Accommodating Religious Objections To Brain Death: Legal Considerations

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Introduction

As the pages of this journal will attest, few issues in Jewish life have generated as much halachic controversy in recent years as that of "brain death." At the same time, few issues in American law have generated as much secular unanimity. By legislation or judicial decision, virtually every one of the 50 states has by now adopted the brain death standard[1] — recognizing that, as a matter of secular law, a person who has sustained irreversible cessation of the entire brain function, including the brain stem, is dead.

For those Jews who follow the view that brain death is not halachic death, the secular law poses a serious problem. According to that view, one whose heart still beats still lives, despite the irreversible cessation of brain function; and it would be an act of murder to disconnect such an individual from a respirator or other life sustaining mechanism, as would routinely be done under the secular standard. Moreover, the secular methodology for *measuring* irreversible cessation of entire brain function may be halachically unacceptable even to those who accept the *concept* of brain death as halachic death.[2] Hence the potential conflict between religious and

1. N.Y.S. Take Force on Life and the Law, *The Determination of Death* (1986) (hereinafter the "Task Force Report"), at 4.
2. See notes 24-25 and accompanying text, *infra.*

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secular law, and the concomitant dilemma: In a secular society that accepts brain death and prescribes the methods of ascertaining its presence, how are the religious beliefs of those who reject the concept or the methodology to be protected?

Anecdotal evidence suggests that the dilemma is frequently resolved on an informal basis. Most doctors, it appears, will generally honor the requests of families that seek to have their brain dead relatives maintained on life-support for religious reasons. Yet there are indications that such informal accommodation is by no means universal; and there is reason to believe that in the years ahead it may be even less readily forthcoming. As the concept of brain death gains increasing acceptance among the general society, as medical technology advances to the point where it is possible to maintain brain dead individuals on life-support for lengthy periods of time, as the costs of such life-support maintenance spiral ever upward, and as the need for organs for purposes of transplantation becomes felt more acutely — health care providers may well increasingly insist upon adherence to the general brain death standard, even over the objections of family members and others close to the brain dead individual.

To address this problem, Rabbi Moshe Feinstein *zt"l* suggested that any governmental effort to make uniform the criteria by which death is determined should include a specific provision exempting patients whose religious definition of death does not coincide with the government's.[3] Advocacy for such exemption has occupied a prominent place on the public policy agendas of several major Orthodox Jewish groups and spokesmen. This approach has encountered stiff resistance, however, primarily from the medical establishment but even from one prominent Orthodox rabbi who supports brain death and opposes legal accommodation of other halachic viewpoints.[4] As a result, success in gaining a formal

3. Written statement dated 8 Sh'vat 5737 (copy available upon request). Rabbi Feinstein's own halachic views on the subject of brain death have themselves generated considerable debate and are beyond the scope of this discussion.

4. *see, e.g.*, the transcript of the public testimony of Rabbi Moshe D. Tendler before the New York State Task Force on Life and the Law, at 7-16 (March 20, 1986).

"religious exemption" from uniform brain death standards has not come easily.

This article is divided into two main parts. Part I analyzes and traces the development of a recently promulgated New York State regulation which, as of this writing, is the only formal legal protection of the rights of persons who dissent on religious grounds from a state mandated brain death standard.[5] Part II reviews some of the key constitutional considerations that arguably protect those rights even absent specific legislation or regulation.

I. The New York State Regulation

In late 1987, the New York State Department of Health promulgated a new regulation setting standards for the "determination of death," and requiring health care facilities to develop procedures for the "reasonable accommodation" of religiously based objections to brain death. (The full text of the regulation is set forth in the footnote below.)[6] New York thus

5. New Jersey is the only state outside New York that has proven at least somewhat receptive to the concept of religious accommodation. In 1984, Governor Kean vetoed a brain death bill because of its failure to accommodate religious objectors. [Letter from W. Carey Edwards, Chief Counsel to the Governor, to Rabbi Yakov M. Dombroff, director of Agudath Israel of New Jersey, Jan. 19, 1984 (copy available upon request).]

