the explicit request of the Kibbutz, as well as the director of the Health Commission for the Regional Council of Galil Elyon and the family, but is not necessary from a medical standpoint.

8. It should also be pointed out that a good part of the support the child needs (like washing and feeding) is administered by a professional nurse who is hired by the Kibbutz and who stays with the child in the morning and by the child's father in the afternoon.

9. Yael Shefer is in a permanent state of unconsciousness (known as a "vegetative" state). She is not suffering from pain and obviously she is not receiving any medication for pain. She is quiet and doesn't cry except when she needs to be fed or requires routine medical care (in case of fever, earaches or constipation - as with any child), conditions which improve after routine care.

10. From a supportive point of view, she is being treated more than reasonably. She is not disgraced or degraded. Her dignity is completely maintained. She is clean, does not suffer from pressure sores which affect many children who are bed-ridden for extended periods of time. Additionally, her above-standard physical surroundings should be noted, beginning with her being in her own room, along with music being played at the request of the father, a cooling fan in her room, etc.

11. The visits of the mother to the ward throughout the period of Yael's stay were rare and infrequent.

12. The child's father visits the child every day after work, stays with her for hours, treats her with love and dedication which radiates in everything he does with her, such as taking her for strolls in her carriage, sitting for long periods of time with her on his chest, being particular regarding her feeding times and feeding her when he is there. In my conversations with him, he noted that he hadn't lost hope that her condition may yet change (affidavit of Dr. Segal-Cooperschmidt on August 8, 1988).

Regarding the few visits by the mother, the mother explained that:

It is true that I make few visits to the hospital. The reason is that we have another daughter who is experiencing a crisis which expresses itself in her studies and other areas. It is incumbent upon me that I always be there for her (pg. 13 of the *Protocols of the Proceedings in the District Court* on August 5, 1988).

As for the father, he didn't take part in the proceedings before us or before the District Court, and the request at issue in our case was submitted, as stated before, by the mother of Yael only. The mother explained this as follows:

The father is on the verge of complete collapse; my husband cannot appear here nor would he, as he hates publicity (pg. 6. of the *Protocols of the Proceedings in the District Court* on August 5, 1988).

The Decision Of the District Court

4. The honorable Judge A. Matza, presiding in the District Court, set out the questions presented to him for decision as follows:

In principle, in general terms, the case raises two fundamental questions: One, what is the legal right of a patient who has reached majority and is of sound mind, to request - in his own name and regarding his own life - the declaratory relief requested here against the hospital in which he is situated and against the treating physician? The second question is: Assuming that such a legal right is granted to a patient who has reached majority and is of sound mind, is this right also granted to a minor, or an incompetent, to be exercised via his guardians?

Viewed more narrowly, yet in a manner sufficient for our purposes, the case raises a third question: Assuming, on the far-reaching assumption that the second question is answered in the affirmative, does a single parent of a minor patient have the authority to represent his child in a request for such declaratory relief when the second parent is not a party to the proceedings at all?

Only with an affirmative response to all three questions will the complaint raise a justiciable claim (section 4 of the judgment).

As for the first question, Judge Matza found after discussing the legal stance that:

I will not be so pretentious as to answer the first question, which is the most difficult of them all when the law, at present, does not allow for a clear answer (section 4 of the judgment).

Regarding the second question he held that -

Even assuming that the law at present recognizes the right of a patient who is terminally ill to request in his own name and regarding his own life declaratory relief as is requested here, such right is only given to one who has reached maturity and is of sound mind and is not granted to a minor or an incompetent. Thus, the subject of the complaint cannot be one of the enumerated powers given to a minor's parents, as his guardians, that would allow them to express, so to speak, his desire (section 9 of the judgment).

Finally, regarding the third question, Judge Matza stated as follows:

Even if we assume that a minor who is terminally ill has the "right to die a natural death" and that it is the obligation of his parents, as his guardians, to see to the implementation of this right, and they, therefore, have standing to represent him in a claim involving the end of his life, we are still forced to find that the plaintiff alone, as one of Yael's parents, does not have the authority to represent her daughter, so long as Yael's father is not part of the proceedings (section 11 of the judgment).

For these reasons Judge Matza dismissed the request *in limine*.

That decision led to the appeal that is before us.

Basic Law: Human Dignity and Freedom

5. As we today begin, to probe this vast, multi-faceted and value laden area according to the law of the State of Israel, we must first and foremost turn to the Basic Law: Human Dignity and Freedom which serves as the guide for the fundamental values involved in this issue. Numerous provisions of the Basic Law apply to our case. Section 2, entitled "Preservation of Life, Body and Dignity," states:

The life, body, and dignity of any person shall not be violated.

Paragraph 4 of the above mentioned law, entitled "Defending the Life, Body and Dignity of a Person," states:

Every person is entitled to the protection of his life, body and dignity.

6. Our issue involves the life, body and dignity of a person, all of which we are commanded to protect and preserve. To define these three basic values, even if each stands alone, requires much analysis and interpretation. And while the supreme values of human life and bodily integrity seem plain and simple, it is not so regarding the supreme value of *human dignity*. What is human dignity? It goes without saying that this concept, in terms of its scope of application, includes many different areas and issues. For example, human dignity does not only apply during a person's life but also after his death. We determined in the Kastenbaum case (*Chevra Kadisha "Kehilat Jerusalem" v. Kastenbaum*, 46(2), P.D. 464), that this fundamental value includes the dignity of the deceased, the dignity of the deceased's family, and even the dignity of the public (see my statement *id.* at p. 493 and the words of Justice Barak, p. 519, and in the Hagar case (*Civil Case 1482/92*, not yet published)).

The concept of *human dignity* is much more complex as to its *content and essence*. We stated elsewhere on this issue (2145/92 פ'שג, *The State of Israel v. Goeta*, not yet published, section 22):

Human dignity means not to disgrace or embarrass the *divine image in man*. Consider the matter well. Not every infringement of honour is included in the Basic Law: Human Dignity and Freedom. For example, insulting a respected person, who is worthy because of his position to sit with others of the same rank rather than among the ordinary people, could possibly be regarded as a social insult (if it indeed is!), but this is not sufficient to cause a disgrace or embarrassment of his divine image, and such "offense" is not in any way included within the framework of the Basic Law: Human Dignity and Freedom.

We have still not exhausted even a fraction of what the concept of "human dignity" means, something which will be done from case to case as time dictates.

We will return to this issue later. However, I would at this point like to make an essential observation.

Recently, my colleague Justice Barak stated (5688/92 פ'גב *Vicsilebaum v. The Minister of Security*, Section 11, not yet published), that “the content of ‘human dignity’ will be determined according to **the outlook of the enlightened public in Israel** based on the background of the purpose of the Basic Law: Human Dignity and Freedom” (emphasis mine - M.E.) I find these words, with all due respect, unacceptable. I wonder, how and from where has “the enlightened public in Israel” entered into the abovementioned Basic Law in order to define the rights enumerated therein. Who is included in this public and who not? What is the nature of this enlightenment and what is its significance? The idea of a public or person who is “enlightened” is a vague notion which in and of itself carries no meaning. This term was used in the era of the enlightenment as a description of the “civilized man, who sees the light of knowledge and intellect, namely a civilized person - civilized, enlightened, *aufgeklaert*” (*Hebrew Dictionary*, Eliezer Ben Yehuda, vol. 7 pg. 3464), or as a person who is a “thinking person, enlightened, cultured” (*The New Dictionary*, Even-Shoshan 1969, vol. 4. pg. 1600). No one knows what quality, essence or measure of the light, enlightenment or culture is needed to merit the title of a “civilized” person or a public.

Furthermore, let us note the statement by a leading thinker of an earlier generation regarding “education in the spirit of one of the *enlightened* (אֲנִיָּא) *nations in Europe.*” (Ahad Ha’am,37, cited in the *Even-Shoshan Dictionary*, *ibid.*) Would that this thinker from the days of the Jewish national reawakening be revived so that he could learn of the *atrocious* (אֲרִיָּא) deeds of one of these so called *enlightened* (אֲנִיָּא) nations that were carried out in the *light* (אֵר) of day in the middle of the 20th century during World War II in the days of destruction and holocaust. The phrase “enlightened” or any similar phrase used to define a person or public does appear from time to time in our previous decisions, but only rarely, and even then its usage provoked much discussion and argument in the Court’s decisions and by thinkers and legal scholars. (See in connection with the term “the progressive and civilized part” of the public: Menachem Elon, *Religious Legislation in the Laws of the State of Israel and the Decisions of the General and Rabbinical Courts*, Tel-Aviv, 1968, pg. 70-73).

In any case, since we have merited to have the Basic Law: Human Dignity and Freedom enter our legal system, it is no longer necessary nor is it *proper* to introduce an element or definition such as “the outlook of the enlightened public in Israel.” It is *not proper* because the Basic Law refers to values whose interpretation reflect varied outlooks and basic approaches, and a term as ambiguous as “enlightened” can only add a profound uncertainty to the difficult task of interpretation. It is *not necessary* because the Basic Law includes within it a binding directive regarding its purpose - and thereby its interpretation - namely: the anchoring of the values of a Jewish and democratic state. It is this

and not the views of the “enlightened” man or the “enlightened” public which determines the breadth, content and essence of the supreme value of “human dignity.” The breadth, content and essence of this supreme value - as is the case for all the values, provisions and guidelines found in the Basic Law: Human Dignity and Freedom - must be determined and interpreted according to what is stated therein, namely, according to the values of a Jewish and democratic state. Such a determination must be arrived at by means of an analysis of these values, their exploration and a synthesis between them.

7. The terms “life,” “body,” and “dignity of man” do not exhaust all the supreme values in the Basic Law: Human Dignity and Freedom. Section 5 of the Basic Law lists the fundamental right of personal liberty, and section 7 of the Basic Law entitled “Individual Privacy and Intimacy,” in its first two sub-sections provides:

Each person is entitled to the privacy and intimacy of his life.

A person’s domain may not be invaded without his consent.

It goes without saying that even these basic rights of personal liberty, privacy and intimacy and the prohibition of entering into the personal domain of an individual are fundamental and respected values which are the subject of our case.

8. Furthermore, as to our issue there is a singular and unique question regarding the implementation of the supreme values that are protected by the Basic Law: Human Dignity and Freedom. Generally, the enumerated basic rights complement each other. The protection of a person’s life and body, dignity and privacy, and his personal liberty and intimacy do not contradict each other, but are complementary. This is not so in our case. A central problem that arises before us appears to be that the protection of the person’s **life**, does not go hand in hand with the protection of human *dignity, personal liberty, privacy and intimacy*.

In our case the obligation to protect the *life* of the patient stands - such is the argument before us - in opposition to the protection of the dignity of the patient who wants to die and who refuses to accept the medical treatment whose purpose is to preserve his life; it is in opposition to *the personal liberty of the patient* and *his personal autonomy*. With this, we reach the heart of the matter before us: Is there really a contradiction between the fundamental right of a person’s *life* and its companion, human *dignity*? And if there is, indeed, a contradiction between some basic rights and others enumerated above, which among the rights is to be preferred over the other, and which one must we protect and preserve? In other words, as is common and accepted in our legal system: How and according to what standard shall the balance between them be struck?

9. The proper and correct solution for resolving a clash between the fundamental values in the Basic Law is the resort to the balancing principle, found in section 8 of the Basic Law: Human Dignity and Freedom which states:

8. The rights enumerated in this Basic Law shall not be infringed except by a statute that exemplifies the values of the State of Israel, is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary.

A condition precedent to infringing the basic rights of human dignity and freedom is, therefore, that the infringement be consistent with the values of the State of Israel. As previously mentioned the nature of these values is ascertained from the first section of the above mentioned Basic Law, the section which states the purpose of the law: to foster the values of the State of Israel as a Jewish and democratic state. In considering this dual-valued goal, one must also interpret the two other conditions mentioned in allowing an infringement, i.e. the need be "directed towards a worthy purpose" and the condition that it "not exceed what is necessary."

It is true that section 8 speaks of a situation where a different statute contains provisions that infringe on the fundamental rights mentioned in the Basic Law: Human Dignity and Freedom, and does not mention the case where there is a clash between two fundamental rights within the Basic Law *itself*, as is the case before us. Yet, there is no reason nor logic not to apply the standard which the legislator set out in the Basic Law: Human Dignity and Freedom for situations of conflict with a different statute to a situation where the clash is between two basic rights within the Basic Law itself. We will return to this point later.

10. As stated, the purpose of the basic rights protected in the Basic Law: Human Dignity and Freedom is to anchor the values of the State of Israel as a Jewish and democratic state. Elsewhere, we have dealt with the character and essence of this multivalued goal and the way to arrive at a synthesis (see *Chevra Kadisha "Kehilat Jerusalem" v. Kastenbaum*, 46 (2), P.D. 464; *Suisa v. State of Israel*, 46 (3), P.D. 338; *Gabai et al. vs. The State of Israel*, 46 (4) 487, *State of Israel v. Azazami*, 46 (5). P.D. 72, *Sasson v. State of Israel*, not yet published; *State of Israel v. Goeta*, not yet published; *Abdulla v. Commander of the Armed Forces et al.*, not yet published; 1992 פ"ד Association v. Minister of Justice et al., not yet published; Menachem Elon, "The Legal Method in the Constitution: the Values of a Jewish and Democratic State in Light of the Basic Law: Human Dignity and Freedom," *Iyunei Mishpat*, vol. 17, Kislev תשנ"ב - November 1992, pg. 659).

This probe into the values of the state of Israel as a Jewish and democratic state and this multivalued goal is of great significance. The basic rights, the provisions and guidelines found in the Basic Law: Human Dignity and Freedom, reflect not only upon themselves but upon the entire legal system in Israel for they embody the basic values of the Israeli jurisprudential approach with all that that implies (see the statement of Justice Barak in *Poraz v. the Mayor of the Municipality of Tel-Aviv-Yafo et al.*, 42 (2) P.D. 309, 329-331). In light of the legal importance and standing of the Basic Law: Human Dignity and Freedom, the provisions of this law are not simply the *basic values* of Israeli jurisprudence, but they also embody the basic infrastructure of the Israeli legal system whose rules and laws

will be interpreted in accordance with the purpose set out in this Basic Law, i.e. to embody the values of a Jewish and democratic state.

We will discuss this matter later in this decision.

The following, therefore, will be the order in which we will analyze the issues. We will first discuss the substance and implications of each of the fundamental values that arise in our case as they are embodied in the values of a *Jewish State*. Following this, their substance and implications as they are embodied in a *democratic state*. In the light of our conclusions, we will analyze the method to be taken to achieve a synthesis between them so as to achieve this dualvalued objective in the case before us.

The Values of a Jewish State Regarding the Issues of our Case

11. The chairman of the Legislative Committee when the Basic Law: Human Dignity and Freedom reached its final reading in the Knesset stated as follows

regarding the definition of the values of a *Jewish State* (*Divrei KaKnesset*, vol. 125, [1992] pg. 3782-3783):

This law is prepared with the understanding that we must reach a broad consensus from all parties of the House. We admit that we cannot pass a Basic Law which anchors the values of the State of Israel as a Jewish and democratic state if we do not reach a broad consensus from all the parties...

The law opens with a declarative statement, a declaration which is designed to protect human dignity and freedom in order to anchor in the law the values of the State of Israel as a Jewish and democratic state. The law in this sense establishes from the very first section that we see ourselves indebted to the **legacy of Israel and the legacy of Judaism** as it is set out positively and expressly - the values of the State of Israel as a Jewish and democratic state. The law defines some of the rights of the individual, **none of which stand in opposition to the Jewish tradition or the world of values which are presently prevalent and accepted in the State of Israel among all the parties** (emphasis mine, M.E.).

The interpretation of the values of the State of Israel as a Jewish state is, therefore, determined by the values of the Jewish tradition and the legacy of Judaism, namely the conclusions reached by means of a study of the basic values contained in the sources of the Jewish tradition and Judaism's legacy. In carrying out this task we will be fulfilling the wishes of the legislator to define properly the values of the State of Israel as a Jewish state. (See also in detail, *Iyunei Mishpat*, vol. 17. *ibid.*, pg. 663-670, 684-688.)

In this context I would like to mention what we have said on numerous occasions in regard to the method of resorting to the sources of the Jewish tradition, pursuant to the Foundations of Law Act, 1980, which in turn has special significance when we define the basic rights which anchor this dual-valued goal of a Jewish and democratic state:

It is well known that Jewish thought throughout the generations, including even the halachic system itself as will be seen later, is replete with differing views and contradictory approaches. It goes without saying that all these views and opinions have contributed to the depth and richness of Jewish thought throughout the generations. Nevertheless, the scholar and researcher must distinguish between statements made for a particular time only and statements intended for all times, and between statements reflecting the accepted view and those expressing aberrant views. Out of this vast and rich treasure, the researcher must extract the ample material to be applied

so as to meet the needs of his time; and the new applications will then themselves be added to the storehouses of Jewish thought and the Jewish heritage. Such an approach and such distinctions are essential to Jewish thought and the halacha as they are, because of their very nature, to every philosophical and theoretical system. The subject has many aspects and this is not the place to go into detail. See also Rav Abraham Yitzchak Kook, Chief Rabbi of the Land of Israel, *Eder ha-Yekar*, Mosad HaRav Kook, Jerusalem, 1927, pgs. 13-28; *Naiman v. Chairman*, Central Elections Committee, 39 (2), P.D. 225,293,294; and see *Eloni v. Minister of Justice*, 41 (2) P.D. 97-98; Menachem Elon, *HaMishpat Halvri* (3rd ed., 1987) pg. 1563, n. 130.

We will be applying these principles as we discuss the subject before us.

The Doctor and Healing

Before we deal with the basic rights themselves, we shall begin with an analysis of the laws of healing as affecting the patient and doctor and as formulated by Jewish law.

12. Regarding the supreme value of the protection of human life, as reflected in the practice of medical profession, two stages in Jewish thought can be discerned.

In the beginning during the tannaitic era, it was established that it is *permitted* for a doctor to heal. In the School of Rabbi Ishmael, the proponent of a hermeneutical approach to Biblical interpretation, this was derived from *Exodus* 21:19 "He shall cause him to be thoroughly healed." "This teaches that *permission* is given to the physicians to heal (*Bava Kamma*, 85a)." This is a negation of the approach then prevalent in various philosophies and religions, and in later times as well, and even in some statements by Jewish thinkers (See Rabbi I. Jakobovitz, *Jewish Medical Ethics*, 1966, pg. 26 *et seq.*) which held that one should not heal a person whom God has made ill because there should be no intervention in what Heaven has decreed. (See Rashi, *Bava Kamma*, *ibid*: "We should not say that he whom God has made ill, he (=the doctor) has healed;" Nahmanides, *Torat ha-Adam*: "It should not be said that God has made ill and he (=the doctor) has cured" *Writings of Nahmanides*, vol. 2, ed. Chavel, 1964, pg. 42; and see Nahmanides, *Commentary on Leviticus* 26:11, and *infra*, section 23).

The sages employed an insightful analogy (*Midrash Samuel ad 4:1*):

R. Ishmael and R. Akiva were walking in the streets of Jerusalem with a certain man. A sick person crossed their

path and asked: "My teachers, how can I be healed?" They replied: "Take such and such until you are healed."

The man who accompanied them turned to them and asked: "Who afflicted that person with his sickness?" They replied: "The Holy One Blessed Be He." He said: "And you Sages interfere in what is not your concern. He afflicted and you heal." They asked: "What do you do?" He responded: "I am a farmer. The sickle is in my hand." They asked: "Who created the ground and Who created the vineyard?" He replied: "The Holy One Blessed Be He." They said. "You interfere in what is not yours. He created it and you eat His fruit."

The man replied: "Do you not see the sickle in my hand? But for the fact that I go out and plough, till, fertilize and weed, it would yield nothing." They replied: "Fool that you are. Have you not learned from your labor that 'the days of man are like grass?' Just as a tree that is not fertilized or ploughed will not yield fruit, and if it yields fruit but is not watered and not fertilized, it will not continue to live and will die, so too the body of a person, which is like a tree. The fertilizer is the medicine and the farmer is the doctor."

Other laws set out the legal responsibility of the doctor, and these too were taught by the tanna'im. An expert doctor, i.e. one who is authorized to heal and is an expert in his work, who intentionally injured a patient, i.e., "he damaged him more than was necessary" is liable (*Tosefta Gittin 4:6, Bava Kamma, 9:11*).

However, if he unintentionally caused damage he is not liable. The reason for this rule is to promote the welfare of society (*tikkun haolam: Tosefta Gittin, ibid.*) and is an exception to the rule that man is always liable for his acts (*adam muad leolam*). Otherwise, the doctor would refrain from healing (*Resp. Tashbetz III:82*). Nevertheless, this exemption in unintentional cases is - in the language of the Tosefta - "from the laws of man, and his judgment is given over to Heaven" (*Tosefta, Bava Kamma, 6:17* and see Nahmanides' statement in *Torat HaAdam*, quoted *infra*, and Lieberman, *Tosefta Kifshutah, Tractate Gittin*, pg. 840-841, and *Bava Kamma* pg. 57).

13. Over a thousand years later, two great halachic authorities held that healing is not only permitted but an **obligation and the fulfillment of a commandment**. This conclusion was reached via different methods of interpretation. Maimonides reached this conclusion in an original way. The verse "Do not stand idly by the blood of your fellow (*Leviticus 19:16*)" indicates, according to the Sages, that a person must save his fellow man from danger (*Bava Kamma, 81b, Sanhedrin, 73a*). The Sages held that one must not only act oneself but is also obligated to hire others and the

like to accomplish the rescue (*Bava Kamma* and *Sanhedrin, ibid*). The obligation to save another was also based on the law regarding lost property (*Deuteronomy 22:1-3*), which applies not only to the return of lost property but also to the rescue of the person: "What is the source of the law requiring one to rescue someone else? It is stated: 'And you shall restore it to him' (*Bava Kamma* and *Sanhedrin, ibid*)." From this source Maimonides derived an additional principle, i.e. **that there is a Biblical obligation for the doctor to heal:**

Included in the interpretation of the verse "You shall restore it to him (*Deut. 22:2*)" is the obligation **to heal** when one sees another in danger and can save him, using his body, his money or his **knowledge** (Maimonides, *Commentary on the Mishna, Nedarim 4:4*); "For this is a commandment (mitzvah; Maimonides, *MT, Laws of Vows, 6:8*)."

The same conclusion was reached by Nachmanides (Ramban), but via a different exegetical method. Nachmanides, one of the great Spanish halachic authorities of the thirteenth century and founder of a settlement in the Land of Israel, compiled a special monograph which, in one part, dealt with the laws of healing and their halachic implications and in another section dealt with the laws of mourning and their ramifications. Like many halachic authorities of the Middle Ages, Nachmanides was a physician by profession. His work is entitled "*Torat HaAdam*" (The Way of the Person; the origin of this name, is apparently in the words of King David: "And you spoke to the house of your servant from afar, and this is the way of the person (*Torat HaAdam; 2 Samuel 7:19*)." The title alone contains much with reference to the physician and healing! We will return to this point later. According to Nachmanides the **permission** of the doctor to heal, found in the words of R. Ishmael, assumed the status of a **commandment** (mitzvah); Regarding the saving of life, which is a great mitzvah, the scrupulous are to be extolled. Any doctor who is knowledgeable **is obligated** to heal, and anyone who refuses has shed blood" (and see the Jerusalem Talmud, *Yoma 8:5*, regarding the danger to human life overriding the Sabbath). And in order to harmonize his stance with the statement of R. Ishmael that "the doctor is **permitted** to heal," Nachmanides comments: "This permission is a **permission having the force of a mitzvah to heal** (*Torat HaAdam, id. at 42*)."

The Doctor and the Judge

14. In his commentary Nachmanides adds another reason to explain why the Torah needed a special dispensation for doctors to heal, as indicated in the statement of R. Ishmael above. "Perhaps the doctor will say: "Why do I need this anguish. Perhaps I will err and kill someone unintentionally." Therefore the Torah gave him permission to heal (*Torat HaAdam, ibid.*, pg. 41-42, and See *Resp. Da'at Kohen* by Rabbi Avraham Yitzchak HaKohen Kook, The Chief Rabbi of the Land of Israel, no. 140)." To counter this hesitation and other doubts that may arise in the mind of the doctor, R. Ishmael said it is permitted for the doctor to heal. And

if an unintentional error indeed occurs and the patient is injured, the doctor is not to be punished.

As previously stated, it is not only *permitted* to heal but it is also a *mitzvah and obligation* to do so. In this connection Nachmanides (*ibid.*, pg. 41) makes an instructive analogy between the doctor treating a patient and the judge presiding over a court. The duty of the judge to judge the people in each generation and in all matters is depicted in the Talmud as creating a soul-searching dilemma. The dilemma is phrased as follows (*Sanhedrin* 6b):

The judges should know who they are judging, before Whom they are judging, and Who will exact punishment from them, for it is stated: "God stands amidst the community of God; in the midst of judges (*elohim*) He will judge (*Psalms* 82:1);" and similarly with regard to Yehoshafat it is stated: "And he said to the judges, understand what you are doing, for you are not judging for man but for God (*2 Chronicles* 19:6)."

Perhaps the judge will say *why do I need this anguish?* Therefore it is stated: "And he [God] is with you in judgment" (*Chronicles, ibid*; Rashi - "for He is with your hearts, as your hearts incline as to the matter"). A judge can rule only according to what his eyes see. (Rashi adds, *Sanhedrin, ibid*, "and he should intend to rule according to justice and truth and he will not be punished.")

The work of the doctor is similar requiring a great deal of conscientious effort accompanied by much anguish resulting from this dilemma. For this reason Nachmanides concludes that the laws pertaining to a doctor who is as careful as he should be when dealing with life and death situations (*ibid.*, pg.42) are the same as those applicable to a judge who seeks to reach a decision based on the justice and the truth of the matter. If he (=either the doctor or the judge) is unaware that he erred, he (=the doctor or the judge) is culpable neither in the laws of man nor in those of Heaven. Yet there is one fundamental difference where a doctor's responsibility is greater than that of the judge. While an authorized judge (one who judges "with the permission of the Bet-Din") on becoming aware of his unintentional mistake is exempt even from the laws of Heaven, the doctor who becomes aware of his unintentional mistake is albeit exempt from the law of man but is liable in the laws of Heaven. Indeed, if his mistake caused someone's death he is subject to exile to a city of refuge.

In the halachic system exemption from the laws of man and liability under the laws of Heaven does not remove the case from the normative legal framework passing it on to the relation between man and God. In the halachic system liability under the laws of Heaven applies to a series of legal rules in torts and obligations whose character is defined as follows: "In

any case where the rule is that one is liable under the rules of Heaven, if he is a party to a case, the court must inform him: 'we are not forcing you, but you must clear yourself in the eyes of Heaven, for your sentence is in His hands,' so that he should contemplate the matter and appease his fellow and absolve himself in the eyes of Heaven" (Raav'an on *Bava Kamma*, 55b). The notice that he must clear himself in the eyes of Heaven is given by the court and is not left only to the conscience of the individual (See in detail, Elon, *Hamishpat Halvri*, pp. 129-131).

The doctor and the judge are partners to the anguish and the dilemma inherent in their work and to the easing of this anguish by acting scrupulously according to "what his eyes see" or, as formulated by Meiri (a halachic authority of the thirteenth century and one of the classic commentators on the Talmud), according to "what his eyes see, his ears hear and his heart understands (Meiri, *Ketuboth* 55b)."

15. It is instructive that we find in the halacha more than one parallel between the art of judging and the art of medicine. It appears to me that it is not only because of the similarities they share, as outlined above, but also because many halachic authorities were also doctors. Let us look at two instructive examples in the works of Maimonides, the greatest halachic codifier, who functioned as and was known as a master in the field of medicine.

In discussing the principles of legislation in the Jewish legal system, Maimonides deals, among other things, with the power of the halachic authorities to promulgate a *takkanah* (enactment) even if it uproots a law of the Torah by dictating that some prohibited action be done and even in the realm of *issur* and *heter* (matters between man and God; *Laws of Mamrim*, ch. 2 and see in detail, Elon, *HaMishpat Halvri*, pp. 210-213, 405- 446 and the chapter following). This is possible when the halachic authorities see a need to do so as a temporary measure to preserve the law and to return the people to religion. Based on Talmudic sources this power vested in the halachic authorities is summarized by Maimonides as follows (*ibid.*, 2: 4):

And so too, if they (=the court) should deem it necessary temporarily to set aside a positive commandment or to nullify a negative commandment in order to restore the people to the faith or to save many Jews from becoming lax in other matters they may act as the needs of the time dictate. Just as a physician amputates a hand or foot to save a life, so a court in appropriate circumstances may decree a temporary violation of some of the commandments to preserve all of them in line with the approach of the early Sages who said: One should violate one Sabbath in order to enable the observance of many Sabbaths (and see Elon, *Hamishpat Halvri*, pp. 425-426, regarding the halachic sources for this legislative rule.)

And in this connection he adds (*Laws of Shabbat*, 2:3):

Any hesitation about violating the Sabbath for a dangerously sick person is forbidden as it is written (*Leviticus* 18:5): "By the pursuit of them [My laws] man shall live," and not die because of them. Thus you learn that the commandments of the Torah were not intended to be an act of vengeance on the world, but an act of mercy, grace and peace in the world.

