J. David Bleich

Survey of Recent Halakhic Periodical Literature

PALLIATION OF PAIN

Dr. Richard Chapman, a past president of the American Pain Society, reports that in only one in four of the approximately twenty-three million surgical procedures performed in the United States annually does the patient receive adequate relief. Put somewhat differently, three out of every four patients who undergo an operation in the United States can anticipate experiencing pain needlessly. Moreover, each year Americans incur more than sixty-five million traumatic injuries, including two million burns, and millions more are afflicted by diseases that cause acute pain.[1]

Of fifty million people in the United States who experience chronic pain, four in ten, i.e., forty percent, of those who suffer moderate to severe pain cannot find adequate relief. More than twenty-six million people twenty to sixty-four years of age have frequent or persistent back-pain and one in six Americans suffers from painful arthritis. *In toto*, many, many people experience a great deal of pain. But only about thirty percent of all patients who experience pain receive adequate pain relief. There are tens of millions of patients who experience pain that might be palliated but who, unfortunately, are not treated adequately.[2]

Professor Perry Fine, an anesthesiologist at the medical school of the University of Utah and associate director of a pain management center in Salt Lake City explains why this is the case: Half the population may experience pregnancy. Nature has decreed that only females can become pregnant. Males do not go through pregnancy—the motion picture "Junior" notwithstanding. Yet a hundred percent of board certified students must pass medical boards in obstetrics and gynecology. In contradistinction to pregnancy, one hundred percent of the population is at risk for pain. But how many physicians are required to demonstrate proficiency in pain management? The answer is that zero percent of medical students or of practicing physicians must undergo examination in pain palliation.[3] This situation is only now beginning to change in the United States. The Joint Commission on Accreditation

TRADITION 36:1 / © 2002
Rabbinical Council of America

of Health Care Organizations has formulated standards for pain management which formally went into effect on January 1, 2001. Although that development signals a marked improvement in a patient's prospects for receiving adequate pain relief, it is hardly a panacea.

I. THE OBLIGATION TO RELIEVE PAIN

The halakhic obligation to relieve pain must be examined first in terms of the general obligation with regard to palliation of pain and then with regard to treatment of pain in the terminally ill. The obligation to provide medical care in order to cure disease stems from a variety of sources. The Gemara, *Bava Kamma* 85a, cites the verse "And he shall surely cause him to be healed" (Exodus 21:19) as a grant of authority establishing licensure to practice the healing arts. Rambam, both in his *Commentary on the Mishnah*, *Nedarim* 4:4, and in the *Mishneh Torah*, *Hilkhot Nedarim* 6:8, adduces the verse "and you shall restore it to him" (Deuteronomy 22:2) as the source of the obligation to heal. Ramban, in his *Torat ha-Adam*,[4] finds that, in addition to whatever other obligations that may exist with regard to the treatment of the sick, the obligation of the physician to treat a suffering patient is inherent in the commandment "and you shall love your neighbor as yourself" (Leviticus 19:18). As a specific instance of the general obligation to manifest love and concern for one's neighbor, the obligation to heal encompasses not only alleviation of a threat to life or limb and restoration of impaired health but also extends to situations of lesser gravity that warrant medical attention for relief of pain and promotion of well-being. No one wishes to suffer pain; hence there is an obligation not to allow the pain of one's fellow to go untreated.

A latter-day authority, R. Yehudah Leib Zirelson, in his *Teshuvot Azei ha-Levanon*, no. 61, argues cogently that the obligations of rescue posited by the Gemara, *Sanhedrin* 73a, apply under non-life-threatening circumstances no less than in life-threatening situations. The verse "and you shall restore it to him" (Deuteronomy 22:2) mandates not only the return of lost property but, *a fortiori*, preservation of life as well. The verse, then does not refer only to the return of objects of material value. Accordingly, declares *Azei ha-Levanon*, restoration of health to a person suffering from an illness is assuredly included in the commandment "and you shall restore it to him." *Azei ha-Levanon* further demonstrates that failure to provide a medical remedy, when available, entails violation both of the commandment "you may not hide

yourself" (Deuteronomy 22:3), which, in its biblical context, refers to a person who comes upon lost property belonging to another, and the admonition "nor shall you stand idly by the blood of your fellow" (Leviticus 19:16). *Sifra*, *Kedoshim* 41, declares that those commandments establish an obligation making it incumbent upon an individual to act, if he is capable of doing so, in order to prevent his fellow from sustaining a financial loss. This obligation is recorded by Rambam, *Hilkhot Rozeah* 1:13; *Sefer ha-Hinnukh*, no. 237; and *Shulhan Arukh, Hoshen Mishpat* 426:1. It similarly follows that a person is bound by the same commandments to prevent loss or deterioration of health if he possesses the requisite knowledge and skill to be of assistance in providing medical care. Failure to do so, concludes *Azei ha-Levanon*, would constitute transgression of those two negative commandments as well as of the positive commandment "and you shall restore it to him." The obligations requiring a person to restore his fellow to a state of good health should logically also mandate restoration to a pain-free state.

Indeed, a much earlier authority, R. David ibn Zimra, *Teshuvot Radvaz*, II, no. 628, declares explicitly that a person is obliged to come to the assistance of an individual in distress due to being weighed down by an excessive burden both because of the obligation to restore "the loss of his body" and because of the commandment "you shall not stand idly by the blood of your fellow." According to *Teshuvot Radvaz*, relief of pain and suffering is mandated not only by the commandment to restore that which has been lost but also by the admonition not to "stand idly by the blood of your fellow."[5]

Although it is quite apparent that alleviation of pain is integral to the physician's halakhic obligation to minister to the sick, unfortunately, such recognition is not reflected in the mores of the medical profession. Physicians, at least until recently, certainly have not regarded palliation of pain as a primary responsibility. An entirely different perspective emerges from the comments of R. Judah the Pious recorded in his *Sefer Hasidim*, no. 666, who declares that a person is punished for any pain or anguish he causes his fellow.[6] *Sefer Hasidim*, no. 676, further declares that a person is culpable for harm that he does to himself just he is culpable for harm that he causes his fellow. The author of *Sefer Hasidim* proceeds to enumerate various forms of harm including physical and financial harm as well as "tearing his hair" as examples of prohibited forms of self-inflicted harm. Tearing one's hair is an example of self-inflicted pain and represents a form of pain that one dare not inflict upon others or upon oneself. Most striking is *Sefer Hasidim*'s conclud-

ing comment that a person who performs such an act "is not liable at the hands of man but his punishment is turned over to Heaven as it is said, 'But your blood from your souls will I require'" (Genesis 9:5). Classical rabbinic sources regard this verse as the source of the prohibition against suicide. *Sefer Hasidim*, in an expansive interpretation of the verse, regards self-mutilation, negligence in exposing oneself to disease, as well as exposing oneself to pain, as constituting a form of demi-suicide. Any interference with the well-being of the human organism, according to *Sefer Hasidim,* represents a form of self-destruction; and self-destruction, *Sefer Hasidim* maintains, is prohibited not only in whole but in part as well.

It might, of course, be argued that suicide is limited to self-destruction by means of an overt act and that, according to *Sefer Hasidim,* strictures against infliction of harm are similarly limited to matters such as taking a knife and mutilating one's body or causing oneself pain in an active, overt manner, but that passive non-intervention in the face of pain might be acceptable. That, however, turns out not to be the case.