6. "*Determination of Death.* (a) An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.

(b) A determination of death must be made in accordance with accepted medical standards.

(c) Death, as determined in accordance with subdivision (a) (2), shall be deemed to have occurred as of the time of the completion of the determination of death.

(d) Prior to the completion of a determination of death of an individual in accordance with subdivision (a) (2), the hospital shall make reasonable efforts to notify the individual's next of kin or other person closest to the individual that such determination will soon be completed.

(e) Each hospital shall establish and implement a written policy regarding

became the first jurisdiction in the United States — and, to the date of this writing (February 1989), still the only jurisdiction — explicitly to recognize as a matter of law the religious rights of persons who object to brain death.

It is instructive to review the background events that culminated in the adoption of the New York State regulation; and then to analyze some of the key provisions of the regulation.

Background

Dating back to the mid-1970's, the New York State legislature on numerous occasions attempted but failed to pass legislation that would officially recognize neurological criteria for death.[7] However, in 1984, New York's highest court, the Court of Appeals, accomplished what the legislature had not. The court held that "[w]hen . . . respiratory and circulatory functions are maintained by mechanical means . . . , death may nevertheless be deemed to occur when, according to accepted medical practice, it is determined that the entire brain's function has irreversibly ceased."[8]

Two years later, the New York State Task Force on Life and the Law, responding to a specific mandate contained in Governor Cuomo's' 1984 Executive Order creating the Task Force, issued its

determinations of death in accordance with subdivision (a) (2). Such policy shall include:

(1) a description of the tests to be employed in making the determination;

(2) a procedure for the notification of the individual's next of kin or other person closest to the individual in accordance with subdivision (d); and

(3) a procedure for the reasonable accommodation of the individual's religious or moral objection to the determination as expressed by the individual, or by the next kin or other person closest to the individual." [10 N.Y.C.R.R. sec. 400-16 (1987).]

7. *See People* v. *Bonilla*, 95 A.D. 2d 396, 402 (2d Dept. 1983).
8. *People* v. *Eulo*, 63 N.Y. 2d 341, 355-56 (1984). The *Eulo* case involved the appeals of two defendants convicted of manslaughter, who argued that it was not their bullets that had caused the death of their victims, but rather the hospitals that had removed their victims' vital organs upon a determination of irreversible cessation of brain function. The Court of Appeals took note of the legislature's failure to enact brain death legislation, but held nonetheless that the defendants' victims were already dead when the hospitals removed their vital organs.

report on "The Determination of Death." The Task Force, like the Court of Appeals, concluded that irreversible cessation of brain function was an appropriate measure of death.[9] Despite the absence of brain death legislation in New York, the Task Force found no need for any such statute in light of the Court of Appeals' 1984[10] ruling. Nonetheless, because it felt that hospitals required further guidance in implementing the court's decision, the Task Force recommended that the Department of Health promulgate a specific regulation embodying the brain death standard, and publish an advisory memorandum setting forth the current clinical tests and procedures for determining brain death.[11]

With respect to individuals who objected on religious grounds to brain death, the Task Force waffled. It considered but specifically rejected creation of an express statutory or regulatory obligation requiring hospitals to accommodate the religious beliefs of such individuals.[12] Nonetheless, the Task Force recommended that "hospitals develop procedures to respond to moral and religious objections to the brain death standard expressed by patients prior to the loss of decision making capacity or by family members on a patient's behalf."[13]

In the spring of 1987, the New York State Department of Health published a proposed regulation that embodied precisely the Task Force's recommendation: It defined as "dead" any person who has sustained "irreversible cessation of all functions of the entire brain, including the brain stem"; and it included no mandate that religious objections to that definition be accommodated.[14] This failed to satisfy proponents of religious accommodation, who

9. Task Force Report at 6.
10. *Id.* at 13.
11. *Id.* at 9, 14.
12. *Id.* at 11. In an araticulate minority report, Task Force member Rabbi J. David Bleich took issue with the other members of the Task Force on this point, urgin as "a matter of civil liberty" the enactment of a statue expressly accommodating religious objections to brain death. *Id.* at 29, 40-43.
13. *Id.* at 12-13.
14. N.Y. State Register, I.D. No. HLT-19-87-00040-P (May 13, 1987).

