Bioethical Inquiry (2009) 6:297–305
DOI 10.1007/s11673-009-9176-z

Dealing With Death in the Jewish Legal Tradition

Daniel B. Sinclair

Received: 17 March 2009 / Accepted: 16 July 2009 / Published online: 7 August 2009

Abstract The main theme of the article is the tension between the obligation to preserve life, and the value of timely death. This tension is resolved by distinguishing between precipitating death, which is prohibited, and merely removing an impediment to it, which is permitted. In contemporary Jewish law, a distinction is made between therapy, which may be discontinued, and life-support, which must be maintained until the establishment of death. Another theme is that of "soft" patient autonomy, and its role in dealing with the dying in both traditional Jewish law and Israel's Terminal Patient Law, 2005. Preventing suffering in relation to a dying person, and praying for his or her death are also discussed in the article.

Keywords Obligation to heal · Timely death · Precipitating death · Removing an impediment to death · Therapy · Life-support · "Soft" autonomy, Terminal Patient Law, 2005 · Preventing suffering in relation to the dying · Praying for the death of a suffering dying person

D. B. Sinclair
Fordham University Law School,
140 West 62nd Street,
New York, NY 11230, USA
e-mail: dsinclair@law.fordham.edu

D. B. Sinclair (✉)
CMAS Law School,
7 Yitzhak Rabin Boulevard,
Rishon Lezion 71590, Israel
e-mail: daniels@colman.ac.il

The Obligation to Preserve Life in Jewish Law

The Biblical mandate to "perform the Divine Commandments in order to live by them"(*Leviticus* 18:5) is interpreted by the Sages in the *Talmud* to mean that the preservation of human life is a paramount value. Under Jewish law (*halakhah*), the obligation to save human life overrides all but the three cardinal prohibitions of murder, idolatry, and unlawful sexual relations (*Yoma* 85a). In all other cases, the preservation of human life is paramount, and even the sanctity of the Sabbath and the Day of Atonement is overridden by the obligation to save life (*Shulkhan Arukh, Orah Hayyim* 328, 618). A person is not allowed to risk his or her life by ignoring medical advice which entails a desecration of these Holy Days, and most authorities maintain that any religious obligation that is fulfilled in defiance of potentially life-saving medical advice is also halakhically invalid (*Resp. Mahari Assad, Orah Hayyim* no.160; *Resp. Maharam Shick* no. 260; *Resp. Minhat Yizhak* 4 no.102).

The Jerusalem *Talmud* goes as far as to brand a rabbi a "despicable individual" if he has failed to teach his flock the rule about the paramount status of the obligation to preserve life, and as a result, is asked a question concerning the permissibility of breaking the Sabbath in order to save a particular individual (*Yoma* 8:5). This is because the very first thing that the rabbi ought to have done was to teach this rule to his congregation so that if a life-threatening situation

arose on the Sabbath, there would be no need to waste any time in asking a question.

The value of life in Jewish law is also manifested by the existence of halakhic prohibitions on suicide, and self-endangerment.[1] According to Maimonides, these prohibitions all rest upon the theological principle that human life is "not a person's property, but is the property of the Holy One, blessed be He" (*Laws of Murder and the Preservation of Life* 1:4; Radbaz, *Laws of the Sanhedrin* 18:6).[2] It is, therefore, forbidden to endanger or destroy God's property unless there is a halakhic license for doing so, and martyrdom would be a case in point. This theory of Divine ownership is often cited by halakhic authorities as the ideological springboard for their endorsement of coercive life-saving treatment in Jewish Law (*Nishmat Avraham, Yoreh Deah* no. 155).

Now, since Jewish law provides that an individual may be compelled to perform his or her halakhic obligations, it follows that recalcitrant individuals may be compelled to undergo life-saving therapy in order to prevent them from transgressing the above-mentioned prohibitions (*Resp. Radbaz* 4 no. 1139; *Magen Avraham, Orah Hayyim* 328:6). In the past, the preferred means of coercing recalcitrant individuals was a court-administered lashing. In more recent times, and in the context of consenting to life-saving medical treatment, gentler methods such as persuasion or deception are the preferred means of achieving the desired result (Elon 1974, 535; *Resp. Iggrot Moshe, Hoshen Mishpat* 2 no.74). Moreover, according to R. Immanuel Jacobovits, a modern halakhist, the complexity of modern medicine has made uncertainty a pervasive feature of all treatments. In the light of this ubiquitous medical uncertainty, R. Jacobovits makes coercive medical therapy in Jewish law into a non-issue (Jacobovits 1988). However, as we will shortly see, the Israeli Supreme Court went beyond these milder forms of coercion, and used Jewish law to justify forcing life-saving stomach surgery on a recalcitrant patient. Current Israeli law also empowers hospital ethics committees to order coercive life-saving treatment in certain circumstances.