Rambam, *Hilkhot Shevu'ot* 5:20, codifies a presumption that a person cannot survive for a period of more than seven days without food. Consequently, a person who swears an oath to abstain from all food for seven days will face death before that time expires. Violation of an oath is required when necessary for purposes of preserving life. There is certainly no question that as soon as his life becomes endangered and he actually faces death by starvation, a person who has sworn to abstain from food must break his fast despite any oath he has taken. Rambam, however, adopts the position that since it can be predicted with certainty that the oath will not be fulfilled because of the threat to life that will certainly ensue, the oath must be regarded as a *shevu'at shav*, i.e., a vain oath. Swearing an oath that is vain because it cannot possibly be fulfilled is a punishable offense but the oath itself is a nullity. Accordingly, Rambam rules that such a person is subject to the statutory punishment for having sworn a vain oath, but since the oath itself is null and void *ab initio,* he need not wait to eat until his life is endangered because of imminent starvation; instead, he may partake of food immediately.

Rabbenu Nissim, in his commentary on *Shevu'ot* 25a, concurs in Rambam's ruling but for an entirely different reason. Rabbenu Nissim declares that a person who swears not to partake of food for a period of seven days has, in effect, taken an oath to violate a biblical law, i.e., he has sworn to put himself to death. An oath to commit a transgression does not give rise to license to commit that transgression. On the con-

trary, the oath is a nullity and the person is to be punished for having sworn a vain oath. An oath not to eat for seven days, declares Rabbenu Nissim, is a vain oath because it is in contravention of the biblical admonition "but your blood of your lives will I require," i.e., the prohibition against suicide. It should be noted that a person who starves himself to death commits suicide but does so only passively. Thus Rabbenu Nissim declares that passive suicide is also a proscribed form of self-destruction. Since the selfsame biblical verse that serves as a prohibition against active suicide also applies to passive suicide, it follows that the penalty provided for suicide in that verse applies to passive suicide as well.

Rabbenu Nissim's comments certainly establish unequivocally that the prohibition expressed in the phrase "but your blood of your lives will I require" applies equally to both overt acts and to passive acts. It is an elementary principle of logic that if A equals B and B equals C, then A must equal C as well. If, as *Sefer Hasidim* declares, infliction of pain is tantamount to demi-suicide, then even passive refusal to palliate pain, insofar as *Sefer Hasidim* is concerned, must also be regarded as prohibited on the basis of the verse "but your blood from your souls will I require." Thus, this biblical verse must be understood as commanding the patient to seek pain palliation. By the same token, the physician who provides such relief has, at the very minimum, performed the meritorious deed of assisting the patient in fulfilling a biblical obligation.

The obligation to seek relief of pain can be established on the basis of yet another source as well. The Gemara, *Ta'anit* 11a, records a controversy with regard to whether an individual who chooses to become a Nazarite is to be regarded as a *kadosh*, a holy individual, or whether he is to be regarded as a *hoteh*, a transgressor, because he denies himself the pleasures of the grape and its derivatives. The Gemara then proceeds to declare that, if a person who denies himself only wine is a transgressor, then, *a fortiori*, a person who fasts without good reason, i.e., a person who abstains from all food, is a transgressor. By the same token, if a person who merely denies himself the single pleasure of the fruit of the vine and its liquor is considered to have committed a transgression, then an individual who engages in self-mortification or who needlessly allows himself to remain in a state of pain is certainly a transgressor.

The Gemara further declares that, even according to the opinion that deems the Nazarite to have attained a state of holiness, a Nazarite can be deemed to be holy only if his self-denial does not cause him undue distress. If, however, the Nazarite's distress is severe ("*lo mozi le-ze'urei nafsheih*"), all concede that he is a transgressor. *Shulhan Arukh*,

Orah Hayyim 571:1, rules that a person who fasts but for whom the fast is onerous, i.e. "he is not healthy and strong," is a sinner. Similarly, a person is not permitted to assume the obligation of a non-mandatory fast if, as a result of abstaining from nourishment, his ability to engage in the "work of Heaven" will be diminished. Failure to seek palliation of pain is entirely comparable to failure to seek food and water. Such conduct, despite its passive nature, is sinful when the result is either severe and inordinate discomfort or diminution of the "work of Heaven."

The obligation to relieve pain is recorded in *Shulhan Arukh*, albeit in a rather obscure and indirect manner. There is no section in *Shulhan Arukh* that addresses palliation of pain explicitly. However, *Shulhan Arukh* does record a ruling with regard to bloodletting of a father by his son. "Wounding" a father or mother, i.e., inflicting a trauma that causes bleeding, is ordinarily a capital crime. Nevertheless, Rema, *Yoreh De'ah* 241:3, rules that bloodletting, surgery or even amputating a limb of a parent is permitted but only when there is no other physician available. It is noteworthy that, in formulating that ruling, Rema does not justify bloodletting or performance of surgery by a son because the procedure is necessary to preserve a human life or even to cure a malady. Instead, Rema declares that the son may engage in bloodletting or a surgical procedure "if there is no other [physician] there to perform [the procedure] and the father is in pain." The implication of Rema's comment is, even if the procedure will have no effect upon the course of the underlying disease or malady, the son may nevertheless engage in an otherwise forbidden act of "wounding" simply in order to relieve the father's pain. If a son may treat the father under those circumstances solely in order to palliate pain, clearly, there must be an obligation to alleviate pain if it is in the power of the physician to do so.

Alleviation of pain and suffering is certainly commendable. Even in the absence of a particular halakhically mandated obligation, relief of pain should be aggressively pursued simply because it is the humane thing to do. The Psalmist declares of God: "and His mercy is upon all His creatures" (145:9). The verse "And you shall walk in His ways" (Deuteronomy 28:9), declares the Gemara, *Shabbat* 123b, obliges man to emulate the ways of God. Rambam, *Hilkhot De'ot* 1:6, understands this obligation as requiring man to emulate the traits of the Deity: "Just as He is merciful, so be you merciful." The doctrine of *imitatio Dei* demands that a person act in a humane manner because, in doing so he shares, at least in a miniscule fashion, in the divine attributes.

II. PALLIATION OF PAIN IN THE TERMINALLY ILL

Palliation of pain in the terminally ill presents a much more difficult and complex issue. It is a much more difficult question because, in treating the terminally ill, palliation of pain may at times come into conflict with other *desiderata.* The preamble of the Declaration of Independence reveals that the Founding Fathers believed that "all men are endowed by their Creator with certain unalienable rights, among them life, liberty and the pursuit of happiness." Happiness is certainly a human value. But happiness is a dual-faced coin; sometimes it is positive, and sometimes it is found in the absence of a negative. Sometimes happiness is found in eating, drinking and making merry; but sometimes happiness lies simply in the alleviation of pain. Suffering is the antithesis of happiness and no one can be happy while in a state of anguish. Elimination of pain and suffering is one way of promoting happiness.

Life, liberty and happiness are human values. But there are times when those values come into conflict with one another. Sometimes there is a conflict between preservation of life and preservation of happiness, if happiness is defined as the elimination of pain. Sometimes the only way in which pain can be eliminated is by extinguishing life, either overtly through active euthanasia or passively by allowing the patient to die. In some circumstances the only effective pain palliation is eternal slumber.

Among American revolutionaries, Patrick Henry declaimed, "Give me liberty or give me death!" In doing so, he sough to give primacy to the value of liberty over other values, including life itself. Today, given the mores of contemporary society, the slogan might well be "Give me liberty *and* give me death!" In the bioethical context, the demand for death in the form of euthanasia or physician-assisted suicide is clothed in assertion of a right to liberty. However, the demand for liberty in the guise of patient autonomy is a demand for the right to choose death not necessarily because autonomy is perceived as the cardinal human value but often because of its instrumental value in assuring happiness in the form of alleviation of pain.