continued to urge that respect for the rights of religious dissenters be made obligatory by law rather than merely encouraged by non-binding recommendations. Their efforts finally met with some success in July 1987, when the New York State legislature passed for the first time a religious accommodation bill.[15]

The essence of this bill, whose key sponsors were Assemblyman Sheldon Silver, Assemblyman Sam Colman and Senator Eugene Levy, was that "no decision or decisions with respect to an individual to commence or terminate life support treatment . . . shall employ a definition of death that would be contrary to the religious beliefs or practices or moral convictions of such individual . . ." The Silver-Colman-Levy bill further imposed upon an individual's health care provider the affirmative duty "to use reasonable efforts to determine, from such individual's family member or friend," whether any contemplated action in this context would violate the individual's beliefs.

Passage of the Silver-Colman-Levy bill, coupled with vigorous lobbying efforts directed at New York State's Commissioner of Health, finally resulted in the Department of Health's promulgating a revised regulation which, as noted above, mandated for the first time that health care providers develop procedures for the reasonable accommodation of individuals' religiously based objections to brain death.[16] This revised regulation in place, New York's Governor Cuomo allowed the proposed Silver-Colman-Levy legislation to die.

Noteworthy Aspects of the Regulation

Turning to the substance of the regulation, it is apparent that its purpose, like that of the Silver-Colman-Levy bill which Governor Cuomo ultimately did not sign into law, is to ensure protection of the religious rights of persons who do not accept neurological criteria for measuring death. Nonetheless, the

15. A. 4882 (introduced March 3, 1987); S. 6415 (introduced June 30, 1987).
16. N.Y. State Register, I.D. No. HLT-31-87-00034-P (Aug. 5, 1987). The text of the regulation appears at note 6 *supra*.

regulation does differ from the lapsed legislative approach in several respects. Those differences, as well as certain other noteworthy aspects of the regulation, deserve close attention.

1. *"Reasonable Accommodation."* The regulation does not mandate absolute accommodation of a patient's or family's religious objection to brain death, but only such accommodation as is "reasonable."[17] Although the body of the regulation offers no guidance as to when accommodation might not be "reasonable," the "Regulatory Impact Statement" issued simultaneously with the initial proposal of the regulation suggests that the line of reasonableness may be crossed in situations of triage, "instances when maintenance of a brain dead person would result in harm to another patient for whom meaningful life could be saved." The Silver-Colman-Levy bill, in contrast, speaks in terms of absolute accommodation, and at least arguably would have required hospitals to continue treating religious objectors notwithstanding triage.

Although the imposition of a "reasonableness" standard upon a hospital's duty of religious accommodation may create halachic difficulties in individual cases, it may at the same time enhance the constitutionality of the regulation by insulating it against attack as an "establishment of religion" in violation of the First Amendment to the United States Constitution. This conclusion emerges from *Estate of Thornton* v. *Caldor,*[19] in which the U.S. Supreme Court struck down a Connecticut statute that prohibited an employer

17. 10 N.Y.C.R.R. sec. 400.16 (e) (3).
18. *See, e.g.,* Rabbi M. Feinstein, *Iggerot Moshe,* II *Choshen Mishpat* 73 (b), at 304 (5742), where Rabbi Feinstein rules that an individual who has already been placed in an emergency room is entitled to remain there even if only to preserve temporary life *(chayei sha'ah),* despite the fact that as a result there is no room to treat another individual for whom there might be hope of full recovery. Accordingly, if one assumes that a brain dead individual is still alive for purposes of halacha, it would seem to follow that his right to remain on life support would take halachic precedence over the right of a new patient to the same support, even in cases where that would prelude the new patient from receiving treatment that could save his life.
19. 472 U.S. 703 (1985).