The eighteenth-century authority, R. Jacob Emden, adds the rider that coercive medical therapy is only mandated by Jewish law if the therapy in question is a standard one, and is of proven effectiveness. His example of such a therapy is the amputation of a gangrenous limb. Internal therapies, however, are all in the realm of the experimental as far as R. Emden is concerned, and the coercion rule does not apply to them (*Mor Ukeziah* no. 328). Clearly, R. Emden's distinction between amputations of gangrenous limbs and internal medicine is to be understood against the background of eighteenth-century medicine, and is no longer relevant in the context of contemporary medical practice. The rider, nevertheless, still applies, that is, coercion is only justified in relation to risk-free therapies.

In Jewish law, 50% is the base line for distinguishing between risky and non-risky treatment. In practice, however, halakhic authorities will deviate from this base line if the circumstances warrant such a deviation. As will be explained at length in R. Feinstein's Soft Doctrine of Patient Autonomy below, R. Moses Feinstein, a modern halakhic authority, permits an individual to undergo a highly risky procedure, in which the chances of success fall well below 50%, for the purpose of achieving a much higher quality of life.

The authority to make judgments regarding the legitimacy of undertaking risky therapies is vested in halakhic authorities who arrive at their decisions on the basis of a combination of legal criteria and the medical assessment of qualified professionals (Steinberg 1994).

In 1985, the Israeli Supreme Court applied Jewish law in order to enforce life-saving medical therapy in a case in which the appellant, a suspected drug dealer, was operated on by a police surgeon against his

[1] See Elon (1974, 477); *Deuteronomy* 4:9. In his *Laws of Murder and the Preservation of Life* 1:4, Maimonides states that "whoever transgresses the decrees of the Sages concerning self-endangerment, and says that as long as he is prepared to take the risk, his actions should be of no concern to others, is to be beaten for his rebelliousness". In other words, there is no room for the liberal approach associated with J.S. Mill in Jewish Law.

[2] The idea that human life is Divine property, and may not be damaged by its human stewards is also found in Greek thought. Plato's *Phaedo* contains the following exchange between Socrates and Cebes: "But I do think, Cebes, that it is true that the gods are our guardians and that we men are part of their property. Do you not think so? I do, said Cebes. Well then, said he, if one of your possessions were to kill itself, though you had not signified that you wished it to die, should you not be angry with it? Should you not punish it if punishment were possible? Certainly, he replied". Socrates uses this argument in order to refute the legitimacy of suicide in circumstances other than those mandated by the gods (Plato 1910, 113).

express wishes, and two packages of heroin were removed from his stomach (Kurtam v State of Israel). The justification for doing so was that without the non-consensual stomach surgery, the suspect would have died. Upon his recovery, the appellant was charged with drug-dealing, and the drugs obtained from his stomach were offered as evidence against him. The appellant sought to have the evidence rejected on the grounds that he had refused to consent to the surgery, and it had, therefore, been obtained by illegal means. He claimed that coercive life-saving medical therapy was prohibited under Israel's 1951 Protection of Privacy Law, and was in breach of the standards of substantive democracy as applied in the legal systems of Western liberal states. The Supreme Court ruled that the drugs were admissible, and Jewish law was cited in order to justify this decision.[3] In his judgment, Beiski J. pointed out that under Jewish law, all individuals are obligated to undergo life-saving treatment, hence, "the patient's wishes are… of no account" (Kurtam v State of Israel, 697).[4] As such, it was perfectly legal to have carried out the invasive stomach surgery against the suspected drug dealer's express wishes. The heroin obtained from his stomach was not tainted by illegality, and could be used in evidence against him.

This precedent was incorporated into Israel's Patient's Rights Law, 1996, section 15 (2) which provides that a hospital ethics committee may approve coercive life-saving therapy for a competent adult provided that the treating physicians are unanimous in their belief that the therapy will be successful; the patient is informed of all aspects of the proposed therapy as if he or she had consented to it, and that there is a reasonable expectation that the patient will consent retroactively.