In Western culture there is general agreement with regard to delineation of moral values. Palliation of pain is a value in virtually all systems of ethics. Moral dilemmas occur when ethical values come into conflict with one another. Every ethical system must either establish a hierarchy of values so that a moral agent will know immediately which value must be given priority or else it must establish a set of canons or rules which will allow a moral agent to adjudicate between conflicting values. When ethi-

cists talk about values, they do so with a *ceteris paribus* clause. All things being equal, we value motherhood and apple pie but, in the real world, it is seldom that all things are equal. The necessary result is that ethical values frequently come into conflict with one another. Relief of pain may, at times, present precisely such a dilemma. How is one to act when relief of pain can be achieved only at the cost of termination of life itself?

Robin Hood is a children's story and children perceive it as such. But a thoughtful adult who reads the story to his or her children must realize that it is not a children's story at all but a profound ethical treatise. The narrative, as everyone knows, recounts how Robin Hood steals from the Sheriff of Nottingham, but he does not steal because he is avaricious and wishes to enrich himself. Robin Hood steals because he is concerned for the plight of starving orphans and widows and he has no way to provide relief for them other than by appropriating property that belongs to the Sheriff of Nottingham. Now, Robin Hood recognizes full well that there exists a moral right to enjoyment of one's property; he accepts the binding nature of the commandment "*lo tignovu*—you shall not steal" (Leviticus 19:1). Presumably, the Sheriff of Nottingham not only accepts the commandment "*lo tirzah*—you shall not commit murder" (Exodus 20:13) but also recognizes the moral value reflected in "*lo ta'amod al dam re'ekha*—you shall not stand idly by the blood of your fellow" (Leviticus 19:16). The situation presents a conflict between two values—the preservation of life versus the preservation of property. And how is that conflict resolved? Apparently, the Sheriff of Nottingham thinks that the preservation of property represents a higher value than preservation of life, at least when the property to be preserved is that of the Sheriff of Nottingham.

All things being equal, the Sheriff of Nottingham would be happy to see the starving widows and orphans provided for, but not at his expense. Robin Hood, on the other hand, regards the preservation of the lives of starving orphans and widows to be a more compelling moral value than respect for the property of others. Both Robin Hood and the Sheriff of Nottingham subscribe to the same set of moral values, but each posits a different hierarchical ranking of those values so that, in the real world, when those values conflict, as they surely must, one acts in accordance with one value and the other acts in accordance with a different value.

It is noteworthy that one of the members of Robin Hood's band was Friar Tuck. One may ask, what was Friar Tuck's role in this group? It is not at all far-fetched to assume that Friar Tuck was present in the role of a professor of moral theology; he was there to give a *hekhsher*

shtempel, an ecclesiastic imprimatur, to Robin Hood's value system as opposed to that of the Sheriff of Nottingham. Had a rabbinic figure been present rather than Friar Tuck, he would have adopted exactly the same position and would have ruled that preservation of life represents a cardinal value, and hence preservation of life takes precedence over preservation of property.[7] A rabbinic decisor, however, would have found it necessary to address the question of whether Robin Hood[8] and/or the beneficiaries of his largesse would have been obligated to make restitution to the Sheriff of Nottingham at such time as it became financially possible for them to do so.[9] Putting that point aside, preservation of life takes precedence even over promotion of happiness because, in the Jewish system of values, it is preservation of life which is the supreme value.

In some circles "vitalism" is a term of derision, but that should not be the case among Jews. On the contrary, it should be stated loudly and clearly that Jews are vitalists. We need not be ashamed of the fact that Judaism is a religion of vitalism and regards human life as being endowed with a value that far surpasses virtually all other values.

To state that preservation of life is a cardinal value is not to declare that life must be preserved in any and all circumstances. The few exceptions to the primacy of the preservation of life must be spelled out with precision. One such exception does exist, at least in theory, in the case of a patient who suffers intractable pain. In theory, there is no obligation, in the opinion of this writer, to treat a patient who suffers excruciating pain that cannot be palliated. Although active euthanasia cannot be countenanced in any circumstances, withdrawal of treatment is warranted in such situations, at least in theory.

There is a remarkable responsum authored by R. Moshe Feinstein, published in *Iggerot Mosheh, Yoreh De'ah*, II, no. 174, sec. 4. The issue concerned a requirement for the consent of next of kin for removal of an organ from a cadaver for the purpose of transplantation. To place the matter in historical context, the responsum was written at a time at which there was a furor with regard to autopsy practices in Israel. The demand was put forth that pathologists not be authorized by law to perform post-mortem examinations other than with consent of next of kin.

That proposal created a backlash. There was some agitation against the proposal even in rabbinic circles because, basically, insofar as Jewish law is concerned, autopsies are sanctioned in instances in which the information to be derived is necessary for *pikuah nefesh*, i.e., in order to save a person's life. Preservation of life supercedes the dignity that must be

accorded to a corpse reflected in the prohibition against desecration of the dead. Since it is the overriding consideration of preservation of life that governs, a life-saving organ, for example, may be recovered from the body without prior consent of the deceased during his lifetime. It would therefore seem that consent of next of kin is similarly not required.

At the time, rabbinic spokesmen took the position that consent of next of kin should be mandatory but that position appeared to many to be grounded in *realpolitik* rather than in halakhic prerogatives. The argument was that since, in virtually all democratic countries, consent of kin is required, Israel should be no different. Basically, and for good reason, the rabbinic activists did not trust the medical establishment to perform post-mortem examinations only in situations of genuine *pikuah nefesh* and, consequently, sought to establish a legal requirement for consent of next of kin as a means of preventing halakhically unjustified post-mortem procedures.

Iggerot Mosheh, however, asserts that consent of next of kin is required as an intrinsic matter of Halakhah. In support of that position he cites a rabbinic leniency with regard to conduct in the wake of a fire that breaks out on *Shabbat*. A corpse is regarded as *mukzah* on *Shabbat* and ordinarily may not be moved. Nevertheless, the Gemara, *Shabbat* 43b, declares that it is permissible to remove a corpse in order to place the body outside the range of the fire. The Gemara justifies this exception to the rabbinic prohibition against moving a corpse on *Shabbat* on the grounds that *adam bahul al meto*, i.e., a person becomes extremely distraught when confronted by a situation in which a loved one is about to be incinerated before his very eyes. Therefore, the Sages sanctioned what would otherwise have been a violation of a rabbinic prohibition because of their recognition that the individual who becomes *bahul*, agitated and excited, is quite likely to transgress a halakhic prohibition in his agitation. Accordingly, they suspended the prohibition against the movement of *mukzah* in order to assuage the quite normal agitation attendant upon such a situation.

Iggerot Mosheh, however, points to a psychological observation noted by *Tosafot, Shabbat* 44a. There is something remarkable in what the Gemara does not say. There is no similar dispensation for a person who has secreted his life's savings under his mattress and who now is confronted by a conflagration that is about to engulf the mattress. That individual is certainly agitated and in a state of stress. The banknotes hidden under his mattress are *mukzah*. If he is not permitted to move them to a safe place, he may well become even more agitated, lose his

head and in his confusion seek to preserve his fortune by seizing the money and transporting it through a public thoroughfare. Yet we find no dispensation to move the currency to a safe place even within a private domain. Even more striking is that, as recorded in the Mishnah, *Shabbat* 117b, with the exception of the quantity of food ordinarily consumed in the course of the *Shabbat* day, the Sages forbade a person to rescue even non-*mukzah* items from a fire. The Gemara explains that they promulgated such an edict because of a fear that, if they were to permit a person to preserve his property from a conflagration even in a permissible manner, he might, in his agitation and confusion, unwittingly attempt to quench the flames.

