Life in the Balance

*Jewish Perspectives on Everyday Medical Dilemmas*

*A new six-week course from*
**The Rohr Jewish Learning Institute**

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*30 AMA PRA Category 1 credits™*

# CLE Course Syllabus

***General Introduction***

Is it legal to do whatever we want to our bodies? Although many people are under the impression that we are the absolute masters of ourselves, there are legal limits, both new and old, to one's personal autonomy.

With the advent of modern medicine, yesterday's science fiction is today's reality. Not very long ago, there were no machines that prolonged life, there were no elective surgeries, and there was no way to harvest and transplant organs from one person to another. Nowadays, these incredible medical advances are accompanied by the proliferation of many new ethical and legal quandaries, many of which test the legal limits of our autonomy and liberty and challenge the proper role of government in this area.

This course will survey relevant cases, laws, and doctrines as they apply to the cutting edge of medical technology and everyday life. This course will compare the various rulings, statutes, and bioethical concerns to Talmudic civil law, the same law that governed the autonomous Jewish communities of ancient Babylonia and Palestine and informs modern Israeli law and Jewish custom worldwide today.

# Course Overview

## Lesson One

***Preventive Medicine***

This lesson will discuss the laws of when, why, and how the government is justified in forcing a citizen to take or refrain from certain actions for the sake of his or her health. The United States embraces liberty and personal autonomy, but, as will be seen, this has its limits.

*Jacobson v. Massachusetts,* 197 U.S. 11 (1905) will be discussed in this lesson. In that case, the issue was whether Massachusetts was allowed to compel a citizen, under threat of penalty, to be inoculated during a smallpox outbreak. The United States Supreme Court found that the state's police powers under the Tenth Amendment of the Constitution justified such action with the attendant penalty.

The lesson will then probe the legality of the government's forcing one to do something for his health when it does not negatively affect another. This issue was debated when mandatory motorcycle helmet laws were being enacted by states in order to receive money under the 1966 Federal National Highway Safety Act. Many motorcyclists challenged these laws based on the Equal Protection and Due Process clauses of the Fourteenth Amendment, arguing that because helmets only protected the rider, and there was no public health issue, the government was unable to enact such laws.

As will be discussed, most states found that mandatory helmet laws were constitutional as a valid exercise of police power because the general public's health safety and welfare could be affected physically or financially (*Simon v. Sargent*, 346 F. Supp. 277, 278-79 (D. Mass. 1972) and *Bogue v. Faircloth*, 316 F. Supp. 486, 489-90 (S.D. Fla. 1970)). The lesson proceeds to discuss

the various justifications that courts have cited in defense of helmet and seat-belt laws. But Illinois and Michigan found that under the Due Process clause such laws were in fact unconstitutional. See, *People v. Fries*, 42 Ill.2d 446 (1969) and *American Motorcycle Association v. Department of State Police*, 11 Mich. App. 351 (1968). While these cases were subsequently overturned, we will discuss and analyze the principles behind these rulings as compared to the approach of Talmudic civil law regarding the mandate to preserve one's health.

"Paternalism and Discontents: Motorcycle Helmet Laws, Libertarian Values, and Public Health," *American Journal of Public Health* (February 2007), by Marian Moser Jones and Ronald Bayer will be reviewed to summarize the history and current state of helmet laws across the nation.

## Lesson Two

### *The Right to Die*

Does one have a "right to die"? This lesson will discuss this matter in depth according to the law, medical ethics, and Talmudic civil law.

The first major case on this matter that will be discussed is *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), a New Jersey case that for the first time allowed a person to be removed from artificial ventilation. The right to refuse lifesaving treatment then came before the United States Supreme Court in the case of *Cruzan v. Director*, 497 U.S. 261 (1990), which will be discussed in the lesson. There the Supreme Court found for the first time, under the Due Process clause of the Fourteenth Amendment, that a person has the right to refuse all lifesaving medical treatments, irrespective of the patient's prognosis.

Soon after *Cruzan* was decided, in *Compassion in Dying v. Washington*, 79 F. 3d 790, 798 (1996), the Ninth Circuit Court of Appeals took *Cruzan's* holding to what they believed to be the apparent next step and ruled that physician-assisted suicide is a fundamental right under the Due Process clause of the Fourteenth Amendment. As will be explained, SCOTUS took up the case and a companion case from the Second Circuit and held that the respective Appellate Courts were wrong and that there is no right to physician-assisted suicide under the Equal Protection or Due Process clauses of the Fourteenth Amendment. See *Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Vacco v. Quill*, 521 U.S. 793 (1997).