from requiring an employee to work on the day designated by the employee as his Sabbath, or from dismissing any employee who refuses to work on his Sabbath. In so doing, the Court made repeated reference to the fact that the religious accommodation mandated nder the statute allowed for no exceptions.[20] The clear implication is that religious accommodation laws do not unconstitutionally establish religion *per se*, unless they create a hierarchy f values in which religion *always* takes precedence over any other concern.[21]

By analogy, any attempt to require a health care provider to accommodate a patient's religious objection to brain death would be constitutionally ulnerable were its mandate stated in absoute terms. In contrast, the New York State regulation, couched as it is in the limited terms of reasonable accommodation, would likely survive any constitutional attack.

2. *Timing of Notification to Next of Kin.* Section (d) of the regulation requires a hospital to make reasonable efforts to notify the patient's next of kin or other close person — and thereby afford an opportunity for the assertion of a religious objection — *prior* to the completion of a determination of brain death. Read in conjunction with section (c) of the regulation, which states that death shall be deemed to have occurred only "as of the time of the completion of a determination of death;" the implication of this pre-completion notification requirement is that any patient whose religious beliefs will be accommodated pursuant to the regulation will never have been confirmed as brain dead. That patient would thus be fully alive for purposes of the law.

The Regulatory Impact Statement published simultaneously

20. *Id.* at 709-10.

21. Justice O'Connor, in her concurring opinion, spelled this out even more clearly. She observed that *Thornton* did not call into question the constitutionality of Title VII of the federal Civil Rights Act, which mandates *reasonable* accommodation of an employee's religious needs. A critical distinction between Title VII and the Connecticut law, in Justice O'Connor's view, was the absence of any requirement of *absolute* religious accommodation under the federal statue. *Id.* at 711-12.

with the regulation suggests that the pre-death notification requirement was designed to promote the value of uniformity. Under this theory, once irreversible cessation of all brain activity has conclusively been confirmed, mandating reasonable religious accommodation would undermine the state's interest in maintaining uniform standards of death determination.

Whatever the merits of the uniformity line of reasoning,[22] one possible ancillary benefit of pre-death notification, from the perspective of the family that has interposed a religious objection on behalf of a near brain-dead relative, is that the costs of continued maintenance on life support following such an objection are likely to be covered by the patient's insurance. The patient is, after all, still alive and presumably still entitled to the benefits of health care coverage. In contrast, were the regulation to allow a hospital to conclude a determination of brain death before notifying the family (as would have been the case under the Silver-Colman-Levy bill), the costs of any subsequent maintenance upon life support might well be resisted by third-party insurers on the theory that they are not obligated to finance the treatment of confirmed brain dead individuals.

3. *The Hospital's Obligation to Notify.* Under the Silver-Colman-Levy bill, a hospital would not have been permitted to remove a brain dead individual from life-support mechanisms without first making "reasonable efforts to determine, from such individual's family member or friend, that such action will not violate such individual's religious beliefs or practices or moral convictions." To satisfy this requirement, the hospital presumably would have had to query the family member or friend as to the patient's beliefs.

The regulation adopts a different approach. Section (d) requires a hospital merely to *notify* the patient's next of kin or other close person of the patient's condition. Upon meeting that requirement, the hospital need not say another word; it must

22. See discussion at text accompanying notes 40-46 *infra.*

reasonably accommodate any religious objection interposed on behalf of the patient, but it has no affirmative duty to solicit any such objection.

Although advocates of a religious exemption from brain death standards did press for a provision requiring the hospital affirmatively to ask whether the patient would have religious objection to brain death, such a requirement would have represented a departure from religious accommodation laws in other contexts. Such laws typically do no more than afford an individual the opportunity to ask for different treatment based on his religious beliefs — or, where the individual's condition precludes him from making such a request on his own, allow someone close to the individual the opportunity to make the request on the individual's behalf.[23] An argument can be advanced, however, that the gravity of what is at stake in the brain death context — literally the life or death of the patient — justifies the imposition of a more severe burden on the health care provider than is ordinarily imposed on a party required to accommodate. In promulgating its final regulation, the New York State Health Department rejected this argument, and it remains to be seen whether any future legislation or regulation in this field will accept it.