16. Elsewhere Maimonides compares the medical and judicial professions to *differentiate* between them. This passage concerns the tension between law and justice, which is one of the topics which stands at the forefront of every legal system.

One of the characteristics of a legal rule is that while it establishes a principle which is satisfactory as a general matter, it may occasionally work an injustice in an individual case. This is almost inescapable for inherent in a normative system of law which strives to achieve justice in the majority of cases, it is almost natural that the goal will not be achieved for all the cases. The problem that arises here is a contradiction within the legal system itself: achieving justice in general while but causing injustice in an individual case. Is it possible, and, if so, how can injustice be prevented in an individual case *within the framework* of the law, i.e. as a part of the system of binding normative law. This issue severely engages first and foremost the peace of mind of the judge, who is the very one who encounters the individual who is caught between the general law and individualized justice.

What is the authority of the court and the task of the judge who enforces the legally effective norms in a situation where injustice is caused to an *individual* as a consequence of deciding in accordance with the general law meant for the *public as a whole*? Thinkers and legal scholars have differed on this issue since ancient times. There are those who believe that the individual has no recourse except at the *legislative* level, leaving the judge unable to arrive at a just result he must rule in accord with the general law. On the other hand, others believe that the authority given to *the judge* includes the power to prevent injustice in a specific case, i.e. to do justice with the individual who is injured by the harshness of the general rule. These approaches rest on the fact that there are two legitimate and necessary goals for any legal system: The first is the need to achieve uniformity and consistency, which is reflected in the generality of the law, and the possibility of knowing in advance what the law will determine. The second goal, which is the goal of every fair and equitable legal system and is the soul of the law, is the desire to administer justice to the specific individual whose matter is being heard by the court. These two goals clash when the generality of the law leads to injustice for the individual party. The question then arises which of these goals takes precedence in such a case, or even whether it is possible to find some middle ground between them

and arrive at a proper balance between the demands of the general public and the needs of the individual (see Elon, *HaMishpat Halvri*, pp. 157-163; *Minster v. Central Board of the Bar Association*, 36(2) P.D. 1, 13).

In the Jewish legal system, opinions have varied on this question. According to many, the remedy of the individual lies within the authority and function of the legal system itself. Just as it must govern in accordance with the rule which deals out justice as a general matter, so too it must prevent the general rule from causing injustice for an individual in his specific circumstances. This obligation to administer justice is part of the inherent authority of the court in accord with the words of the Sages: "Even if they (the court) tell you that left is right and right is left, obey them" (Sifrei on *Deut.*, Section Shofetim, 154, based on *Deut.* 17:11: "You shall act in accordance with the instructions given you and the ruling handed down to you. You must not deviate from the verdict that they announce to you either to the right or to the left;" and see in detail, Elon, *HaMishpat Halvri*, pp. 219-231, the opinions of R. Yitzhak Arama, author of *Akedat Yitzhak*, R. Yitzhak Abarbanel, R. Shlomo Efraim of Luntshitz and others.

On the other hand, in Maimonides' opinion the judge must rule according to the law which was established for the benefit of the majority - for the general public:

It is directed to the common, and not exceptional circumstance; it ignores the injury that might be caused to a particular individual. The general benefits may cause injury in individual cases... "There shall be one law for you!" (*Numbers* 15:15); they are intended to produce results that are generally beneficial (*Guide to the Perplexed*, Part 3, ch. 34, R. Kafih, Jerusalem, 1992).

The remedy of the individual must, therefore, be found through different means, for example via legislation or in certain cases by ruling in accordance with the principle of "temporary measures."

However, Maimonides goes on to say that such is not the case with the doctor's practice of medicine:

The cure for each person is unique depending on his temperament at that time (*Guide to the Perplexed, ibid.*)

The judge's decision must accord with the legal norm, but the physician's care depends on the circumstances and temperament unique to the patient before him. Whether this is the way a judge should approach his decision-making is debatable (see Elon, *HaMishpat Halvri, ibid.*); however, no one disagrees that that is the doctor's approach in practicing medicine. He must cure *the disease* in order to cure *the specific patient* before him according to his unique make-up and circumstances.

17. It is worth noting that the principles governing the professional behavior of the doctor - his art - intertwine law and ethics, going beyond the letter of the law, the nature of the halacha and the nature of the world. These principles are set forth, in the manner of Nachmanides' book *Torat HaAdam* (see *Tur, Yoreh Deah*, at the beginning of ch. 365), in a separate section in the later halachic codes - the *Sefer HaTurim* of R. Jacob ben-Asher and the *Shulchan Aruch* of R. Josef Karo (*Tur* and *Shulchan Aruch, Yoreh Deah*, ch. 365, *et seq.*) It is also worth noting that in the *Mishneh Torah* of Maimonides there is no separate section for laws dealing with medicine. Chapter Four of Maimonides' *Hilchot De'ot* deals only with the general rules concerning preserving the health of the body. It is certainly instructive that these codifiers, who do not generally deal with laws that have no current application, and therefore do not codify the laws relating to the exile of an unintentional murderer to a city of refuge (see *Tur* and *Shulchan Aruch, H.M. 425:1*), nevertheless do include the rule that a doctor who has caused a death and then becomes aware that he has been negligent should be exiled (*Tur* and *Shulchan Aruch, Y.D. 336:1*). This demonstrates the basic responsibility placed on the doctor: even when there is no legal sanction, he is liable, in cases of negligence, to enter a city of refuge, to grieve and to make an accounting of his life.

This dilemma of medical practice where on the one hand there is the commandment to heal others and on the other hand there is the hesitation of "why do I need this anguish?" has become greater and more pronounced as a result of the tremendous advances in modern medicine and contemporary legal and philosophical thinking concerning basic rights and supreme values. Today, too, and even more so than before, both the judge and the doctor are partners in this dilemma. Both carry that responsibility and both seek to do justice in their work, each in his own field - the judge to reach a truly correct decision and the doctor to achieve a true healing.

This guideline of searching out the essential truth, whose implications we will see later, serves as a road-map, complex and difficult yet indispensable for solving the important, difficult and complex questions which lie at the doorstep of the physician and judge alike. As is the nature of such basic questions, there are fundamentally different approaches which create a profound sense of awe as one proceeds to grapple with and apply them.

The Obligation of the Patient to be Healed

18. In Jewish thought, just as there is an obligation upon the *doctor* to heal, as seen from our discussion above, so too there is an obligation *upon the patient* to be healed.

This is the way of the world and it is common sense: "One who is in pain goes to the house of the doctor (TB *Bava Kamma* 46b);" moreover, one

who refrains from being healed violates the Scriptural verses: "You shall guard yourselves well (*Deuteronomy* 4:15)" and "Indeed, the blood of your lives I will demand (*Genesis* 9:5)." This guiding principle in Judaism - that the saving of life takes precedence over the prohibitions of the Torah (except for idolatry, certain sexual offenses and murder - TB *Yoma* 82a, *Sanhedrin* 74a) - is derived from the verse: "You shall keep my statutes and laws; by the pursuit of them man shall live (*Leviticus* 18:5)." The Sages propounded: "One shall live by them - and not die because of them (*Yoma* 85b, *Sanhedrin*, *ibid.*)." The obligation to be healed from a life-threatening illness takes precedence over almost all of the commandments of the Torah. When a doctor determines that in order to become cured one must desecrate the Sabbath and the patient refuses to accept treatment for fear of desecrating the Sabbath, he is considered to be "a pious fool," and the Lord will demand his blood of him for the Torah states: "Live by them and not die because of them... and we coerce him to do" what the physician ordered (*Resp. Rabdaz*, #1139; *Shulchan Aruch*, OH, 328, Magen Avraham, *ibid.*, sub-par. 6).

Preferring observance of a commandment over the medical treatment in such circumstances is a "commandment performed through sin" (*Resp. Mahari Asad*, O.H. #160). The desire of a patient is accepted when he seeks to improve the medical care he is receiving, e.g. if the patient thinks there is a need to desecrate the Sabbath or eat on the Day of Atonement, we follow the patient's desire even against the doctor's opinion, because "a heart knows its bitter soul (*Proverbs* 14:1; and see *Yoma* 82a, 83a; *Tur* and *Shulchan Aruch O.H. ibid.*, and 618:1; *Resp. Radbaz* #1138. See also *Tur* and *Shulchan Aruch Y.D.* ch. 336 and *Taz ibid.*, sub-par 1; *Resp. Ramat Rachel* #20; Dr. A. Steinberg, *Encyclopedia of Jewish Medical Ethics*, Vol. 2, pp. 24-26, 443-445, and see there other rules relating to patients who are not in a life threatening situation.)"

The Right of the Patient to Choose his Care

19. The basic principle in Jewish thought which obligates the physician to heal and the patient to be healed has significant implications for our issue, concerning the refusal of the patient to undergo medical treatment and the right of the doctor to submit to such a request. We shall deal with this basic issue later when we look at this principle, its limitations and the differences of opinion among various halachic authorities (see *infra* section 23). But first we shall examine a number of additional halachic principles applicable to the medical field.

According to Jewish law, it is not only *the obligation* of the patient to seek a cure but it is also his *basic right* to receive that treatment from a doctor whom he trusts and chooses. We have stated elsewhere (*The State of Israel v. Tamir*, 37(3) P.D. 201, 205-206):

3. It is an established halacha, stemming from the basic personal freedom of every person created in the image of God, that is there a fundamental right not to be bodily interfered with against one's will or without one's consent (548/18 א"ו ;391 ,373 ,370 ,355/19 ט"ג at 755). This basic right includes the right to choose from among competent doctors the one whom he will trust to treat him for this decision is an essential part of his basic right to maintain physical and mental integrity and not to have these "infringed" upon without his consent (and see 81 ,76/66 א"ו at 233).

An illuminating phrase can be found in the teachings of our Sages. *Mishna Nedarim* 4:4 states: "If one has vowed not to receive benefit from another... he (the latter) can (nonetheless) treat his illness." The one who made the vow may receive benefit from the other's medical services because the obligation to heal and the right to medical care is a "commandment" (Maimonides, *Mishneh Torah, Laws of Vows* 6:8). The Jerusalem Talmud states that this rule applies not only where there is only one doctor available and he turns out to be the one whose benefit is prohibited upon the other, but even if there is another doctor available. Despite that fact, the person who made the vow is allowed to opt for the doctor whose benefit is prohibited to him, if he so desires. The reason given is that "not from every person will he merit to be cured (Jerusalem Talmud, *Nedarim* 4:2)." "Even if there is someone else who can cure him, the other is allowed to cure him for not from every person does one merit to be cured (*Nimmukei Yosef* on Alfasi, *Nedarim* 41b)." The codified law reads: "If Reuben forbade himself to provide benefit to Simeon and Simeon fell ill, Reuben may... cure him, even actively and even if there is another doctor who can cure him (*Shulchan Aruch* Y.D. 221:4)." In attaining a cure the relationship between patient and doctor plays an important role and, therefore, "even though someone else can cure him, he (the doctor who vowed not to provide benefit to the sick patient - M.E.) must cure him if he is can for the saving of a life is a momentous thing (Ritba, *Nedarim* 41b)."

This basic right is preserved even for a person who has been legally deprived of his freedom and is imprisoned. As we stated (*id.* at 206): "These basic rights of maintaining physical and mental integrity and choosing the medical care to maintain such integrity are reserved for the person even when in detention or incarceration and the fact that he is imprisoned, in and of itself, is insufficient to deprive him of any right unless

it is absolutely necessary and stems from the inherent denial of his freedom of movement or there is an explicit provision of the law which deals with it. Therefore, when the prison authorities wish to deprive a detainee or the prisoner of this right, they must prove that such deprivation is rooted in law and has good reason to be granted.”

This fundamental right also relates to other basic rights, such as the dignity of the person, which are preserved even when one is denied personal liberty because of imprisonment (see the *Tamir case*, *id.* at 206 *et seq.*, and most recently *The State of Israel v. Azazmi*, 46(5) P.D. 72.)

“In the Image of God He Created Man”

20. The basic right to physical and mental integrity has a special meaning in Jewish law and stems from its fundamental philosophical outlook regarding the source of man's right to his life, body and dignity:

The foundation of the world view of Judaism is the concept of the creation of man in the image of God (*Genesis* 1:27). This is how the Torah begins, and from it the halacha derives fundamental principles concerning the worth of every human being - whoever he may be - and the right of every person to equal and loving treatment. “He (R. Akiva) would say: ‘Beloved is man for he was created in the image [of God]; but it was an act of greater love that it was made known to him that he was created in the image of God in that it is stated “God created man in his image” (*Genesis* 9:6 *Mishneh Avot*, 3:14).” The latter verse is the source for the Noahide command not to kill prior to the giving of the Torah (*Naiman v. Central Elections Committee*, 39(2) P.D 225, 298).

The creation of man in the image of God is the basis of the value of the life of each person:

The creation of humankind started with the creation of a single individual to teach that whoever removes one single soul from the world is regarded as if he has caused the whole world to perish; and whoever keeps one single soul alive in this world is regarded as having preserved the whole world (*Sanhedrin* 4:5 acc. to Maimonides, *Laws of the Sanhedrin* 12:3, and see Elon, *HaMishpat Halvri*, p. 1426 and n. 303.)

As we have stated elsewhere (*Attorney General v. Doe et al.*, 42(2) P.D. 661, 676):

The general principle that must guide the court is that we are not authorized nor allowed to differentiate on the basis of the “worth” of an individual - whether poor or rich, physically healthy or disabled, psychologically strong or mentally ill. All human beings, created in the image of God, are equal in value.

The creation of man in the image of God is the underlying foundation for the value of each person's life, and is the source for the basic rights of a person's liberty and dignity (See 2145/92 מ"פג, *The State of Israel v. Goeta*, section 22, not yet published.) The principle that man was created in the image of God - every person qua person - whose source, as stated, rests in Jewish thought, has been accepted and used as a basis for the supreme value of human life in other philosophical outlooks of various cultures and legal systems except for those cultures which have from time immemorial discriminated among people, for example between those

without bodily defect and those who have a bodily defect, between a healthy person and a mentally deficient person (such as in the philosophy of Plato, in Sparta and others; see *infra* section 59).

In Jewish thought additional concepts were derived from the creation of man in the image of God. For example, just as one is commanded not to violate the divine image of *his fellow man*, so is one commanded not to violate his *own* divine image, his *own* life, body and dignity. As we stated in the Goeta case mentioned above (section 23):

What we have said regarding the manner of the [bodily] search dealt with cases where the search was conducted without the consent of the person to be searched. Yet, it seems to me that even if such consent were given, not everything is permitted. Inasmuch as the infringement of an individual's human dignity and privacy is involved, the search must be conducted with a great deal of propriety even when there is consent so as not to trample on the dignity and privacy of the individual to the extent consistent with the purpose of the search. This conclusion arises from the sources of the Jewish heritage discussed above. The basic foundation for the supreme value of human dignity is that man is created in the image of God. Therefore, each person is commanded to guard even his own dignity as infringement of one's own dignity is a denigration of the image of God. The essence of the matter is as Ben-Azzai said: "Know who you are denigrating; God made him in his own image," and there is no difference between the denigration of God's image in a fellow human and the denigration of God's image in oneself. This is the conclusion to be drawn from the provision of the law which provides that a search may be conducted only by a person of the same gender as the one to be searched.

It seems to me that even if consent is given to a search by a different-gender person, such consent should not be complied with. Similarly, it is inconceivable with regard to a search which involves bodily invasion as the enema in the *Katlan* case. If and when there is consent to the administering of an enema in public in the middle of the street, could one imagine that such a search be carried out! This involves an extreme case of humiliation and this is prohibited even when the person consents. In such a case, by virtue of the principle of basic rights, we must not infringe the dignity and privacy of the individual; such a procedure may not be carried out in public as it degrades the human image and dignity to an extent that is intolerable to society.

Therefore, when consent is given to a search, we may conduct the search on the person's body, but as human beings we are still obligated to preserve the dignity of the person being searched and *our own dignity* as human beings conducting the search. In this way we will have achieved the proper balance that reflects the values of the State of Israel as a Jewish and democratic state for an act that has a proper purpose *and does no more than is absolutely necessary*.

"In the image of God did He create man" is the philosophical and analytical basis for the unique approach of Jewish law regarding the supreme value of the sanctity of human life - of the sanctity of the Divine image in which man was created - and the many consequences which follow in various areas of law, of which our subject is one central issue. As we will see, Jewish law has struggled, especially in recent times, with the tremendous advancements in medicine and its needs, with the many problems that have arisen as a result of the clash between the value of the *sanctity of life* and the values of *preventing pain and suffering*, as well as other values and considerations. Indeed, the point of origin and cornerstone for this struggle was and remains the supreme value of the sanctity of human life and the *right and obligation* to protect the Divine image of humankind.

The prayer of a Jew during the Days of Awe before his Creator does not say "The soul is Yours and the body is *Your handiwork*," but "The soul is Yours and the body is *Yours*" for man is created in the image of God, the image of the Creator of the world. This concept, which is essentially analytical-philosophical, has sometimes been used as a basis for legal conclusions. The Biblical rule (*Numbers 35:31*): "You shall take no ransom

from a murderer” is explained by Maimonides (*Laws of Homicide and Preservation of Life*, 1:4) as follows:

The court is cautioned not to take ransom from the murderer, even if he gives all the money in the world, and even if the blood-avenger agrees to acquit him, for the victim is not the property of the blood-avenger but belongs to God as stated: “You shall not take ransom for the life of the murderer (*Numbers* 35:31).” There is nothing as to which the Torah was more strict than murder for it is stated: “You shall not pollute the land... for blood pollutes the land(*Numbers* 35:30).”

Even if the relative of the victim, “the blood avenger,” foregoes punishing the murderer, his waiver is insufficient to prevent the murderer from standing trial. The victim is not the possession of the relative, as it were, to enable him, if he so desired, to forego his conviction and punishment. A person’s life is the possession of God and the Torah commanded that the murderer must stand trial and be punished for there is no crime as severe as shedding blood (and see *Ketuboth* 37b).

However, one should not draw the legal conclusion from the words of Maimonides that a person’s life belongs to God when he wrote that the reason that a relative of the victim may not forgive the crime of murder is that a person is not the “owner” of his own body. Such a notion was expressed for the first time, by Rabbi David Ibn Zimra (Radbaz), but with some hesitation. Radbaz’s statement was made in connection with the rule of Jewish law that one may not be convicted of murder on the sole evidence of his confession (*Yevamot* 25b). Numerous reasons are given for this rule (see *Yevamot* *ibid.* and others). An instructive reason is given by Maimonides (*Laws of Sanhedrin* 18:6):

It is a scriptural edict that the court may not execute on the basis of one’s confession.... Perhaps he is mentally unbalanced on this matter. Perhaps he is of the bitter workmen who try to kill themselves by stabbing themselves with a sword in their stomachs or throwing themselves off roofs. Perhaps this person admits to a crime he didn’t commit in order to get killed. But the rule of the matter is that it is a decree from the King [i.e. a Scriptural edict].

We have elsewhere discussed the rule that one may not be convicted on the sole evidence of his confession which Maimonides reasoned was due to the fear that the confession was rooted in psychological pressure on the defendant, who attributes to himself a crime that was committed by another (3)37 ,614 ,556/80 פ”ד) P.D 169, 184). Radbaz adds another possible reason as follows (Radbaz, Commentary on Maimonides, *Mishneh Torah*, *ibid.*):

It is a decree of the king and we do not know the reason. *But it is possible to provide a modicum of understanding.* The person is not his own possession, but that of God, for it is stated: "All the souls are mine (*Ezekiel 18:4*)." Therefore, his confession will be of no avail when it concerns something which is not his... but his money is his, and, therefore, his confession is said to be equivalent to one hundred witnesses. Just as a person is forbidden to kill himself (*Bava Kamma 91b*, Maimonides, *Laws of Homicide and Preservation of Life 2:2-3; Tur and Shulchan Aruch, Yoreh Deah, 345*). So too a person may not confess to a capital crime, for his person is not his own possession.

Maimonides, as we have seen, gives a reason for not executing a person solely on the evidence of his confession that is completely different from that of Radbaz. Even according to Radbaz, as stated, that a person is not the "owner" of his own body provides only "a modicum of understanding" for the rule that we do not execute a person solely on the basis of his confession (see the Radbaz's words quoted above). He repeats this point in his conclusion: "And having said all this, I admit that it is a decree of the King of the world and may not be questioned."

Apparently, with the exception of Radbaz, the halachic authorities have not given the analytical-philosophical idea of "The soul is Yours and the body is Yours" any legal standing. Recently, a number of halachic authorities have stated that from the halachic perspective a person *does* have ownership over his body.

(This conclusion is derived from the words of the *Minchat Chinuch*, Commandment 48; Turei Even on *Megillah 27a*; and see in detail: Rabbi Shaul Yisraeli, "The Incident at Kibiye in Light of the Halacha," *HaTorah VeHaMedinah* volume 5-6, 1953-1954, p. 106 et. seq., and see there his interpretation of Maimonides and Radbaz discussed above; See also *Amud Ha-Yemini* 16: 16 ff.; Rabbi Shilo Refael, "Nonconsensual Medical Treatment of a Patient" in *Torah Sheba'Al Peh*, compilation of lectures at the 33rd National Conference of Torah Shebe'Al Peh, Jerusalem, 1992, pp. 77-79.) According to Rabbi Shilo Refael, a judge in the Rabbinical Court of Jerusalem, the concept that a person is the owner of his body and other reasons are sufficient to lead to the conclusion that "one should not administer medical treatment against a patient's will" (see *Torah SheBe'Al Peh, ibid.*, p. 81), a point we will discuss later (section 22).

This difference of opinion concerning the legal consequences of a person's "ownership" of his body in no way changes the *philosophical* view in Judaism that the source for a person's rights qua person rests on the foundation that "In the image of God did He create man."

The Principle of “Love Your Neighbor As Yourself” in the Context of Medicine

21. An illuminating principle of Jewish law relating to medical issues is the fundamental precept: “Love your neighbor as yourself.” We wrote the following in connection with the right of a person not to be bodily injured (*Sharon v. Levi*, 35(1) P.D. 736, 755):

The manner in which this basic right is expressed in Jewish law is enlightening. “One who strikes another with a blow which does not cause even a penny of damage” transgresses a negative commandment (*TB Sanhedrin* 85a; Maimonides, *Laws of Wounding and Damaging* 5: 1-3), and even if the victim allows him to do it, his consent has no legal effect (*TB Bava Kamma* 92a, *Sh. Ar.* H.M. 420:1 *et seq.*; *Shulchan Aruch*, *Tanya* H.M. Laws of Injuries to the Body and Person, par. 4). A person is forbidden to wound himself (*TB Bava Kamma*, Maimonides, *ibid.*); On what basis can a person shed the blood of his fellow even if it has therapeutic purposes? According to the amora, R. Matna (*TB Sanhedrin* 84b) permission to do this is not based on the consent of the patient - express or implied - for such consent, as stated, is invalid; but rather it is based on the verse “Love your neighbor as yourself (*Leviticus* 19:18),” from which one can infer, as Rashi put it, that “a Jew is cautioned not to do to his fellows what he does not want done to himself (Rashi, *Sanhedrin* 84b, *s.v. v’Ahavtah*; Nahmanides, Chavel ed., Mossad ha-Rav Kook, 1964, *Torat Ha-Adam* pp. 42ff; and see M. Elon, *The Halacha and Modern Medicine*, Molad, (New series) 4 (27), 1971, 228, 232).”

The philosophic-halachic view that permission to wound a sick person in order to cure him is based on the fundamental Biblical command “Love your neighbor as yourself” is extremely instructive. The act of healing another person involves “loving” one’s fellow, which from the halachic perspective does not mean only loving another person in one’s heart as stated in *Naiman v. Central Elections Committee*, 39(2) P.D. 225, 298-299:

The fundamental principle “Love your neighbor as yourself” is not merely a theoretical matter, a matter of abstract love with no practical requirements. On the contrary, it expresses a way of life in the practical world. Hillel expressed this principle in the negative: “Whatever is hateful to you, do not do to your fellow (*TB Shabbat* 31a).” Commentators on the Torah noted that the statement of the principle in the negative form makes it more possible for human nature to comply: “For a human being simply cannot love his fellow as he loves himself.

Moreover, R. Akiva had previously taught: 'One's own life takes precedence over the life of one's fellow' (Nachmanides, *Commentary on Leviticus 19:18*)." R. Akiva, who declared that the primary principle is "love your neighbor as yourself" also taught that in time of danger to an individual or to the community self-preservation takes precedence over preserving the life of one's fellow (*TB Bava Mezi'a 62a*).

This concept of R. Matna is cited by Nachmanides as a generally accepted principle of Jewish law in medical contexts:

Whoever wounds his fellow in order to cure him is exempt [from liability], and this is a fulfillment of "love your neighbor as yourself" (*Torat HaAdam*, p. 43)."

R. Eliezer Waldenberg, a leading contemporary authority in the area of halachic-medical law, commented as follows on these words of Nachmanides (*Resp. Ramat Rachel*, #21 appended to *Resp. Tzitz Eliezer Vol. 5*):

The command to heal one's fellow man is also derived from the verse "Love your neighbor as yourself." We require the inference from the verse and it is insufficient to state simply that "There is nothing which is as important as the saving of human life," which Nahmanides himself mentions beforehand, and which is the only rationale given by the *Tur* and *Shulchan Aruch* and the *Aruch HaShulchan* (i.e. that it exemplifies the principle of saving human life). The reason is that the scriptural verses (such as "Love your neighbor as yourself" - M.E.) teach that there is an obligation to heal in cases where it is clear that there is no danger to human life, but there is pain or danger to a limb and the like. And this is a simple point.

22. In this connection, there is an additional point to be made which touches on the approach to interpretation. It is well known that the basic rule of the Torah - "Love your neighbor as yourself" - has been adopted and accepted by various religions and cultures and has been called "The Golden Rule." It would seem that the most impressive and forceful expression of the generality of the rule is found in the words of Hillel the Elder, who, after phrasing the rule as - "What is hateful unto you - do not do to your neighbor," adds "and this is the entire Torah, and the rest is commentary. Go learn." Indeed this rule is discussed and analyzed at great lengths by the Sages in halacha and Aggada, as well as in the philosophical literature of various cultures (see commentaries on the Torah, *Leviticus 19:18*, and especially, in addition to Nachmanides cited above, the *Keli Yakar* of R. Efraim of Lunshits; *HaKetav VeHaKabbalah* of R. Yaakov Zvi Mecklenberg; and Nehama Leibowitz, *New Studies in Leviticus*, 1983, pp. 300-304; see also *The Book of Tobiah 4:15*, 1st ed., Kahane, *The Apocryphal Books*, vol.

2, p. 322 and notes and bibliography by the publisher [Dov Heller], *ibid.*; and Elon, *HaMishpat Halvri*, pp.126-127; *The Pentateuch and Haftoras*, Edited by Rabbi J.H. Hertz, London, 1938, 501, 502, 563-564; *The Torah, A Modern Commentary*, Edited by W. Gunther Plaut, New-York, 1981 pp. 892-896, 1738.)

At the same time, in certain other religions and cultures which espoused this rule, other ideas were added to it which are antithetical to Judaism. Thus, in one example (*Luke 6:29*) we find that following the statement that one should love one's enemy and pray for the one who hurts you, the instruction is given "He who hits you on the cheek - turn the other cheek towards him as well" (and see there the rest of the passage; see also *Matthew 5:38-48*). This mode of thinking, which contains elements of an unnatural outlook and which is not practiced in daily life, is foreign to Judaism. R. Akiva gives full expression to the point that the rule of "Love your neighbor as yourself" is to be integrated with the principle "Your life takes priority over the life of your fellow." It is the force and significance of this interpretation in Judaism of "Love your neighbor as yourself" which provides the justification for the doctor's invasion of the patient's body when necessary for the treatment; and it is reasonable to say that it is also the source for limiting treatment against the patient's will since "what is hateful unto you - do not do to your neighbor (see *infra*, sections, 23, 32-36, 38)."

The Obligation to be Healed and the Refusal of Medical Treatment: Rules and Limitations

23. The basic approach of Jewish law regarding the obligation to heal and to be healed is subject to some limitations that in our own times are increasing in number. These limit the possibility of treating a patient without his consent.

Such limitations are implied in a responsum of R. Ya'akov Emden, a leading halachic authority in the eighteenth century (*Mor u-Kez'iah*, O.H., 328; we shall later discuss a different section of the responsum dealing with pain and suffering, section 26). The responsum states:

In the case of a sickness or injury *that is visible* and regarding which the doctor *has definitive knowledge and close familiarity and has a tried and tested cure*, it is clear that we always coerce the refusing patient who is dangerously ill by any and all means. For the Torah gave permission to the doctor to cure him, such as by cutting live flesh around a wound, expanding its perimeter, removing the puss, bandaging a break, and even amputating a limb (in order to save him from death)... We surely do anything like to this even against his will for the purpose of saving his life.