Despite not being a fundamental right, Oregon, Washington, Montana, and Vermont have allowed physician-assisted suicide in one way or another, as will be discussed. Professor Yale Kamisar's "Are the Distinctions Drawn in the Debate about End-of-Life Decision Making 'Principled'? If Not, How Much Does It Matter?," *Journal of Law Medicine & Ethics*, Spring 2012, 66-84 and the New York State Task Force on Life and the Law will be prominently featured in discussing the present debate about the ethics of legalizing physician-assisted suicide.

The lesson will also provide an overview of advance medical directives. We shall briefly discuss the variants from state to state in terms of health-care-proxies and living wills.

## Lesson Three

### *Abortion/Fetal Reduction*

When a woman is pregnant with multiple fetuses, she might choose to undergo fetal reduction, to abort some but not all of her fetuses. Reasons

for fetal reduction include preserving the health of the mother, preserving the health of the other fetus/fetuses, and for lifestyle reasons. This sort of procedure touches on two legal areas that will be discussed in this lesson.

The first legal area to be discussed is whether one can legally kill one to save many others from harm, as this is essentially the purpose of some of the fetal reductions. We will study the well-known cases of *United States v. Holmes*, 26 F.Cas. 360 (E.D. Pa. 1842) and *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884), both of which took place on the high seas and involved situations where people were killed in order to allow others to live.

The second legal area involves United States abortion law. The starting point of this issue will be the constitutional right to privacy and the principles laid out in *Roe vs. Wade*, 410 U.S. 113, 132-34 (1973), the changes made in the abortion framework in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and how it compares and contrasts with the Talmudic civil law perspective.

After the legal principles of modern abortion law are laid out and compared, the current state of affairs will be discussed. Presently, many states are enacting laws that require that the mother view an ultrasound of the fetus before being allowed to abort the fetus. Some of the new laws also mandate that the woman see an image of the fetus and listen to the sound of the fetal heartbeat prior to receiving an abortion. We will talk about the legality of this practice under the right to privacy and First Amendment and the opposite conclusions reached in this regard in *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) and *Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011).

We will also summarize the various states that have recently legislated bans against abortion starting at twenty weeks, which seems to conflict with the Supreme Court ruling that abortions cannot be banned before the point of fetal viability. Yet, a federal district court in July 2012 refused to block enforcement of the law. *Isaacson v. Horne*, 884 F. Supp. 2d 961 (D. Ariz. 2012) was overturned by *Isaacson v. Horne*, 2013 U.S. App. LEXIS 10187 (9th Cir. 2012). We will also briefly visit the recent legislation in North Dakota and Arkansas banning abortions from six weeks and twelve weeks respectively, which would have had serious consequences for women who would need fetal reduction (as this procedure is usually done at twelve weeks). A recent ruling in Arkansas blocked the law, and the North Dakota law is currently being challenged. See, *Edwards v. Beck*, NO: 4:13CV00224 SWW(E.D. Ark. 2013).

## Lesson Four

***Autopsy and Anatomical Dissection***

This lesson will deal with the laws, both American and Talmudic, that relate to the issues of autopsies and dissection, whether conducted for scientific reasons, crime investigation purposes, or any other objective. We will discuss the history of laws in this regard, and what medical bioethics has to say about it. Many religious theologies assert that the body is sacred and should not be tampered with after death. But this breeds inevitable complications due to the very different outlook that is so prevalent in today's society.

One area that will be examined is anatomical dissection for medical research. Historically,

dissections were not allowed. In the 1700s, however, the English Murder Act of 1751 (25 Geo 2 c 37) and Federal Crimes Act of 1790 both quite controversially allowed—as an after-death punishment for murder—dissection of the body. Subsequently, as medical researchers were relying on grave robbers ("resurrectionists") and even "anatomy-murders," statutes such as the Massachusetts Anatomy Act of 1831 were passed, permitting medical researchers to claim unclaimed bodies for science, thereby minimizing grave robberies. With regard to choosing what to do with one's own body, *Enos v. Snyder,* 131 Cal. 68 (1900) held that the body is not property, and thus cannot be passed down in a will in California. Some states agreed with this, while others disagreed, as will be discussed. This crazy quilt of state laws eventually led to the Uniform Anatomical Gift Act (UAGA) in the early 1960s, which attempted to clarify who controls one's body after death. All of this will be discussed as will the present state of the law.