Why did the Sages suspend the prohibition against moving a corpse in the case of fire but forbid the preservation of property that, in identical circumstances, could be rescued without any violation of Sabbath strictures whatsoever? It must be remembered that the prohibition against rescuing property from a fire on *Shabbat* remains in place even if as a result a person's entire fortune will go up in flames. The conclusion to be drawn, observe *Tosafot*, is that there are individuals who suffer far more distress at the sight of mutilation of the corpse of a loved one than they would experience upon the loss of their entire fortune. Accordingly, the Sages found it necessary to suspend the prohibition against moving an object that is *mukzah* in situations in which a corpse would otherwise be ravaged by fire but did not do so, and indeed found it inadvisable to do so, when the prospect was only loss of a fortune.[10]

According to some authorities, it is a principle of Halakhah that a person is required to surrender his entire fortune for purposes of rescuing a person from death; according to other authorities, a person is obliged to expend only twenty percent of the value of his net worth in order to preserve the life of another.[11] However, no authority regards it as obligatory for any person to expend *more* than his entire fortune in such an endeavor.[12]

Limiting financial liability to the expenditure of no more than one's fortune may serve to negate an obligation to borrow funds in excess of one's net worth for such purpose. However capping liability at the value of one's entire fortune establishes another ceiling as well. A person may not be called upon to expend money, but may find himself in a situation in which he is called upon to suffer intractable pain or emotional anguish of such severity that, if given the choice, he would cheerfully part with his entire fortune and go into debt in order to avoid the suffering. A person who would give more than his entire fortune in order to alleviate

such pain, argues *Iggerot Mosheh*, need not accept the onus of such pain for purposes of rescuing the life of another. In effect, declares *Iggerot Mosheh*, a person may be obligated to expend his entire fortune in order to save a life, but not more than his entire fortune. Accordingly, he maintains, a person who would willingly surrender his entire fortune in order to prevent an autopsy or in order to prevent removal of an organ from the corpse of a loved one need not consent to such a procedure even in life-threatening circumstances. For some people, defilement of the corpse of a close relative may cause more anguish than the loss of an entire fortune. Consequently, rules *Iggerot Mosheh*, since a relative may legitimately object to a cadaveric organ transplant, informed consent of the relatives is required. *Iggerot Mosheh* quite understandably adds that, in cases of *pikuah nefesh*, surviving relatives should be encouraged to give their consent and should be assured that to do so is extremely meritorious and constitutes a great *mizvah*. Nevertheless, a relative who withholds consent is acting within his halakhic rights in refusing his cooperation.[13]

Further evidence demonstrating that some forms of suffering are more onerous than loss of an entire fortune may be adduced on the basis of a comment of an anonymous medieval scholar cited in *Shittah Mekubezet*, *Ketubot* 33b, and identified simply as the author of the *kuntresin* or notebooks. The Gemara, *ad locum*, affirms that, as recorded in Daniel 3:13-23, Hananiah, Mishael and Azariah (referred to in Scripture as Shadrach, Meshach and Abed-nego)[14] did indeed accept martyrdom rather than transgress the prohibition against idolatry but that, had they been subjected to torture, they would have succumbed and worshipped the idol. *Tosafot* and other talmudic commentators object that idolatry is one of the three cardinal transgressions and, accordingly, one is obligated to suffer martyrdom under any and all circumstances rather than violate the commandment prohibiting idolatry. Those commentators advance various solutions to the problem based upon the general thesis that the act Hananiah, Mishael and Azariah were ordered to perform was not, in actuality, an act of idol worship.

The anonymous author of the *kuntresin* cited by *Shittah Mekubezet* resolves the matter in an entirely different way. That authority argues that the obligation to suffer martyrdom derived from the verse "And you shall love the Lord your God, . . . and with all your soul" (Deuteronomy 6:5) requires even the sacrifice of one's life in order to avoid an act of idolatry but does not require a sacrifice greater than that of the sacrifice of one's life. Torture, argues this authority, is more onerous than surrender of one's life and hence acceptance of torture is not

demanded of a person even if it can be avoided only by an act of idolatry.[15] According to the author of the *kuntresin*, it is quite clear that excruciating pain need not be endured to avoid a transgression for which martyrdom need not be accepted. If such pain is more onerous than death, *a fortiori*, it must be regarded as more onerous than loss of all of one's material possessions.

Failure on the part of *Tosafot* and other early-day authorities to resolve their perplexity by advancing the view propounded by the author of the *kantresin* certainly indicates their disagreement with that position. Those scholars apparently accept the notion that the obligation to suffer martyrdom entails an obligation to accept extreme and enduring pain. However, although they reject the notion that extreme pain need not be endured even in situations requiring surrender of one's life, there is ample reason to assume that they would concede that extreme pain is more onerous than expenditure of an entire fortune. Indeed, *Tiferet Yisra'el, Yoma, Bo'az* 8:3, cites the talmudic statement with regard to Hananiah, Mishael and Azariah as demonstrating that "great pain is more onerous than death" in arguing that there is no obligation to seek prolongation of life in circumstances of extreme pain.

It is thus clear from the comments of both *Tiferet Yisra'el* and *Iggerot Mosheh* that a patient who suffers intractable pain of a nature such that he would consider it well worth surrendering his entire fortune in order to avoid the torment does not have an obligation to accept such suffering for the purpose of prolonging his life.[16] The patient's obligation to preserve his own life requires expenditure of funds and for many authorities that obligation would require him to sign over his entire fortune if necessary to achieve that purpose but does not require expenditure of more than his entire fortune. Nor, it would seem, can such a burden be placed upon him by others. Accordingly, since the patient is under no obligation to accept ongoing intractable pain as the cost of prolonging his life, others do not have the right to impose such a burden upon him against his will. Of course, active euthanasia involving an overt act is prohibited even in such extreme circumstances, but passive withholding of treatment would be acceptable in cases of intractable pain of such magnitude.

Although it is subject to dispute, one explanation of the concept of a *goses*, i.e., a moribund patient as defined by Halakhah, and of why it is permissible to withdraw some types of treatment from a *goses* is based upon the notion that Halakhah postulates that a *goses* suffers some type of extreme metaphysical anguish. Halakhah does indeed recognize the

phenomenon of metaphysical anguish at the moment of *yezi'at ha-nefesh*, the moment at which the soul departs from the body. Although the matter is open to dispute, some scholars maintain that such suffering is experienced not only at the moment of disassociation of the soul from the body but during the entire course of the terminal period. According to this hypothesis, justification for withholding treatment from a *goses* is based upon the consideration that metaphysical anguish during the period of *gesisah* involves expenditure of a non-monetary coin greater than the value of one's entire fortune. Such anguish is so great that the patient is not required, and cannot be expected, to suffer it with equanimity even for the purpose of prolongation of life.[17] Thus, treatment may be withheld because the patient need not accept pain of such magnitude for purposes of prolonging life.

It cannot be overly emphasized that the obligation of *pikuah nefesh* in Jewish law is not limited to effecting a cure or even to enabling a patient to be discharged from a hospital; the obligation is equally binding even in situations in which it is clear that the patient will remain non-sapient and in which the patient's life will be preserved only ephemerally. There is an obligation to prolong life of even a terminally-ill patient and the quality of the life that is prolonged is not a determining factor in establishing the ambit of the obligation. Nevertheless, it remains true that, when the patient is afflicted by intractable pain such that the patient would cheerfully surrender even more than his entire fortune, there is no obligation to prolong the life of the patient. That, however, is true in theory; it is generally not true in practice.