This section is unique in contemporary Common Law jurisdictions, and reflects the traditional Jewish law position, rather than the modern liberal consensus. The Israeli legislator chose to disregard the strong version of patient autonomy commonly incorporated into Western legal systems, and, instead, to apply the halakhic obligation to preserve life.

The Weakening of the Obligation to Save Life in the Context of the Terminally Ill Patient

The halakhic situation is different with respect to a terminally ill patient or *goses*. The Talmudic *goses* is identified by physical features traditionally associated with dying, that is, the emission of a death rattle and the inability to swallow (Maimonides' Commentary to the *Mishnah*, *Arakhin* 1:3; *Tiferet Yisrael, Arakhin* 1:3). Under Talmudic law, it is forbidden to precipitate the death of a *goses*, and whoever does so is guilty of murder (*Sanhedrin* 78a; *Semahot* 1:1–4). According to a sixteenth-century authority, R. Joshua Falk Katz, a *goses* is incapable of surviving for more than three days (*Perishah, Yoreh Deah* 339:5). Most contemporary halakhic authorities, however, adopt a qualitative rather than a quantitative definition of *goses*, the core of which is the determination that death will almost certainly take place in the near future (*Resp. Iggrot Moshe, Hoshen Mishpat* 2 no.73; Bleich 1972, 275 n.2).

In relation to the *goses*, the halakhic obligation to preserve life is tempered by the requirement that death not be delayed. According to the thirteenth-century *Sefer Hasidim*, no. 722, it is mandatory to remove a woodchopper from the vicinity of the *goses* so that his soul may leave the body in a timely manner. The sound of the chopping was thought to be instrumental in keeping the soul in the body. Also, salt is not to be put on the tongue of the *goses* for a similar reason,

[3] Israeli law is a secular legal system based upon rules and principles of English Common law and equity which were put into place during the British Mandate. Only marriage and divorce are governed solely by traditional Jewish law. Nevertheless, in cases of first impression, Israeli judges sometimes turn to Jewish law in areas other than marriage and divorce, and since 1980 there is a legislative basis for such a course of action (Foundations of Law Act 1980). In recent years, secular courts in Israel have tended to use Jewish law in their decisions in the field of biomedical law on a fairly frequent basis, and one of the features of Israeli legislation in this area in the use of Jewish law in crafting laws relating to matters of life, death and assisted reproduction; see Sinclair (Sinclair 1996, 421). It is also important to note that once a halakhic principle has been adopted by secular Israeli law, it loses its Jewish pedigree, and for all intents and purposes becomes part of Israeli law (Cohen v State of Israel).

[4] A strong critique of the Kurtam decision as an example of extreme and unjustified paternalism was mounted by Shapira (1989, 225 ff). Also see: Sinclair (2003, 176–177) for a discussion of this point, and the view of Elon J. that the Kurtam decision conforms to the values of the State of Israel as a "Jewish and democratic state" under Section 8 of the Basic Law: Human Dignity and Freedom Act, 1992.

that is, it was believed that the salt would prevent the emergence of the soul.[5] Moving the *goses* from place to place, even for the purpose of ensuring a timely death is, however, forbidden by the *Sefer Hasidim* for fear that any such movement will precipitate his death. According to R. Moses Isserless, a prominent sixteenth-century authority, if salt is placed on the tongue of the *goses*, it may be gently brushed off.[6] The distinction made in the *Sefer Hasidim* between removing an impediment to death which is permitted, and precipitating death which is prohibited, became the cornerstone of the *halakhah* regarding the treatment of the dying (Sinclair 2003, 181–186).