4. *Criteria for Measuring Brain Death.* Death, according to section (b) of the regulation, is to be determined "in accordance with accepted medical standards." Innocuous though this provision

23. A good illustration of this approach is the statutory protection available in New York State against routine post-mortem dissection or autopsy procedures. Sections 4209-a and 4214 of New York's Public Health Law enable an individual to protect himself against such procedures by carrying a card stating his objection to routine dissection or autopsies. Where a decedent is found with no such card on his person, he is nonetheless afforded a measure or protection under section 4210-c of the Public Health Law, which allows a surviving relative or friend to assert on the decedent's behalf a religious objection to the performance of routine post-mortem procedures. However, nothing in the law requires the medical examiner to take affirmative steps to contact a relative or friend to determine whether the decedent would have had religious objection to such a procedure.

24. The "accepted medical standards" formulation, which is a common feature in many of the state brain death laws, was developed in 1980 when the National Conference of Commissioners on Uniform State Laws proposed the Uniform Determination of Death Act. The Commissioners explained that measurement criteria for establishing brain death would inevitably clash with advances in "biomedical knowledge, diagnostic tests, and equipment," and that it was therefore preferable that the law refrain from mandating specific measurement procedures. Prefatory Note, *Uniform Determination of Death Act*, 2 U.L.A. 293 (1980).

may seem, it demonstrates the potential importance of the section (e) religious accommodation requirement even for those in the halachic community who accept brain death as halachic death. For even if halacha would regard as dead an individual who has sustained irreversible cessation of the entire brain function including the brain stem, the "accepted medical standards" for *measuring* such cessation may not necessarily be acceptable halachic standards of measurement. The degree of certainty that physicians may accept in determining brain death may be (or may become) less than the degree of certainty upon which halacha would insist.[25]

Thus, one need not dispute the underlying concept of brain death in order to require protection against an "accepted medical standards" measurement of brain death. The reasonable religious accommodation mandate provides the necessary protection.

II. Constitutional Considerations

As noted above, New York is the only state that hks codified, at least in some measure, the requirement that a patient's religious beliefs be reasonably accommodated in the context of determining his death. The absence of specific legislation or regulation, however, does not necessarily mean that religious objectors outside of New York have no legal protection against uniform application of brain

25. This is no idle or abstract concern. One prominent halachic supporter of brain death, Rabbi Moshe Tendler, has argued for the standardized usage of radioisotope blood flow studies as the most reliable means of ascertaining brain death. Such studies, however, are neither a part of the well-knwon "Harvard criteria" for determining brain death, nor are they routinely performed. *See, e.g.*, N.Y.S. Dept. of Health Memorandum, *Guidelines for a Determination of Death Using Brain Based Criteria*, Series 87-71, Health Facilities Series H-45 (Aug. 21, 1987).

death laws. Uniform determination of death laws that recognize no explicit exception for religious objectors are nonetheless subject to certain overriding constitutional values that may mandate reasonable religious accommodation in appropriate cases. Specifically, as outlined below, an individual's rights to (1) free religious exercise and (2) privacy, both of which are constitutionally protected, provide ample basis for requiring reasonable religious accommodation even where there is no express statutory or regulatory authority.

The Constitutional Rights

1. *Free Exercise of Religion.* Under the "free exercise clause" of the First Amendment ("Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof . . .*"), government may not burden religious practice unless it can demonstrate that "an inroad on religious liberty . . . is the least restrictive means of achieving some compelling state interest."[26]

The lack of universal opposition to brain death among halachic authorities in no way undercuts the constitutional standing of individuals who follow the view that brain death is not halachic death. As the U.S. Supreme Court has held, the First Amendment's free exercise protections are triggered not by unanimity of religious conviction, but by sincerity of religious conviction. Thus, in commenting upon an apparent conflict between two members of a certain faith group as to whether working on the production of military weapons violated that faith's religious principles, the Supreme Court stated as follows:

> Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[27]

26. *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718 (1981).