Why is it not true in practice? Dr. Porter Storey reports that the findings of a study involving some two thousand terminally ill patients, demonstrate that patients can be effectively and safely palliated by administrating narcotic analgesics provided that the dosages are carefully titrated against the symptoms.[18] Numerous other studies have been published over the past decade that indicate that narcotics can be administered for palliation of pain in a careful and sustained manner without risk to the patient. In an *amicus brief* submitted to the Supreme Court in *Washington v. Glucksberg*, the American Medical Association stated that "the pain of most terminally ill patients can be controlled throughout the dying process without heavy sedation or anesthesia."[19] A manual published by the Washington Medical Association reports that "adequate interventions exist to control pain in 90-99% of patients."[20] Oral information received from physicians prominent in the field of pain palliation indicates that 99% is probably a more accurate figure. In

particular, chronic pain caused by various forms of carcinoma can be relieved and the patient should not be allowed to suffer unnecessarily. To be sure, there are cases in which pain may prove to be intractable, e.g., myeloma. One expert has informed me that some facial tumors involve certain sets of nerves that do not respond to pain inhibitors but even that gentleman conceded that such cases are extremely rare. Hence, it may be stated that, in the vast majority of cases, the point at which the patient need suffer this type of intractable pain is never reached. And, it must be remembered, in situations in which pain *can* be controlled there is a halakhic obligation to alleviate suffering by controlling pain.

III. RISK-TAKING FOR PAIN PALLIATION

Despite the plethora of medical evidence demonstrating that pain can be palliated with minimal risk of foreshortening the life of the patient,[21] it is widely presumed that pain relief is hazardous. Moreover, it is generally assumed that, despite the risk involved, it is halakhically acceptable to use methods of pain palliation that may shorten the life of the patient despite the fact that, as a general rule, Jewish law requires that the life of a patient be prolonged to the fullest extent possible.

There is discussion in halakhic literature of use of potentially hazardous analgesics even in situations that do not involve *pikuah nefesh*, i.e., in situations in which the underlying disease presents no risk to the life of the patient but in which the medical condition does cause pain or discomfort. At least one authority, Rabbi Jacob Emden, *Mor u-Kezi'a*, no. 328, discusses a proposed surgical procedure that he correctly or incorrectly understood as not required for alleviation of a life-threatening condition but that was being considered solely for purposes of pain palliation. The procedure in question seems to have been an operation for removal of gallstones. Referring to that procedure, R. Jacob Emden declares, "*Karov be-einai le'esor*—In my eyes it is close to being forbidden." Rabbi Emden's words are chosen with care: A matter that is "close to being forbidden" is not actually prohibited. Permissibility may not be obvious; permissibility may not even be beyond doubt. The proposed cause of action may perhaps not be commendable or even compatible with a halakhic value system, but it is not unequivocally forbidden. Although he refuses to encourage the procedure, R. Jacob Emden stops short of forbidding placing one's life at risk in order to obtain relief from pain.

The permissibility of self-endangerment for purposes of palliation of pain is evident from the earlier-cited ruling of Rema, *Yoreh De'ah* 241:3, permitting a son to perform surgery and even to amputate his father's limb in the absence of another qualified physician. As already noted, Rema justifies such intervention by a son, not because of fear that failure to intervene will result in the loss of the father's life, but because the father is in pain. Even today, surgical amputation of a limb involves a recognized degree of risk. In the sixteenth century, when Rema penned that ruling, the risk to life was quite high. On the basis of terminology employed by Rema, it is abundantly clear that he sanctions the hazardous surgical procedure simply to alleviate pain. In effect, Rema rules that one may assume certain risks even for purpose of alleviating pain, despite the fact that the underlying pathology presents no danger to the patient. In actuality, a similar statement appears in the talmudic commentary of an earlier medieval authority, R. Menachem ha-Me'iri, *Bet ha-Behirah, Sanhedrin* 84a. Although Me'iri's commentary was not available to the Rema, the principle formulated therein seems to have been well-known and accepted. Indeed, there seems to be no dispute with regard to the ruling formulated by Me'iri and Rema.

There is, of course, a general prohibition against self-endangerment derived from the verse "And you shall be exceedingly watchful over your lives" (Deuteronomy 4:15). The right to assume a measure of danger in order to escape pain is an exception to that prohibition. The theory upon which that exception is based is not spelled out by either Me'iri or Rema but such justification does not appear to be elusive. Dispensation, and hence the obligation, to practice medicine is derived from the verse "*ve-rapo yerape*—and he shall surely cause him to be healed" (Exodus 21:19). In its biblical formulation, the obligation to heal does not occur in the context of what is necessarily a case of *pikuah nefesh*. The phrase "*ve-rapo yerape*" occurs in the biblical section dealing with the financial liability of a person who has committed an act of mayhem and is consequently called upon to make compensation for the physical danger caused by his battery. The injury suffered by the victim is not necessarily life-threatening. Since Scripture provides that the victim may recover damages, including medical expenses, the clear inference is that the physician may minister to the patient. What condition is the physician treating? The physician is caring for a patient who has suffered a non-terminal trauma. Yet Halakhah appreciates the fact that no therapy is entirely free of danger. Rabbenu Nissim, *Sanhedrin* 84b, observes, "All modes of therapy are a danger for the patient for it is

possible that, if the practitioner errs with regard to a specific drug, it will kill the patient." Ramban, in his *Torat ha-Adam*, states even more explicitly, "With regard to cures there is naught but danger; what heals one kills another." [22] Since the physician is granted the right to treat even patients whose lives are not in danger even though the treatment is accompanied by an element of risk, and since palliation of pain is included in the physician's obligation *vis-à-vis* the patient, it follows that at least some hazards may be accepted even for the purpose of eliminating pain. Certainly, assumption of untoward risks for palliation of pain is not acceptable just as untoward risk is not acceptable in treatment of the underlying malady. Principles of prudence apply to pain relief just as they apply to therapeutic procedures having the potential of foreshortening life. Risks that are ordinary and usual and which would be accepted by a prudent person may be assumed in order to alleviate the pain that the patient suffers.

There are even stronger grounds to support risk-taking in the palliation of pain suffered by the terminally ill. Jewish law postulates a halakhic presumption that pain itself poses a danger of foreshortening life. Halakhah recognizes that *tiruf ha-da'at* i.e., despondency, shock and emotional anguish, can cause death, or at least hasten the demise, of a dying patient. There are reports in the medical literature of a phenomenon known as "voodoo death," which is simply one form of *tiruf ha-da'at*, that may hasten death.[23] Similarly, *Mishneh Beruah* 328:13 rules that, if an infant is locked in a room on *Shabbat*, the door must be broken down without delay lest fear and shock cause the child to die.

If emotional anguish and agitation can hasten death, it should not be surprising that halakhic authorities recognize that physical pain, in some circumstances, may also hasten death.[24] Accordingly, palliation of pain with a hazardous drug is a matter or weighing one risk against another risk. Since Halakhah recognizes a license to assume risk for the alleviation of pain even in situations in which the patient is not terminal, *a fortiori*, in the case of terminal patient for whom pain can hasten death, assumption of a prudent risk for relief of pain is certainly warranted.