In the modern period, woodchoppers and salt have been replaced by respirators and artificial nutrition, and although the underlying principle remains the same, namely, the death of a *goses* is not to be precipitated, but anything impeding it may be removed, the distinction between precipitation of death and impediment-removal has become much more complicated. In an age of hospital death and intense medical treatment of the dying, the focus of the distinction has shifted to the aim of the medical treatment being administered to the terminally ill patient (*Arukh Hashulhan, Yoreh Deah* 339:4; Sinclair 2003, 186–199). Treatment calculated to provide a temporary cure is regarded as an impediment to death, and may, therefore, be withheld or withdrawn. Only treatment directly aimed at the preservation of life itself remains subject to the principle of coercive life-preserving medical therapy (Jakobovits 1957, pt.1, 28–31; pt.3, 16–19). A good illustration of the modern application of the distinction is provided by R. Shlomo Zalman Auerbach, a leading Israeli authority in the second half of the twentieth century, who wrote that it is not mandatory to amputate the gangrenous leg of a patient dying from terminal cancer, since this treatment cannot change the prognosis, and merely serves to delay death. It is, however, forbidden to remove artificial nutrition, hydration or respiration from the dying patient until the establishment of death.[7]

The one exception to the trend amongst modern halakhists to distinguish between temporary cures and life support in relation the treatment of the dying is R. Hayyim David Halevy, a modern halakhic authority, and former Chief Rabbi of Tel Aviv. R. Halevy was, indeed, prepared to make a simple transition from salt and woodchoppers to modern medical life support. In his view, any non-natural life support may be considered an impediment to death, and may be removed in the final phase of life when no cure is possible (Halevy 1981, 304–305). His view, however, has been rejected by the overwhelming majority of modern halakhic authorities on various grounds (Steinberg 1994, 406–407). First, it oversimplifies the distinction between death-precipitation and impediment-removal, especially in the light of the fact that the impediments mentioned in traditional halakhic texts, for example, the sound of woodchoppers and salt on the tongue have no basis in rational medicine, and it is arguable that their removal was permitted by the rabbis precisely because of that fact (Sinclair 2003, 188). Second, R. Halvey's position is troubling one from a moral perspective, since it would permit the removal of all medical devices or therapies on the basis of the argument that such a course merely restores the patient to his or her natural state. This is a very strong form of medical naturalism, and would, for example, sanction the withdrawal of insulin from a terminal diabetic, since the supply of insulin falls into the category of an artificial impediment to death. In the light of the possible ramifications of such an approach, it is unlikely that R. Halevy would wish to subscribe to this type of strong naturalist position vis-a-vis the status of medical therapy in Jewish law (Zohar 1997, 47–48).

Contemporary halakhists, therefore, reject the position adopted in most modern Common Law jurisdictions that the artificial nature of life-support converts it into a medical therapy subject only to

[5] These practices were believed to be efficacious in keeping the soul in the body (Trachtenberg 1939, 160). They were also prevalent in non-Jewish society (Questelius 1678, 1,7).

[6] *Rema, Yoreh Deah* 339:7. Also see: *Siftei Cohen, Yoreh Deah* 339:7; *Beth Lehem Yehuda, Yoreh Deah* 339:1; *Resp. Tsits Eliezer*, 13 no. 89; 14 no. 80. The question addressed by these authorities is the extent to which R. Isserless's permission to brush salt off the tongue constitutes permission to withdraw therapy in addition to the mandate to withhold it.

[7] *Resp. Minhat Shlomoh* no.31. This *responsum* deals with withdrawing life support, not with its withholding. In the light of the permission given in the Sefer Hasidim to withhold salt from a *goses*, many modern authorities maintain that in certain circumstances, life support may be withheld. Once commenced, however, it is almost universally agreed that it may not be terminated until death (Steinberg 1994, 406–408).

medical discretion, or to the rules of medical as opposed to regular criminal law (Airedale National Health Service Trust v Bland 1993; Cruzan v Director of the Missouri Department of Health 1990). There is no difference between natural and artificial life support, and neither form may be discontinued, until the establishment of death (Jakobovits 1957, pt.1, 28–31; pt.3, 16–19).