We pay no attention to him if he does not wish to undergo suffering and chooses death over life; rather we amputate even a complete limb, if necessary to save him from death. We do all that is necessary to save life even against the will of the patient.

Every person is admonished in this matter for [the Torah states:] "Do not stand idly by the blood of your fellow." The matter is not dependent on the desire of the patient; he has no permission to commit suicide.

The subject under discussion was a disease that was recognized and known to the doctor who had "definitive knowledge and close familiarity" with it. In R. Ya'akov Emden's day it was "a sickness or injury *that is visible*" (i.e. external); and the medication which the doctor sought to administer was "a tried and tested cure." It was also a disease that was life-threatening; the patient was "dangerously ill." (And see there other limitations affecting the administration of treatment without the patient's consent at the beginning of and the continuation of the quoted passage.)

Many contemporary halachic authorities deal with the right of a patient to refuse medical treatment and they have established additional limitations and situations when a patient's consent is necessary. It is reasonable to say that the principle of individual autonomy which has been advanced in our times has unconsciously influenced these decisions. An example is the decision of R. Moshe Feinstein, a leading authority in our generation, who ruled as follows:

If a patient needs an operation to save him and there is a *large majority* who believe that the operation will be successful, they should perform the operation even against his will so long as there is no reason to fear that *the very fact that they force him will cause a greater danger* (*Refuah U'Mishpat*, 1989, p. 101, *Halachic Aspects*, Dr. Mordechai Halperin, p. 102).

According to this decision, in addition to needing a *large majority* who believe that the operation be successful (see *id.* 104, 15 as to whether a majority of *two-thirds* is required as implied in another responsum in the area of halacha and medicine, *Resp. Shevut Ya'akov* by R. Ya'akov Reischer, III, #75, which requires, "a recognizable majority," or whether a majority of *51 percent* is sufficient). We must also take into account the possibility *that the very act of administering medical treatment against the patient's will may have a negative effect.*

According to another opinion, if the patient will suffer even after the treatment is administered to such an extent that we can assume that if he had known this in advance he would not have consented, we may not administer such treatment before receiving the informed consent of the

patient (*Refuah U'Mishpat*, pp., 103-104). In this context, there is an enlightening responsum by R. Shlomo Zalman Auerbach, a leading contemporary authority, quoted in *Nishmat Avraham* (Y.D., 155:2, pp. 47-48) as follows:

This case involved a fifty-year old patient who was greatly suffering from diabetes and had serious complications such as blindness, blocked arteries and infections. He already had one leg amputated because of gangrene and was in the hospital with gangrene on his second leg, which was causing enormous pain.

At the advisory meeting, which included both experts on internal medicine and surgery, it was agreed that the patient would die within a few days if the second leg was not amputated. However, he could also die as a result of the operation. At the same time, even were the operation to be successful it would only prolong his life temporarily and not cure the underlying disease.

The patient himself refused to undergo the operation on account of fear of the operation itself, the pain and suffering caused by the operation, and mainly because he did not wish to live without legs and eyesight.

At the time I asked R. Shlomo Zalman Auerbach for the halachic view of this case. He ruled that the operation should not be performed against the will of the patient (or even to try to convince him to agree to the operation), because it was a complex and dangerous operation that would only add to the suffering of the patient without any hope of his being restored to health.

The decision was that, under the circumstances, the operation should not be performed without the patient's consent even though the danger was mortal and immediate. At the same time, if the patient had consented to the operation, it would have been permissible to violate the Sabbath for him since once he had given his consent and there was immediate life-threatening danger, saving a human life has priority over the Sabbath (and see there for an additional responsum of R. Shlomo Zalman Auerbach on the issue as well as *Refuah U'Mishpat*, p. 104).

The opinion has also been expressed that since in many cases the medical prognosis is uncertain, treatment should not be administered without the patient's consent unless there is a definite life-threatening situation (see *Encyclopedia of Jewish Medical Ethics*, vol. 2, ed. Dr. Avraham Steinberg, Informed Consent, p. 30, and pp. 86-87, and see additional decisions, *id.* at 30-33.)

An interesting approach on this subject has recently been taken in an article by R. Shilo Refael (*Torah SheBe'al Peh* 1992, p. 77ff.), which deals entirely with the issue of non-consensual treatment of a patient. R. Refael comes to the conclusion that "treatment should not be administered to a patient without his consent (*id.*, at 81)." While it isn't explicitly stated, it is understood that this applies only to situations that are *not* life-threatening. Where there is danger to life, *treatment is allowed and even obligated* even without the consent of the patient (see the reponsum of R. Ya'akov Emden, *Mor u-Kez'iah*, O.H. 328, cited *supra*). R. Refael bases his conclusion on three grounds. The first is that according to Nachmanides in his commentary on the Torah (*Leviticus* 26:11), one who is God-fearing and extremely pious may choose not to seek a doctor for treatment but seek a cure through prayer and good deeds as was the practice during the era of the ancient prophets (see *Exodus*, 15:26; *Deuteronomy* 32:39; *II Chronicles* 16:12; TB *Berachot* 9a, *Diveri Rav Acha*). Indeed, this opinion finds support in a number of different sources (*id.* at 75), but as pointed out earlier, this approach negates the accepted approach of the decisive majority of the halachic authorities regarding the *obligation* of the patient to seek a cure.

R. Refael's main grounds are his last two: The first of these is that the human being is the "owner" of his body. As noted above (section 20), after a detailed analysis of the question and on the basis of statements by various halachic authorities, R. Refael reached the conclusion that: "From all the above-mentioned, it is evident that there is a recognizable chain of halachic authorities who believe that a person is the owner of his body, and when necessary he may refuse to be fed or treated against his will (*id.*, at 80)."

The third ground presented by him is original and instructive. This ground applies even according to the halachic authorities who do not accept the previous two grounds. The argument is that there is no basis for coercing anyone to undergo medical treatment inasmuch as today the rule that one may be coerced to fulfill a commandment does not apply (the source of the rule is *TB Ketoboth* 86a, the statement of R. Papa). Today, the authority of the three judges comprising a *bet din* (court) is only "to judge and decide." Enforcement requires three expert judges (*mumchim*; *id.*, at 80) and nowadays there are no experts who fulfill the applicable halachic criteria. (Regarding the question of coercion to fulfill a commandment in the post-Temple era, see the instructive words of R.

Meir Simcha ha-Cohen of Dvinsk in his book *Or Sameach* commenting on Maimonides, *Laws of Rebels* 4:3). R. Refael concludes (*id.* 81):

We conclude from all that was explained above that there are three reasons not to administer medical treatment against a patient's wishes: 1) There are those who rely on Nachmanides who states that there is no requirement to resort to doctors; 2) There are authorities who hold that a person is the owner of his body and can do with it as he wishes; 3) In order to coerce treatment, a court of three judges, and according to *Sefer Yereim* a court of three *mumchim* [expert judges], is necessary. Since we have no such *mumchim*, the rule doesn't apply at all in the post-Temple period.

At the end of his article, he supports his conclusion with the decisions of R. Feinstein and R. Auerbach (cited above) that coerced treatment may itself cause damage, being administered against the patient's will. (On this subject see also, Dr. D.B. Sinclair "Non-Consensual Medical Treatment of Competent Individuals in Jewish Law with some Comparative Reference to Anglo-American Law," Tel-Aviv University, *Studies in Law*, vol. 2, 1992, p. 227).

R. Shilo Refael's approach is interesting and original and joins the wide spectrum of contemporary halachic approaches and opinions. These opinions have been rendered in the context of the manifold new problems arising out of the advancement of medicine and the struggle of the halachic authorities to find solutions to these problems. The solutions are based on the principles of the halacha, yet reflect the medical and social realities of our time.

The Supreme Value of Human Life

24. A basic rule which is at the foundation of Jewish law is that the value of human life is immeasurable, both as to its worth and as to its duration. A person's life cannot be quantified; each second of human life is unique and as valuable as many long years. Thus Jewish law provides:

A *gossess* [i.e. a moribund patient] is considered a living person in all respects... Whoever touches him has spilled his blood. To what is this comparable? To a candle that flickers. As soon as someone touches it, it becomes extinguished. And anyone who closes his [the *gossess*] eyes while he is dying has shed his blood. Rather, one must wait a while, for perhaps he has fainted (*Shabbat*, 151b; Maimonides, *Laws of Mourning* 4:5; *Shulchan Aruch*, *Yoreh Deah*, 339:1).

Even a flickering candle burns and it too can give light. Therefore the rule is:

One who kills a healthy person, and one who kills an ill person who will probably die, and even one who kills a *gossess* is guilty of a capital crime. (Maimonides, *ibid.*, and *Laws of Homicide 2:17, Shulchan Aruch, ibid.*)

The reason is:

Even if the prophet Elijah should come and tell us that this person will only live an hour or a moment, nonetheless the Torah did not differentiate between someone who kills a child and someone who kills an old man of a hundred years. In every case, the killer is guilty even though the victim was near death. Because of the additional moment that he would have lived, he is guilty (*Minchat Chinuch, on Sefer HaChinuch, Commandment 34*).

Since there is no measure or limit to the worth of meaningful life, there is no way to differentiate between a minuscule part of something that is infinite and a very large part of it. Therefore, the Torah did not differentiate between killing a healthy young person and killing an old man aged one hundred who is a *gossess* (R. Yechiel Michal Tekuchinsky, *Gesher HaChayyim, Laws of Mourning, part 1, ch.2, p. 16*)."

The commandments that are set aside in order to preserve human life (see *infra*), are also set aside for the *temporary life* of an individual, even for the shortest of times. This is the law regarding the violation of the Sabbath (Maimonides, *Laws of Shabbat 2:18; Shulchan Aruch, Orach Chayyim 328:4* based on *Yoma 88a*):

If debris falls on someone [on the Sabbath]... and you find him alive, even if he is crushed and it is impossible for him to recover we remove the debris from him on Sabbath, and remove him *for that temporary period*.

Rabbi Yechiel Michal Epstein, a leading halachic authority of the beginning of this century, adds and clarifies (*Aruch HaShulchan, Orach Chayyim 328:9*) that:

Even if the doctors are certain that he will die, but that with medications he could live *a few more hours*, one is permitted to violate the Sabbath for him for we violate the Sabbath to save a temporary life as well.

There was the decision of R. Shimon b. Tzemach Duran, a leading respondent in Spain and Algeria in the fifteenth century (*Resp. Tashbetz, part 1, #54*):

Even if such endangered person will only live as a result of this violation of the Sabbath for one moment and will then die, we violate the Sabbath for him, even for that one moment. For the

saving of life is of great importance before the Lord, even a minuscule saving like a moment. Even the Sabbath, which is as important as the entire Torah, is desecrated to save a life.

25. While recognizing the supreme value of life, Jewish law holds that a temporary threat to the life of a patient may be permitted in order to allow him *to live longer*. Even if there is a *doubt* as to whether the procedure that endangers his temporary life will succeed in gaining a longer life for him, the rule is the same (*Avodah Zara 27b*, Tosafot, *s.v. Lechayei Sha'ah*; Nachmanides, *Torat HaAdam*, p. 22ff.; and see Dr. A. Steinberg, *Encyclopedia of Jewish Medical Ethics*, vol. 4, section "One on The Verge of Death" (prepublication copy), pp. 45-48 - section 4T).

An instructive discussion on this question is found in a responsum of Rabbi Ya'akov Reischer, a leading halachic authority in Galicia [Poland] in the beginning of the eighteenth century. I discussed this responsum in another context in connection with problems as to heart transplants (*The Halakhah and Modern Medicine*, Molad, booklet 21(231), pp. 228, 234-235) as follows:

The other question regarding the receiver of the transplanted heart is also a very important halachic question, but it has already been discussed at length. This is the question: With removal of the heart of the patient [=receiver], it is certain that we are shortening the life of the patient by a few weeks, a few days and even a few hours, and while doing so we are not certain that the transplant will be successful to allow the continuation of that patient's life. We have already seen that even a moment of life is equal to a long life, and anyone who shortens that moment is a spiller of blood. It is instructive that this fundamental question relating to the immediate threat to the patient's life, when there is only a chance that with a particular medicine the patient will gain health and life, has already been discussed to a certain extent by the Rishonim and in detail by Rabbi Ya'akov Reischer, a leading halachic authority in Galicia in the beginning of the eighteenth century. The solution is indeed to prefer the chance of a long life over the certain temporary life.

The following was the question that was asked of Rabbi Ya'akov Reischer (*Shevut Ya'akov* part 3, #75) by an "expert doctor:"

A patient became ill with a fatal disease from which he will soon die. All the doctors say he will surely die within a day or two. Yet, they believe that there is an additional medicine that could possibly save him. However, the reverse is also possible. If he takes the medicine and it does not work, heaven forbid, he could die within an hour or two. Is it

permissible to administer such medication, or do we take account of temporary life and say that it is preferable to do nothing?

Rabbi Reischer responded:

Since this is literally a case of life or death, we must be very careful. When examining the Talmud and codifiers and making numerous inquiries and investigations. For anyone who causes the loss of a single Jewish life is considered as if he causes the loss of an entire world. The reverse is also true, that anyone who maintains a life is considered as if he maintains an entire world. At first glance, it would seem preferable not to do anything for we take account of temporary life even when a person is an actual *gossess*.

This was only his initial reaction to the question. Rabbi Reischer goes on to state:

When I delved into the question, it seems that it is permitted... If it is possible that by use of this medication he could be completely cured, surely we do not worry about an immediate threat to life... Since he will surely die [if he does not take the medicine], we put aside the definite and grasp hold of the doubtful. Perhaps he will be cured.

After he proves this in his halachic discussion, he concludes by saying:

In any case the doctor should not simply go ahead; he must approach the matter very deliberately, obtain the opinions of the expert doctors in the city, and act according to the majority opinion, i.e. a recognizable majority which is double (=two thirds), for we must be wary of being hasty.

We find, therefore, that the halacha accepts the basic principle, but requires much thought and deliberation, and complete and precise understanding and knowledge. One should also take into account the chances of success when making this difficult and fateful decision.

This has also been the decision of contemporary halachic authorities (see *Resp. Melamed LeHoi'l* of Rabbi David Zvi Hoffman, second booklet, Yoreh De'ah #104, and in detail *Nishmat Avraham*, Laws of Patients, Doctors, and Medicine, Yoreh De'ah, by Dr. Abraham Abraham, 1945, 155:1, pp. 45-47. And see there p. 47, where the point is made that temporary life that may be endangered in such situations includes life for a prolonged period).

The Principle of Preventing Pain and Suffering

26. Another fundamental principle in the field of Jewish law and medicine is that the extent of the pain and suffering of the patient must be taken into account in deciding any issue.

In various halachic areas the pain and suffering which a person endures - even if his illness is not life threatening - is a sufficient basis for setting aside certain laws (see, for example, *Shulchan Aruch, Orach Chayyim*, 329-331, *Shulchan Aruch, Yoreh Deah* 262:2). According to Rabbi Ya'akov Emden, one may undergo a dangerous procedure to alleviate suffering (*Mor u-Kezi'ah, Orach Chayyim* 329):

There are some who choose to endanger their lives in order to save themselves from terrible suffering, such as those who undergo an operation because of a stone in the pocket and sinews which lacerate the kidneys. This is very painful, like death itself, The Merciful One should save us [from such things]. We allow them to do as they please without objection since sometimes they are relieved and cured. (Regarding this responsum see *supra* section 23.)

The duty to prevent pain and suffering, to preserve human dignity, is given expression in the maxim of the Sages: "Choose for him a humane death." This maxim in the halachic literature has nothing at all to do with the concept of "a dignified death," which is used today in connection with euthanasia, with which we shall deal later. This maxim concerns a person who has been sentenced to death. The Sages ruled that special means must be taken to lessen the amount of pain and suffering an executed person would endure and to "choose for him a human death." It is instructive to note the source from which this rule was taken. Even someone who is sentenced as stated has the fundamental principle of the Torah applied to him:

Love your neighbor as yourself. Choose for him a humane death (*Baba Kamma* 51a, *Sanhedrin* 45a).

On this basis, the Sages established that every means be used to alleviate the suffering of the person sentenced to death by speeding up the process of the execution and preventing his humiliation as a person (*Sanhedrin* 45a). And it was also established (*Sanhedrin* 43a):

One who is led out to be executed is given to drink a *koret* (=small grain) of frankincense (=a strong drink; *Exodus* 30:34) in a cup of wine (=an intoxicating beverage) in order that his mind should become confused (=and should not worry, so as not to delay his execution - *Rashi, ibid.*), for it is stated (*Proverbs* 31:6): "Give beer to the lost [of hope] and wine to the embittered soul."

In *Midrash Tanchuma* on Parshat Pekudei, letter ך, the formulation is:

They bring him good and strong wine and give him to drink in order that he shouldn't suffer from the stoning (See Maimonides, *Laws of Sanhedrin* 23:2).

The need to take cognizance of a person's suffering and the goal of alleviating and preventing it act as a guiding principle in connection with various issues of medicine and halacha. In recent times, the duty to prevent pain and suffering has served as a factor in reaching balanced decisions in difficult and complex cases where the circumstances call for a deviation from the absolute application of the principle of the supreme value of human life. In this way, Jewish law has to a considerable extent developed the factor of preventing pain and suffering in grappling with the needs of the time and of man as they arise from time to time and from era to era. We have dealt with this in detail above (section 23), and we will return to this point, *infra*, regarding euthanasia, and the distinction between active and passive euthanasia (sections 27-36).

The Judicial Principle that “Its Ways Are Pleasant Ways” and “The Laws of Our Torah Must Accord with Reason and Logic”

27. The principles set out above, have served the halachic authorities in the past and even more so in recent times as guidelines in the area of medicine and law. The goal is the application of these principles in this complex and difficult area both from an analytical-philosophical standpoint and from the point of view of the individual in his particular circumstances. As stated, the number of such decisions has recently increased greatly in view of the tremendous advances in medicine, which on the one hand has brought about longer life and much good and, on the other hand, produced difficult dilemmas and problems. Before we turn to these problems, giving some examples of contemporary halachic decisions, we will first analyze an additional halachic-judicial principle which was established in a similar context in the sixteenth century by one of the leading respondents, R. David Ibn Zimra (Radbaz, the rabbi of Israel and Egypt in the sixteenth century) as a basis for solving many medical halachic problems.

This additional principle was enunciated in connection with the obligation to save another's life. An important rule of the Jewish law is that "One who can save another person but does not do so transgresses the command, 'Do not stand idly by the blood of your fellow'" (*Leviticus* 19:16; see: *TB Sanhedrin*, 73a, Maimonides, *Laws of Homicide and Preservation of Life* 1:14-16; *Tur*, H.M. 426; *Sh. Ar.*, H.M. 426). When there is no danger to the rescuer, the obligation of saving another is unequivocal. But the difficult question is: to what extent is a person *obligated*? Perhaps the question can be formulated as: under what circumstances is a person *permitted* to endanger his own life in order to save another's life? This question engaged the attention of more than a few of the halachic authorities, and according to some one must go so far as to place himself in a position of a possible danger to save his fellow from certain danger (*Bet Yosef*, H.M. 426). Many others dispute this (*Rema*, H.M. 426, subpar. 2). The law was stated as follows by a leading contemporary authority: "It all depends on the circumstances. One should weigh the situation carefully and not be overly self-protective.... When anyone saves a single person..., it is as if he saved an entire world." (*Aruch HaShulchan*, H.M. 426:4; and for a discussion of the many sources for this dispute see R. Ovadia Yosef: "Responsum on the Permission of Kidney Transplants, *Dinei Israel* 7, 1976, 25; *id.*, *Halacha U'Refuah* 3, 1983, p. 61; *id.*, *Yehavve Da'at*, 3:84).

In the recent discussion by the halachic authorities in connection with the removal of an organ from one person to transplant it in another, the question was raised as to the danger that could arise to the donor. This question is bound up with a further question: Is there any obligation - even to save the life of another - to donate one's organ? The response of Radbaz is instructive... The question that arose amidst the tragic-heroic

reality of the exile and the relation of the foreign sovereign to the Jewish minority within was as follows (*Resp. Radbaz*, III #1052):

You have asked of me and I will express my opinion about what I have seen written. [What should one do] if the government says to a Jew: "If you do not allow us to sever one of your limbs which will not cause your death, we will kill your fellow?"

What is the law that should govern this Jew's response to this Draconian request? Elaborating on this question, the inquirer states there are those who say that the Jew must allow the amputation of his limb to save his fellow from death inasmuch as saving life takes precedence over the other commandments of the Torah and the amputation does not present a life-threatening danger. Following a detailed halachic analysis, Radbaz's response was that even if it is clear that the amputation poses no danger to life, there is no obligation to allow the procedure even to save another person. On the other hand, it is *permissible* to allow it and it is a pious act. Radbaz's summary is most enlightening:

It is written: "Its ways are pleasant ways (*Proverbs* 3:17)." [This means that] the laws of our Torah must accord with reason and logic. And how can we suggest that a person should allow his eye to be blinded or his arm or leg be amputated in order that someone should not be killed? Therefore, I do not see such an act as a legal obligation, but as one of pious behavior. Happy is the lot of anyone who can bring himself to do such a thing. And if there is any possible danger to his life, he would be a pious fool because his possible danger has priority over the certainty of his fellow.

The amputation of a limb of one person in order to save another, even if there is no danger to the life of the donor, cannot be *obligatory* for this would contradict the important principle that "its ways are pleasant ways," and "the laws of our Torah must accord with reason and logic." Thus, we cannot *obligate* a person to sacrifice a limb to save someone else. However, this would be pious behavior that is meritorious, as a volunteer act beyond the requirements of the law. (And see *Resp. Radbaz*, vol. 5, 218) 1582 ם"ה ןהרנב" (ללשונונת הרנב"ם) and the reconciling of these two responsa. But this is not the place to elaborate on this).

This responsum of Radbaz serves as one of the bases of discussion by contemporary halachic authorities regarding to the donation of a kidney for transplantation into another person. The discussion touches on aspects of danger to the donor and whether one is allowed to injure himself, as well as other halachic questions, some of which were dealt with elsewhere (*The Attorney General v. John Doe*, 42(2) P.D. 661, 667-679).

Radbaz extensively analyzes the issue of obtaining the consent of a person to the removal of one of his organs to save the life of another (see *The Doe Case, supra*). It would seem that the principle that was enunciated by this leading halachic authority regarding organ removals is an appropriate rule for the problems that arise in the general context of medical-halachic questions and our issue as well. The fundamental concepts that influenced Radbaz, i.e. "Its ways are pleasant ways" and "The rules of our Torah must accord with reason and logic," must perforce serve as guidelines in the difficult and complex cases of medicine and law, just as they appropriately govern decision making for the halacha in general (and see Elon, *HaMishpat Halvri*, p. 323ff.; *id.*, *Index of Responsa of Spanish and North African Authorities - Index of Sources*, Magnes Press, vol 1, 1981, p. 28). This principle must be used with great care and profound analysis as one of the many principles applicable to each case, according to the particular circumstances and with the proper balance.

The Terminally Ill Patient

28. Having come this far, we will now deal with the problems that arise in our case. The first and the most difficult and severe problem involves the person who is on the verge of death: one who is terminally ill.

There have always been serious and complex moral problems regarding the end of one's stay on this earth. Jewish law includes various rules dealing with the medical care to be given, as well as issues of civil and religious law concerning the person who is a *gossess* or terminally ill and one who is a *terefa* or is dying. Jewish law distinguishes between these states, but there are controversies as to their definitions and their consequences. In any event this is not the place to elaborate (see Dr. A. Steinberg, *Terminally Ill*, pp. 2-5, 26-45, *id.*, *Mercy Killing*, pp. 11-13). As to this terminal state, Jewish law emphasizes the importance of *temporary life* (*chayyei sha'a*) and even the life of a *moment*, so long as "the candle flickers," a topic referred to earlier. This is also true in non-Jewish cultures, evidence of which we find as early as the Hippocratic oath which states, *inter alia*: "I will not give poison to any person, even if he requests it; and I will not offer it." Some cultures, however, did not have this approach (see C.J. Gruman, *Encyclopedia of Bioethics*, pp. 168-261; A. Steinberg, *Terminally Ill*, pp. 5-6).

These medical-legal problems, which involve fundamental questions of values, have grown more difficult and more complex in recent years arousing much discussion and dispute in the medical and legal communities, as well as among philosophers, men of religion and the general public. On the one hand, the awesome advancement in science and medicine resulting from technological progress has allowed for the prolongation of life by preventing the spread of disease and by various

artificial means; on the other hand, the *prolongation* of life has not always led to the improvement of the *quality* of life. At times, the prolongation of life brings with it physical and mental pain, and the disruption of day-to-day life. In addition, a patient in such circumstances today may find himself in a hospital or other institution, attached to various machines which keep him alive, and not - as in the past - within the walls of his own home, with his family and loved ones in the natural environment in which he lived and grew. The people who must deal with these problems are mainly the patient himself and his family; and in addition physicians, legal scholars, and people of religion and philosophy. The problems that arise involve serious and fundamental moral, religious and ethical questions. And the basic question is: who sufficiently understands all of these to be competent to decide what is the proper life span of a person and whether to shorten or to refrain from prolonging it? (See, A. Steinberg *Terminally Ill*, pp. 2-13, 70-72).

Euthanasia

29. Since the beginning of the nineteenth century one of the well-known terms in the context of our discussion has been euthanasia. Euthanasia means "good death" or "easy death." The term is taken from two Greek words; *eu* (good, easy), and *thanatos* (death). This idea is sometimes referred to as "mercy killing," "killing out of pity," or "killing out of compassion," with each term hinting at a certain approach to the issue. Euthanasia is discussed with reference to children born with severe mental and physical defects, severely mentally retarded people without hope of a cure, and terminally ill patients.

There are two types of euthanasia. The first is *active* euthanasia, i.e. the administering of drugs or treatment that speeds up the dying process either by the doctor, e.g. injecting poison into the patient, or by the patient himself with the assistance of the physician, e.g. assistance to commit suicide. The second is *passive* euthanasia, which could be accomplished in two ways. The first is *the withholding* of life-prolonging treatment, such as by refraining from attaching a respirator to the patient; and the second is the *withdrawal* of life-prolonging treatment, such as *by disconnecting* an already attached respirator. The *withdrawal* of life-prolonging treatment is clearly a much more problematic and difficult question as it involves the taking of some action to cause an earlier termination of life. There are many differences of opinion as to defining the various treatments and as to whether to continue them or to withhold or discontinue them, whether a treatment is ordinary or extraordinary, etc. (See A. Steinberg, *Terminally Ill*, pp. 79-96, *id.*, *Mercy Killing*, p. 10.)

Active Euthanasia

30. It is absolutely clear that Jewish law utterly forbids active euthanasia. In contrast, there are various opinions and approaches, especially in recent times, regarding passive euthanasia. The focus of these discussions is the concept of "removal of the impediment," first formulated in the twelfth century. The differences of opinion concern the two types of passive euthanasia: withholding life-prolonging treatment from the outset and withdrawing life-prolonging means after they have begun.

We have already mentioned the halachic rule that:

A *gossess* [a person near death] is considered a living person in all respects. One may not bind his jaws... One may not move him... One may not close the eyes of a *gossess* (*M. Semachot*, 1:1-4; *TB Shabbat* 151b).

These actions as well as others (see *Sh. Ar.*, Y.D. 339:1, *Encyclopedia Talmudit*, 5:393) are forbidden because that may hasten the death of the *gossess*:

Rabbi Meir would say: "It is like a flickering candle. As soon as someone touches it, it becomes extinguished. Similarly, whoever closes the eyes of a *gossess* is considered to have taken his life (*Samahot, ibid.*, 1:4, *Shabbat, ibid.*)"

Actively hastening death is forbidden even when the patient is suffering:

It is forbidden to hasten his death, even if he is a *gossess* and the deceased (i.e., the soon to be deceased) and his relatives are suffering greatly (*Chochmat Adam*, 151:14).

Even though he is suffering greatly and dying, and it would be good from him to die, nevertheless we may not do anything to hasten his death (*Aruch HaShulchan* Y.D., 339, par. 1; see also *Nishmat Avraham, ibid*, 339, IV, pp. 245-246; *infra*, section 31).

Sometimes, the punishments imposed differ, such as in regard to the status of *terefa*, but the active causing of death is prohibited and punishable (see Maimonides, *Laws of Homicide and Preservation of Life*, 2: 7-8; *Encyclopedia Talmudit, ibid.* In this way, specific instances mentioned in Scripture [*I Samuel* 31: 4-5] and in the Talmud and other sources were explained [see, for example, *Avoda Zara* 18a and others, and see A. Steinberg, *Terminally Ill* pp. 15-18, 53-56; *id*, "Mercy Killing", pp. 10-19, in which numerous cases are cited all of which clearly lead to the conclusion that active euthanasia is absolutely forbidden). Active euthanasia is forbidden even when the patient agrees to it. The value of life is absolute and cannot be waived.