There can be little doubt, therefore, that laws which purport to establish uniform death criteria, and which make no exceptions for individuals whose religious views on life and death do not coincide with the state's, burden free exercise rights and implicate First Amendment considerations.

2. *The Right of Privacy.* Although the United States Constitution nowhere mentions any right of privacy, the Supreme Court has held that such a right does exist and is of constitutional dimension. The essence of this right is that there are certain decisions so personal and so fundamental, that it is "implicit in the concept of ordered liberty" that such decisions be left to each individual rather than to government.[28] This amorphous yet powerful consitutional right has been invoked in a wide variety of circumstances (though there is some indication that the Supreme Court has now begun to retrench from its expansive interpretation of the privacy right[29]). Most relevant for our purposes are the judicial rulings in cases involving abortion (relating to the *beginning* of life) and cases involving the "right to die" (relating to the *end* of life).

(i) *Abortion.* The leading abortion case is *Roe* v. *Wade*,[30] which

27. *Id.* at 715-16.
28. *Roe* v. *Wade*, 410 U.S. 113, 152 (1973).
29. *See Bowers* v. *Hardwick*, 478 U.S. 186 (1986), where a 5-4 majority of the Supreme Court refused to extend the right of privacy to cover consensual homosexual activity.
30. 410 U.S. 113 (1973).

ranks as one of the most controversial decisions in the history of the Supreme Court. At issue in *Roe* was a Texas statute that made it a crime to procure or attempt an abortion other than as necessary to save the mother's life. The Court identified two main interests at tension with one another: the state's interest in protecting human life or potential human life; and the woman's constitutional right to privacy. The privacy right, reasoned the Court, was in the category of "fundamental rights," and accordingly could be overcome only by a "compelling state interest" embodied in a law "narrowly drawn to express only the legitimate state interests at stake."[31] The Court reasoned that the state's interest in preserving the fetus' potential human life[32] becomes "compelling" only when the fetus has developed to the point of viability, beyond which a state generally has the right to proscribe abortions. Prior to viability, however, the state's interest in protecting the fetus is not "compelling" and must thus yield to the mother's privacy rights.[33]

So long as *Roe* v. *Wade* remains the law of the land,[34] a case can be made by analogy for the proposition that the right of privacy encompasses the right to reasonable accommodation of a patient's religious objection to brain death. Under this theory, if government is restricted from defining the onset of human life in a manner that encumbers a pregnant woman's right of privacy, it ought similarly be restricted from defining the conclusion of human

31. *Id.* at 155.
32. The Supreme Court considered but specificially rejected the contention that a fetus was a "person" for purposes of the Fourteenth Amendment ("[N] or shall any State deprive any person of life, liberty, or property, without due process of law") or for other purposes of law. 410 U.S. at 156-62. The Court did acknowledge, however, the state's "important and legitimate interest in protecting the potentiality of human life." *Id.* at 162.
33. *Id.* at 163-165.
34. In January 1989, the U.S. Supreme Court agreed to review *Webster* v. *Reproductive Health Services*, 851 F. 2d 1071 (8th Cir. 1988), wherein a federal appellate court struck down as unconstitutional a Missouri anti-abortion statue. In its order grating review, the Supreme Court asked counsel to address the issue of whether "*Roe* v. *Wade* . . . [should] be reconsidered and discarded . . ." 57 U.S.L.W. 3442 (Jan. 10, 1989).

life in a manner that encumbers a patient's right of privacy.

(ii) *The "Right to Die"*. The common law has long recognized the concept of personal autonomy in medical decision-making.[35] In the celebrated Karen Anne Quinlan case, New Jersey's Supreme Court invested that common law right with constitutional stature. Citing *Roe* v. *Wade*, the court in *Quinlan* observed: "Presumably this right [of privacy] 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."[36] Although not all jurisdictions have conferred constitutional status upon an individual's decision to refuse medical treatment, the trend of the states has been to follow New Jersey's lead in cloaking the common law right of personal autonomy in constitutional privacy garb.[37]

By analogy, where a patient's religious beliefs impel him to seek continued life-support beyond brain death, such decision should be encompassed within the privacy/personal autonomy rubric articulated in the "right to die" cases. Choosing to receive treatment is no less an expression of personal autonomy than choosing to forego treatment; it deserves no less constitutional protection.