R. Feinstein's Soft Doctrine of Patient Autonomy

A unique contribution to this area of Jewish law was made by R. Moses Feinstein, the leading halakhic authority in North American Orthodoxy in the latter half of the twentieth-century. In normal circumstances, R. Feinstein subscribes to the principle of coercive life-saving therapy (*Resp. Iggrot Moshe, Hoshen Mishpat* 2 no. 73). In the case of a terminal patient, however, this obligation may be overridden by the wishes of that patient, even to the extent of withdrawing life support. In responding to a question involving a patient who persistently removes his intravenous feeding tube, R. Feinstein rules that, "one may not apply physical force to an adult to make him accept nutrition, especially if he believes it is causing him harm" (*Resp. Iggrot Moshe, Hoshen Mishpat* 2 no. 74). The reason for this is that the trauma of coercion in such a situation endangers the patient's physical and mental health, and as a result, it is more than likely to precipitate his or her death. Support for this position is found in the *Talmud* (*Bava Bathra* 147b, 156b; *Ketubot* 70a). In discussing the legal position with respect to dying individuals who wish to dispose of their property even though the formal means for so doing—for example, valid witnesses and formal deeds—are unavailable to them, the *Talmud* rules that the wishes of such individuals are to be respected, and the property transferred in accordance with their wishes, irrespective of the lack of formality at the time of the deathbed disposition. The reason for this leniency is the fear that any refusal to implement the express desire of the dying person is likely to cause him or her grave mental distress, and this in turn will lead to a worsening of their condition to the extent of precipitating their death. R. Feinstein adds that the medical treatment of the dying is surely worthy of even more serious consideration, as far as trauma-avoidance is concerned, than the disposition of their property. Hence, basic life support may be withdrawn[8] if this is in accordance with the clearly articulated wishes of a terminal patient.

It is tempting to link this decision with an earlier one in which R. Feinstein argues, in effect, that Jewish law recognizes a soft form of patient autonomy. In this earlier *responsum*, the question posed to R. Feinstein concerned a patient who was offered a rather risky treatment which would, if successful, significantly increase both his life expectancy, and his quality of life. The problem was that the risk of death was a lot more than 50%, and the accepted position under Jewish law is that the obligation to preserve life applies equally to the short as it does to the long term (*Yoma 85a* and commentaries ad loc). A treatment which does not even have a 50% chance of success would seem to fall short of the necessary statistical qualifications for justifying the taking of the risk, and there are precedents to the effect that in this type of situation, the best course is that of inaction (*Resp. Noda Biyehudah*, 2, *Yoreh Deah* no. 59). Nevertheless, R. Feinstein rules that the decision lies in the hand of the patient, and that he is permitted to choose the chance of a significant improvement to his life expectancy and quality of life, notwithstanding the high risk involved in the treatment. He points out that the desire for improved quality of life and an extended life-span is common to people everywhere, and in this respect, the case pits two legitimate values against each other. On the one hand there is the value of life, however short it may be, and on the other, there is the general desire for improved quality of life and longer life-span. The way that *halakhah* chooses to resolve this conflict is to respect the wishes of the patient. R. Feinstein reinforces his argument with a

[8] It ought to be pointed out that this interpretation of R. Feinstein's position is not an uncontroversial one, and it is possible to argue that his *responsum* is confined to cases of withholding, not withdrawing. Such an interpretation would contend that the patient had already pulled out the tube, and the sole question was whether or not it must be reinserted. This interpretation is possible, but it is certainly not definitive. There is room to read the *responsum* in such a way that it refers to withdrawal as well as to withholding. Also, in this type of case, the distinction between withholding and withdrawing tends to become highly artificial, if not entirely vacuous, since, in effect, the decision not to reconnect leads to death in exactly the same way that withdrawal leads to the patient's demise.

fine gloss on the principle of the Divine ownership of human life mentioned above. In a rather dramatic statement, he claims that in this type of situation, "people get to own their bodies with respect to improving the quality of their lives". In other words, God transfers His title in that patient's life to him, and makes him or her the arbiter of their physical fates (*Resp. Iggrot Moshe, Yoreh Deah* 3 no. 36). According to R. Feinstein, therefore, the Divine will in hard cases make itself known in the form of the patient's wishes.

It is important to emphasize that R. Feinstein does not make patient autonomy into a systemic value in Jewish law. This would be entirely foreign to his way of thinking as a classical halakhist. Traditional *halakhah* is predicated upon the assumption that Jewish law is based upon the Divinely-revealed word of God as recorded in the Torah, and in its juristic development at the hands of qualified legal scholars.[9] All he is saying, therefore, is that in certain types of hard cases, patient choice is the appropriate halakhic criterion for their resolution. This is the meaning of the phrase "soft autonomy", that is, autonomy as a halakhic solution, rather than as an independent value. The starting point of Jewish law remains the notion of obligation together with its practical corollary—coercive life-saving treatment—provided that the therapy is both tried and tested. Hence, the decision in the drug dealer's case to accept the evidence, notwithstanding the non-consensual invasive stomach surgery by which it became available. In hard cases involving competing values, however, autonomy is the vehicle by which the *halakhah* expresses itself, and the patient's wishes dictate the outcome.