Regarding autopsies for investigative purposes, a number of states have enacted laws to respect religious beliefs when there could be a conflict. Such laws, such as NY Public Health Law 4210-C state that when conducting an autopsy would be contrary to the religious belief of the dead person, it should not be performed unless there is a compelling reason. *Schwartz v. New York,* 616 N.Y.S.2d 921 (1994) a case on this issue, will also be discussed. Lately, the state equivalents of the religious freedom restoration act (RFRA) have been enacted in many states, and courts in states that have not made laws protecting religious beliefs in autopsies found that the RFRA could prevent autopsies. See, *Johnson v. Levy*, No. M2009-02596 COA-R3-CV 2010 WL 119288 (Tenn. Ct. App. Jan. 14, 2010) and *Sanchez v. Saghian*, No. 01-07-00951-C, 2009 WL 3248266 (Tex. App.-Houston [1st Dist.] 2009.

## Lesson Five

### *Compensation for Organs*

The notion of commodifying organs, that is, being allowed to buy and sell them in a market of some sort, strikes many people as being abhorrent and unethical for a variety of reasons. Reflecting that attitude, the federal government made it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation" in the National Organ Transplant Act (NOTA), Pub. L. No. 98-507, 98 Stat. 2339 (1984) (codified as amended at 42 U.S.C. §§ 273–274 (2006 & Supp. IV 2011)). People who need to obtain organs in order to live, however, do not necessarily hold this view, and many would like to see NOTA invalidated by the courts or voted down by Congress. The legality and ethics of compensation for organ donations will be discussed in this lesson according to United States law, medical ethics, and Talmudic civil law.

In 2009, Doreen Flynn as the named plaintiff, together with a diverse group of plaintiffs, challenged NOTA as it pertained to bone-marrow transplants under the Due Process and Equal Protection clauses of the Fourteenth Amendment. The basis for her

challenge will be discussed in depth in this lesson. The District Court upheld NOTA and rejected Flynn et al's challenge. We shall examine the court's reasoning in this regard. In *Flynn v. Holder*, 684 F. 3d 852 (9th Cir. 2012) Judge Kleinfeld of the Ninth Circuit Court of Appeals, however, held that the new technique of extracting bone marrow—apheresis—was not encompassed by NOTA and allowed compensation for that procedure; but he affirmed that NOTA was a valid exercise of congressional power and declined to invalidate it. This opinion will be discussed and compared to the Talmudic civil law perspective.

## Lesson Six

***Uterine Transplants vs. Surrogate Motherhood***

Recent medical advances have enabled people who, in the past, would have been unable to procreate to now have children. One of these advances, starting in the 1980s, has been surrogacy arrangements where a female surrogate carries a fetus belonging to another couple to term. This often involves an extensive contract between the surrogate and parents. But as we shall discuss, these arrangements are far from optimal, which is why the recent development of uterine transplants is potentially welcome news. This lesson will discuss the legal issues and the Talmudic civil law perspective on surrogacy arrangements and uterine transplants.

Regarding surrogates, there has been much discussion by courts and legislatures, and different states have reached different conclusions as to whether surrogacy contracts should be allowed and why. Two such cases are *Johnson v Calvert*, 851 P.2d 776, (1993) and *In the Matter of Baby M*, 109 N.J. 396 (1988). We shall study these two cases decided by the California and New Jersey Supreme Courts, respectively, which came to opposite conclusions on the issue of whether a surrogacy contract is enforceable and who is the legal parent. Further, respected organizations such as the Uniform Law Commission's Uniform Parentage Act and the New York State Task Force on Life and the Law came to opposite conclusions on whether surrogacy contracts should be allowed and enforced, and their various takes on the matter will be discussed in the lesson. Other legal complications that can come up, as in the recent case of Crystal Kelly, involve contract law, public policy, jurisdictional issues, and abortion, all of which will be touched on in our discussion.

A solution to many of these surrogacy issues (when they are pursued due to uterine factor infertility) is a uterine transplant. This lesson will discuss the legal hurdles and prospects of uterine transplants from the prospective of both American and Talmudic civil law. The lesson will focus on how the states who regard the gestational host as mother would approach maternity in the case of a uterine transplant. Another area of interest will be a discussion as to whether these transplants should be regulated under the National Organ Transplant Act (NOTA), Pub. L. No. 98-507, 98 Stat. 2339 (1984) (codified as amended at 42U.S.C. §§ 273–274 (2006 & Supp. IV 2011)) and thus, it would be illegal to provide or receive compensation for donating a uterus, even though it is permitted for the surrogate. Much of this discussion will be based on Valarie K. Blake's, "Ovaries, Testicles, and Uteruses, Oh My! Regulating Reproductive Tissue Transplants," 19 Wm. & Mary J. *Women & L.* 353 (2013).