31. A living will, even when made by a competent adult, calling for active euthanasia under certain conditions, has no force according to Jewish law and it is forbidden for a physician to follow these instructions (A. Steinberg,

Terminally Ill, pp. 55-56; *id. Mercy Killing* p. 23, n. 84; as to passive euthanasia see *infra*). Similarly, living wills in various countries, especially the United States (*id.*; at 97-102), do not deal with *active* euthanasia but with *passive* euthanasia. It is uncertain if a living will, will have a legally binding effect according to Israeli law even when it concerns only *passive* euthanasia (see H. Cohen, "The Legal Right to Refuse Medical Treatment," *The Freedom to Die with Dignity*, 2nd ed., 9, 24. And in contrast, see Judge Telgam in the Zadok case ((498 ,485 פ"ד (ב) תשנ"ב ,759/92 פ"ד (א"ת)).

“Removal of the Impediment” - Passive Euthanasia

32. In contrast with the absolute prohibition of *active* euthanasia, there are many opinions regarding the right and obligation *to prolong the life* of the patient or to *refrain* from doing so, according to the two types of *passive* euthanasia. As to this issue, Jewish law focuses on two basic principles: The first principle is the supreme value of the sanctity and immeasurability of human life which carries with it the obligation of the patient himself and of the treating physician to preserve and maintain that life. The other principle is the paramount value of preventing pain and suffering, both physical and mental, which is also a mandatory principle of Jewish law.

The discussion of this issue revolves around the concept of “removal of the impediment” - i.e. removing the object which prevents the patient from dying. The first mention of this concept is found in the writings of R. Judah the Pious, who lived in the twelfth century in Germany, in his book *Sefer Chassidim* as follows (ch. 723 in the Bologna ed. , 1538):

We do not delay a person’s death. For example, if someone is dying and there is a man chopping wood near that house so that the soul cannot depart, we remove the woodchopper from there. Also, we do not place salt on his tongue to prevent his death. But if he was dying and says that he cannot die until he is placed somewhere else, he is not to be moved from there.

And in another section he adds (ch. 234):

A *gossess* should not be given to eat because he cannot swallow, but we put water in his mouth... and we should not scream out at the time the soul departs, so that the soul should not return and suffer tremendously. “A time to die (*Ecclesiastics* 3:2);” Why did *Ecclesiastics* need to say this? [It must be that] when a person is dying and his soul departs, we should not scream out lest the soul return because he can only live for a few days, and even those would be with great suffering. And why did he not say “A time to live?” Because this is not dependent on man for there is no control over the day of death.

These words of the *Sefer Chassidim* were discussed at length during the first half of the sixteenth century by Rabbi Joshua Boaz (a victim of the Spanish expulsion of 1492 who moved to Italy) in his book *Shiltei Gibborim*. He stated (commentary on Alfasi, *Moed Katan* 26b):

On that basis it would seem necessary to prohibit the practice of some people who, when the deceased (i.e., the soon to be deceased) is dying and the soul cannot depart pull away the pillow from underneath him so that he should die quickly. They say that the feathers in the bed prevent the soul from

departing. I have strongly protested on a number of occasions against this terrible custom but I have been unsuccessful... My Rabbi differed with me, and Rabbi Nathan of Igra, of blessed memory, wrote that it is permitted.

After a number of years I found support for my position in *Sefer Hasidim* ch. 723, where it is written: "If he is a *gossess* and cannot die until he is put somewhere else, he should not be moved from his place."

It is true that the words of the *Sefer Hasidim* must be closely examined. For initially he wrote that if someone is a *gossess* and there is someone chopping wood near that house so that the soul cannot depart, we remove the woodchopper from there. This seems to be the reverse of what he wrote afterwards.

However, we can resolve this by saying that to perform an act which would delay the death of the *gossess* is forbidden. For example, chopping wood at that place so that the soul will be hindered in departing, putting salt on his tongue to prevent him from dying quickly. All this is forbidden, as stated by him. But it is permitted to remove these impediments. A positive act which hastens death and the departure of his soul is however forbidden. Therefore, it is forbidden to move a *gossess* from his place and put him somewhere else in order that he should die. It is therefore forbidden to place the keys of the synagogue under the head of a *gossess* to hasten his death for this too speeds the departure of his soul.

According to this, if there is something that is causing him *not to die*, it is permitted to remove that cause. There is no problem here at all for one is not placing his finger on the candle and is not doing any act. But putting something on a *gossess* or carrying him from place to place to hasten his death is certainly forbidden, for here the finger is being placed on the candle.

Based on *Sefer Chasidim* and *Shiltei Gibborim*, R. Moshe Isserles (Rema) wrote in his glosses to the *Shulchan Aruch* (Y.D. 339:1), as follows:

It is forbidden to hasten death. For example, if someone is a *gossess* for a period of time but cannot die, it is forbidden to remove the pillow from under him as some wish to do believing that certain feathers are causing this [=the delay of the death]. So, too, he should not be moved from his place; and it is also prohibited to place the keys of the synagogue underneath his head to hasten his death.

However, if there is something which is an impediment to his death, such as a knocking noise near that house like that of a woodchopper or there is salt on his tongue and these are impeding his death, it is permitted to remove it, because this is not a positive act but rather *the removal of an impediment*.

We can conclude from the above rulings that any positive act which will hasten the death of the patient such as causing the body of the patient to move by carrying him from his place or taking the pillow from beneath his head and the like is forbidden. In contrast, it is permitted "to remove the impediment," i.e. *to refrain* from doing certain actions which prevent his death from occurring. In certain situations, where it is desirable to prevent the prolonging of the pain and suffering of the patient, not only is it *permitted* to take no action to prolong life but it is even *forbidden* to take steps which would prevent his natural death, as, in the words of *Sefer Chassidim* in ch. 234 above: "And we should not scream out at the time the soul departs, so that the soul should not return and suffer tremendously" (and see A. Steinberg, "Mercy Killing," pp. 23-29)."

The halachic authorities of later generations have disagreed with regard to the application of the statements just quoted, but this is not the place to elaborate on this (see *Aruch HaShulchan*, Y.D. 339:4). A major difficulty in their application stems from the fact that the specific examples there and in other sources essentially reflect the popular beliefs prevalent in those days. The task facing contemporary authorities is to translate and apply these examples to the procedures used by modern medicine. This in itself has led to wide differences of opinion.

For example, R. Hayyim David HaLevy, the Chief Rabbi of Tel-Aviv-Yafo, in discussing the sources quoted above, states ("Disconnecting a Patient who has No Hope of Living from an Artificial Respirator," *Tehumin*, vol. 2, 1981, p. 297; reprinted in his *Asei Lecha Rav* 8:39):

Clearly we did not discuss the cases mentioned above to clarify the law of feathers in a pillow or the grain of salt, but rather the law relating to the grain of salt that can be removed from the tongue of a *gossess* is the perfect analogy to the artificial respirator. Without exception all the authorities agree to the removal of the grain of salt, the reason being that this is removing an impediment. This grain of salt was placed on the tongue of the ill-person ostensibly to prolong his life with the hope of finding a cure for his illness (see *Bet-Lehem Yehuda*, published in the *Shulchan Aruch*, *supra*). But, when it is seen that the grain of salt is only prolonging his suffering, it is permitted to remove it. The artificial respirator is completely similar. The patient is brought to the hospital in a dangerous condition and is immediately connected to an artificial

respirator. He is kept alive artificially to try to treat and cure him. When the doctors determine that there is no cure for his disease, it is clear that it is permissible to remove the machine.

This permissibility can also be derived at *a fortiori*. All the patients dealt with in the halachic literature were still breathing on their own. Nevertheless since in each case it was seen that the soul wished to die, but the grain of salt was impeding the death, it was permitted to remove the grain of salt and make it possible for the patient to die. All the more so in our time where the patient who is attached to a respirator has no ability to breathe on his own at all and the continuation of his life is only due to this machine. For patients attached to respirators are unconscious and in coma. Yet, it seems in my humble opinion to go even further.

Even if the doctors wish to continue to keep the patient alive by using the respirator, they are not permitted to do so. For, as already explained, it is forbidden to prolong the life of a *gossess* by artificial means such as placing a grain of salt on his tongue or chopping wood when he has no hope of living. It is true that the halacha deals with someone who breathes on his own and, therefore, suffers greatly, which is not the case in our situation where the patient feels no pain and is not suffering. Nevertheless, it is my opinion that not only is it permitted to disconnect the respirator, but that there is an obligation to do so, for hasn't the life of man, which is the property of God already been taken from this man by God? For immediately upon the removal of the machine he will die. Even more so, the artificial respirator prevents the soul from departing thus causing it pain inasmuch as it cannot depart and come to rest.

Therefore, it is my opinion that once you have come to a clear decision without doubt or hesitation that this person has no chance of being cured, it is permitted to disconnect him from the artificial respirator and you can do this without any pangs of conscience.

And my God the Healer of all flesh stand by your side and help you to bring a cure and remedy to all those who need it.

For a similar responsum, see R. Eliezer Valdenberg, a leading contemporary halachic authority and expert on halachic-medical questions (*Resp. Tzitz Eliezer*, vol. 13, #89).

33. Who is a *gossess* regarding whom it is permitted "to remove the impediment?" There are those who restrict the term *gossess* to a person

whose life expectancy is no more than 72 hours (see J. David Bleich, *Judaism and Healing, Halachic Perspectives*, 1981, p. 141). According to R. Bleich “removal of the impediment” is permitted only where the patient is a *gossess*, i.e. within 72 hours before his death (*id*; at 140). This is a minority opinion. In contrast, others expand the permissibility of “removal of the impediment” and apply it not only to a *gossess* but also to any “patient concerning whom the doctors have given up hope and is certainly going to die.” This is the opinion, for example, of the late R. Ovadia Hedaya, who served as a member of the Rabbinical Court of Appeals in Israel. His responsum is enlightening and deserves careful analysis (*Resp. Yaskil Avdi*, Part 7, Yoreh Deah #40). The responsum first states the opinion of the questioner who approached him:

Your honor writes that one should distinguish between positive acts, such as those which Rema described in *Yoreh Deah* ch. 339:1: pulling the pillow from underneath him, putting the keys of the synagogue under his head, etc. and removing the impediment which hinders the departure of the soul which is allowed. You wish to deduce from that in our case not doing anything actively and being passive is permitted. You also distinguish between a patient whose soul is departing and a *gossess* who will probably die. But in our case the patient was not a *gossess*, nor was his soul ready to depart. In this case the removal of the impediment to speed up his death is perhaps prohibited and we must give him the insulin so long as he is not a *gossess*.

At the outset, the questioner distinguished between active killing, which is forbidden and “removal of the impediment,” i.e. passive euthanasia, which is allowed. Since the case involved an injection of insulin, in the absence of which the patient would die, it would be defined as “removal of the impediment.” Yet, at the conclusion of his statement the questioner states that since the patient with whom we are dealing was not a *gossess* nor was he near immediate death, it would be prohibited to hasten his death even by “removal of the impediment.”

In his response Rabbi Hedaya differed with the second part of what his questioner wrote:

I did not fully understand your last words. If we are dealing with a patient for whom the doctors give no hope and he will surely die and is suffering tremendous pain, how could such a state not be considered to be the same as a *gossess*? If in the case of a *gossess* who is considered alive for all matters, we allow the removal of the impediment, then all the more so in this case. For all the doctors say that he will surely die, which is worse than a *gossess*. Why should we not allow the removal

of the impediment? Even though it is accepted doctrine that: "One should never lose hope for mercy," removal of the impediment for a *gossess* has been permitted even though he is considered alive for all matters; it was not prohibited on account of "Do not lose hope for mercy."

The matter is simple. The statement, "One should not lose hope for mercy" refers only to petitioning for mercy. One should continue to pray for the patient, even to the last moment, for perhaps some miracle will occur and the prayer will be accepted. But man can only see what is before him, and if there is truly no hope that he will live and we see that he is suffering greatly, surely then we should not rely on a miracle and add more pain by giving medications. This would be causing pain by our own positive action. It is better not to do anything rather than causing him pain by means of the medication. One should hope for the mercy of Heaven which can even resuscitate the dead. But to rely on a miracle and actively cause pain - no one has ever said such a thing.

Therefore, we may refrain from giving insulin to a terminally ill patient who is surely going to die and who is suffering tremendously, for we should not further increase his suffering by giving him medications. This would be "actively causing him pain" which is forbidden in such a case.

The comparison is instructive. Just as it is prohibited to accelerate natural death by administering a treatment which *hastens death*, similarly it is prohibited to give medical care that inflicts pain on a terminally ill patient who will surely die as this involves *actively causing pain and suffering*.

R. Shlomo Zalman Auerbach ruled (*Minchat Shlomo*, 91:24) as follows:

Many are confused with regard to the question of treating a patient who is a *gossess*. There are those who believe that just as we violate the Sabbath for temporary life, so too are we obligated to coerce the patient on this, for he is not the "owner" of himself and may not forgo even a single moment.

Nevertheless, it seems reasonable to say that if the patient is suffering great pain, even great psychological pain, I think that he must be given food and oxygen even against his will, but it is permitted to refrain from giving medications that cause pain if the patient so requests.

34. This too was the ruling of R. Moshe Feinstein, a leading contemporary respondent. We will cite three of his responsa. In one responsum (*Resp. Iggerot Moshe*, Y.D. II, #74) various issues regarding heart transplants are dealt with. *Inter alia* the following problem was discussed (*id.*, subpar 3):

It is the practice of the doctors to keep alive by artificial means someone from whom they wish to remove an organ so that the donor should continue to live beyond the time that he would live naturally until they are ready to do the transplantation.

The question was whether the life of a donor may be prolonged for a short period of time by use of artificial means beyond the time he would live naturally, the purpose of doing so being to enable the transplantation to be performed at the right time. Rabbi Feinstein stated:

In my opinion since the procedure is done not to cure him but to prolong his life for a few moments, if those moments which are given him by the doctor will entail suffering, it is prohibited. For it is reasonable to say that the purpose of allowing the removal of whatever impedes the soul's departure... is to prevent suffering...

And since it is forbidden to do this for his own life it is certainly forbidden for someone else's life.

As to the statements of the doctors that he feels no pain - they are not to be believed. It would seem that they have no way of knowing this. For it is implied that impeding death involves suffering even though we do not recognize it.

Even if it is true that he will not suffer, it will then be forbidden to discontinue the treatment of the donor since his life is being prolonged even if only for a moment. Therefore, it is clear that it is forbidden to do this.

Prolonging life for a moment for someone who naturally has no hope of living and whose extended life will involve suffering is prohibited. This was the reasoning behind the "removal of the impediment" principle. Where someone's life is prolonged by something that impedes death, that object may be removed.

In the above case, R. Feinstein dealt with a situation where the prolongation of life was to be done on behalf of another, i.e. to transplant the heart of the donor to another person. In the following responsum, R. Feinstein reached the same conclusion even where life was to be prolonged artificially for the sake of the patient himself.

This responsum (*Resp. Iggerot Moshe*, H.M. II, #73:1) is a reply to two doctors who asked R. Feinstein "whether there are patients who should not be given medications to prolong their lives for a short time."

First, R. Feinstein discussed the sources in the Talmud and Commentaries which imply "that sometimes it is appropriate to pray for a patient to die, for example if he is suffering greatly from his illness and it is impossible for him to recover."

From this point he continued:

Regarding those whom the doctors know cannot be cured and who cannot continue to live as they are without pain, *but it is possible to give medication to prolong life which will continue as before with the suffering - such a medication should not be given. Rather, they should be left the way they are.* To give medication which will cause death or to do any action which will shorten life even for one moment is considered shedding blood.

Rather, they (the doctors) should do nothing.

But if there are medications *which ease the pain* and will not shorten life by even a moment, they must give such medication even if he is not a *gossess*.

A dangerously ill patient that cannot breathe *must be given oxygen* even if he cannot be cured, for this *alleviates his pain* and it will be extremely painful when it becomes impossible to breathe, and the oxygen soothes that pain.

But since it is not clear whether he will die, he must be given oxygen in small doses at intervals of one or two hours, and when the oxygen runs out they will see if he is still alive. If so, he should be given additional oxygen for another hour or two until such time that the oxygen runs out and they see that he is dead.

In this manner there will be no mistakes which might cause death nor negligence in his medical care even for the shortest of moments.

Administering medications which *shorten* the life of the patient "even for one moment," i.e. *active* euthanasia, has the same rule as murder and is forbidden. But a terminally ill patient who cannot be cured should not have his life prolonged by medication or treatment if it will be accompanied by the same suffering that he is presently experiencing. However, oxygen must be supplied to the patient for it serves to alleviate the pain.

In connection with the previous responsum, which was, as stated, submitted by two physicians, we read in another responsum (*ibid.*, 74:1) that they asked for an additional explanation of the response that I wrote to Dr. Ringel and Dr. Jakobovitz (printed above, #73). Honestly I do not see the need for this additional explanation, for I do not see any place to err.

The ruling that I gave was clear and simple. If the doctors do not know of any medication that will cure the patient or even alleviate his pain but can prolong his life for a short time

without relieving the pain, they should not administer any medication.

R. Feinstein then adds the following guidelines and general principles:

It is clear that if the treatment will help [sustain the patient] until they could consult a more expert physician who might be able to cure him, such treatment should be given even if it does not alleviate the pain but only prolongs his life with the pain until such time as that physician can be brought in.

And there is no need to ask the patient about this; even if the patient refuses, we pay no attention to him. But it is desirable to persuade the patient because bringing in a doctor against the patient's will also entails some danger. However, if he refuses to allow a physician to be brought in under any circumstances, his wishes should not be followed....

It is clear that if even the most expert physicians cannot cure the patient, they should not give the medications which neither cure nor alleviate the pain nor give the patient strength to suffer longer. Only if the patient will be put at ease upon receiving something from the doctor is it obligatory to give it to him.

But we should not even rely on the opinion of a group of doctors who say that no medicine is available to help him, but we must consult as many doctors as possible, even less experienced doctors than the treating physicians. For, sometimes, the less experienced doctor may know better than the more experienced.

For even in other matters we find that sometimes the greater the knowledge the greater the mistakes (*TB Bava Mezia* 96b). A simple matter may be overlooked by the more knowledgeable person and the less knowledgeable person will see the point correctly. And this applies in medical matters all the more; especially among doctors as to whom it is not always so clear who is truly greater and because a person does not merit to be cured by every doctor.

Up to this point, R. Feinstein dealt with the law pertaining to choosing and consulting with doctors. R. Feinstein then proceeded to discuss the significance to be given to his previous responsa which stated that in certain situations it is permissible to refrain from prolonging life because of concerns about the "quality of life:"

Afterwards, it became known to me that you have been concerned that since in this case we examine the "quality of life" and on that basis rule that a patient need not be given

treatment, this ruling may be used as a precedent from which the definition of the "quality of life" will be broadened to the effect that there is no need to cure someone who (God save us from such things) is an imbecile or was in an accident and was reduced to a coma and the like.

I honestly do not see how someone could misconstrue my words to the effect that there is no obligation to cure an *imbecile* who becomes ill, nor with regard to those who are described by some as being mentally deficient so as to be in a coma that they should not receive medical treatment when they are ill but suffer no pain and the treatment will allow them to be cured and to live for a long time.

For it is clear and well understood by any person of Torah who is God-fearing that we must treat and save every person with whatever means possible *without regard to his intelligence or understanding.*"

(See more on this issue Rabbi Zvi Shechter, "אולי תהיה נשאל", *Beit Yitzhak* (New-York, 1986), p. 104ff.)

In regard to balancing the supreme value of *the sanctity of life* and the obligation to give and receive medical treatment on the one hand, and the principle of *the quality of life*, which allows or obligates us to refrain from prolonging life and justifies the patient's refusal of medical treatment on the other hand, in such a balance the principle of *the quality of life does not* in any way take into account the fact that the patient is mentally deficient or physically handicapped, such as someone who is in a coma or is paralyzed. Of course, the fact that such person is mentally or physically handicapped is difficult in and of itself, but it does play any role in such balancing. According to Jewish law the balance is between *the sanctity of life* on the one hand and the *pain and suffering* of the patient on the other hand. In this regard every case is to be evaluated on its own merits.

35. As we have seen, some halachic authorities *permit* refraining from prolonging a patient's life in cases of severe pain and extreme psychological suffering. At the same time, there is no *prohibition* to prolong it; and there are even those who say that it is *obligatory to prolong* life in certain circumstances so long as the patient is alive (see A. Steinberg, *Terminally Ill*, pp. 56-58).

R. Ovadia Hedaya ruled that one should not give insulin to a terminally ill patient who is in great pain; in contrast, R. Moshe Feinstein and R. Shlomo Zalman Auerbach held that oxygen should be given to ease the breathing and pain of such a patient. This topic with various permutations and ramifications are discussed in numerous other responsa but this is not the

place to discuss them all. The following summary of Dr. A. Steinberg will suffice:

According to the opinions that in certain circumstances it is permitted to refrain from prolonging life, or even that it is prohibited to prolong life, a number of conditions and limitations have been established as follows:

In principle, one must continue all procedures that supply the natural needs of the patient, such as food, drink and oxygen; also beneficial procedures for complications that any other patient would receive, such as antibiotics for pneumonia or blood transfusion in cases of severe hemorrhaging. This must be done even against the patient's wishes.

On the other hand, there is no obligation to treat the underlying disease or severe complications that will clearly cause the patient to die when such treatment will only prolong his life somewhat without hope that the treatment will rehabilitate and cure him. And there is certainly no obligation to treat if the treatment will increase the pain and suffering or if the patient does not consent. This includes: resuscitation, artificial respiration, surgery, dialysis, chemotherapy, radiation, and the like. (*Terminally Ill*, pp. 57-58, and see there, pp. 58-64, a detailed description of all the medical treatments throughout the different stages of terminal illness and the factoring in of the patient's consent, his pain and suffering.)

36. An additional distinction exists in Jewish law which helps in determining which medical treatment is classified as "removal of the impediment." R. Shlomo Zalman Auerbach, a leading contemporary authority, distinguishes between ordinary and extraordinary treatment. The following are his words, as quoted in *Nishmat Avraham*, Y.D. by Dr. Abraham Abraham, p. 245:

We must distinguish between treatment that fulfills the natural needs of the patient or is accepted as ordinary treatment, and treatment which is extraordinary. Thus, for example, a patient who has cancer which has spread throughout his entire body, is near death, and is in severe pain may not be deprived of oxygen, food, or other nutritional liquid that he needs. If he is suffering from diabetes, one should not stop the insulin injections so as to hasten his death. One should not discontinue blood transfusions or other medications, such as antibiotics, needed for his care... However, there is no obligation to treat such a patient where the treatment is extraordinary and the only effect would be to prolong the life of the patient for a short time without curing his underlying

disease. This is especially true when the patient does not consent due to the extreme pain or suffering involved...

Similarly, where a patient whose condition is hopeless has stopped breathing or his heart has stopped beating, there is no obligation to try to resuscitate him or prolong his temporary life if this will add pain to the pain he already has.

A Patient Who Is Not Competent To Express His Wishes

37. It is worth noting that unlike other legal systems Jewish legal literature contains no separate discussion regarding euthanasia where the patient is not competent to express his opinion and desire (see *infra*, section 61 B4) This is because in other legal systems *the point of departure* is the autonomy of the individual patient, i.e. the wishes of the patient, and the cases that do not take account of the patient's wishes, which are held in American law (as we will discuss later) to involve compelling State interests, are the exceptions to the rule. Therefore, there is specific treatment of how to assess the wishes of a patient who is incompetent to express them.

In contrast, the principles that govern the issue in Jewish law are mainly objective principles: The sanctity of life, prevention of the pain and suffering, the distinction between active and passive euthanasia, and in certain circumstances the consent or non-consent of the patient, etc. Based on these principles Jewish law reaches its decisions against the background of the principle "Its ways are pleasant ways" and the decision "must accord with reason and logic." The task of decision-making is placed primarily on the halachic authority and the doctor and is based on the factors mentioned above (see the responsum of R. Moshe Feinstein which dealt at length with quality of life of a comatose patient).

The Values of a Jewish State - Summary

38. In Jewish thought various overarching principles and values operate within the context of this momentous and complex labyrinth of law and medicine. Such principles include the sanctity of human life based on the supreme value of man's creation in the image of God, the fundamental precept of "love your neighbor as yourself," the minimizing of pain and suffering, the obligation of the doctor to heal and the patient to seek healing and his right to refuse medical treatment. It also includes the approach to the decision-making of "Its ways are pleasant ways" and the application of reason, as well as other rules that we discussed above.

The point of departure in the complex and extensive area of medicine and Jewish law is the supreme value of the sanctity of life. This supreme value is based, as stated, on the belief that man was created in the image of God

with all that that implies. Therefore, the standard of the *value* of a person does not exist nor can it exist. The law for a physically handicapped person is the same as that for a physically healthy person, and the law for a mentally deficient person is the same as that for a mentally healthy person; we do not measure the degree of health of the body or mind. Similarly, there is not, nor can there be, a standard for the *length* of a person's life. The same rules apply to a moment of life as to a lengthy life; the flickering candle still burns and illuminates. Therefore, *actively* hastening death or actively shortening life, is absolutely forbidden even under the nomenclature of "mercy killing," and even at the behest of the patient. In such situations the obligation is to ameliorate pain and suffering in every possible way.

The situation is different with regard to *passive* euthanasia, the non-prolongation of life, known in Jewish law as the "removal of the impediment." Passive euthanasia is permissible, and according to some authorities mandatory, after taking into account the value of minimizing the patient's physical and mental pain and suffering, the desire of the patient, the effects of treating the patient against his will, the types of treatment, whether ordinary or extraordinary, natural or artificial, and the like.

With regard to the question of patient autonomy as a matter of principle, medical treatment is obligatory for both the doctor and the patient, this obligation being applicable primarily where the treatment is life saving. Aside from these special cases that involve immediate danger to life, this principle has been progressively circumscribed in various situations where the consent of the patient is held to be needed and he should not be treated against his will. The consideration of individual autonomy in the decisions of the halachic authorities came about largely as a consequence of the momentous developments in our generation in the field of medicine and the struggle of the halachic authorities to deal with them. At times, it is not the opinion of the doctor with regard to the pain and suffering of the patient that is determinative but rather that of the patient himself, for it is forbidden "actively to cause him pain." The adverse effect of the undesired treatment itself on the patient is regarded as significant: "the mere fact that it is forced on him can be dangerous." This illustrates the methodology of the halacha; it develops and evolves in the process of case by case by decision making.

In all these and similar questions, we are witness to halachic decisions which continue to grow in number with many differences of opinion regarding the most difficult and complex questions dealing with issues of the sanctity of life and the minimization of physical and psychological pain and suffering with all their ramifications and variations as is the usual and accepted process in the halachic system.

The Values of a Democratic State as to Our Issue

39. Having come this far and having delineated the values of a Jewish state on our issue, we must now examine the question according to the values of a democratic state. For this purpose we will analyze the situation in two western democracies. The United States of America and Holland.

The United States

A. The Right to Refuse Medical Treatment

40. American law recognizes the right of a patient to refuse medical treatment with the limitations which we will set out below. The legal recognition of this right went through a number of stages. In the case of Karen Quinlan (*In Re Quinlan*, 355 A.2d. 647 (1976)) the right to privacy was held to be the legal source of a patient's right to refuse medical treatment.

Karen Quinlan was 21 years old when as a result of an accident her breathing stopped for a significant amount of time. The lack of oxygen caused severe brain damage and she entered into a "persistent vegetative state." A year after the accident Karen was still in a vegetative state while attached to a respirator and receiving artificial nutrition and hydration. Karen's father, after consulting with his priest, sought to disconnect Karen from the respirator. The Supreme Court of New Jersey granted the request stating:

We have no hesitancy in deciding... that no external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life (*id.*, at 663).

As mentioned, the Court saw the right to privacy as the legal source of Karen's right:

Although the Constitution does not explicitly mention a right of privacy, Supreme Court decisions have recognized that a right of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L.Ed.2d 349 (1972); *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). The court has interdicted judicial intrusion into many aspects of personal decision, sometimes basing this restraint upon the conception of a limitation of judicial interest and responsibility, such as with regard to contraception and its relationship to family life and decision. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965).

The Court in *Griswold* found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights “formed by emanations from those guarantees that help give them life and substance.” 381 U.S. at 484, 85 S.Ct. at 1681, 14 L.Ed.2d at 514. Presumably this right is broad enough to encompass a patient’s decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman’s decision to terminate pregnancy under certain conditions. *Roe v. Wade*, 410 U.S. 113, 153, 93 S. Ct. 705, 727, 35 L.Ed. 147, 177 (1973).

The right of privacy is not explicitly mentioned in the American constitution. Therefore, the courts sought an additional legal source for the patient’s right to refuse medical treatment. In *Saikewicz (Superintendent of Belchertown State School v. Saikewicz)*, 370 N.E.2d 417 (1977) the supreme Court of Massachusetts based the patient’s right to refuse medical treatment on both the right to privacy and the common law doctrine of informed consent. As already stated by Justice Cardozo in the *Schloendorff* case:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault for which he is liable in damages (*Schloendorff v. Society of New-York Hospital*, 105 N.E. 92, 93 (1914)).