It is noteworthy that although the starting point in modern Common law jurisdictions is strong patient autonomy (Schloendorff v Society of New York Hospital 1914; Skegg 1982, ch.2), there are situations in which the law appears to be licensing what is, in effect, coercive treatment. Typical examples are cases involving disputes between parents and doctors with regard to the treatment of minors (Mason and McCall Smith 1999, 251; Re A (Children) 2001), and the rejection by competent adults of standard life-saving treatment on the basis of religious beliefs (Re T (1992); Skene 1997, 84).

Now, although R. Feinstein does not specifically mention ownership transfer in his *responsum* regarding the patient who refuses to remain connected to a feeding tube, his decision partakes of that same spirit in that it posits the solution to the problem of the clash between patient choice and halakhic rules in the form of the wishes of the patient. In that sense, it may, in our view, be classified under R. Feinstein's rubric of soft autonomy in Jewish law.

An important pastoral ramification of R. Feinstein's position is that rabbis consulted regarding the treatment of a terminal patient must also ascertain the wishes of the patient, and factor them into the halakhic decision. It is no longer appropriate to provide guidance on the basis of a combination of black-letter law and medical opinion alone.

Soft Autonomy and the Terminally Ill Patient Law 2005

Notwithstanding the facts that R. Feinstein's soft autonomy position does not appear to be shared by the majority of authorities, the majority of whom adopt a halakhically paternalistic approach to the treatment of the dying, it is nevertheless, a highly influential one. This is undoubtedly due to his great stature as a *posek*, that is, a widely acceptance authority on halakhic matters, and the rationally compelling nature of the argumental that a dying patient should have a say in his medical treatment. Indeed, R. Feinstein's soft autonomy lies at the heart of Israel's 2005 Terminally Ill Patient Law. Under Section 8 (a) of the law, the definition of a terminally ill patient is someone who has less than 6 months to

[9] In his Commentary on the *Mishnah*, Maimonides makes the following broad generalization: "Give heart to this great principle…all that we disdain or perform…we do so solely by virtue of the command of the Holy One, blessed be He through our teacher Moses…" (*Hullin* 7:6). Judaism certainly recognizes free will, but that free will is meant to be used in order to fulfill the Divine commandments. This is readily evidenced by the following Biblical text: "Behold, I set before you this day a blessing and a curse. The blessing, if you obey the commandments of the Lord your God which I command you this day. And a curse if you will not obey the commandments of the Lord your God…" (*Deuteronomy* 11: 26–28). The role of human reason as a source of halakhic obligation in a traditional context is a tricky issue, and has been addressed by the present author in: "Feticide, Cannibalism, Nudity and Extra-Legal Sanctions: Elements of Natural Law in 19th–20th Century Halakhists (Sinclair 2010, in press)" (due to appear in the forthcoming issue of the *Jewish Law Association Studies*).

live. This law, which was designed from its very outset to reflect a balance between Judaism and democracy (Section 1(b)) relies to a great extent on R. Feinstein's approach in order to achieve this balance.[10] The law begins with a presumption of life drawn from the halakhic obligation to preserve life, but, in accordance with democratic principles, proceeds to allow for its rebuttal by virtue of the express wishes of the terminal patient, or his indirect ones in the form of either an advance directive or a health proxy (Sections 4–7). The halakhic legitimacy of the rebuttal option is derived from R. Feinstein's above-cited decision in relation to the termination of artificial feeding in conformity to the wishes of the terminal patient. Its spirit also underlies the acceptability of advance directives, and the appointment of health proxies in accordance with the regulations drawn up under the law (Sections 30–44). The law is quite specific with regard to the situations under which life support may be withheld or withdrawn. In accordance with R. Feinstein's position, the law permits the withholding of all life support from a competent patient who refuses to accept it (Section 15). In Section 16, the law provides for the withholding of all treatment directly related to the terminal condition of a legally incompetent terminal patient, and the withdrawal of periodic, as opposed to continuous life support (Section 16). It is, however, forbidden to withdraw continuous life support (Section 21). Nevertheless, the law also provides that it is permitted to "refrain from restarting continuous treatment which was terminated unintentionally, or in a manner that does not contravene any legal provision" (Section 21). Presumably, the rather obscure phrase "or in a manner that does not contravene any legal provision" refers to the option promised in the notes to the draft law and referred to in Section 3 of the law itself proposing that a timer be developed which would bring one cycle of continuous treatment to an end, and in a halakhically acceptable manner, prevent another cycle kicking into action (*Resp. Tsits Eliezer* 13 no.89; Sinclair 2003, 188, 191, 272). If this option, which has received halakhic approval in relation to patients suffering from ALS, were to be translated into practice, it would undoubtedly constitute the most dramatic application of R. Feinstein's soft autonomy doctrine in relation to the treatment of the terminally ill.