The Countervailing Governmental Interest

Constitutionally grounded though they may be, neither the

35. In the oft-quoted words of the renowned jurist Benjamin N. Cardozo, then the Chief Judge of New York's Court of Appeals: "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 Hospitals*, 211 N.Y. 125, 129-30 (1914).
36. *Matter of Quinlan*, 355 A.2d 647, 663 (N.J. 1976).
37. *Compare In re Storar*, 52 N.Y. 2d 363, 376-77 (1981), where the New York Court of Appeals reaffirmed the common law right of personal autonomy in medical decisions but declined to extend the constitutional right of privacy to "right to die" decisions, *with* such decisions as *Supt. of Belchertown State School* v. *Saikewicz*, 370 N.E. 2d 417, 424 (Mass. 1977), *Leach* v. *Akron General*

right freely to exercise one's religion nor the right of privacy is absolute. As noted above, government may abridge free religious exercise where it employs "the least restrictive means of achieving some compelling state interest."[38] Similarly, the right of privacy must yield to a "compelling state interest" embodied in a law "narrowly drawn to express only the legitimate state interests at stake."[39]

In this context, the governmental interest most frequently asserted in support of generally applicable brain death laws is that of uniformity. To make exceptions for religious objectors, the argument goes, would undermine society's interest in having one uniform definition of life and death. Typical of this line of reasoning is The Hastings Center's argument against any formal "religious exemption" from brain death standards:

> Religious freedom and pluralism are important values in our society. However, in many areas society is forced to have consistent standards. We believe that the societal need for consistency and clarity in determining death mandates as much uniformity as possible in the criteria for declaring death. Accordingly, when a patient meets the neurological criteria, the Guidelines do not leave a declaration of death to the discretion of the health care professional, surrogate, family, or others.[40]

Similarly, when the New York State Task Force on Life and Law issued its report on "The Determination of Death," it expressly rejected the suggestion that the brain death regulation

Medical Center, 426 N.E. 2d 809, 814 (Ohio 1980), and *Matter of Conservatorship of Torres*, 357 N.W. 2d 332, 339 (Minn. 1984), where the highest courts of Massachusetts, Ohio and Minnesota (respectively) concluded that personal autonomy in medical decision-making was an aspect of the constitutional right of privacy.

38. See text accompanying note 26 *supra*.
39. See text accompanying note 31 *supra*.
40. The Hastings Center, *Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying*, at 87 (1987).

mandate reasonable accommodation of religious objections because of its view that "the State's interest in uniformity with respect to so basic a determination is too great to permit variation dependent upon religious beliefs."[41]

Contrary to these viewpoints, however, neither logic nor legal precedent compel the conclusion that government's interest in uniformity precludes the mandating of reasonable religious accommodation. For one thing, uniformity is not necessarily incompatible with free exercise and privacy rights. Uniform determination of death laws can be crafted in such a manner as to require reasonable accommodation without undermining uniformity. The recently promulgated New York State Health Department regulation, as discussed above, was designed specifically to avoid this conflict, by requiring notification of the patient's family or friend *prior* to a final determination of brain death. This ensured that accommodation of the patient's beliefs could be accomplished while he was still alive pursuant to uniformly applicable standards.

Moreover, even if the values of uniformity and accommodation would be mutually and irrevocably incompatible, the constitutional guarantees of free religious exercise and privacy are not so easily pushed aside. In determining whether an asserted governmental interest is sufficiently "compelling" as to justify some restriction of religious freedom, "only those interests *of the highest order* . . . can overbalance legitimate claims to the free exercise of religion." It is highly questionable whether insistence upon one uniform standard of death qualifies as such an interest of the highest order. The key governmental interest here is not so much uniformity as it is clarity. So long as government prescribes clear guidelines upon which a health care provider can safely rely without being concerned about running afoul of the law, it has achieved the main purpose of creating uniform laws.