Recent medical studies confirm that the halakhic presumption that severe pain is a causal factor of decreased longevity is empirically correct. One prospective, randomized, placebo-controlled study was primarily designed to assess the efficacy of pain relief in patients with unresectable pancreatic cancer. A total of 137 patients were randomized and blinded to receive either intraoperative chemical splanchnicectomy with alcohol block or placebo.[25] In what the authors of the report describe as

"an unexpected finding" the study demonstrated a "highly significant improvement in actuarial survival" in the patients who received alcohol chemical splanchnicectomy.[26]

It should be added that if, in the course of judicious administration of analgesics, the patient does die, the death is a *davar she-eino mitkaven*, an unintended result giving rise to no halakhic or moral culpability.[27] Halakhah does not regard a calculated risk as an error of judgment and hence such misadventure does not constitute malpractice. Since reasonable assumption of risk is sanctioned by Halakhah, an untoward result carries with it no onus of transgression. Compelling arguments may be advanced in support of the position that that even in the days of the Temple when, as indicated by *Shulhan Arukh, Yoreh De'ah* 336:1, the physician who committed an act of manslaughter as a result of malpractice was subject to the penalty of exile to one of the cities of refuge, a physician who made a judicious determination to expose his patient to such a risk was not subject to any penalty.[28] Consequently, the physician need have no hesitation in palliating pain provided that he does so in a responsible and medically indicated manner.

Nevertheless, the right to palliation of pain is not unlimited. A rather enigmatic statement attributed to a highly respected and eminent halakhic authority is quoted in the literature to the effect that a physician may administer morphine even in a situation in which he knows in advance that at some undetermined time the patient will certainly die as a result.[29] The reason cited is that, in such circumstances, the death of a patient is a *davar she-eino mitkaven*, i.e., the physician has no intent to foreshorten the life of the patient. Although the patient's premature demise is a certainty, nevertheless, there is no *psik reisha*, or certainty, that any particular injection of morphine will cause death. Accordingly, it is argued, the principle of *davar she-eino mitkaven*, or the "double effect" principle, remains applicable. The statement itself is somewhat unclear and it is doubtful that this is really the import of the original statement. If it is, this writer must respectfully but emphatically disagree.

The sources and arguments adduced in support of the permissibility of assuming certain risks in the treatment of pain apply only to situations in which resultant death is only a possibility, but not a certainty, even over a period of time. If, however, the resultant death of the patient is known to be a certainty, it seems to me that, according to Halakhah, administration of the drug is forbidden. The Gemara, *Sanhedrin* 78a, discusses a case in which a person is simultaneously beaten by ten people and a second case in which the victim is beaten by

ten people *in seriam*. In both cases the victim dies as a result of the beating. In the case in which the blows are administered simultaneously none of the ten miscreants can be punished since no single person administered the fatal blow. However, the Gemara records a dispute with regard to culpability in the case in which the blows are administered in serial order. The controversy is whether the last person who administers the *coup de grace* is guilty of homicide. The technical controversy is whether causing the death of a person who has been placed in a terminal state by another human being, rather than by Heaven, i.e., the terminal state is not the result of any physiological cause but is the result of an act of violence, constitutes homicide. Put somewhat differently, the issue is whether a supervening agent is to be punished for imminently causing the death of a *goses be-yedei adam*, i.e., a person who otherwise would die as a result of another perpetrator's already completed homicidal act.

There is no specific talmudic discussion of the possible exoneration of a person who administers ten lashes and thereby causes the death of his victim on the basis of the fact that the murderer could not know in advance which of the ten lashes will actually cause the death of the victim. Such a situation is hardly unusual since a person intent upon committing homicide by brute force is unlikely to know how many blows will be required to achieve that malevolent goal. If the perpetrator intends to commit homicide and has been properly admonished and informed that if the beating results in death he will be culpable, it would appear that the perpetrator is guilty of capital homicide even though it is impossible to predict in advance how many blows it will take before the victim actually dies. Indeed, the Gemara's explicit exoneration of the ten individuals who simultaneously administer ten blows implies that a single person who administers all ten blows would indeed be guilty of capital homicide.[30]

There is yet another pertinent source in the form of a comment of *Bereshit Rabbah*, 31:5, regarding the *dor ha-mabul*, the generation of the Deluge. Scripture declares "and the earth was filled with robbery" (Genesis 6:13). The Midrash amplifies this statement with the comment that those people were very crafty thieves. They knew that under the Noahide Code theft of property having the value of a *perutah* was a capital crime. To avoid culpability, they formed bands and sought as their victims persons in possession of *turmisin*, coins equal in value to half a *perutah*. Each thief would seize only one of those small coins, secure in the knowledge that there would be no recovery and no punishment. The net result was that the victim had no recourse against any one of the

thieves but, since all of his coins were taken from him, he was left impoverished. Says the Midrash: "*Amar ha-Kadosh baruch Hu, 'Atem osim she-lo ke-shurah, ani oseh lakhem she-lo ke-shurah.*'" Translated literally, the Midrash declares: "The Holy One, blessed be He, said, 'You are acting out of line: I will also act out of line in punishing you." In effect, God declared, "You are taking advantage of loopholes and technicalities in order to accomplish goals that are clearly wrong and therefore I will respond accordingly. I will punish you even though what you have stolen is *de minimis.*" Generally, *de minimis non cogit lex*, but the insignificant added over and over again can become highly significant. Even if repeated acts leading to an undesired result would be technically unpunishable in terms of the laws that apply to capital punishment, it is clear that acts that in the aggregate will certainly culminate in the taking of the life of a patient cannot be sanctioned in terms of Halakhah.

However, this discussion is largely theoretical. A recent report of the bioethics committee of the Montefiore Medical Center concludes with the statement: "The widespread belief that adequate pain control usually poses high risk of respiratory distress and a consequent hastening of death appears to be based more on longstanding myth than on medical fact." It is simply not the case that adequate pain control creates a certainty that sooner or later the drugs utilized for that purpose will extinguish the life of the patient. Yes, accidents can happen. Nevertheless, one of the leading specialists in pain palliation in the United States has commented to this writer that, in his decades of clinical practice, he has never heard of a single case of a death of a patient as a result of pain palliation—unless the death was intended by the physician. The "accidents" he assured me, are not accidental at all. Assuming that assurance to be exaggerated, it remains true that the certainty of a patient dying as a result of properly titrated pain medication is contrafactual. Hence the halakhic issue of the permissibility of performing a series of uncertain acts that in the aggregate will lead to certain death need not be adjudicated in the context of pain palliation.

Another concern that has been voiced is the fear that if high doses of pain medication are administered, the patient may become addicted to the pain medication. "Opiaphobia" is the word that has been coined to describe the fear of opiates. In actuality, that concern is without basis in fact. Clinical studies have shown that when terminally ill patients who are suffering great pain are treated with carefully titrated doses of narcotics the patients do not become addicted. Not only do they tolerate such doses of narcotics without ill effect but, for some unexplained rea-

son, they do not become addicted to the opiates. In particular, patients suffering chronic pain associated with malignancies who are treated with narcotics for pain relief and who are subsequently cured of their malignancy do not remain drug dependent. This phenomenon is but one of the myriad wonders of the universe.

Moreover, fear of addiction in the terminally ill patient is misplaced. If addiction were indeed the cost of pain palliation of the terminally ill, the result would be well worth the price. Were the terminally ill patient to become addicted to narcotics, then he might indeed require opiates for the rest of his natural life. But surely, it is preferable to survive as a pain-free addict than to suffer intractable pain or not to survive at all.

To be sure, if high doses of opiates are administered to control pain the medication may suppress respiration with the result that the patient will then have to be placed on a ventilator. That is indeed unfortunate, but if it is necessary to provide artificial respiration in order to preserve the life of a patient he must be placed on a respirator. Let it be reiterated: Judaism espouses vitalism as a supreme value. From the vantage point of Judaism the primary goal and purpose of the healing arts is to prolong the life of a patient until such time as the Creator sees fit to reclaim that life. Of course, although life itself is an intrinsic goal, medical practitioners are also obligated to enhance the patient's quality of life to the extent possible. But, only to the extent that achievement of that goal is compatible with preservation of life. When the two goals come into conflict, one dare not sacrifice human life because the quality of life that the patient or his family would desire is not attainable. The ultimate value is life itself.