As stated, *Saikewicz* used this doctrine together with the right to privacy as the legal source to allow the discontinuance of chemotherapy for a 67 year old leukemia patient who was severely retarded. In contrast, in the *Storar* case (*In re Storar*, 420 N.E.2d 64 (1981)) the New York Court of Appeals refused to base the patient’s right to refuse medical treatment on the right to privacy and, instead, found it sufficient to rely on the doctrine of informed consent. Such was also the case in the *Eichner* case (*In re Eichner* was decided together with *In re Storar*), where the court allowed the disconnecting of a respirator from an elderly man who during the course of a hernia operation had a heart attack and fell into a persistent vegetative state.

In 1985 the same court that decided the *Quinlan* case (in *In re Conroy*), basing the right to refuse medical treatment directly on the doctrine of informed consent, while the right to privacy *might* apply:

While this right of privacy **might** apply in a case such as this, we need not decide that issue since the right to decline medical treatment is, in any event, embraced within the

common-law right to self-determination (*In re Conroy*, 486 A.2d 1209, 1223 (1985); emphasis added).

Similarly in *In re Estate of Lonegeway* (549 N.E.2d 292 (1989)) the Supreme Court of Illinois preferred to base the right of a patient to refuse medical treatment on the doctrine of informed consent and not the right of privacy:

Lacking guidance from the Supreme Court, we decline to address whether Federal privacy guarantees the right to refuse life-sustaining medical treatment... In the present case, we find a right to refuse life-sustaining medical treatment in our State's common law and in provisions of the Illinois Probate Act (*id.* at 297).

The turning point in regard to the legal basis for a patient's right to refuse medical treatment occurred when, for the first time, the issue came before the Supreme Court of the United States in *Cruzan v. Director Missouri Department of Health*, 110 S.Ct. 2841 (1990). Nancy Cruzan was 30 years old when she was rendered unconscious by a car accident and became a comatose. Her respiration and heartbeat continued independently but her mental faculties were severely damaged. The doctors estimated that Nancy could continue living for another 30 years; however, when it became clear to her parents that there was no hope of her regaining consciousness, they requested that the artificial nutrition and hydration be discontinued. When the case came before the Supreme Court of the United States, Nancy had been in a comatose state for seven years.

The Supreme Court took note that the State courts based the right to refuse medical treatment on the doctrine of informed consent, or the right to privacy, or both (*id.*, at 2847); but the Supreme Court chose to base the right on the 14th Amendment to the American Constitution which reads:

Nor shall any State deprive any person of life, **liberty**, or property, without due process of law. (emphasis added).

As a result, the right to refuse medical treatment was given constitutional protection.

B. Limitations on the Right to Refuse Medical Treatment

41. The right to refuse medical treatment is not absolute. The Supreme Court of the United States expressed such a view in the *Jacobson* case:

The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the

common good. On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy (*Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)).

In *Cruzan*, in addition to recognizing the right to refuse medical treatment, the Supreme Court similarly clarified that the right is a relative one:

But determining that a person has a “liberty interest” under the Due Process Clause does not end the inquiry; whether respondent’s constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests (*Cruzan* at 2851-2852).

The relative nature of the right to refuse medical treatment is manifest in its being limited by four interests deemed “compelling State interests.” The four interests are: The preservation of human life, the prevention of suicide, the maintenance of the integrity of the medical profession and the protection of innocent third parties who are dependent on the patient.

Before briefly discussing the nature of these interests, a comment is in order. The phrase “compelling State interests” has certain negative connotations. It is worth noting what we wrote on a different but relevant issue regarding the situation in the ancient Middle East where a debtor was enslaved for non-payment of his debt. According to Jewish law, the enslavement of a debtor is absolutely prohibited under the principle of personal liberty for one created in the image of God. Even entering the debtor’s home in order to seize the collateral was prohibited. In contrast, the laws of the ancient Near East allowed such an enslavement. However, there is a record of an exception:

We receive interesting information from the Greek scribe, Diodorus, with regard to the Egyptian king Bocchoris’ order at the end of the 800’s B.C.E. doing away with enslavement for debt. We find the reasoning of Diodorus “instructive:” As opposed to a person’s wealth which is designated for payment of a debt, “the *bodies* of the citizens *necessarily belong to the State*, in order that the State receive the most benefit from the services which its citizens owe it, whether at times of war or times of peace” (see in detail, M. Elon, *The Liberty of the Individual in Regard to Debt Collection in Mishpat Ivri* ((ט”כשן 7, and notes, *ibid*; *Perach Non-Profit Corp. v. Minister of Justice*, not yet published, section 18 of the opinion).

This reason for the cessation of the creditor’s ability to enslave the debtor, namely the State’s ownership of his body, is repugnant. And a hint of this

offensive nature is found in the phrase “*State interests*” in preserving human life and the like.

42. *The interest in preserving human life* is recognized as the most important interest in limiting a patient’s right to refuse medical treatment. Regarding this interest, the Court stated in *Cruzan*:

We think a State may properly decline to make judgments about the “quality” of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual (*Cruzan v. Director*, 110 S.Ct. 2841, 2843 (1990)).

And in the *Saikewicz* case it was stated that:

It is clear that the most significant of the asserted State interests is that of the preservation of human life (*Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 425 (1977). And see *Foody v. Manchester Memorial Hospital*, 482 A.2d 713, 718 (1984); *In re Spring*, 405 N.E.2d 115, 123 (1980); *In re Conroy*, 486 A.2d 1209, 1223 (1985)).

When balancing the interest in preserving human life and the right of a patient to refuse medical treatment, the court will consider the *degree of intrusion* into the body of the patient that is necessary for the treatment and *the chances of the treatment being successful*. The greater the intrusion and the smaller the chance of success, the less the court will be inclined to force the treatment on the patient; and vice versa. As the Court in the Karen Quinlan case put it:

The nature of Karen’s care and the realistic chances of her recovery are quite unlike those of the patients discussed in many of the cases where treatments were ordered. In many of those cases, the medical procedure required (usually a transfusion) constituted a minimal bodily invasion and the chances of recovery and return to functioning life were very good. We think that the State’s interest *contra* weakens and the individual’s right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual’s rights overcome the State interest (*Quinlan* at 664).

The court will also take into account the *pain and suffering* that will be caused to the patient by the medical treatment and the *risk* involved in the procedure. Such was the case in *Saikewicz*, which dealt with administering chemotherapy to a 67 year old leukemia patient who was severely retarded. The court discussed the suffering caused by the treatment and the inability of the patient to understand the reason for his suffering:

These factors in addition to **the inability of the ward to understand** the treatment and **the fear and pain he would suffer** as a result outweighed any benefit from such treatment, namely, the possibility of some uncertain but limited *extension* of life (*Saikewicz* at 419, emphasis added).

The court also noted that the chemotherapy may impact on the healthy cells and expose the patient to various infections and that the chemotherapy is effective only in 30-50% of the cases and can stop the spread of the disease only for a period of two to thirteen months on average. Therefore, the Court decided that the treatment may not be forced on the patient.

It is clear that the most significant of the asserted State interests is that of the preservation of human life. Recognition of such an interest, however, does not necessarily resolve the problem where the affliction or disease clearly indicates that life will soon, and inevitably, be extinguished. The interest of the State in prolonging a life must be reconciled with the traumatic costs of the prolongation. There is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where, as here the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended (*id.*, at 425).

Similarly the *Candura* case held that a 77 year old diabetes patient should not be compelled to amputate her leg despite the fact that it became gangrenous (*Lane v. Candura* 376 N.E.2d 1232 (1978)).

In contrast, the same factors have led the court, in the appropriate circumstances, to force medical treatment on the patient. In *Jacobson* the Court held that one may be forced to receive an injection against a contagious disease (*Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). And the *Georgetown* case held that a woman of a certain religious sect should be compelled to receive a transfusion. The woman had refused the transfusion for religious reasons; however, the court compelled the treatment because it was a simple, routine procedure which was necessary to save her life, and it was determined that the woman did indeed want to continue living [*President of Georgetown College, In re Inc.*, 331 F.2d 1000 (D.C. Cir., 1964)].

43. *The interest in preventing suicide* is related to the interest of preserving human life:

The underlying State interest in this area lies in *the prevention of irrational self-destruction* (*Saikewicz* at 426 n. 11).

At the same time, in regard to *terminally ill* patients the court in *Saikewicz* noted that the interest in preventing suicide is likely to give way to the right of the patient to refuse medical treatment because the *intent* of the refusal is not necessarily the desire to die:

In the case of the competent adult's refusing medical treatment, such an act does not necessarily constitute suicide since (1) in refusing treatment the patient may not have the **specific intent to die**, and (2) even if he did, to the extent that the **cause of death was from natural** causes the patient did not set the death producing agent in motion with **the intent of causing his own death...** Furthermore, the underlying State interest in this area lies in the prevention of irrational self-destruction. What we consider here is a competent, rational decision to refuse treatment when death is inevitable and the treatment offers no hope of cure or preservation of life (*ibid.*, emphasis added).

Maintaining the Integrity of the Medical Profession

44. Another important interest justifying the limitation of a patient's right to refuse medical treatment is *the interest in maintaining the integrity of the medical profession*. The entire endeavor of the medical profession is only to cure the sick and preserve life:

The medical and nursing professions are consecrated to preserving life. That is their professional creed. To them a failure to use a simple established procedure... would be malpractice (*John F. Kennedy Memorial Hospital v. Heston*, 279 A.2d 670, 673 (1971)).

In order not to blur the boundaries of obligatory medical ethics and in order to allow the doctor to employ proper judgment in each situation, it is appropriate to limit the right to refuse medical treatment in the interest of maintaining the integrity of the medical profession.

The last State interest requiring discussion is that of the maintenance of the ethical integrity of the medical profession as well as allowing the hospitals the full opportunity to care for people under their control (*Saikewicz* at 426).

However, in regard to *terminally ill* patients, the view is expressed that medical ethics do not dictate the prolongation of life at any cost. Therefore, in such cases there is no reason why the right of the patient to refuse medical treatment should give way to the interest of maintaining the integrity of the medical profession:

Physicians distinguish between curing the ill and comforting and easing the dying; that they refuse to treat the curable as if they were dying or ought to die, and that they have sometimes

refused to treat the hopeless and dying as if they were curable (*In re Quinlan*, 335 A.2d 647, 667 (1976)).

The force and impact of this interest is lessened by the prevailing medical ethical standards. Prevailing medical ethical practice does not, without exception, demand that all efforts toward life prolongation be made in all circumstances (*Saikewicz* at 426).

Active and Passive Euthanasia - Distinguishing Between Different Types of Treatments

45. In order clearly to define when the patient's right to refuse medical treatment is limited by the interest in maintaining the integrity of the medical profession, the courts have made use of the following three distinctions: between *active* and *passive* euthanasia; between refraining from acting to prolong life and discontinuing life-prolonging acts (compare *supra*, section 29 on euthanasia); and between ordinary and extraordinary treatment.
- A. Active euthanasia is forbidden and constitutes a crime in all of the United States. Attempts to pass a law recognizing the possibility of active mercy killing in California and Washington between 1988 and 1992 failed, even if only by a small majority (see Dr. A. Steinberg "Terminally Ill," p. 94).

At the same time, there have been some exceptions with regard to active mercy killing. Dr. Steinberg states (*id.*) that:

It was publicized that the pathologist Dr. Jack Kevorkian "invented the suicide machine," with which twenty people committed suicide between 1990 and 1993 in Michigan until a law was passed prohibiting assisted suicide and mercy killing. The first patient who committed suicide with the help of this doctor was an Alzheimer's patient by the name of Janet Adkins on June 4, 1990... This doctor, who was called "the doctor of death" was tried and acquitted twice in the Michigan State court, but his methods stirred up wide public protest. It is worth noting that he is a doctor without any clinical experience, without any ability of verifying the medical condition of the patient and without any professional ability to ascertain the seriousness of the intentions of those who request his active assistance in committing suicide.

Another phenomenon (*id.*):

An entire book devoted to ideas about suicide (D. Humphry, *Final Exit*, The Hemlock Society, 1991) was published in the United States, describing methods for assisted suicide, encouraging parents to commit suicide and giving practical advice on how to do this. The book was subject to harsh

reviews, for beyond its basic value defects the book contains serious social-moral flaws. It does not address itself only to terminally ill patients; it is addressed to the mass of people and it negatively effects all sorts of people, especially teenagers, who have a tendency to commit suicide.

- B. A second distinction is that between *refraining* from acting to prolong life, which is permissible, and *discontinuing* life-prolonging activities, which is forbidden. It is instructive to note the similarity of this distinction to that of Jewish law which distinguishes between the "removal of an impediment" and other acts which are not so classified. We will return to this point later.

It should be noted that the Supreme Court of New Jersey retracted the force of this distinction in *Conroy*. In that case, the nephew of a 94 year old patient requested that artificial nutrition and hydration be discontinued. The patient suffered from severe brain damage and did not respond to speech. Yet, she would move her head, neck, and arms, and would smile when her hair was stroked. The court stated:

Thus, we reject the distinction that some have made between actively hastening death by terminating treatment and passively allowing a person to die of a disease as one of limited use (*In re Conroy* at 1233-1234).

Would a physician who discontinued nasogastric feeding be actively causing her death by removing her primary source of nutrients; or would he merely be omitting to continue the artificial form of treatment, thus passively allowing her medical condition, which includes her inability to swallow, to take its natural course? (*id.*)

[I]t might well be unwise to forbid persons from discontinuing a treatment under circumstances in which the treatment could permissibly be withheld. Such a rule could discourage families and doctors from even attempting certain types of care and could thereby force them into hasty and premature decisions to allow a patient to die (*id.*)

- C. The final distinction to which the American courts relate is that between *ordinary* treatment and *extraordinary* treatment. The more ordinary the treatment, the greater the State interest in compelling the treatment; and vice versa:

The decision whether to discontinue life - sustaining measures has traditionally been expressed by the distinction between ordinary and extraordinary treatment... Under the distinction, ordinary care is obligatory for the patient to accept and the doctor to provide, and extraordinary care is optional (*Foody v. Manchester Memorial Hospital*, 482 A.2d. 713, 719 (1984)).

Ordinary treatment, as opposed to extraordinary treatment, is defined as follows:

Ordinary means are 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 (*id.* quoting *Kelly, Medico-Moral Problems*, 129 (1959)).

Protecting Third Party Interests

46. The fourth and last interest limiting the patient's right to refuse treatment is the interest in *protecting third parties who are dependent on the patient*:

When the patient's exercise of his free choice could adversely and directly affect the health, safety and security of others, the patient's right of self determination must frequently give way (*In re Conroy* at 1225).

In the United States great weight is given to this interest when children are dependent upon the patient. As the court noted in *Saikewicz*:

One of the interests requiring protection was that of the minor child in order to avoid the effect of 'abandonment' on that child as a result of a parent's decision to refuse the necessary medical measures (*Saikewicz* at 426, and See *Georgetown* at 1008).

Some have also considered this interest when dealing with a pregnant woman who refuses to accept medical treatment (*Jefferson v. Griffin Spalding Country Hospital Authority*, 274 S.E.2d 457 (1981)).

The Right of a Minor / Incompetent to Refuse Medical Treatment

47. The right to refuse medical treatment also exists for a minor and incompetent and its source is discussed in *Cruzan* (at 2852) and other places, but this is not the place to be lengthy.

The difficulty regarding minors and incompetents may perhaps be described as a *judicial* one. How can one ascertain that the minor or incompetent wishes to exercise his right to refuse medical treatment? In this connection there are three issues:

1. The test for establishing the desire of the minor/incompetent
2. The standard of proof on this question
3. The authorized body to decide the question

48. In the United States there are two tests to establish the desire of the incompetent; the “substituted judgment” standard and the “best interests” standard. With the former test an attempt is made to determine the will of the specific patient. Under the latter, the decision is based on what is best for the patient without necessarily representing the desire of the specific patient.

The *substituted judgment* standard is applied mainly when the incompetent (this is not relevant to minors) had drafted a “living will,” i.e. a document that was drafted before the person became an incompetent, in which he expressed his desire to refuse certain medical treatment (see, for example, *John F. Kennedy Memorial Hospital v. Bludworth*, 45 So.2d 921 (Fla. 1984)). There are also cases where the court determines the desire of the patient, even if he never expressed his desire, by relying on the desire of “the reasonable person:”

If preferences are unknown, we must act with respect to the preferences a reasonable, competent person in the incompetent’s situation would have (*Saikewicz at 430 n. 15*).

In these instances, the substituted judgment standard comes close to the “best interests” standard. According to the best interests test, the minor’s best interests are decided by weighing the advantages of the treatment against the burden caused to the patient by the treatment (see *Barber v. Superior Ct.*, 195 Cal. Rptr. 484 (1983)). The court stated in *Conroy*:

The net burdens of the patient’s life with the treatment should clearly and markedly outweigh the benefits that the patient derives from life. Further, the recurring, unavoidable and severe pain of the patient’s life with the treatment should be such that the effect of administering life sustaining treatment would be inhumane (*In re Conroy at 1232*).

The reasoning of the court in *Conroy* is interesting:

We recognize that for some incompetent patients it might be impossible to be clearly satisfied as to the patient’s intent to accept or reject the life-sustaining treatment. Many people have spoken of their desires in general or casual terms, or, indeed, never considered or resolved the issue at all. In such cases, a surrogate decision maker cannot presume that treatment decisions made by a third party on the patient’s behalf will further the patient’s right to self-determination, since effectuating another person’s right to self-determination presupposes that the substitute decision maker knows what the other person would have wanted. Thus, in the absence of adequate proof of the patient’s wishes, it is naive to pretend that the right to self-determination serves as the basis for substituted decision making.

We hesitate, however, to foreclose the possibility of humane actions, which may involve termination of life-sustaining treatment for persons who never clearly expressed their desires about life-sustaining treatment, but who are now suffering a prolonged and painful death. **An incompetent, like a minor child, is a ward of the state, and the state's parens patriae power supports the authority of its courts to allow decisions to be made for an incompetent** that serve the incompetent's best interests, even if the person's wishes cannot be clearly established. This authority permits the state to authorize guardians to withhold or withdraw life-sustaining treatment from an incompetent patient if it is manifest that such action would further the patient's best interests in a narrow sense of the phrase, even though the subjective test that we articulated above may not be satisfied (*Conroy* at 1231).

Compare the comment of Diodorus discussed above.

49. The issue of the standard of proof as to the desire of the incompetent only arises regarding the *substituted judgment* of the patient, for the *best interests* standard does not purport to represent the desire of the patient. American cases refer to three standards of proof that could be used: Beyond a reasonable doubt, as in criminal cases; preponderance of the evidence, as in civil cases; and an intermediate standard, clear and convincing evidence (see D.F.Forre "The Role of the Clear and Convincing Standard of Proof in Right to Die Cases" 8(2) *Issues in Law and Medicine*(1992), 183-85.)

On this issue, there is no uniform law among the various States; each state follows its own legislation and case-law. In *Eichner, supra*, decided by the Court of Appeals of New-York, an 83 year old patient had been a member of a Christian order for 66 years. Father Eichner, the head of the religious order, requested that the patient be disconnected from the respirator. He claimed that the patient had stated on many occasions that he did not want his life prolonged by any extraordinary procedures such as being connected to a respirator. The court granted the request after finding a sufficient evidentiary basis as to the desire of the patient.

In the *Spring* case, (405 N.E.2d 115 (1980)), the court relied on the judgment of the patient's wife and son as to the *estimated* will of the patient to refrain from medical treatment, despite the absence of evidence as to the *actual* will of the patient. In contrast, in *O'Conner* the New-York Court of Appeals refused to adopt this approach and held, against the wishes of the family and relatives, to connect a 77 year old patient to artificial nutrition. The court stated:

It is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another. Consequently, we adhere to the view that, despite its pitfalls and inevitable uncertainties, the inquiry must always be narrowed to the patient's *expressed intent*, with every effort made to minimize the opportunity for error (*In re Westchester Country Medical Center on behalf of O'Conner*, 531 N.E.2d 601, 613 (1988)).

50. The dispute as to *the standard of proof* in regard to the wishes of a minor/incompetent was dealt with in the *Cruzan* case, where the Court stated that "*clear and convincing evidence*" was necessary:

A State may apply a *clear and convincing evidence standard* in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. We note that many courts which have adopted some sort of substituted judgment procedure in situations like this, whether they limit consideration of evidence to the *prior expressed wishes* of the incompetent individual, or whether they allow *more general* proof of what the individual's decision would have been, require a *clear and convincing standard of proof* for such evidence. (*Curzan* at 2854-2855).

Shortly after the decision in *Cruzan*, the "living will" became the guide for establishing the wishes of the patient who is incompetent. In 1989, a federal statute was adopted which in effect requires every hospital to provide a patient who comes to the emergency room with a "living will" form which the patient can fill out (Patient Self-Determination Act, 1989). Use of this form, which is called The Danforth Form because it was proposed by Senator Danforth, became an obligatory practice in 1992 (Senate Bill 1776, 101st Congress 1st Session).

51. As for *the authorized body* that will determine the wishes of the patient, *Curzan* relied on the ability to appoint a person - a relative or someone else - as someone who would express the wishes of the patient and serve as a guardian for the patient on this matter (*Curzan* at 2855).

The relevant literature indicates the factors which the court should weigh when choosing a surrogate decision maker for the patient. Alan Meisel stresses the possible biases that the surrogate may have (Alan Meisel, *The Right to Die*, 1989, with cumulative supplement current to March 1991). A Commission appointed by the President set out the advantages of appointing a family member:

1. The family is generally most concerned about the good of the patient.

2. The family will also usually be most knowledgeable about the patient's goals, preferences and values.
3. The family deserves recognition as an important social unit that ought to be treated, within limits, as a responsible decision maker in matters that intimately affect its members.
4. Especially in a society in which many other traditional forms of community have eroded, participation in a family is often an important dimension of personal fulfillment.
5. Since a protected sphere of privacy and autonomy is required for the flourishing of this interpersonal union, institutions and the state should be reluctant to intrude, particularly regarding matters that are personal and on which there is a wide range of opinion in society. (President's Commission for the Study of Ethical Problems and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment* at p. 28).

In *Cruzan*, the Court approved the appointment of a family member as a surrogate:

We also *upheld* the constitutionality of a state scheme in which parents made certain decisions for mentally ill minors...decision which allowed a State to rely on family decision making (*Cruzan* at 2855).

At the same time, the Court expressed a cautious note:

But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself... There is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent (*id.*, at 2855-2856).

Ethics Committees in Hospitals

52. It is worth noting that in the United States, ethics committees help decide questions relating to our subject on an ongoing basis. Only when there is a difference of opinion is the case referred to the courts (see *Saikewicz* at 424).

Alan Meisel, *ibid.*, discussed the advantages of the ethics committees in comparison to the court. The most important advantage, according to Meisel, is the cooperation between family members, friends, treating physicians and other doctors, men of faith, legal advisors, philosophers and psychologists. On a question that involves a mix of law and ethics, medicine and psychology, halacha and philosophy, it is appropriate that the experts do their share. Other advantages which Meisel mentions are:

maintaining privacy for the family and relatives by keeping things out of the media, accelerating the decision making process, and saving court costs.

The existence of such ethics committees under the supervision of the court, where there is a difference of opinion, has ostensibly a number of advantages, and it is advisable for the authorized bodies in Israel to investigate the matter and consider its different aspects.

Holland

53. Holland is the only western democracy that openly and legally active euthanasia. Initially, the courts and the Royal Society for the Advancement of Medicine drafted specific guidelines which, if met, would allow the acquittal of a doctor who committed an active mercy killing despite the illegality of the act. The guidelines are the following:

The patient himself declares that his physical and mental suffering is unbearable; the patient himself requests and agrees to such action, at a time that he is fully and legally competent; the pain and desire to die are fixed and constant; the consent of the patient is given freely, informed and consistent; the patient understands his condition, as well as the alternatives and the significance of his decision; the doctor and the patient agree that they are dealing with a terminal illness accompanied by a great deal of pain; other attempts have been made to alleviate the pain and suffering but there is no other solution which the patient finds acceptable; an additional doctor agrees to the same facts; only the doctor himself and no agent will do the killing; the act will not cause suffering to others beyond what is necessary; the decision and implementation is done with great caution; the facts and the process of reaching a decision will be put to writing and clearly documented. In cases involving children, the parent's consent is effective under the same conditions (A. Steinberg, *Terminally Ill*, p. 92).

At the beginning of 1993 the Dutch Parliament adopted a statute permitting active euthanasia under the above conditions. Sorrowfully, the recognition of active euthanasia, even with these constraints, has produced in Holland a situation where the danger foreseen to occur on the "slippery slope" has actually come about.

The number of those killed in this manner is not certain. But, based on various studies, it ranges between 5,000 and 10,000 people every year.

Indeed, within a few years of Holland's starting down this path we have become aware of various sharp deviations [from the guidelines]. Only a minimal number of the killings are reported as required. Killings have been carried out on minors and incompetents even without the consent of their parents. Killings have been carried out on unconscious patients. In many cases, the decision was made by a single doctor without the consultation or cooperation of another physician. Some claim that euthanasia in Holland is out of control and that there are hundreds and thousands of cases of mercy killings without the consent of the patient and without a report to the authorities. Moreover, the advocates of active euthanasia in Holland have moved from a stance that recognizes and allows such action to a stance that sees it as the doctor's ethical obligation to respond to such a request and bring an end to a worthless life (*id.*, at 93-94).

Israeli Judicial Decisions on Issues of Law and Medicine Prior to the Adoption of the Basic Law: Human Dignity and Freedom

54. Having studied our issue as reflected in the values of a Jewish state and of a democratic state, we should first attempt to find a syntheses between Jewish and democratic values as we are instructed to do in order to fulfill the provisions of paragraphs one and eight of the Basic Law: Human Dignity and Freedom. However, before doing that, it is worth looking at the case-law at all levels of the judicial system which involved medicine, halacha and law. This analysis will reveal an instructive phenomenon, i.e. that even *before* the Basic Law: Human Dignity and Freedom came into effect, the practice of drawing from Jewish values was clearly evident. We will cite a number of examples.

The Zim Case

Zim v. Mazier (17 P.D.1319) dealt with the enforceability of an "exemption clause" which appeared in a travel ticket of the Zim company which exempted the company from all damage due to the company's negligence caused to the passenger while on the ship. Ms. Mazier was injured by spoiled food which she received on board. The court held that this exculpatory clause was void as against public policy. The deceased Chief Justice Silberg wrote (*id.*, at 1332):

We surveyed the English and American decisions on our legal issue. We saw the fundamentally different ethical approaches and the question is, which path should we choose for ourselves. The judges of Israel are at a crossroads: Shall we follow the harsh English law which states: "Let the letter of the

contract be followed” or perhaps we will choose, at least when it comes to an injury which involves a person’s life or health, the more liberal law of the United States.

It seems to me that we should adopt the American law. While doing so we aren’t “adopting” a stranger, but are reaching legal conclusions that are deeply rooted in the Jewish tradition.

If you be asked on the morrow: on what basis can one derive the legitimacy of imposing our outlook on a rule whose origin is in Turkish law? You shall answer: The rule that we may void a contract as against the public interest is drawn from paragraph 64(1) of the Ottoman Civil Procedure Law. But as to the very question of what constitutes public policy or the public welfare (= *tikkun ha-olam*), we must answer: our own moral outlook and our own culture, for no other source for “order” or “stability” exists!

At this point, Justice Silberg discussed the supreme value of human life in the Jewish outlook (*id.*, at 1333):

From time immemorial Judaism glorified the immense value of human life. The Torah of Israel is not a philosophy of beliefs and ideas but rather a living Torah - *for* life and *of* life. “By the pursuit of them [My laws], man shall live (*Leviticus* 18:5);” “Live by them and not die because of them (*Yoma* 85b).” There are countless verses which stress the *causal* connection between the Torah and life. For example, “Keep my commandments and live (*Proverbs* 4:4);” “He is a righteous person; he shall surely live (*Ezekiel* 18:9);” “Who is the person who seeks life...(*Psalms* 34:13),” and others like these.

It is clear that, Judaism also does not see life as the ultimate value. There are more idealistic and lofty goals which are worth - and so are we commanded - the sacrifice of our lives. Evidence of this: Hundreds of thousands of Jews gave their lives throughout the ages and throughout the world to sanctify God’s name. But, within the normal framework of societal life and according to the priorities of the Torah of Israel, life is the most holy of all possessions, the preserving of which sets aside all other sacred things without a doubt including the sanctity of a contract. “Nothing stands in the way of saving life except for the commission of idolatry, incest or murder (*Ketubot* 19a);” “For it (the Shabbat) is holy to you - it is given into your hands and you are not given into her hands (*Yoma* 85b).”

There is nothing more abominable to Jewish morality than the taking of a life. King David was punished and the Lord told him: "You will not build a house for My name, for you are a warrior and have spilled blood (*I Chronicles* 28:3);" Even a Sanhedrin which applies the law to execute someone once every seven years is considered a hanging court (*Makkot* 7a), and the vision of the prophets is for everlasting world peace. In the prophecies of Isaiah and Micha: "Nation shall not lift sword against nation and they shall no longer learn war (*Isaiah* 2:4; *Micha* 4:3)." After all is said and done do these not reflect a disgust and repulsiveness about killing? And these are ancient ideas.