[10] The Chair of the Draft Law Committee, Prof. Abraham Steinberg, is an expert in the field of biomedical *halakhah*, and he has analysed the halakhic background to the Draft Law which was accepted by the vast majority of the mixed religious and secular Committee (Steinberg 1993). R. Feinstein is cited on almost every page, and his pervasive influence on the provisions of the Draft Law is patent.

The Prevention of Suffering in the Dying Process

Running like a golden thread throughout the halakhic literature on the *goses* is the principle that the dying should be spared as much physical and mental suffering as possible (Steinberg 1994, 394–396). Relief of suffering, however, does not abrogate the prohibition on precipitating the life of the *goses* (*Arukh Hashulhan, Yoreh Deah* 339:4). Nevertheless, in a case which the prevention of suffering in the final phase of life is achievable within the legal context of the laws of the *goses*, the relief of suffering becomes the overriding norm. A dramatic illustration of such an instance is the Talmudic account of the martyrdom of R. Hanina b.Teradyon (*Avoda Zarah* 18a). The Romans wrapped R. Hanina in a Torah scroll and lit a fire underneath him. They also placed wet tufts of wool next to his skin in order to prolong his agony. When his student suggested that he open his mouth so that the "fire would enter and he would die more quickly", he refused on the grounds that that would be tantamount to taking his own life. When his executioner offered to remove the wet tufts and increase the intensity of the fire in order to achieve the very same result, R. Hanina accepted. Indeed, he also acquiesced to the executioner's request that this deed guarantee him a place in the Hereafter, and swore a solemn oath to that effect. As soon as the tufts were removed and the fire increased, R. Hanina died, and his suffering came to an end. The executioner than jumped into the fire and a Heavenly voice was heard proclaiming "R. Hanina and his executioner are to be received in the World to Come". Since suicide is forbidden by *halakhah*, R. Hanina could not avail himself of the course of action suggested by his students, notwithstanding his suffering. He was, however, prepared to accept the executioner's offer. This is because he was a *goses*, and both the removal of the tufts and the increasing of the intensity of the fire constituted impediment removal, which is permitted under Jewish law. It is important to note that modern authorities

permit the administering of analgesics to the terminally ill, even though this may potentially lead to the shortening of life. The sole condition is that no one single dose be sufficient to cause death (*Nishmat Avraham, Yoreh Deah* no. 339).

It is also permitted to pray for the death of a suffering individual. The *Talmud* recounts that when R. Judah the prince became seriously ill, the rabbis prayed for his life to be preserved. His handmaid prayed in a similar vein. Upon observing the amount of severe physical and mental suffering he was undergoing, however, she changed her prayer and asked that he be allowed to die. She also caused a disturbance by throwing a stone into the crowd of praying rabbis with the result that they momentarily ceased their prayers, and at that instant, R. Judah's soul departed to its eternal rest (*Ketubot* 104a). The handmaid's conduct seems to be perfectly in order as far as the *Talmud* is concerned, and it is tempting to suggest that that it took the wisdom of a handmaid to realize that any spiritual benefits which may have accrued as a result of the continued existence of R. Judah were far outweighed by his suffering. This passage serves as the basis for the rule that it is permitted to pray for the death of a suffering person, although care should be taken to ensure that the person doing the praying does so out of the purest of motives only (R. Nissim, *Nedarim* 40a, s.v.ein mevakesh; *Resp. Hikekei Lev, Yoreh Deah* no. 50).

Conclusion

The Jewish legal tradition in relation to the treatment of the dying seeks to achieve a balance between a strong obligation to preserve life, and an understanding that there is a "time to die" (*Ecclesiastes* 3:2), and timely death is a value. This balance was expressed in different forms over the ages, and in the modern world of medicalized death, it is expressed in the distinction between treatment which will only prolong life for the short term, and the maintenance of basic bodily functions. Whereas the former may be withheld or withdrawn, the latter must, in general, be maintained until the establishment of death.