A concluding comment that stems from a non-Jewish source appears to be entirely apropos. That comment reflects a rule that should govern halakhists and certainly should govern doctors in clinical practice. In the real world, there are many situations in which a doctor has to make a decision and he cannot always be certain that his decision is correct. There are cases in which a rabbinic decisor may not immediately know the answer, but he is called upon to render a decision and the situation does not permit procrastination. In the concluding sentences of his decision in *Application of the President and Directors of Georgetown College, Inc.*, Judge Skelly Wright remarks, "To refuse to act, only to find later that the law required action, was a risk I was unwilling to accept. I determined to act on the side of life."[31] A person called upon to make a decision involving a matter of life or death should govern himself by the aphorism "If I am to err, better to err on the side of life."

NOTES

1. See Donald McPhillips, "JCAHO Pain Management Standards Are Unveiled," *Journal of the American Medical Association*, vol. 284, no. 4 (July 26, 2000), p. 428.
2. One leading authority has intimated that, in economic terms, more than 400 million days of work were lost in 1986 because of chronic pain. Loss of earnings together with the cost of health care, compensation, litigation and quackery for that year were estimated at 79 billion dollars. See John J. Bonica "General Considerations of Chronic Pain," *The Management of Pain*, ed. John J. Bonica, 2nd edition (Philadelphia, 1990), I, 182.
3. See Phillips, "JCAHO Pain Management," p. 429.
4. *Torat ha-Adam, Kol Kitvei Ramban*, ed. R. Bernard Chavel (Jerusalem, 5724), II, 48.
5. See R. Ya'akov Yeshayah Blau, *Pithei Hoshen*, V (Jerusalem, 5748) 12:1, note 3, who, without citing *Teshuvot Radvaz*, declares that alleviation of suffering is subsumed in the latter obligation.
6. Causing pain or anguish to another is also prohibited according to the many authorities who regard the prohibition against causing pain to animals (*za'ar ba'alei hayyim*) as also forbidding the infliction of pain or anguish upon humans. For a survey of those sources, see R. Betzalel Stern, *Be-Zel he-Hokhmah*, IV, no. 125, and *Pithei Hoshen*, V, 2:1, note 6.
7. *Shulhan Arukh, Hoshen Mishpat* 359:4, rules explicitly that, in a life-threatening situation, one may appropriate the property of another person in order to avert danger but only with intent to make restitution at some future time. That ruling is confirmed by *Sema, Hoshen Mishpat* 259:10; *Bi'ur ha-Gra, Hoshen Mishpat* 259:4; *Shulhan Arukh ha-Rav, Hilkhot Gezeilah u-Geneivah*, sec. 2; and *Arukh ha-Shulhan, Hoshen Mishpat* 359:3 and is also the opinion of *Yam shel Shlomoh, Bava Kamma* 6:27 and a host of later authorities. That position is based upon the analysis of *Bava Kamma* 60b by *Tosafot, ad locum. Teshuvot ha-Rashba*, IV, no. 17, however, apparently maintains that in such circumstances, subsequent payment is not required.

   Rashi, *Bava Kamma* 60b, is conventionally understood as maintaining that theft is not permitted even for the purpose of preserving life while Me'iri, *Bava Kamma* 80a, is understood as asserting that, although normatively permitted, it is not an act of piety to appropriate the property of another person for such purpose. See, however, the discussion of Meiri's comments presented by *Sedei Hemed, Ma'arekhet ha-Alef*, sec. 16. Rashi's position is accepted by *Teshuvot Binyan Zion*, nos. 167-168; *Sho'el u-Meshiv, Mahadura Kamma*, II, no. 174; and *Dvar Yehoshu'a*, II, no. 24. However, *Teshuvot Maharam Shik, Yoreh De'ah*, no. 347, asserts that even Rashi would concede that, as a matter of normative law, theft and subsequent restitution is permissible. *Teshuvot Zekher Simhah*, no. 235, maintains that, in fact, Rashi understands the discussion in *Bava Kamma* 60b in the same manner as *Tosafot. Iggerot Mosheh, Yoreh De'ah*, I, no. 214, employs emphatic language in dismissing the conventional understanding

of Rashi. For a comprehensive discussion of this issue, see Dr. Abraham S. Abraham, *Nishmat Avraham*, II, *Yoreh De'ah* 157:1, note 4(1).

8. For a discussion of the rescuer's liability for appropriation of property see this writer's *Contemporary Halakhic Problems*, IV (New York, 1995), pp. 309-314. In addition to the sources cited in that discussion, mention should be made of the comments of *Netivot ha-Mishpat* 340:6. The situation addressed by *Netivot* is that of a person who borrowed arms for use against enemy soldiers only to have those arms seized by the aggressor. The issue, of course, is the borrower's liability to the bailor. *Netivot* cites the statement of the Gemara, *Sanhedrin* 34a, to the effect that if a bystander who is intervening in order to rescue a potential victim from a pursuer breaks utensils belonging to a third party he is absolved from financial liability. *Netivot* argues that the borrower sought to defend not only himself but other potential victims as well and hence should not be liable and adds a comment to the effect that his privilege should not be diminished because he sought to preserve himself as well. Contrary to the position of R. Moshe Feinstein, *Iggerot Mosheh*, II, no. 63, *Netivot* does not regard the rescuer's immunity as limited to liability for tort damages but also to other forms of liability such as liability arising from a bailment contract. Moreover, the Gemara declares that the pursuer is absolved from financial liability because "if you say [that he is liable] the result will be that no man will rescue his fellow man from a pursuer." That rationale does not seem to apply in situations in which the rescuer is himself among the endangered since no inducement is necessary to prompt a person to act when he is also among those whose lives are endangered.
9. *Nishmat Avraham*, III, *Hoshen Mishpat* 426:1, addresses the question of whether a person who is impoverished at the time of his rescue is obligated to compensate the rescuer if he acquires funds at some later time. R. Shlomoh Zalman Auerbach is quoted as stating that, unlike the situation with regard to a person who accepts alms, a lien attaches to the beneficiary with the result that he remains liable. It should however be noted that *Teshuvot Maharashdam, Yoreh De'ah*, no. 204, rules that a person lacking assets at the time of rescue cannot be held liable subsequently. See also sources cited by *Pithei Hoshen*, V, 12:5, note 11.