It is not easy to take these ideas and fashion actual law from them. But when the question that must be decided hinges on our outlook, what is "good" and what is "bad," what is "improving" and what is "damaging" the world, we are permitted and obligated to draw specifically from these early sources, for only these faithfully represent the basis of the Jewish nation at large.

In the *Zim* case, the late Justice Vitkin stated (*id.*, at 1337):

No one questions the weight granted to the sanctity of life. And I would say this is one of those well known principles which requires no proof. In all places, without differentiating between religion or nationality, all see human life as a precious possession which is to be protected at all costs. This is the guiding rule, and so too by us, the Jewish nation, as my colleague Justice Silberg has shown in his opinion.

Between two possible alternatives concerning the content of public policy - from two western legal systems - the court chose the approach which matched the "moral outlook and culture" of Israel's heritage that are "deeply rooted in Jewish tradition." This is the synthesis between Jewish and democratic values, which is part of Israel's legal framework even without the legislator's mandate, but rather, from a correct and intelligent interpretation, according to the socio-historical principles of our legal system. And all the more so is this the proper approach to interpretation today, when the synthesis between Jewish and democratic values in the State of Israel has become a binding legislative requirement of the legal system of the State of Israel.

In another case (*Attorney General v. Doe* 42(2) P.D. 661), the question involved the consent of an incompetent to donate a kidney for transplanting into his father. We conducted a broad survey of the Jewish law on the matter (*id.* at 677-684). The major points of this case were discussed above (Section 25, 27).

The *Zaisov* case (40(2) P.D. 85) concerned a claim against a doctor for damages resulting from his negligent genetic diagnosis of a minor. The baby was born with a hereditary disease, the birth being the outcome of his negligence and but for that negligence the parents would not have brought that child into the world. To support the decision, Jewish law was referred to (*id.*, at 95, 128); but this is not the place to be lengthy.

The Kurtam Case

55. Of great importance for our issue is the decision of this Court in the Kurtam case (*Kurtam v. The State of Israel*, 40(3) P.D. 673). The issue there was:

The complex question, in which circumstances if at all may a doctor operate on a patient against his will when the doctor is convinced that the surgery is absolutely necessary to save his life (*id.*, at 681).

In the opinion of Justice Bach (*id.* at 681-682):

There is no hiding from the fact that at least in England and America the principle that a person is the ruler over his body has become rooted and accepted and that it is impermissible to carry out any physical treatment, and all the more so any surgery, against the wishes of the patient and without receiving his permission...

It is reasonable to conclude that a doctor is prohibited from carrying out an operation without the consent of the patient, even if the doctor is convinced that it will save the patient's life.

The exceptions to this rule are, as stated in the opinion of Justice Bach, as follows (*id.*, at 683):

There are a number of recognized exceptions in Anglo-American case-law, the main ones being:

1. When the patient is unconscious or is incapable for any other reason to make an independent decision regarding the proposed operation or [is incapable] of expressing his desire and there is no person authorized to make such a decision for him...

In such a case, when the doctor believes that the operation is needed immediately to save his life, we may look upon such cases as an emergency situation which will justify the operation; and we assume an implied consent on part of the patient.

2. Similarly where the doctor believes that the patient tried to commit suicide. In such cases, the court assumes that the person involved acted out of a lack of clear thinking and

confused emotions and that he really wants his life to be saved... It is possible that this assumption is not factually accurate in all cases, but doctors invariably intervene to save the life of an attempted suicide, and there is no expectation that the court will object.

3. When the life of a minor is dependent on surgery and the parents refuse to consent without any reasonable explanation.

An additional exception involves a prisoner, according to the Israeli law, which states that when:

the doctor determines that there is a danger to the health or life of the prisoner and the prisoner refuses to accept such treatment, it is permissible to use the requisite amount of force to follow the doctor's orders (Amendment 10 to the Prison Regulations, Kurtam, *id.* at 686).

Justice Bach also referred to the view of Jewish law on the "entrenched recognition, especially among us, that life is a supreme value (*id.* at 687)." He saw in such a principle an additional reason for adopting the exceptions that are practiced in the United States and England.

This was not the opinion of Justice Bejski. In commenting on the words of Justice Bach, that "generally, the rule that a person may not be operated on without his consent is a right which applies in Israel," Justice Bejski stated (*id.* at 695):

I find this general approach unacceptable when dealing with an operation, especially in times of emergency, whose whole purpose is to save the person's life or to prevent severe harm to his health such that without such intervention death is imminent and certain or the harm is irreparable.

In the opinion of Justice Bejski, the case-law in America and England "is too radical in prohibiting things except in certain situations (*id.* at 694)." Moreover (*id.* at 696):

As for me, I don't think that on this difficult and complicated subject we need necessarily adopt the principles that were formulated in the United States and England, neither the general rule prohibiting physical treatment by a doctor without consent of the patient nor the few exceptions to the general rule. I am not diminishing the value of the support texts which my colleague has brought, but I am not convinced that this approach is consistent with the Jewish philosophical approach to the sanctity of life as a supreme value and the Jewish tradition to save [life] where it can be saved.

As an illustration of the supreme value of the sanctity of life in the Jewish tradition, Justice Bejski cited the words of Rabbi Ya'akov Emden (in his book *Mor u- Kezi'ah*) which we quoted above, and he also relied on the decision of Chief Justice Agranat in the Garti case (*Garti v. The State of Israel*, 18(2) P.D. 449), and on the opinion of Justice Silberg in the Zim case. He concluded his opinion as follows (*id.*, at 697-698):

I believe that the principle of the sanctity and safeguarding of life justifies the rejection of those rules which maintain almost audaciously with certain exceptions, that it is prohibited to

operate on a person's body without his consent and without regard to the consequences.

It seems to me that the approach derived from 322/63 א"י (The Garti Case) and 461/62 א"י (The Zim Case) is the approach which better represents and is consistent with the approach that is appropriate for Israel as it is closer to the Jewish heritage which proclaims the sanctity of life. Therefore, when a person is in immediate mortal danger or will suffer severe and certain harm to his health, it is surely permissible to perform an operation or other bodily procedure even without his consent; and all the more so is it permissible and even obligatory when the intervention itself does not involve any unusual risks for that type of intervention and there is no risk of causing substantial disability.

We will return to these statements later.

Decisions of the District Courts

56. The District Courts have also followed this approach. In *Helman* the court dealt with a mother who shot her cancer-stricken son. Justice H. Bental stated:

The prosecutor has reminded us that Jewish law also deals severely with the killing of a "gossess by the hands of man (*Sanhedrin* 78)." Any action which hastens the death of the terminal patient is defined as a severe moral transgression. Maimonides similarly ruled that "such a murderer is exempt from execution only by the hands of man but his moral transgression is great (Rabbi Dr. S. Federbush - *Mishpat ha-Melukha be-Yisrael*, 224)." The sages of Israel were not apathetic to the suffering that a person endures when he is about to die, and the law of the Sanhedrin required them to give the person sentenced to death "wine until his mind should become confused (*Sanhedrin* 43)." However, one spans a great distance between that and the case of a terminally ill patient.

It should be recalled that Maimonides warned against relying on the opinions of physicians as to the chances of a person living since they are liable to be mistaken. It is also interesting that even in our time the specter of error still looms large despite the advancement of medical science ((555/75 א"י *The State of Israel v. Helman*, (139-139 ,34 פ"ד תשל"ג, 34 (ב)).

Justice Halima added:

There can be no doubt that society promulgates laws in order to preserve the human image within it. Toward this end, one of the most sanctified element factors is the right of a person to live.

Practically, this right has become an integral and fundamental foundation for the Jewish people ever since the acceptance of the command "Thou shalt not murder," which has served throughout the generations as an example for other nations. Today, it is possible to say that the taking of another's life is considered the most serious crime found in the law books (*id.* at 141-142)."

The *Ayal* case ((187 , ר"נשת ת"פ (ג)1141/90 פ"ה (ר"ת) dealt with a terminally ill patient who requested disconnection from a respirator. Justice A. Goren drew upon Jewish law:

It is clear that Jewish law, which is known as one of the most moral systems, strongly proclaims the principle mentioned earlier - i.e. "the sanctity of life." The halachic basis for this principle can be found in the opinion of Justice Zilberg in the *Zim* case (462/62 ר"ד) which was quoted above.

Alongside this, Jewish law recognizes as a humane law the prohibition to cause pain to the terminally ill and the Talmud sets forth the concept of "a humane death." This term indicates that the pain and suffering of a human being is considered even when dealing with a person being led to execution.

A positive act which shortens the life of the patient is completely forbidden according to halacha. If, for example, the patient was already attached to a respirator, its disconnection would apparently be forbidden by the halacha.

However, the halachic authorities are divided regarding inaction, i.e. whether it is proper to prolong the life of a *gossess* by any artificial means possible. In any case, there are those who believe that it is improper to prolong the life of the patient, as has been mentioned in the above mentioned article (Dr. A. Steinberg, "Mercy Killing in Light of the Halacha," at 443):

"On the other hand, there are those who believe that it is forbidden to prolong the life of a *gossess* who is suffering. For example, it is surely forbidden to undertake procedures to prolong temporary life if such will cause pain. Similarly, when the doctors believe that there is no possibility for a curing a

gossess, no injections should be given to delay the time of death for a few hours.”

An additional development in this area of Jewish law can be found in the concept of “removing the impediment” as mentioned in the *Sefer Chassidim*. “Removal of the impediment” refers to refraining from taking certain actions which prevent the soul’s departure. This is defined today, in part, as passive euthanasia.

The discussions among the halachic authorities provide illustrations of the principle of “removal of impediment.”

I am yet inadequate and insufficiently learned in the Torah to determine the law according to the law of the Torah... In any event, for the purposes of the case before me, it is sufficient that I find that the principle of respecting the patient’s wishes and the prevention of pain and suffering in his final moments is not foreign to Jewish law and is accepted by some of its authorities (*id.* at 199-200. And see 498/93 פ”ק *Saadi v. Kupat Holim of the General Histadrut, et al.*, not yet published.)

The references to Jewish law greatly increased with the passage of the Foundations of Law Act, 1980, which under enumerated conditions requires reference to the principles of freedom, justice, equity and peace of the Jewish heritage (see the Kidney case, *supra*, at 677; the *Zadok* case (פ”ק 485 ב”פ ת”ש נ”ב), 759/92 (א”ת) at 503-504).

The Synthesis Between the Values of a Jewish and Democratic State

57. As directed by the legislature in the Basic Law: Human Liberty and Freedom, we have examined the values of a Jewish state and those of a democratic state concerning the multifaceted and vast areas of medicine, halacha and law. Our discussion was conducted as required on the basis of from a detailed analysis of the sources of both of these systems. By doing so, we have examined the supreme values within each system and the main principles which stem from these supreme values, some of which limit while others broaden. After this analysis, we are instructed to arrive at a synthesis between the dual-valued goal of the Basic law: Human Liberty and Freedom: to anchor in the laws of the State of Israel in its values as a Jewish and democratic State.

The natural way of achieving this synthesis is to find the common ground between the Jewish and democratic systems, the shared principles or at least what can be integrated from them. In the Jewish legal system we found supreme values which were not shrouded in controversy as well as divergent opinions on specific doctrines and certain details. Such was also

found in various democratic systems. Some differences of opinion within each system allow for an easier synthesis and others make the synthesis more difficult, but at no time do they make it impossible.

Let us elaborate and illustrate what is meant. One of the more fundamental issues of our subject is the question of actively shortening life. Jewish Law absolutely negates such a possibility. No opinion of even negligible weight allows this; Jewish law treats it as murder. In the democratic world we found that the United States forbids the active hastening of the patient's death, while in Holland active euthanasia is even legislatively permitted. It goes without saying that the synthesis between the Jewish and the democratic systems requires the acceptance of what is common in both, i.e. the prohibition of active euthanasia and the absolute negation of the law in Holland that allows active euthanasia. Moreover, even if *the majority* of democratic legal systems in certain circumstances allowed active euthanasia, i.e. hastening death "with one's own hands," the synthesis would find expression in the common ground between Jewish Law and that singular legal system, in any democratic state that can be found, which forbids active euthanasia. Furthermore, even if no democratic legal system could in fact be found which forbade active euthanasia (and we saw that various States within the United States attempted in certain circumstances to permit active euthanasia but failed by a small majority - *supra*, section 45), since active euthanasia negates the essence of the State of Israel as a *Jewish* state, as seen above, the synthesis between the two systems - "the values of a Jewish and democratic state" - requires the conclusion reached by the values of a Jewish state *as interpreted according to Jewish Law* (see *Suisa v. The State of Israel*, 46(3) P.D. 338; M. Elon, "The Way of the Constitution in the Law", *Iyyunei Mishpat*, 17, (1992) at 687.)

In other basic issues in the field of law and medicine, the finding of a synthesis is possible but requires patience and much analysis. As seen, both Jewish law and American law distinguish between active euthanasia - which is forbidden - and passive euthanasia - "removal of the impediment" - which is permitted; between refraining from artificially prolonging life from the outset and discontinuing treatment that has already begun; between ordinary treatment and extraordinary treatment. As the same time, there are differences of opinion and approach in each system regarding the need for the patient's consent and his right to refuse treatment, regarding which cases and under what circumstances this right can be exercised, and regarding other issues as well. Further, there is an essential difference regarding the *point of departure* in each of the systems.

The primary overarching principle in Jewish law is that of the sanctity of life based on the concept of the creation of man in the image of God. According to this the life of every person qua person whether healthy and sound or physically defective or mentally deficient - cannot be measured for

its worth or length. Acceptable limitations and boundaries to the principle of the sanctity of life are primarily based on the principle of preventing physical and mental pain and suffering, on adhering to the patient's wishes when such adherence can influence his condition, on the application of the rule "love your fellow as yourself" and others. In contrast, the point of departure in the American democratic system is the right of a patient to refuse medical treatment stemming from the principle of personal liberty, this right being limited in certain situations by the state's interest in protecting the lives of its citizens, maintaining the dignity of the medical profession and other principles. It is clear that the difference in the *point of departure* is highly significant in various situations, and much thought and analysis is required to reach a synthesis between the values of a Jewish state and those of a democratic state.

An instructive example of this synthesis can be seen in the Supreme Court's opinion in the *Kurtam* case which we discussed earlier (Section 55). In the *Kurtam* case, a suspect trying to escape from the police swallowed packages of drugs which endangered his life. All the judges on the bench agreed that the drugs were admissible evidence but their reasoning differed. Professor Amos Shapira did not approve the opinions of Justices Bejski and Bach, mentioned above, finding in both paternalistic views that were worthy of criticism. He states (*Iyyunei Mishpat*, 14, (1989) 269):

These paternalistic views were stated as dicta, and almost none of them were necessary to reach the decision in the *Kurtam* case. However, they point to a judicial attitude which is astonishing and worthy of criticism. The limited permission which Justice G. Bach is prepared to give to life saving medical treatment against the wishes of the patient, and all the more so his sweeping approval of such treatment, do not go hand in hand with the doctrine of "informed consent" to medical treatment. They do not reflect the present law and stand in glaring opposition to the principles of individual liberty and personal autonomy. According to Justice Bach, a doctor is legally permitted, and has an ethical and professional obligation, to perform an operation on a competent adult patient whose life is in danger, even against his will, if in the doctor's opinion the patient does not present "a reasonable explanation" for his refusal, which as far as can be seen stems from "external considerations." Justice Bejski totally waives the need for a competent adult's consent to an operation which will save his life or prevent significant bodily harm. With all due respect, such norms do not belong in a legal system which advocates the right of the individual to self-expression, free choice and control of one's fate.

I find the statements of Professor Shapira unacceptable. They did not go hand in hand, even when they were written, with the existing law, and certainly even *today* stand in contradiction to the legislative provisions in the Basic Law: Human Dignity and Freedom which anchored the laws of the State of Israel in the values of a Jewish and democratic state (section 1). They also contradict the balancing principle in the Basic Law (section 8), according to which an infringement of one of the basic rights must meet three prerequisites: that the infringement reflect the values of the State of Israel as a Jewish and democratic state; that it be designed for a worthy purpose; and that it only infringe to the extent necessary. These three requirements are fundamental to the entire legal system of the State of Israel, and attaching terms like “paternalism” has absolutely no bearing on their application.

It is well known that the task of reaching a proper and correct balance between the values of personal liberty and freedom - freedom of expression, movement and similar values - on the one hand, and the values of security, public order, a person's good name, basic survivalistic values and others on the other hand, is a necessary and difficult challenge which is becoming increasingly important and portentous within our legal framework in general and in our jurisprudential literature in particular. Every decision, for example, which is necessary for the security of the country and the public order can be deemed “paternalism of the government” or “paternalism of the court.” The task in our case is to balance, i.e. to find the balance between the basic value of personal liberty and free choice and the basic value of preserving human life. It was the finding of this balance which occupied this Court in the Kurtam case, each Justice according to his particular method of decision making.

At the time the judgment was rendered in the Kurtam case, there was room for the difference of opinion between Justice Bach and Bejski *in explaining their views*, which as stated, led, to the same practical conclusion. Today, with the adoption of the Basic Law: Human dignity and Freedom, and the establishment of the principle of anchoring the values of the State of Israel as a Jewish and democratic state, it would seem that the words of Justice Bejski go hand in hand with the provisions and content of the Basic Law: Human Dignity and Freedom. The protection of the life, body and dignity of the individual is aimed at anchoring in the legal system of the State of Israel the values of a Jewish and democratic state. Our task is, therefore, to create the proper and correct synthesis between the values of a Jewish and democratic state, and it is right and proper that the decision's usage of the values of a Jewish state not only serve to support the exceptions found in the American and English systems, but also to fashion an original approach in our legal system.

Value laden concepts such as liberty, justice, human life and dignity, can be given the most perverted interpretation in a given society; human history is not at a loss for such examples and in our generation, the generation of the holocaust, the atrocities of the Third Reich and the tyranny of the “peoples republics” reached a point that no mind could have fathomed. The values of a *Jewish* state, whose roots are planted in the basic concepts of the dignity of the human being created in the image of God, the sanctity of life, and the prevention of pain and suffering - concepts which have stood the test of generations and which have nurtured and sustained the rest of the world - are the true guidelines for achieving the correct synthesis of the values of a Jewish and democratic state (see *Jerjefsky v. The Head of Government et al.* 45(1) P.D. 749, 783-784; and the article of the late Professor G. Prokacia “Notes on the Changes in Content of Basic Values in the Law” *Iyyunei Mishpat* 15 (1990) 377, 378).

“The Right to Die,” “Dying With Dignity,” Mercy Killing,” and Other Similar Terms

58. There is special significance to *the point of departure* in Jewish law regarding the sanctity, value and length of human life when discussing the question of euthanasia in its various forms, which is the main issue before us. In discussing this issue phrases like *the right to die*, to die *with dignity* and other similar phrases are bandied about; scholars, researchers, doctors and jurists have expressed their views regarding these terms from the vantage point of their research or real-life experience. It is worth lending an ear to some of these comments, after which we will again discuss the great care and caution needed in reaching a decision in this fateful area and in finding the proper, thoughtful and correct synthesis.

A patient’s consent to die, even his explicit request for such, does not always reflect an autonomous decision free of other considerations:

Agreement to such a route makes the person feel *obligated* to die more quickly in order not to burden his family. The *right to die* thus becomes *the obligation to die*; at times the *mercy killing* is mercy for *the relatives and society* and not necessarily for *the terminally ill patient* (Dr. A. Steinberg, *Terminally Ill*, p. 91).

Societal consent for such a route prevents the advancement of research toward the development of effective ways for minimizing pain and suffering. Such an action can destroy the trust between doctors and patients. It is not the job of the doctor to be society’s executioner; the job of the doctor and of medicine is to prolong and improve life and not to kill patients. There is a basic difference between active euthanasia, where the cause of death is a direct murder by the physician and

tolerable euthanasia where the patient dies because of his illness and death comes naturally. The doctor's task ends when he has nothing to offer the patient, but does not extend to the patient's death. Active euthanasia is irreversible, while passive euthanasia leaves room for a second thought, for the correction of mistakes with tests and forecasts. There are other ways of easing the suffering of the terminally ill patient and the quick and generous offer to kill him to save him from his pain is not justified given the background of wanting to help the patient (*ibid.*)

The following was stated in the opinion of Dr. Ram Yishai, head of the Medical Association of Israel and Member of the Ethics Committee of the World Medical Association since 1985, which opinion we will later quote in its entirety in the course of our discussion of the specific case before us:

9. The task of the physician treating a terminally ill patient is to alleviate physical and mental suffering while restricting his intervention to treatment which preserves, as much as possible, the quality of life of the patient reaching his end. We are not speaking of dying with dignity; R. Ramsey ("The Indignity of Death with Dignity" *The Hastings Center Report*, 1981,) asserts that "*dying with dignity is an oxymoron*" for death is the ultimate human indignity. Such flowery words sometimes conceal an exceedingly callous outlook. The less *emphasis placed on helping and treating the terminally ill, the more the emphasis is placed on dying with dignity*. It can be said, as M. Muggeridge stated: "*I am not exactly in favor of prolonging life in this world, but I very much suggest against arbitrarily bringing it to an end.*"

And in the decisions of our courts, it has been stated:

The real fear is that the boundary between voluntary euthanasia and involuntary euthanasia will be blurred. It is possible that the patient, *who wants to continue living*, will feel *obligated to choose death* when he sees the tired look in the eyes of his relatives which he will interpret as a desire to be free of the suffering they endure because of him (Judge H. Bentel in 555/75 (א"ת) פ"ת *State of Israel v. Helman*, (138 ,134 ת"פ 1"לש"ת).

In an interesting article by Professor Robertson, an advocate of use of the "living will" (Robertson, "Living Wills," *Hastings Center Report*, 1991), he testifies concerning his own second thoughts on the issue. Perhaps *stressing the liberty of the healthy and his right to autonomy disregards the rights of the patient to cling to life so long as it has any value whatsoever* (9/92 (א"ת) פ"ת *Zadok, supra* at 496).

An additional factor mentioned in connection with this difficult and complex subject is that the treatment is likely to be expensive, and the likelihood of success is small. The result is the “hidden” influence of economic considerations on the ideology of “respecting the patient’s wishes:”

Alongside humanitarian and ideological considerations are very strong economic influences. The resources of society are limited, and if they are used for helping patients whose treatment is prolonged and expensive it is at the expense of the large number of other “healthier” patients who can be restored to meaningful life. This reason, could seemingly, cause the scales to be weighed down [against the patient], and what started out as “mercy killing” ends up as “*forced mercy killing*” (759/92 (ל”ת) פ”ג *Zadok supra* at 501).

The terminally ill patient who lives a life of suffering, yet who wishes - and in this is his free desire should be respected - to continue living such a life, may be “helped” by someone else who thinks it is “his best interest” to have his life shortened.

This is the general principle: “The phrase ‘dying with dignity’ is an oxymoron;” the words of Ramsey, which were cited from his instructive article “The Indignity of Death,” reached the roots of one of the main problems in our case. Between *the death* of a person and *his dignity* lies a contradiction. In contrast, the very essence of a person’s life is itself the very dignity of man; there is no contradiction between *his life* and *his dignity*, nor could there be one. A similar critique can be lodged against the use of phrases like “the right to die” and “mercy killing” and other similar phrases. It is worth looking into all of these terms and being very cautious in using them. It is also worth studying how they came about, as researchers and various thinkers are presently doing.

The Slippery Slope

59. The dangers spoken of are especially great when dealing with *minors and incompetents*. When one begins to weigh and evaluate a human life, it frequently happens that such “weighing” and “evaluating” make it permissible to kill those who are severely mentally and physically deficient. Afterwards, this would include people who are a little less impaired, and in time there would be no standard for just how impaired one must be. This is the slippery slope.

Such things have occurred in human history. An approach that relativized the worth of human life is found as early as in the teachings of Plato (Plato, *The Republic*, 3, 405), according to which disabled people should not be kept alive to be a burden on society. In theory and in practice this approach was adopted by the Greek Spartans. In our own generation we are witness

to the horrendous depths to which the slippery slope could lead. In the middle of the twentieth century in a country which *in the past* boasted of its being “civilized” and enlightened, the slippery slope led to the T4 plan of the Third German Reich. Under this plan, approximately 275,000 mentally ill and retarded people, people in old age homes and other unfortunates were murdered, many of them Germans themselves. The rationale and “justification” for this was that according to the values of the perpetrators of the action, such life had no value being a burden on society. This operation, with its “innovative” use of gas to kill its victims, served as a model for the death camps and gas chambers in carrying out the racist Nazi plans for the annihilation of six million Jews in the Holocaust. (See *Ivan (John) Demjanjuk v. The State of Israel, Judgment* published by the Government Press, Jerusalem *id.* July 1993, pp. 14-15 (section 5-7); Steinberg, *Terminally Ill*, pp. 77-79, 90-91, *Mercy Killing*, p. 11).

Concern with the *slippery slope*, which has more than once become a reality, the fear that we may, God Forbid, cross over due to societal pressures and the like from the *right* of the patient to die to the patient’s *obligation* to die and similar fears are a severe warning. *The extreme* applications of the concept of “the autonomy of the individual” to the questions under discussion, which are ostensibly required by the best interests of society, are likely to produce grievous consequences. Philosophers, doctors, judges and many others have fallen prey to this danger. A striking example of this can be found in the words of the renowned Justice O.W. Holmes, one of the great Justices of the United States, in the case of *Buck v. Bell* (270 U.S. 200 (1927)) cited in *The Attorney General v. John Doe*, 42(2), P.D. 661 at 687-688).

The case was as follows: Carrie Buck was an 18 year old woman, a mother to a retarded child. Ms. Buck’s mother was also retarded. Under a statute of Virginia it was permitted to perform a sterilization operation in such cases and the Virginia State court ordered such an operation to be performed on Carrie Buck. In the Supreme Court of the United States it was claimed, *inter alia*, that the Virginia statute violated the equal protection clause of the fourteenth amendment to the United States constitution. The Supreme Court dismissed the complaint and upheld the sterilization of Carrie Buck. In this connection, Justice Holmes wrote in the judgment (*id.* at 207):

The judgment finds the facts that have been recited that Carrie Buck is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society **will be promoted** by her sterilization and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as a matter of law that the grounds

do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes (*Jacobson v. Massachusetts*, 197 U.S. 11). Three generations of imbeciles are enough (Emphasis mine - M.E.).

These words are harsh and bewildering, and stand in direct contrast to basic understandings in Jewish thought and in our society. The sterilization - as stated - is for both "her welfare and that of society," but it is clear that the determinative factor in the eyes of the judges is the welfare of *society*. The comparison between a state calling its "best" citizens to sacrifice their lives and calling upon retarded people, who "already sap the strength of the State," to make their sacrifice to prevent society from "being swamped with incompetence" is painful to our ears. The same is true in regard to the balance of the statement including the declaration that "three generations of imbeciles are enough." If such a distinguished and respected Justice could go astray to such an extent in his judgment, all the more so must we be cautious in using terms like "the welfare and dignity of the patient;" "The welfare of society" and "the public interest." It is worth noting that one of the Justices, Justice Butler dissented from the court's judgment.

**Justice and Healing that are "True to its Very Truth" (*Emet La-Amitto*);
Agreement with Reason and Logic**

60. The statements we made and the considerations we took into account concerning the various issues of our case as to the values of a Jewish and democratic state and the synthesis between the two sets of values are designed to guide not only the court in its decision making but also all those who must make such decisions in the field of law and medicine, primarily the family and friends of the patient and the treating physician.

It goes without saying that each case is to be seen individually, according to the specific circumstances and in light of these principles and guidelines. In this manner, a corpus of laws and guidelines will develop step by step to govern this difficult and complex area of law.

This method of interpretation challenges us to reach a decision which is the product of careful consideration and erudite analysis, of openness to and understanding of ideas that are as old as time itself, yet responsive to the needs of the time. We have already mentioned at the outset that a judge and a doctor must attempt to achieve a truly correct result (“true to its very truth” - *emet la-amitto*). The question has already been asked: what does “true to its very truth” mean? Is there such a thing as a truth which is not “true to its very truth?” On this point, Rabbi Joshua Falk Katz, a leading commentator on *Shulchan Aruch Choshen Mishpat* and halachic authority in Poland in the seventeenth century commented:

What is meant by “a judgment that is true to its very truth” is that one should judge *according to the particular time and place* so that the judgment is in full conformity with the truth. For there are times that the case calls for acting beyond the letter of the law rather than always inflexibly applying the law precisely as it is set forth in the Torah, to reflect what is called for by the particular time and circumstance. When this is not done, even though it is a true judgment, it is not true to its very truth (*Derisha, Tur H.M. 1: subparagraph 2*).

And Rabbi Eliyahu, the Gaon of Vilna adds:

A judge must also be expert in the *nature of the world* in order not to issue perverted decisions. For if he will not be expert in such matters, *even though he may be expert in the law of the Torah*, true justice will not be attained, i.e. even if he issues a true decision it is not completely true... Therefore, a judge must be an expert in both areas... i.e. *wise* in Torah issues and *sharp* in worldly matters (*Commentary of the Gra [Mikraot Gedolot, Pardes], Proverbs 6:4*).