In the light of the concept of soft patient autonomy in Jewish law, however, a dying competent adult who refuses life support is to have his wishes respected even if this entails the withholding and, possibly, even the removal of that life support. As a result, rabbis dealing with the dying and their treatment must now add the patient's wishes to their halakhic considerations when providing guidance and council to the dying and to their families. The influence of soft autonomy upon the new Israeli Terminally Ill Patient Law 2005 was described above, and is evidence of the fact that it is possible to craft a law for a secular society which is capable of embracing both religion and substantive democracy.

Jewish law has always striven to relieve the suffering of the dying, and provided that it can do so within the framework of the *halakhah*, the prevention of suffering is a paramount value. It is also permitted to pray for the death of a suffering individual. From a psychological perspective, this is undoubtedly one method for resolving some of the tension between the need to preserve the moral and spiritual safeguards on taking life, and the human need to bring the suffering of a terminally ill loved one to an end. In this respect, one of the advantages of a religious legal system is that it can also employ spiritual principles in a normative setting.

Jewish law is an ancient system with a rich storehouse of primary and secondary principles, and a long history of casuistic reasoning. Its insights developed over centuries continue to provide guidance to some of the very challenging issues raised by the treatment of the dying and the terminally ill.

References

Airedale National Health Service Trust v Bland. 1993. 1 All ER 821.

Bleich, J.D. 1972. The Quinlan case: A Jewish perspective. In *Jewish bioethics*, ed. F. Rosner and J.D. Bleich. New York: Sanhedrin.

Cohen v State of Israel Cr.A. 91/80, 35(3) PD, 281.

Cruzan v Director of the Missouri Department of Health. 1990. 110 S. Ct. 2841, 58 USLW 4916.

Elon, M. (ed). 1974. *The principles of Jewish law.* Jerusalem: Keter.

Foundations of Law Act. 1980.

Halevy, H. 1981. Removing a patient with no chance of recovery from an artificial respirator. (Heb.). *Tehumin* 2: 304–305.

Jakobovits, I. 1957. The law relating to the precipitation of the death of a hopeless patient who is undergoing great suffering. (Heb.) *Hapardes* 31.

Jacobovits, I. 1988. Some modern responsa on medico-moral problems. *Jewish Medical Ethics* 1(1): 5–10.

Kurtam v State of Israel, Cr.A. 490/85, 31 PD, 673 ff.
Mason, J.K. and R. McCall Smith. 1999. *Law and medical ethics*. London: Butterworth.
Plato. 1910. *The trial and death of Socrates*. (trans. F. J. Church). London: Macmillan.
Questelius, C. 1678. *De Pulvineri Morientibus Subtrahendo*. Jena: Gollner.
Re T. 1992. 4 All ER 649.
Re A (Children). 2001. 2 WLR 480.
Schloendorff v Society of New York Hospital. 1914. 211 NY 125.
Shapira, A. 1989. Informed consent to medical procedures. (Heb.). *Iyyunei Mishpat* 14: 225.
Sinclair, D. 1996. Jewish law in the state of Israel. In *An introduction to the sources and history of Jewish law*, ed. N. Hecht, B. Jackson, S. Passamaneck, D. Piatelli, and A. Rabello. New York: Oxford University Press.
Sinclair, D. 2003. *Jewish biomedical law: Legal and extra-legal dimensions*. New York: Oxford University Press.
Sinclair, D. 2010. Feticide, cannibalism, nudity and extra-legal sanctions: Elements of natural law in 19th–20th century halakhists. *Jewish Law Association Studies* (in press).
Skegg, P.D.G. 1982. *Law, ethics and medicine*. New York: Oxford University Press.
Skene, L. 1997. When can doctors treat patients who cannot or will not consent? *Monash University Law Review* 23: 84.
Steinberg, A. 1993. The halakhic basis for the terminally ill patient draft law. *Assia* 71–72: 25–39.
Steinberg, A. 1994. *Encyclopedia of Jewish medical ethics, 4 (Heb.)*. Jerusalem: Falk-Schlesinger Institute.
Terminally Ill Patient Law. 2005.
Trachtenberg, J. 1939. *Jewish magic and superstition*. New York: Behrman.
Zohar, N. 1997. *Alternatives in Jewish bioethics*. Albany: State University of New York.