41. Task Force Report at 11.
42. 10 N.Y.C.R.R. section 400.16 (d). See dicussion at text accompanying note 22 *supra*.
43. *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972).

There are instances, perhaps, where the state's interest in applying brain death criteria to religious objectors may be sufficiently compelling to subordinate the patient's religious or privacy rights. An example might be a situation of triage, where maintaining a religious objector on life support beyond brain death would make it impossible for a hospital to provide life support to a new patient whose life might be saved. The constitutional rights of free religious exercise and privacy require no such accommodation in the face of the state's compelling interest in protecting innocent third parties.[44] As noted above, the recently promulgated New York State regulation mandates only such accommodation as is "reasonable," precisely in order to allow hospitals to allocate scarce medical resources to other patients in triage situations. As a general rule, though, the state's interest in uniformity is not so compelling as to justify dispensing with the patient's constitutional rights.

Even assuming that uniformity does embody a compelling governmental interest of the highest order, it does not necessarily follow that applying a uniform determination of death standard across the board without making allowance for minority religious viewpoints constitutes the "least restrictive means" of achieving that interest. In the first edition of his landmark treatise on constitutional law, Professor Lawrence H. Tribe described the relevant considerations in determining whether the "least restrictive" test has been satisfied:

> Failure to accommodate religion when the government could substantially achieve its legitimate goals while granting religious exemptions has been disapproved as hostility toward religion rather than hailed as the essence of neutrality.
>
> In applying the least restrictive alternative compelling interest requirement, it is crucial to avoid the error of equating the State's interest in denying a religious exemption with the State's usually much greater interest in maintaining the underlying rule or program for unexceptional cases. Only the first interest — that in denying an exemption — is constitutionally relevant when an exemption is sought.[46]

Since the Orthodox Jewish community appears to be the only significant segment of the general populace that has religious objection to brain death — indeed, even among the Orthodox there are different halachic views — adopting a policy that accommodates the religious needs of those relatively few individuals will in large measure leave intact the state's interest in uniformity. Thus, this is not a situation where government has no alternative but to burden free exercise or privacy rights. It can accomplish its main objective of uniformity without insisting that individuals choose between their religion and the secular law.

Conclusion

There are differences of view within the halachic community regarding the criteria by which death is to be measured. Individual families faced with the agonizing question of whether their brain dead relative is halachically dead will no doubt consult with, and act pursuant to the direction of, their own halachic authorities. Sometimes, at least, this process will cause them to seek to maintain their brain dead relative on life support, notwithstanding the secular law's insistence that he is dead.

The principle of religious accommodation is one that has stood the American Orthodox Jewish community in good stead in a wide

44. Thus, in the context of abortion, the state's interest in preserving the life of a viable fetus is deemed sufficiently compelling to override the mother's right of privacy (*Roe* v. *Wade*, 410 U.S. 113, 163-65 (1973)). Similarly, in the context of refusing necessary medical treatment where that would endanger the well-being of minor or even unborn children, the state's interest in protecting innocent third parties has been deemed sufficiently compelling to override the patient's rights of privacy (*e.g., Matter of Farrell*, 529 A.2d 404, 411-12 (N.J. 1987)) and free religious exercise (*e.g., Application of President and Directors of Georgetown College*, 331 F. 2d 1000, 1008 (D.C. Cir. 1964)).

45. See text accompanying votes 17-21 *supra*.

46. Tribe, *American Constitutional Law*, at 852, 855 (1st Ed. 1978).

variety of secular legal contexts. Its application to the determination of death deserves the support of all segments of the community — even those who perceive no conflict between the secular law and the halacha. For what is really at issue here is not whether brain death is or is not halachic death; but whether it is in the interest of the Torah-observant community to combat secular laws that preclude individuals from following the guidance of their individual halachic decisors. On that issue, it is fair to hope that both supporters and opponents of brain death can find common ground.