Decision making on any of the problematic issues that arise in this fateful area must be completely true (“true to its very truth”) and the balance must be found in each case in accordance with the place and the time, as the outcome of a profound understanding of worldly issues and expertise in the nature of the world. As we have stated and ruled, we cannot in advance resolve *all* the problems that could possibly arise at any time. *General* guidelines should be established by courts and ethics committees (whose establishment is much to be desired); and each particular question arising before the doctor and judge will be dealt with under these guidelines and in accordance with the values of a Jewish and democratic state designed for a proper purpose and not beyond what is necessary and according to the nature of the matter and the needs of life. At the foundation of these decisions should stand the approach of decision making enunciated by one of the greatest halachic respondents, Radbaz, whom we mentioned earlier, in a case involving halacha and medicine, namely “Its ways are ways of

pleasantness” and “The laws of our Torah must accord with reason and logic.”

At the outset, we cited from a work by Nachmanides which dealt with the legal and moral aspects of halacha and medicine and is entitled *Torat Ha-Adam (The Way of the Person)*. This is a marvelous name. The person is at the center and is the essence of the Basic Law: Human Dignity and Freedom, which is to be interpreted according to the instructions of the legislature in accordance with the values of the State of Israel as a *Jewish and democratic state*. This is a fundamental statute. The proper synthesis of Jewish and democratic values will advance the purpose of the law, which is the promotion of the peace and welfare of the person, and this requires the peace and welfare of the *extra* dimension of the human being: the divine image in him, which is the secret of his creation and existence, his form and being.

The Problems which Arise in our Case

61. Having come this far, we will now look at the specific problems that face us in our case. Some of these problems find their solution in legislative provisions or court decisions. We will briefly look at these.

A. The Principle of the Sanctity of Life

1. Murder is one of the most severe crimes found in the law books, if not the most severe (see sections 300-301 of the Penal Law 1977, and section 305, dealing with attempted murder; section 298 regarding manslaughter; and section 304 concerning negligent homicide).

The same is true regarding the crime of assisted suicide, which is one of the most severe of those that appear on the law books, carrying a punishment of twenty years of incarceration:

302. One who brings a person to suicide by enticement or by advice, or who assists another to commit suicide will be incarcerated for twenty years.

Originally, suicide was also a crime but this provision was repealed (see Amendment to the Penal Law (no. 28), 1966, 68 ,64 פ"ד). It is instructive to note the background and discussions which preceded the repeal.

When the proposal to repeal the crime of attempted suicide arose, the then Minister of Justice, Mr. D. Yosef stated:

I would like to say a few words regarding the repeal of the punishment for attempted suicide. I did not easily agree to the repeal of this crime. I am aware of the respect that the Jewish tradition has for human life and that it also opposes suicide. I am sure that we all see in the sanctity of life an important human value. But it is specifically that humanitarian value

which brings me to think that a criminal investigation and sentencing are not the best means for handling these tragic cases (*Divrei HaKnesset*, vol. 44, 1966, p. 138).

M.K. Eliyahu Meridor opposed the proposed law to repeal the crime of attempted suicide. He set forth his reasoning as follows:

The principle of the sanctity of life should not be tampered with, even when speaking of a person's own life. He is not entitled to take his own life. This principle is important. And so long as it is written in the law books, I propose it be kept that way.

We are not living in a state where we must prosecute every person who attempts suicide... (*Divrei HaKnesset*, vol. 46, 1966, p. 2090).

Similar opposition was also expressed by M.K. Moshe Unna:

The question is not how to relate to someone who commits suicide - whether I should view him as an unfortunate person, someone who did not find his place in life or one whom we should relate to with forgiveness. All that could be true. Despite that, the significance of repealing that section in the law is entirely different. The significance of the repeal is as an expression of the belittling of human life, an expression that I do not give importance to human life, even if a case involves extraordinary circumstances which give leeway to deviate from the norm. We cannot ignore this message which will be sent forth by erasing that paragraph (*id.* at 2090).

However, these objections were rejected; 11 Members of the Knesset voted for the repeal of the crime of attempted suicide and 10 Members of Knesset voted against. But despite the repeal, the crime of assisting a suicide remained in full force and effect. As to this M.K. Israel Shlomo Ben-Meir asks:

What is the law concerning one who assists? If there is no crime, there is no assistance (*id.* at 2090).

To this, M.K. Mordechai Bibi, on behalf of the majority of the Legislative Committee responded:

Member of the Knesset Ben-Meir, we are not speaking about one who assists. The section under discussion for repeal reads: "Whoever attempts to kill himself will be criminally liable." Thus the reference is to someone who tries to commit suicide. And in the vast majority of the cases, if not in all of them, the person has lost sight of the value of his life. If we were speaking of a sweeping legitimization of anyone who committed suicide, as exists in certain countries, then I would

surely be opposed, but we are not speaking of such a situation (*id.* at 2090).

2. From here we move to the question of *euthanasia*, which we discussed at great lengths above, as found in the laws of the State of Israel. Paragraph 309(4) of the Penal Law, 1977 states:

309. In all of the following cases a person will be seen as the direct cause of the death of another, even if his action or inaction was not the immediate cause or the only cause of the other's death:

- (4) *Where by action or inaction* he hastened the death of one who is suffering from a disease or injury which would have caused his death even without such action or inaction.

As is known, criminal law distinguishes between prohibited action and prohibited inaction. A forbidden action in criminal law is always prohibited, whereas, *inaction*, in order to constitute a crime, requires that there be a *breach of a legal duty*:

It is possible to criminalize inaction as a behavioral element of the basic factual pattern as long as there is a legal duty to act; i.e. the special condition required to create a crime by inaction would be that the inaction constituted a breach of an express legal duty. *Without the abovesaid duty, inaction cannot constitute a basic factual element of the crime* (S.Z. Feller, *Basics in Criminal law* (vol. 1, 1984) 398. And see section 399 of the Penal law, defining a prohibited inaction).

Active euthanasia is thus absolutely prohibited. This is the effect of the provisions of the Penal law, and this was our conclusion from the synthesis of Jewish and democratic values as stated above. Even the consent of the patient to cause his own death is irrelevant; *the ownership of the patient over his body is subservient to the interest of society in protecting the sanctity of life*:

The crime is committed whether or not the person affected agrees to its commission. For the crime effects all of society, and the relation to the perpetrator of the crime of this or that individual, even of the victim of the crime is of no importance. He cannot allow a criminal action or forgive its commission for society and the state as a political unit of society are interested in the elimination of the criminal phenomenon (Feller, *id.* at 112).

The following was said by the late Chief Justice President Zusman, in the *Pinkas* case (27(2) P.D. 617):

The consent of the victim does not cancel criminal liability, and the reason for this is simple: ... One cannot waive the responsibility of another for a crime for the criminal accusation is not meant to enforce the rights of the individual but that of

society and one cannot forgive that which is not his (*Opinion of President Zusman, id.* at 627).

A comparison with the words of Maimonides concerning the rule prohibiting taking ransom from a murderer is instructive. Even if the blood avenger [the relative of the victim] wishes to exonerate the murderer, he cannot for “the life of the victim is not the possession of the blood avenger but that of the Holy One Blessed be He” (*Laws of Homicide and Preservation of Life*, 1:4, see *supra*, section 20. And see our discussion regarding a person’s ownership over his body).

The State of Israel v. Helman, 134 (ב) ת”פ ל”ל, as mentioned above, concerned a mother who shot her son. Her son was suffering from cancer from which there was no hope of cure. With the increased suffering, the son asked his mother to help bring an end to his pain. The court ruled that the mother be punished with imprisonment of one year. Justice Halima stated:

Our law does not recognize the concept of “mercy killing.” There also can be no doubt that society legislates the protection of the human image,, a sanctified element of which is the right to live. (*id.* at 141. And see 455/64 (א”ת) ת”פ *The Attorney General v. Kafri*, unpublished, where a mother killed her retarded son with sleeping pills which she put in his food. And compare ת”פ 219/68 *Sandrovitch v. The Attorney General*, 22(2) P.D. 286).

We will add that recently a number of proposals have been made in the Knesset which *ostensibly* allow active euthanasia, but these proposals did not even reach a first reading. Another proposal was the Patient’s Rights Law 1992 and Bill 359 suggested by the Labor and Welfare Committee of the Knesset, which stated:

10. A terminally ill patient is entitled to die with dignity and in accordance with his outlook and beliefs, and to the extent possible, in the presence of a person whom the patient chooses. The treating physician and the medical institution shall assist him to realize his right and refrain from any action which could impinge on his dignity.

This proposal went through a first reading in the Knesset only after its proponents deleted the above paragraph 10 (*Divrei HaKnesset*, ה”ש”פ ת”פ צ”א, pp. 3836-3840).

3. *Active* euthanasia is thus absolutely forbidden. The main question on which the litigants before us differ concerns refraining from administering medical treatment, that is *passive* euthanasia with its two variant forms: *refraining* from prolonging life and *discontinuing* life prolonging actions already

undertaken. The essence of the question is whether the doctor *is legally obligated to prolong* the life of a patient against his will.

As a general rule, the doctor is *legally obligated* to administer every medical procedure to the patient under his care. It is sufficient to refer to section 322 of the Penal Law, which reads:

322. Whoever has responsibility for a person because of... his sickness... cannot relieve himself of that responsibility and cannot appropriate those needs for himself, whether the responsibility stems from a contractual obligation or from law and whether it was created by a permissible or forbidden act by the one responsible. He must provide him with his needs and look after his health; he will be considered to have caused the results which occur to his life or his health as a result of the failure to fulfill his duties.

(For a detailed analysis of additional sources of this obligation, see A. Gruss, "Passive Euthanasia - Legal and Moral Aspects," *Haperaklit* 39 (1990) 162, 168-173).

At the same time, the *scope and boundaries* of the doctor's duties to administer treatment have yet to be clarified, and the law recognizes, in appropriate situations, the patient's right to refuse medical treatment.

4. Infringing a person's right not to be bodily interfered with constitutes a tortious and criminal act. The crime of battery is defined in the Penal Law, 1977, section 378 as follows:

One who strikes another, touches him, pushes him, or exerts force on his body in any other way, directly or indirectly, without his consent or with a consent that was obtained by fraud has committed a battery. For this purpose, exerting force - includes the use of... any thing or substance that is exerted with the requisite amount of force that could cause damage or discomfort.

Similar language is found in defining the tort of battery in section 23 of the Law of Torts (Consolidated Version):

(1) Battery is the intentional use of force in any form against the body of another by striking, touching, moving or in any other way, whether directly or indirectly, without his consent or with consent that was fraudulently obtained...

(2)... "Use of force" for purposes of this section - includes the use... of any thing or substance in a manner that could cause damage.

We have stated that "the right not to be bodily interfered with is one of the basic rights of a person in Israel, and constitutes a part of a person's right

to personal liberty" (*Sharon v. Levi* 35(1) P.D. 736, 755). This stems "from the force of the principle of personal liberty of all who were created in the image [of God]" (*The State of Israel v. Tamir*, 37(3) P.D. 201, 205; and see section 19, *supra*).

A person's right not to be bodily interfered with means, *inter alia*, that *medical treatment which is, by the very nature of things, an interference with his body may not be carried out upon him without his consent*. From this right arises the obligation of the physician to obtain the freely given consent of the patient for medical treatment. This Court so held in *Bar-Hai et al. v. Steiner et al.*, 20(3) P.D. 230, 233. (And see also *Bar-Hai et al., v. Steiner et al.* 20(4) P.D. 327). And more recently it was stated by Chief Justice President Shamgar that:

There is no disagreement that prior to performing an operation upon a patient's body, a physician must obtain the consent of the patient to do so... The performance of an operation without obtaining the consent of the patient is a battery, a civil wrong under section 23(a) of the Law of Torts (Consolidated Version; 3108/91 ר"ד) *Noam et al. v. Veigal et al.*, not yet published, section 4 of the judgment).

(As to performing surgery against the patient's will in order to save his life, see the Kurtam case, *supra*, section 55).

5. Indeed, most of the questions involved in this subject - defining the scope of the physician's obligation to administer care to the patient on the one hand and the right of the patient to refuse such treatment on the other, and their implications and ramifications - involve a patient who is defined as *terminally ill*. They have been discussed in a series of cases that were heard in the last few years in the District Courts, most of which were mentioned earlier (*The Ayal, Zadok and Saadi* cases, and see *Nahyasi v. The Israel Medical Association* 42(1) P.D. 135, 136). These questions, even to the degree that a they have been discussed has taken place, have yet to be heard by this Court, and these discussions took place prior to the adoption of the Basic Law: Human Dignity and Freedom as part of the Israeli legal system.

B. Determining the Desire of A Minor or Incompetent

1. An additional question with respect to the existing law in Israel is: what is the rule regarding minors or incompetents who cannot express their desire or non-desire for medical treatment in cases such as the one before us?

On this issue, the litigants before us argued at length with reference to the Capacity and Guardianship Law. Mr. Hoshen, the learned attorney for the plaintiff, asserts that “parents are the natural guardians of their minor children” (section 14 of the Capacity and Guardianship Law, 1962). Their guardianship includes “the obligation and right to look after the needs of the child” (section 15 of the above statute), and included in the needs of the child is the right to refuse medical treatment. It follows that the refusal by the parents of medical treatment is tantamount to refusal by the child (pp. 3-4 of the plaintiff’s brief dated Sept. 2, 1988).

In contrast, Ms. Zakai, the learned counsel for the State argues that while “the needs of the child” mentioned in section 15 of the law “undoubtedly include the medical care and health of the minor” (par. 3.1 of the main points for the respondent dated August 19, 1988), nevertheless hastening death is not a need of the child. The right of the child to live or die is not included in the guardianship of his parents and they in any case have no authority to represent him in any such connection (par. 1.5 of the main points of the argument).

In her argument Ms. Zakai discussed section 68 of the Capacity Law, which reads:

68(A). The court may at any time, at the request of the Attorney General or his representative or at the request of an interested party and even at its own initiative, take temporary or permanent measures, as it sees fit, to protect the interests of a minor, incompetent or protected person by appointing a temporary guardian or a guardian *ad litem* or otherwise; and the court may so act if the minor, incompetent or protected person himself applies to the court.

(B) If the request was to order the performance of surgery or the taking of other medical procedures, the court shall not rule on such request unless it is convinced, on the basis of medical opinion, that the said procedures are required *for the protection of the physical or mental well-being* of the minor, incompetent or protected person.

Ms. Zakai stated:

In setting forth section 68(B), the legislature is guiding both the court before which a procedure is brought under this section and the guardians of the minor with regard to medical matters which do not reach the court...

The purpose of section 68(B) is to clarify the “needs of the minor” (as is the language set out in section 15 of the statute). It establishes that in the context of surgery or other medical procedures the “needs of the minor” are only identified with an invasion needed for the protection of the minor’s physical or mental well-being.

... The petition in this case is not designed to protect the physical or mental well-being of the minor. It is not “protecting” for it is not intended to protect the existing situation. It is not “for the well-being of the minor” for the welfare of a person mandates that first and foremost there be a “person” (par. 1.7.7, 1.7.8, 1.7.10 of the main points of the argument).

These arguments are buttressed by section 17 of the Capacity Law which reads:

17. In their guardianship of minors, parents must act *in the best interests of the minor as dedicated parents would act under the circumstances*.

Ms. Zakai pointed to the special system of review in the Capacity Law regarding activities that relate to guardians’ acts involving the immovable property of an incompetent and other special business ventures. These require the approval of the court in order to assure that the general principle is maintained, i.e. that the guardian act only in the best interests of the incompetent or protected person (sections 20, 47 of the Law). Ms Zakai argued that:

It cannot be assumed, therefore, that the legislature which set up the system of approval *for cases involving property matters (damim)* would not require such regarding matters *involving blood (dam: par. 1 of the supplement of the respondent’s response)*.

2. In *Garti v. The State of Israel*, 18 P.D. 449 - which was decided *prior to the adopting of section 68(B) of the Capacity Law* - President Agranat held in regard to a child whose leg was amputated from the knee because it was gangrenous that:

In a case like the one before us, a case where the choice is between saving the child from death or saving his life by undergoing an operation which will leave him crippled, the refusal of the parents to agree to the operation constitutes *a breach of their duty as guardians “over the body” of the minor and to act in his best interests*. Moreover, if their refusal influences the doctor not to perform the necessary surgery and as a result the minor dies, the parents would bear criminal liability for their refusal...(*id.* at 457-458).

In the “Kidney” case (*Attorney-General v. Doe* 42(2) P.D. 661), section 68(B) was discussed at length, and we stated as follows:

Medical treatment that the incompetent needs for his health lies within the authority of the guardian... “The needs of the minor and the protected person” without a doubt include health needs. As to these matters, too, parents and guardians must act in the same way as dedicated parents and guardians would (see (26/82 נ”תת (פ”ד at 227). **For medical treatment which presents a danger to the protected person** (my emphasis - M.E.), we have found that the guardian sought to obtain a court order pursuant to section 44 of the law (see *id.* at 229). An amendment on such matter was proposed with regard to section 68 of the Capacity Law.

Under the amendment, the court may order, upon application of those enumerated in the aforesaid section 68, “the performance of surgery or other medical procedures”... The provision regarding the authority to order other medical procedures in addition to the performance of surgery includes the authority of the court to approve medical procedures even when there is no direct bodily cure of the minor or protected person, but the medical procedure is necessary for the physical or mental well-being of the minor. This would include the authority to order an operation to remove an organ from the protected person for transplantation in another person, so long as the court is convinced that the operation and the transplantation is necessary to protect the physical or mental well-being of the minor, incompetent or protected person. The reason for this provision is clear. An absolute prohibition against removal of an organ from the protected person could possibly cause great injury to the protected person when the contribution of the organ would benefit the person - from the perspective of his physical or mental well-being - to a much greater extent than the damage caused by the removal of the kidney (*id.* at 673, 675).

In our opinion and as shown by the Garti and Kidney cases, the guardianship of the parents includes the right to refuse medical treatment even when the refusal might lead to the death of the child, but such refusal requires the approval of the court. The reason for this is understandable. Such a refusal might constitute a breach of the parents duty to act “in the best interest of the minor as dedicated parents would act under the circumstances,” as was the case in *Garti*. Similarly, the refusal might breach the parents’ duty to act “for the protection of the physical and mental well-being of the minor, incompetent or protected person,” as was the

situation in the “*Kidney*” case. The authority of the court to give such approval stems from the provisions of section 68 of the Capacity Law and is also included in section 44 of that statute:

44. The court may at any time at the request of the guardian or the Attorney General or his representative or of an interested party or at its own initiative give the guardian instructions regarding the fulfillment of any of his duties; the court may also, at the request of the guardian, approve any action he carried out.

For this very reason, even the treating physician of the child must turn to the court and receive its approval to desist from treating him. The Attorney General in certain situations has the same obligation, being entrusted with the protection of the public welfare.

3. Another question related to our issue is that of determining the desire of minors *who have almost reached majority*. In *Doe v. Vardit Zik* 45(3) P.D. 217, we came close to having to decide this question.

That case dealt with the tragic situation of a teenager of 17 years and seven months who was afflicted with cancer. His parents wanted him to undergo chemotherapy treatment, but the youth refused such treatment because of the great pain and suffering involved. In order to escape treatment, the youth ran away from home. When he was finally found with the help of the police, the court held, pursuant to its authority under sections 2(2) and 2(6) of the Youth (Care and Supervision) Law, 1960, that the patient be compelled to receive chemotherapy in the chemotherapy unit of the hospital, as that was the only place such treatment could be given. In his petition the minor requested that the forced treatments be stopped.

As stated, we did not actually have to decide whether the “desire” of the minor take precedence over the will of his parents or other such questions of life and death pursuant to therapy because:

We had the opportunity to speak at length with the petitioner and to inform him about the importance and necessity of the chemotherapy treatment for his illness and his obligation to carry out the overarching command: “Preserve your lives.”

At the end of the discussion the petitioner informed us that indeed, he initially did not want the treatment because of the pain involved. However, he now promises that so long as the order will remain in effect, he will abide by it and continue treatment and not attempt to avoid it. This promise was elicited from the petitioner after much agony, as was seen from his expression. We, who had a serious discussion with him, were convinced to the extent possible that the petitioner was telling

the truth. Indeed, the petitioner is a minor who is only nearing majority; yet, by his appearance, his speech and manner he is an adult, and we can discern truth in his words (*id.* at 219).

This appeared to us to be the proper approach in the particular circumstances of that difficult case. The case did not have a desirable outcome. The minor left Israel and when his illness worsened he returned, and died after a short while.

4. How is the Court to determine what is in “the best interest” of a child and what is “protecting his physical and mental well-being?” Jewish law does not have much to say on this issue, and we mentioned the reason for this above (*supra*, section 37). Nonetheless, we will look at two rulings on the question.

Rabbi David Zvi Hoffman (*Resp. Melamed LeHo'il*, 2nd edition, *Yoreh Deah*, #104, p. 108) was asked:

Is there an obligation on the doctor to perform an operation even when the parents object?

The question is sub-divided as follows: a) If the doctor believes the operation will produce a cure; b) If he isn't sure that the operation will succeed, but without it the child will surely die (*id.* at 108).

Rabbi Hoffman's response, relying on the responsum of Rabbi Ya'akov Reischer in *Resp. Shevut Ya'akov* (see *supra*, section 25) was that inasmuch as the patient will die without the operation and the operation may possibly succeed, he is permitted to undergo the operation. As to whether the parents are authorized to prevent an operation on their children, Rabbi Hoffman ruled (*id.*, at 109):

Since such an operation is permitted, surely the opinion of his mother or father is irrelevant. For there is an obligation on the doctor to heal, and if he does not do so, he has shed blood. And we never find in the entire Torah that a father has authority to endanger his children's lives and prevent them from receiving medical care.

Rabbi Hoffman's concluding statement is instructive: “This is the law of Torah; I do not know the law of the ruling government on this issue.” The reference here is to the law of Germany at the beginning of this century.

In connection with a situation closely related to ours, there are some halachic authorities who believe that a determination of “best interests” can be based on an “estimation,” i.e. a finding of the probable will of the minor or incompetent. As to this we said the following in the *Kidney* case:

A variant opinion [from the usual halachic view] is expressed by a leading halachic authority based on the principle of

“estimation” that brings to mind the “substitute judgment” test followed in some American decisions... This approach was taken by R. Moshe Hershler, (see “Kidney Donation from One with Cerebral Palsy and Mental Deficiencies,” *Halacha U'Refuah* 2, 122, (1981)).

After a detailed discussion of the halachic problems of kidney donation, R. Hershler concluded that we should not permit the taking of the incompetent's kidney for transplanting into his brother...

R. Hershler then turned to the possibility of allowing the transplant based on the principle of “estimation” (*id.* at 127):

But one can approach this from a different perspective. That if he were healthy and competent and knew that his brother was ill and that he is the one donor that is near in blood and heredity and that he can donate a kidney with a good chance that the kidney will be tolerated and he can save his brother's life, he would certainly willingly give his kidney. If so, we might argue that despite his incompetence and inability to consent we may “estimate” that it is likely that he would approve the taking of his kidney for his brother.

After discussing the principle of “estimation” as applied in Jewish law he went on to say (*id.* at 127-128):

If asked to donate a kidney to save the life of a close relative, such as a father or brother, most people would surely consent. Therefore, we may say that a mentally deficient person would also agree. This would be especially true in situations where the protected person is very dependent on his brother, and it is possible that his well-being will be damaged more by losing his brother than by losing his kidney and that as a result of the surgery and the transplant the ill brother will live longer and consequently be able to care for the needs of the protected person.

And even though one can differentiate between “estimation” with regard to money for support or charity on the one hand and organ donation on the other hand in that “estimation” should not be applied in the latter area because of the potential danger, nevertheless it seems correct to equate the two. Whenever we can estimate that the person would surely have done something, we can say that he probably would want it done.

At the conclusion of his responsum, R. Heshler concluded that the transplant in that particular case should not be permitted for two reasons:

From the language of the question which stated that if the transplant would be performed it would lessen the pain of the

sick brother, it seems that the sick brother is not in danger of death. Therefore, there is no “estimation” that he [the incompetent] would have donated his kidney. Further, it is not permitted to endanger oneself in order to reduce another’s pain.

Having investigated the details of this case, we discovered that the sick son has a younger sister who is not prepared to donate a kidney and who points to the brother suffering from cerebral palsy as the proper donor. This fact undermines the assumption we sought to make, i.e. that if the potential donor were competent, it is very probable that he would willingly and with understanding donate the kidney... But in this case the sister refused, and despite the fact that her refusal does not totally destroy the “estimation,” because it may be that if no other potential donor existed she would consent, nevertheless her refusal provides grounds to argue that there is no certainty that the paralyzed brother would agree to donate his kidney.

The first reason is unique to that particular situation: the donor brother is in no mortal danger and the purpose of the transplant would be only to alleviate pain. In such a case one cannot “estimate” that the incompetent would consent to donate his kidney.

Is the second reason also applicable only to that situation, i.e. that after it was shown that the sister refuses to donate her kidney there is no longer a proper “estimation” that the incompetent brother would consent to donate? One could argue differently: perhaps the sister’s refusal disproves, or at least renders doubtful, the general “estimation” for all cases that an incompetent person, if healthy, would consent to donate his kidney. It is doubtful if such an “estimation” is itself accurate inasmuch as statistical studies indicate that only a small percentage of healthy family members consent to donate their kidneys.

On the other hand, one may argue that in the specific case confronting R. Hersher the “estimation” was correct because, as stated earlier, the protected brother was dependent on the other brother. It is possible that his well-being would be damaged more by losing his brother than by losing his kidney. As a result of the surgery and the transplant, the ill brother would live longer and consequently be able to care for the needs of the incompetent. It is only because the sister refused to consent to the kidney donation that the “estimation” is subject to doubt because the refusal demonstrated that in *that* family, even if the donor benefits from the transplant, the readiness to donate a kidney to another family member does not exist. And this requires clarification.

It is also the opinion of another halachic authority that we can rely on the principle of “estimation” to permit the removal of a kidney from an

incompetent person for transplantation into a family member. In an article dealing with the topic of kidney transplantation (R. Moshe Meiselman, "Halachic Problems in Kidney Transplants," *Halacha u'Refuah* 2, 114 (1981)), R. Meiselman states (*id.* at 121): "One of the difficult questions is transplanting a kidney when the donor is deaf-mute, incompetent or child." He concludes:

It can be said that if we could establish that most people donate their kidneys to their brothers, the kidney could be taken from the donor. This does not apply to someone who is not a relative as in those cases people certainly do not donate, and therefore you cannot take the kidney. As to brothers and fathers, etc., only where we can establish that the majority of brothers or parents, or children do donate, is it permissible to take the kidney for transplanting.

In my opinion, this is a far-reaching conclusion from the point of view of Jewish law, namely to allow the removal of a kidney from an incompetent person because of the estimation that most people would donate the kidney. This "estimation," even if based on a factually correct assumption, is insufficient to permit the removal of an incompetent's kidney unless, in addition to the "estimation," the taking of the kidney and the transplantation is of significant benefit to the incompetent's physical and mental health.... We have already noted above that there is a distinction between relying on an "estimation" in a monetary matter for maintenance or charity and removing an organ from one's body (*the Attorney General v. Doe*; 42 (2) P.D.661, 681-684).

Our comments regarding the use of "estimation" as a method of determining the consent of a minor or incompetent to remove an organ from his body are *a fortiori*, germane to the use of "estimation" as a method of determining the consent of a child or incompetent to take his life. It is difficult, very difficult, to estimate the wishes of a person in these sensitive situations and immense caution is needed in connection with children and incompetents, who are weak and dependent, and at times become a burden to their immediate surroundings. In such a situation the risk is great that "the desire" of the child or incompetent will be determined according to the will of *those around him* and not his own will, and from this point there is only a short distance before one confronts the danger of the "slippery slope."

62. As we have seen, a few of the problems in the field of medical ethics find their solution in provisions of existing legislation or have been dealt with by case law. But, there are still many problems that await consideration and decision by this Court, and some have arisen in the case before us. As we have mentioned and stressed before, it goes without saying that in such situations we are not setting out solutions in advance. The answers will be

given, case by case, issue by issue, according to the circumstances and questions that arise in each case. The source for finding the solutions for all these questions is the Basic Law: Human Dignity and Freedom, which is the basis and starting point for discussing these questions, involving fundamental human rights.

As stated at the outset, our subject involves a goodly number of basic rights contained the Basic Law: Human Dignity and Freedom: the protection of one's life, body and dignity and the right to personal liberty, privacy and confidentiality. Our analysis reveals that all the basic rights just mentioned are indeed involved in our case. These are the supreme values of the sanctity of life, the obligation to protect the life and body through medical treatment, and the right of the patient not to have his body invaded without his consent. It is the essential nature of our subject that basic rights very often contradict one another. For example, the obligation to protect and heal contradicts the right to refuse treatment; the latter stands in opposition to the obligation to invade a person's privacy by performing an operation or other necessary procedure to save his life even if the endangered person does not agree to such intervention. In this area, where basic rights come into conflict, Jewish Law has developed - especially in recent generations with the great advancement of medicine - a series of balancing principles, which are themselves basic values, for example: the obligation to prevent pain and suffering, both physical and mental; the fundamental precept of "Love your neighbor as yourself;" the distinction between natural life and artificially prolonging life; the autonomy of the individual, especially in the framework of contemporary responsa literature, and in light of the tremendous medical advances.