   Cf. also the ruling of Rema, *Yoreh De'ah* 252:12, regarding the liability of a captive for reimbursement of funds expended for his ransom. See also *Yam shel Shlomoh, Bava Kamma*, 6:15, regarding the liability of a captive whose life is in danger and the sources cited by *Pithei Hoshen*, V, 12:4, note 8, regarding the liability of an impoverished captive who subsequently acquires funds and of a captive of means who has no access to his fortune.
10. Cf., the discussions of R. Shlomoh Zalman Auerbach, *Minhat Shlomoh*, I, no. 7, and Dr. Abraham S. Abraham, *Nishmat Avraham, Orah Hayyim* 334:1.
11. For a discussion of this controversy, see this writer's *Bioethical Dilemmas: A Jewish Perspective* (Hoboken, NJ, 1998), pp. 90-94.
12. This point was earlier noted by R. Abraham I. Kook, *Mishpat Kohen*, no. 144, sec. 17.
13. *Iggerot Mosheh*'s ruling with regard to the need for consent of family mem-

bers for cadaveric organ donations is subject to question on extraneous grounds. A person need not accept pain that may be regarded as an expenditure of a sum greater than his entire fortune but it is far from clear that the vicarious grief and suffering of another party is to be taken into account, particularly when such anguish is misplaced. For example, an unobservant parent may regard Judaism as a cult and be exceedingly distressed at the sight of a son donning phylacteries. The parent's anguish may be so inordinate that he or she is willing to offer a deprogrammer a sum in excess of her or his net worth in order to convince the child not to perform the *mizvah*. It is certainly the case that the parent's anguish, genuine as it may be, does not relieve the child of his obligation with regard to the *mizvah*. The situation with regard to organ donations is entirely similar. Relatives have no proprietary interest in the corpse of the deceased. The obligation of *pikuah nefesh* that supercedes considerations of *nivul hamet* devolve upon medical practitioners who have the requisite skills to perform the necessary acts of rescue. It is difficult to understand why the misfounded emotional pain of the relatives of the deceased, who essentially have no standing or involvement in the matter, should serve to vitiate the obligation of medical practitioners.

14. For an explanation of the dual names, see Daniel 1:7.
15. Cf. *Midrash Rabbah, Shir ha-Shirim* 2:18: Said R. Hiyya bar Abba, "If a person will say to me 'Give your life in sanctification of the name of the Holy One, blessed be He,' I will give [my life] but only if they will slay me immediately; however, in a generation of [forced] apostasy, I could not bear [torture]."
16. The comments of Rabbenu Nissim, *Nedarim* 40a, sanctioning prayer for death in face of intractable pain are not relevant to this discussion for reasons discussed in this writer's *Judaism and Healing* (New York, 1981), pp. 142-143. See also, R. Shlomoh Zalman Auerbach, *Halakhah u-Refu'ah*, ed. R. Moshe Herschler, III (Jerusalem, 5743), p. 60, reprinted in Rabbi Auerbach's *Minhat Shlomoh*, I, no. 91, sec. 24, and R. Shmu'el Eliezer Stern, "Be-Inyan Tefillah al Holeh Mesukan," *Siah Tefillah* (Jerusalem, 5759), p. 622; cf., however, *Tiferet Yisra'el, Yoma, Bo'az* 8:3 and *Iggerot Mosheh, Hoshen Mishpat*, II, no. 73, sec. 1.
17. For further discussion of this notion as well as of the general question of withholding of treatment from a *goses*, see *Bioethical Dilemmas: A Jewish Perspective*, pp. 61-112.
18. Porter Storey, "It's Over, Debbie," *Journal of the American Medical Association*, vol. 259, no. 14 (April 8, 1988), p. 2095.
19. Brief of the American Medical Association *et al.*, as *amici curiae* in support of petitioners at 6, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (No. 96-110).
20. Albert Einstein, "Overview of Cancer Pain Management," *Pain Management and Care of the Terminal Patient*, Judy Kornell, ed. (Washington: Washington State Medical Association, 1992), p. 4. Another study indicates that when treated by skilled practitioners the pain of 98% of patients in hospice care can be relieved. See American Medical Association Council on Scientific Affairs, "Good Care of the Dying Patient," *Journal of the American Medical Association*, vol. 275, no. 6 (February 14, 1996),

p. 475. See also C.S. Cleeland *et al.*, "Pain and its Treatment in Outpatients with Metastatic Cancer," *New England Journal of Medicine*, vol. 330, no. 9 (March 3, 1994), p. 592.

21. See T.D. Walsh, "Opiates and Respiratory Function in Advanced Cancer," *Recent Results in Cancer Research,* XXXIX (1984), 1115-1117, E. Bruera *et al.*, "Effects of Morphine on the Dyspnea of Terminal Cancer Patients," *Journal of Pain and Symptom Management*, vol. 5, no. 6 (December 1990), pp. 341-344 (December, 1990), p. 6; M. Angell, "The Quality of Mercy" (editorial) *New England Journal of Medicine*, vol. 306, no. 2 (January 14, 1982), pp. 98-99. See also R.R. Miller and H. Jick, "Clinical Effects of Meperidine in Hospitalized Medical Patients," *Journal of Clinical Pharmacology*, vol. 18, no. 4 (April 1978), pp. 180-189; and R. R. Miller, "Analgesics," *Drug Effects in Hospitalized Patients*, ed. R. Miller and D. J. Greenblatt (New York, 1976), pp. 133-164.
22. *Torat ha-Adam, Kol Kitvei Ramban*, II, 43.
23. See Walter B. Cannon, "'Voodoo' Death," *American Anthropologist*, New Series, vol. 44, no. 2 (April- June, 1942), pp 169-181, reprinted in *Psychosomatic Medicine*, vol. 19 (1957), p. 189.
24. See the comment of R. Shlomoh Zalman Auerbach cited by R. Joshua Neuwirth, *Shmirat Shabbat ke-Hillkhatah*, I, 2nd edition (Jerusalem, 5739) 32:56, note 150.
25. See Keith D. Lillemoe, John L. Cameron, Howard S. Kaufman *et al.*, "Chemical Splanchnicectomy in Patients with Unresectable Pancreatic Cancer: A Prospective Randomized Trial," *Annals of Surgery*, vol. 217, no. 5 (May, 1993), pp. 447-55.
26. *Ibid.*, p. 455. For a report of other studies see S. Staats, "The Pain—Mortality Link: Unraveling the Mysteries," *Assessment and Treatment of Cancer*, ed. R. Payne, R.B. Patt and C.P. Hill (Seattle, 1998), pp. 145-156 and *idem*, "Pain, Depression and Survival: Progress in Pain Research and Management," *American Family Physician*, vol. 60, no. 1 (July, 1999), p. 42.
27. For reference to authorities who would regard unintentional death as a *shogeg* rather than a *davar she-eino mitkaven,* see this writer's *Contemporary Halakhic Problems,* III (New York, 1989), pp. 7f.
28. See *Iggerot Mosheh, Even ha-Ezer*, IV, no. 31, s.v. *u-mah she-nizkar* and R. Yitzchak Zilberstein, *Halakhah u-Refu'ah*, ed. R. Moshe Hershler, II (Jerusalem, 5741), 193f., reprinted in *Emek Halakhah: Assia*, ed. R. Mordecai Halperin (Jerusalem, 5746), pp. 136f. The question of the circumstances in which a physician is liable to the penalty of exile is addressed at length by the present writer in an as yet unpublished article.
29. See the statement attributed to the late R. Shlomoh Zalman Auerbach cited by R. Avigdor Nebenzahl, *Sefer Assi'a*, IV (Jerusalem, 5743), pp. 260—262, and his own difficulty with that statement. Cf. also, Dr. Mordecai Halperin, *Emek Halakhah: Assi'a* (Jerusalem, 5746), p. 310, and *idem,* "Modern Perspectives on Halakhah and Medicine," *Assi'a: Jewish Medical Ethics*, vol. 1, no. 2 (May, 1989), p. 157.
30. It has been argued that, on *Shabbat*, a person may perform a series of acts which will eventually lead to an unintended and unwanted effect which, if intended, would be forbidden. Since the person does not know which act will yield that effect each discrete act, it is argued, does not constitute a

psik reisha. See this writer's "Use of Surveillance Systems on *Shabbat*," *Tradition*, vol. 35, no. 3 (Fall, 2001), p. 68. That situation, however, is readily distinguishable from homicide in that violation of *Shabbat* restrictions occurs only if the act is a *melekhet mahashevet*, i.e., the particular act is designed to produce a forbidden effect.

31. *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1010 (Washington, D.C., 1964).