These values and balances are also the fundamental values of a democratic state. The essential difference between the system of Jewish law and the system of values in a democratic state is *the point of origin* in each system: the supreme value of the sanctity of life based on the idea that man was created in the image of God, in the world of Jewish Law, and the basic value of the autonomy of the individual and personal choice, as the value of a democratic state. This difference occasionally takes on practical significance; but in general the set of principles and decisions on our subject in both of these legal systems does permit the achievement of a *synthesis* between the Jewish values and the democratic values and the finding of *a balance* in accordance with the conditions set out in paragraph 8 of the Basic Law: Human Dignity and Liberty. An essential outcome of the synthesis and balance is that *active* euthanasia is absolutely forbidden. We have set out all of this and more in detail in the discussion of the values of a Jewish state (section 11-38), the values of a democratic state (sections 39-52) and the synthesis between them (sections 57-60) and we will not reiterate them.

Yet, we will review one point. Our discussion revealed that not every word, expression and phrase is truly as it appears to be. One example is the phrase the *right to die* which could become, under the pressure of an exaggerated theory of the autonomy of the individual according to which everything depends on the patient's consent, *an obligation* to die, an obligation which the patient unconsciously feels because he is given the opportunity to do so, thereby alleviating matters for his friends and relatives. Another example is the phrase: *mercy killing* which is not so much mercy on *the patient* as mercy on the *people surrounding and helping him*. Even more questionable is the *right to die with dignity*, which according to many thinkers and philosophers is an oxymoron. Death and dignity do not go hand in hand; *life and dignity* suit each other because the essence of life has in it the dignity of man, the dignity of a person created in the image of God.

It would seem that the overarching principal in the case law and decisions on our issue is the jurisprudential principle enunciated by Radbaz regarding one of the important issues of our subject: that the decision has to be fashioned according to the rule of "Her ways are ways of pleasantness" and the basic goal that "The rules of our Torah must accord with reason and logic." We are so instructed by the Basic Law: Human Dignity and Freedom so as to reach its objective, the anchoring of the values of the state of Israel as a Jewish and democratic state. The values of a Jewish state and a democratic state constitute *the foundation and normative shield* of the Israeli legal system and its principles. Laws and rules will be interpreted according to these values.

Before reaching decision, it is proper to review and consider, as we have before (section 52), the establishment of ethics committees in hospitals to assist in deciding questions in this area. In questions of such fateful magnitude, which simultaneously involve problems of law and ethics, medicine and psychology, halacha and philosophy, it is proper that in addition to the patient himself, when he is competent to do so, the relatives, the treating physician and staff, people of religion, legal scholars, philosophers and psychologists all take part in the decision making process. Shared discussion and analysis will clarify the various aspects of the questions awaiting decision, each participant contributing to the best of his talents and abilities, while protecting the privacy of the patient and avoiding publicity and with the necessary speed which is required by the nature of these situations. When a difference of opinion arises among members of the committee, they can bring the issue to the supervising court to decide. Such committees exist in various countries, especially the United States, and it is advisable that we too contemplate establishing such committees. The sooner the better.

The Decision in the Case Before Us

63. The application before us, as submitted by the mother of Yael Shefer, is that the following treatments not be given if and when the infant's condition grows worse:

- A. Respiratory aid.
- B. Administering of any medication except to relieve pain.
- C. [Artificial] nutrition.

(Par. 59 of the mother's affidavit, dated August 2, 1988; the opening motion that was submitted by the mother and cited at the beginning of our opinion).

At the beginning of our opinion we outlined the facts, among which were the details of the illness from which the infant Yael Shefer suffered and the care she received at the hospital as set out in the affidavits of the doctors who were involved in the case (see *supra*, sections 2-3). In the argument before us, other affidavits were submitted on behalf of the plaintiff and the State and they are worth examining.

The plaintiff's expert, Dr. Pinhas Lerman, administrator of the pediatric neurological unit of the Beilinson hospital in Petach-Tikva stated in his affidavit of August 22, 1988, stated:

7. In this condition [=of Yael] the child is like a dead person and there is no medical logic to prolong her life by artificial means of any sort, including respiratory care and/or transfusions, if and when her condition worsens so as to require their administration (hereinafter - 'the event').

8. In my opinion it would be cruel to continue to treat the child when the event occurs.

9. In my opinion, it is also hypocritical to say "that the child receives very humane treatment and is treated with great respect as is proper towards the end of life," for as I pointed out before, we should only refer in this case to one who is like a dead person.

10. If I were responsible for treating this child, my personal and medical conscience would not allow me to continue treating the girl, and I would allow her to die naturally without the aid of any technological means which could not cure her from her condition.

11. In my opinion and according to my medical conscience, it is specifically non-treatment, or non-use of artificial means in the circumstances of this child and her illness which conforms with the rules of medical ethics.

As an aside, as Mr. Hoshen, the learned counsel for the plaintiff pointed out:

Doctor Lerman *is the only one* who is prepared to testify in an Israeli court regarding the non-intervention of medical treatment in situations involving hopeless patients who are deemed to be terminally ill (Par. 3 of Mr. Hoshen's affidavit of August 22, 1988).

In contrast to Dr. Lerman, Dr. Ram Yishai, the expert for the respondent, presented a different approach and opinion. Dr. Yishai, head of the Israeli Medical Association since 1971, member of the Board of Ethics of the World Medical Association since 1985, and founder of the Israeli Society for Medical Ethics in 1988, declared in his affidavit of August 30, 1988:

3. The question of refraining from using extraordinary means and performing resuscitation on a patient who is deemed hopeless and terminal is a central question in medical ethics, and opinions vary in various countries being at times influenced by the world view of the decision makers.
4. The World Medical Association has published The Declaration of Madrid on Euthanasia, which states: Euthanasia, a procedure which is intended to end a patient's life whether by his own request or that of his relatives, is unethical. This is not to prevent the doctor from allowing *the natural process of dying* to continue at the final stage of the illness.
5. *According to those same rules* of medical ethics, the request of a competent patient to withhold medical treatment should be respected. The doctor should try to convince the patient to accept treatment for his benefit. However, if a competent patient who has reached majority is insistent in his refusal, the treatment should not be forced upon him.
6. A number of States in the United States have approved of a living will, and there is a statute, The Natural Death Act, which regulates this area. In a living will, a person, while still competent, directs that extraordinary means not be used to keep him alive if and when he becomes terminally ill.

Regardless of the legal aspects which are designed to relieve the doctor from liability, it is doubtful if the living will solves the moral problems. The decision of the doctor is fixed by the patient's medical condition *whether or not a living will exists*. From an ethical standpoint, the decision to

undertake extraordinary means for resuscitation *is taken according to the medical condition of the patient at the time of the decision.*

7. A debate exists as to whether to continue treatment of a terminal patient who is determined to be in a "vegetative state," but this debate cannot be solved by referring to such a person as "like dead." I find the term "like dead" unacceptable and surely inapplicable with respect to a patient who responds by crying when uncomfortable thereby maintaining a connection with her surroundings.

In the case of Karen Quinlan, it was held that she was alive even under the widest definition of death. The dispute in that case was whether anyone has the right to prefer death to life. So long as one is alive, the decision to end life is beyond the competency of human beings, and any decision not to prolong life actually assumes that we have the ability to evaluate the quality of life and to determine that such a life would be better off ended.

In any case, use of the term "like dead" is dangerous. This is certainly true in light of the fact that doctors have chosen the more stringent definition of death in accordance with the Statement of Death of the World Medical Association (Sydney 1968, Amended 1983) that it must first be definitively determined that all brain functions have ceased and are irreversible, including the brain stem. When it is intended that an organ be used for transplant, the determination of death must be made by two physicians. Only when it has been determined that the moment of death has arrived does it become ethical to stop attempting to revive the patient.

8. The ethical problem is especially difficult because we are not dealing with someone who is "like dead" but with a living person, a terminally ill patient, who is incompetent and who suffers damage that severely impinges on her quality of life, when all that can be achieved is a return to those unbearable conditions as defined by J. Fletcher in *Indicators of Humanhood, a Tentative Profile of Man* (Hastings Center Report, 1972).

Yael Shefer's condition matches this definition and therefore, Dr. Cohen, the administrator of the children's ward of the hospital in Safed, stated that he does not revive patients in such condition (as per the affidavit of the

mother), but he added that he must perform procedures that prevent choking.

It is difficult to differentiate between extraordinary means which would prolong the suffering of the child and those treatments designed to alleviate her pain and allow her to end her life in dignity. At this point, we cannot determine which procedures are of one type and which are of the other.

9. The task of a doctor treating a terminally ill patient is to alleviate physical and mental suffering while restricting his intervention to treatment which preserves, as much as possible, the quality of life of the patient reaching his end. We are not speaking of dying with dignity; R. Ramsey in "The Indignity of Death With Dignity" (*The Hastings Center Report*, 1981), asserts that "dying with dignity is an oxymoron," for death is the ultimate human indignity. Such flowery words sometimes conceal an exceedingly callous outlook. The less emphasis is placed on helping and treating the terminally ill, the more the emphasis is placed on dying with dignity. It can be said, as M. Muggeridge stated, "I am not exactly in favor of prolonging life in this world but I very much suggest against arbitrarily bringing it to an end."
10. In my opinion, if the parents decide to keep the child in the hospital, which is left to their discretion today, the use of these or other means will be determined when the time comes and according to the child's condition at that time. It will then be necessary to decide what is the unnecessary extra treatment that will prevent the natural course of death, and what is necessary treatment which will alleviate suffering during this process (and see A. Gruss, "Passive Euthanasia - Legal and Moral Aspects," *Hapraklit* 39 (1990) 162, 172-171).
64. Mr. Hoshen, the learned counsel for the plaintiff argued that:
The petition is not for a "mercy killing," i.e. to undertake a positive action to shorten Yael's life. Rather, it is meant to prevent the doctors from taking means such as respiration and transfusions which cannot save the infant from her sealed fate, but simply prolong her life artificially (Section 8 of the District Court decision).

Further in his statement, he set out to buttress the petition of the plaintiff to refrain from giving respiratory aid and [artificial] nutrition and supplying medications to Yael.

Ms. Zakai, the learned counsel for the State, vehemently opposed the petition to refrain from giving respiratory aid and [artificial] nutrition, and pointed out a difference of opinion regarding medications.

We have dealt in detail with the set of problems raised by the lawyers for both sides when discussing the stance of Jewish Law and United States Law on this subject. Certainly, Dr. Lerman's definition of Yael's conditions as "like dead" cannot be reconciled with the values of a Jewish and democratic state. I am surprised that this can be said about Yael, who responds by crying when uncomfortable like any other child her age, whose father sits by her bed day after day and plays music for her, and when her treating physician, Dr. Dora Segel-Coopershmidt, states that, "he hasn't lost hope that her condition will change" (see the affidavit of Dr. Segel-Coopershmidt of August 4, 1988, *supra*, section 3). We have also pointed out the essential distinction between starvation and non-supply of oxygen and the giving of various medications (see, for example, sections 32-36, 45). We accept the statement made by Dr. Yishai (and see the opinion of Judge Telgam in the *Zadok* case, *id.* (2) פ"ד (ת"א) 759/92, תשנ"ב פ"ד (2) 485 at 506; that of Judge Goren in the *Ayal* case, *id.* at 194, 198 and in the *Saadi* case, *id.* at sections 6-7 of the judgment). However, in the specifics of the case before us, there is no need to discuss these distinctions: Yael is not suffering and is not in pain. And we shall again quote two essential paragraphs from the affidavit of Dr. Segal-Coopershmidt:

9. Yael Shefer is currently in a permanent state of loss of consciousness (known as "a vegetative state"). *She is not suffering from pain* and, obviously, she is not being given medications for pain. She is quiet *and does not cry, except when she wants to be fed or requires routine medical care* (in case of fever, earaches, constipation, as with any child), conditions which improve after routine care.

10. From a supportive point of view, she is being treated more than reasonably. *She is not disgraced or degraded. Her dignity is completely preserved.* She is clean; she does not suffer from pressure sores which usually affects children who lie in the hospital for prolonged periods of time; and she does not suffer from spasm.

Yael is not suffering and is not in pain. Her dignity is exceptionally preserved. Yael cries like any other child when she needs to eat or requires routine medical care. Her candle still burns and shines for all who are around her. In these circumstances and under these conditions, the

sanctity of Yael's life, even though terminal, is the lone and determining value. Any intervention and encroachment on that life stands in direct opposition to the values of a Jewish and democratic state.

65. We could have ended our opinion here, but we will say a few words with regard to the additional question that arose before us, namely the fact that the application was only made by the mother.

Section 3(a) of the Women's Equal Rights Law, 1951 provides that the "father and mother *together* are the natural guardians over their children." (See also section 14 of the Capacity Law.) The first part of section 18 of the Capacity Law states that "in any matter submitted to their guardianship both parents must act by agreement." It is true, as Mr. Hoshen points out, that the ending of section 18 states that "it shall be presumed that one parent agrees with the actions of the other parent so long as the contrary has not been shown." However, that presumption is not sufficient with regard to such a fateful decision as in this case. And in any event, the presumption is overcome in this case. The conduct of the father clearly expresses, that he has a different attitude than the mother. As will be remembered, Dr. Segal-Coopershmidt declared:

8. ... a good part of the support the child needs (like washing and feeding) is administered by... the father of the child in the afternoon.
10. From a supportive point of view, she is being treated more than reasonably... Additionally, her above-standard physical surroundings should be noted, beginning with her having her own room, along with music played at the father's request, a fan in her room, etc.
11. The visits of the mother to the ward throughout the period of Yael's stay were rare and infrequent.
12. The father of the child visits her every day after work, stays with her for many hours, treats her with love and dedication which radiates in everything he does with her, like taking her for strolls in the carriage, sitting for hours with her on his chest, strictly keeping to feeding times and doing the feeding when he is there. In my discussions with him, he said that he still hasn't lost hope that her condition will change.

We should also mention the reason why the father did not appear before the District Court nor before us. The explanation of the mother that -

The father is completely shattered... My husband could not appear before you nor would he appear before you because he hates publicity (p. 5 of the District Court records)

is insufficient to lead to the conclusion that the father agrees with the steps the mother has taken or to contradict statements made in the affidavit of Dr. Segal-Coopershmidt.

We do not, God forbid, come with complaints or with moral teachings to the mother. Who knows the heart of a mother; the thoughts of her heart are her secrets. But there is no possibility for the court to grant the request before it, the request of "who is for life and who is for death," without the clear and express understanding of both parents. Only in the proper circumstances and in accordance with the values of a Jewish and democratic state, would there be any justification for granting such a request.

It is for all these reasons that we dismissed the complaint.

(-)
Deputy President

Justice Y. Maltz:

I concur.

(-)
Justice

Justice H. Ariel

1. In light of the instructive and painstaking opinion of the distinguished Deputy President, I will confine myself to a brief statement of my agreement and disagreement with the opinion.
2. I believe, as I will state forthwith, that Telila Shefer, the mother of Yael Shefer (of blessed memory), was entitled and permitted to turn to the Court with her request. Her request was brought with love and out of love and with sincere dedication to her daughter Yael (of blessed memory) for the issuance of instructions in regard to refusing certain medical treatments to her daughter, as delineated in the opinion of the distinguished Deputy President. However, the circumstances as they were set out were insufficient to justify granting the request at that time. Therefore, I joined in the decision of Sept. 11, 1988 to dismiss the appeal in those circumstances and after analyzing and weighing the record of the case before us, as was stated in that decision, according to the specific facts before us, but not to dismiss the case at the outset.
3. Indeed, as the distinguished Deputy President states in his elegant language, it is "against our will" that we sit in judgment of the sad case before us. The subject before us involves not only legal, jurisprudential and medical questions but also issues of morality, ethics and different beliefs and values, which have accompanied mankind as a whole and each person individually, in day-to-day life. In my opinion, it is desirable that this subject be speedily regulated to the greatest extent possible in clear and detailed legislation, so that there would be no need to turn, except in rare cases, to a judicial forum for decision.
4. So long as this painful subject has not been regulated, it requires solutions in certain cases, which the court cannot allow itself to refrain from deciding.

The Deputy President spread a broad canvass of opinions, quotations and decisions on our topic which, in public discourse, is seen as part of the general subject of "mercy killing." But such is not the case.

The subject here is a request for a *life of kindness and dignity* before death, and perhaps even "dying with dignity," but not mercy killing.

We deal here with the question whether or when it can be said that despite the fact that a person is hopelessly ill, treatment should be continued even against the will of the patient, where the treatment will not produce a cure but only artificial prolongation of life which has reached the doorstep of death.

Regarding the moment of death - see *Belker v. The State of Israel*, 41 (1) P.D. 1. The subject is the artificial prolongation of life through the use of various medications and machines, in this terminal state, when

the patient is undergoing unbearable pain and personal degradation which infringe upon his freedom and his dignity as one created in the image [of God], and who requests the cessation of such treatment. This subject is akin to the topic of passive euthanasia (in the words of the distinguished Deputy President, according to Jewish law, "removal of the impediment.")

5. The decision in this case is mandated, for as much as it discusses death *it is a need of life*. From the day we leave our mother's womb, we get closer to the day of death. From the time we were expelled from the Garden of Eden, the place of the tree of life, by the harsh decree issued upon us:

The land will be cursed on your account, you will eat from it in sorrow all of your days, and it will grow thorns and thistles for you and you will eat the grass of the earth. By the sweat of your brow will you eat bread until the day you return to the earth from which you came, for you are dust and to dust you shall return (*Genesis* 3:17-20).

Between these two polar times of starting and ending life, we day by day seek to push off the day of death which was decreed us: "... How many will pass on and how many will be born, who will live and who will die, who at their designated time and who not at their designated time...." (From the prayer of the Day of Atonement - *U'netaneh tokef.*) Alongside this we also pray on the Day of Judgment: "In the book of life, blessing and peace, and a good livelihood and good, saving and consoling decrees, may we be remembered and written ... *for a good life....*"

With the prayers and hopes for improving our lives between life and death, we also try in our actions to manage our deeds to attain that "good life," each one according to his understanding of what that is. In this framework, we may, with the existing limitations, act to better our lives and direct our deeds and efforts, according to the basic and natural liberties that pertain to a person in a civilized and progressive society. The dignity and freedom of man are a part of these.

The Basic Law: Human Dignity and Freedom which was recently adopted (March 25, 1992) is obviously of great importance, with all the differences of opinion that have been expressed and will be expressed regarding its interpretation, including the purpose of the law "to protect human dignity and freedom in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state." However, the principle embodied in it constituted part of the fabric of the society in our country even prior to its adoption, as it has in every civilized and progressive state and society (incidentally, the case before us involves

the period prior to the adoption of this Basic Law) including paragraphs 2 and 4:

2. The life, body and dignity of any person shall not be violated....
 4. Every person is entitled to the protection of his life, body and dignity.
6. Without any connection to the debates regarding how to interpret this basic law, I believe that based on fundamental, natural, lawfully recognized liberties, including those pertaining to human dignity and freedom, a person may, before his death, in the framework of striving for that "good life" in principle request the court, when there is no hope for recovery and when his death lingers, if he so desires, to prevent medical treatment which has no purpose, in order to save himself from pain and suffering, a feeling of degradation and disgrace to the image of the person in him, at a point when we should not ask him to tolerate any more. When he cannot ask that himself, his guardians, his family and relatives and the people most dear to him can do so on his behalf. What needs to be done is to establish the necessary explicit and detailed criteria, determined by clear medical opinion, which will have the force and authority to obligate physicians to refrain from those activities and give the doctors protection from the civil and criminal law.

Since I stated that I will keep my opinion brief, I will not comment on all the wealth of legal and other material mentioned by the distinguished Deputy President. I will allow myself, to cite here a short quotation from President Shamgar in the *Kastenbaum* case:

Human beings who are part of a given society are called upon to respect the personal, sensitive feelings of the individual and his dignity as a person. This through patience and understanding, for emotional and personal dispositions are different for each person. In a free society, there is no striving for a collectivism of beliefs, ideas or feelings. A free society minimizes limitations on the liberties and desires of the individual and acts patiently and tolerantly, and endeavors to promote understanding. And this is also applicable to those who choose a path which the majority of people do not view as acceptable or desirable. As one should accept and respect the right of society to nurture its culture, its national tongue, its historical tradition and values etc., so too must it establish a readiness to live with this or that individual within society, who chooses a path which does not identify with the goals and aspirations of the majority.... In a free society, there is room for many different opinions, and the maintenance of freedom within it, in a practical sense is shown by the achievement of the proper balance, which permits each person to express himself as he chooses. This is the essence of tolerance, which allows a wide ranges of opinion, freedom of speech and conscience, so long as these do not create a

danger to the general public or to another individual (46 (2) P.D. 481, parts 2-5).

It is worth noting that the bill on The Rights of the Patient, 1992 passed a first reading after paragraph 10, which reads as follows, was deleted from it, apparently because its provisions were too general and broad or too far-reaching:

10. A terminally ill patient is entitled to die with dignity in accordance with his world view and belief, and to the extent possible in the presence of a person whom the patient desires. The treating physician and the medical institution shall help the person realize this right, and refrain from anything which could impinge upon his dignity.

For this reason I stated earlier that it is proper that this come about through legislation. Such legislation must come, in my opinion, after a committee of the appropriate composition (which will surely include medical and legal scholars but could also include others of spiritual nature as well as other professions or occupations) decide upon it. They will make recommendations for clear rules which will be followed in such situations. And then the request for judicial intervention will lessen.

However, as stated, so long as there are no such criteria, the Court may not abstain from deciding this delicate and sensitive issue, even if it troubles and agonizes the soul of the judge. The decision in this case will be the result of the proper balance between the great principles of the sanctity of life and the sanctity of the will and dignity of the person within the framework of all the natural and legally recognized liberties, including the Basic Law: Human Dignity and Freedom, but not solely within the framework of this law (including section 8 therein), according to the facts and circumstances of each case (see also Barak, "Legal Interpretation" part 2, vol.3, ch.2 which deals with the issue of "basic laws regarding human rights and their practical interpretation.") This will also be a guarantee not to slip on the "slippery slope."

7. This brings us to the case of a minor, as is the situation in the painful case before us. Section 1 of the Legal Capacity and Guardianship Law, 1962 (hereinafter "Legal Capacity Law") states: "Every person has capacity for rights and obligations from the time of his birth until his death." We are directed to protect the well-being and health of the minor and to prevent damage to him, according to our cognizance and the principles which exist regarding every person qua person, and all the more so for a minor. Indeed, the objective of many laws, directly or indirectly is to protect and shelter him. (There are also cases where the law protects a fetus. See *Doe v. Doe*, 35 (3) P.D. 57).

The dignity and freedom of the minor should be as precious to us as our own dignity and freedom, and the sanctity of his life should be more sacred than our own life, and the suffering of a child should hurt us more than our own suffering hurts us.

A minor has full rights except as limited by law.

Therefore, in the case before us too, his right is that his dignity in a terminal state should be maintained, and pain, suffering, degradation of the self and unnecessary disgrace should be prevented. And therefore, a minor may also, in those same instances and circumstances, if he is able to, request the court to prevent such outcomes. His guardians, including his natural guardians, his parents or either one of them, may bring this request in his name, whether the minor is capable of bringing such a request himself or is not.

Indeed, we must strictly adhere to those conditions upon which such a request will be based. Not always and not at every age can a minor formulate his opinion according to the given situation for giving his consent or filing a request. Not every consent is his consent, and it must be ascertained whether his request is influenced by others because of their respect, dignity or fear of them (including his parents and guardians), and that perhaps this request and consent is not a request or consent of the minor. Surely, the inclination of the parents (and in any case, both parents should be heard) or that of the guardians must be examined as well as their sincerity, with all the respect due to them. However, this route should be seen as not only open and possible, but required, in the name of the minor and for his benefit, according to the rules laid out.

With all due respect, I do not accept the argument that this request by the guardians is contrary to any of the provisions of the Legal Capacity Law. Section 68 of the Law, which refers to the requirement "to protect the physical and mental well-being of the minor," surely imposes no impediment. On the contrary. It well fits into this Law. This position is also supported by sections 14, 17, 19 and 20 of the same Law. I also do not agree that *one* of the parents cannot, without the second parent, make the application in the name of the minor. It is true that section 18 requires the consent of both, and under section 19 of the said Law the court makes the decision if there is a difference of opinion between the parents when both parents apply to the court for its decision. However, in such cases, the application to the court is not that of parents or guardians only in their capacity as such, but they act as the voice of the minor.

The minor is himself permitted to apply in whatever manner or via any person or proper organization, and surely by his mother in this or other

situation of distress, to the proper forum. A basis for this is precisely section 68 of the Legal Capacity Law, and see the entire chapter 4, particularly section 72 of the Law (and there is no need to refer to section 3(a) of the Women's Equal Rights Law, 1951), so long as the court will accept such an application, as it is, or by means of appointing a different or additional guardian or a guardian *ad litem*, or hearing the minor himself.

We should not lock the door in the face of a minor in distress so long as he does not use this procedure improperly. (Support for this is found in the *Garti* case, 18 P.D.449, and the *Kidney* case, 42 (2) P.D. 66). It is incumbent upon the Court, in this and other cases, to leave the door open to prevent injustice and distress to minors when their application to the court is for a real need, including the need in a terminal issue, as in the case here, in the nature of: "Open for us a gate, at the time of the locking of the gate, for the day has passed."

(-)
Justice

Decision rendered in accordance with the opinion of Deputy President M. Elon.
Opinion given on the 10th Kislev, 5754, (November 24, 1993.)

(-)
The Deputy President

(-)
Justice

(-)
Justice

III. Concluding Remarks

Having put before you the opinion in the Shefer case, I should like to emphasize a few points.

In regard to the term “the values of a Jewish State,” it is reasonable to conclude that, in view of the current spiritual - cultural climate in the Jewish community, it is unlikely that there will be a single accepted definition of such a fundamental term. One may well assume that this term, which is found in the legislation of the State of Israel, includes within it the values connected to the period of national re-awakening that led to the establishment of the State, and I am sure that the full content of the term will be the subject of many philosophical and legal debates. Such debates are already taking place in legal and philosophical literature, and in all likelihood will continue in the future.

I have also had the privilege, in a long series of judicial opinions and articles, to discuss the meaning of “the values of a Jewish state.” But one thing must be made clear, which in my opinion cannot be disputed. Jewish values certainly include the values of Judaism and the Jewish heritage - the vast and voluminous sources of the halacha and Jewish thought produced during all the generations and periods, beginning with the Bible and continuing with the Talmudic literature, the commentaries and novellae, the codes and responsa until our own day. It is impossible to conceive of a definition of Jewish values that does not include this vast and voluminous Jewish heritage.

It is instructive that the subject of Halacha and Medicine is one of the most discussed and developed subjects in Jewish law. Our generation especially has produced a very substantial halachic literature dealing with the many and variegated problems in the field of Medical Ethics. The problems concern such topics as informed consent, organ transplants, euthanasia and many others. What should be emphasized is that, in regard to Medical Ethics too, we perceive the same phenomenon that is characteristic of and rooted in the halachic system, namely diversity of opinion, varied approaches and differing decisions. The basic principle is: all are the words of the living God. This phenomenon is vital to determining the method of solving the various problems in the field of Medical Ethics that are constantly arising.

In the Shefer case I discussed, in great detail the bulk of these problems and the different approaches of the halachic authorities to their solution. As we saw in the opinion, the fact that there are many different opinions and approaches in the halacha is of great importance in light of the provision of the Basic Law that the problems should find their solution according to “the values of the State of Israel as a Jewish and democratic state.” It is well known that the democratic approach to these subjects often differs - to a lesser or greater extent - from the Jewish

approach as reflected in the Jewish heritage, because of the different points of departure. The Jewish approach to these subjects begins with the creation of man in the image of God, while the starting point of western democratic thought is personal autonomy and self-determination.

The Basic Law requires us to find a synthesis between these approaches. This is a momentous and weighty task, and at times also a difficult one. In achieving this synthesis, we must remember the sequence of the values in the Basic Law: The values of a Jewish state are mentioned first, before the values of a democratic state. This too has a great influence on the method of arriving at a synthesis between these two categories of values; the Jewish must sometimes be given priority over the democratic values. This we also extensively discussed in the opinion in the Shefer case.

This synthesis between Jewish and democratic values constitutes a great innovation in the legal system of the State of Israel; and it is unique to the State of Israel. I have studied many constitutions in various legal systems in the world, and I have found no similar multi-valued approach. I have not found a constitution that refers, for example, to the values of a Canadian and democratic state or the values of an American and democratic state or any other such combination. The fusion of the values of a Jewish and democratic state is entirely original with State of Israel. Its source is the special character of the Jewish state as a Jewish and democratic state.

All that will be said and heard in this conference that we begin today is of profound importance to the construction of the legal system of the State of Israel. I am confident that our guests from abroad will also gain immeasurably from the examination of the solutions to the various problems in the field of Medical Ethics, according to this instructive synthesis between Jewish and democratic values. I wish all of us great success in our deliberations.