Chaim Dovid Zwiebel

A Matter of Life and Death:

Organ Transplants and the New RCA "Health Care Proxy"

"A landmark decision," trumpeted the Jewish Telegraphic Agency. "A victory for halachah," cheered the *Washington Jewish Week*. "A bold and creative effort... to provide proper religious guidance to the community... not only correct according to halakhah, [but also] deeply sensitive to the real needs of society today," exulted Rabbi Marc D. Angel, president of the Rabbinical Council of America (RCA).

The cause for celebration? Ari L. Goldman's June 15, 1991 "Religion Notes" column in *The New York Times* tells the story:

> "In its continuing effort to apply traditional Jewish teaching to modern life, the largest group of Orthodox rabbis in the world has formally endorsed the donation of organs from brain-dead patients.
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> "The action was taken at the 55th anniversary convention of the group, the Rabbinical Council of America, which concluded Thursday in Spring Glen, N.Y. The position puts the 1,000-member group at odds with some other Orthodox authorities, who are opposed to organ transplants because they do not accept the end of brain functioning as death.
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> "The council's approval came in a key paragraph of a 'health-care proxy' prepared by the Orthodox rabbis in response to new Federal guidelines, which take effect next December, that require every health-care provider to make available a health-care proxy to patients. The new proxy, prepared under the direction of Rabbi Moses Tendler of Yeshiva University, declares that organ transplant procedures are in full compliance with halacha, traditional Jewish law."

A landmark decision, indeed. Yet not everyone greeted it with quite the same enthusiasm its promoters displayed. In fact, as of the date of this writing – little more than two weeks after the *Times* broke the story, and only days after *The Jewish Press* splashed the news ("Organ Donations Now Permitted") across its front page – the RCA's new foray into the field of medical *halacha* has already generated a firestorm of controversy.

THE BRAIN DEATH/ORGAN DONATION EQUATION

The controversy over organ donation centers around the critical question of whether *halacha* recognizes "brain death." A person is brain dead when his entire brain, including the brain stem, has irreversibly ceased functioning. Medical science has concluded that the brain stem controls respiratory activity; and that accordingly, if a person's brain stem has irreversibly ceased functioning, he is no longer capable of breathing independently. With the assistance of a respirator, however, his heart can continue beating, if only for a relatively short period of time.

Secular law, at least in the United States, now accepts that a person who has suffered brain death is legally dead. Therefore, upon his prior consent, or the consent of his relatives, doctors may "harvest" his vital organs for purposes of transplantation. Under current law, doctors would not be permitted to harvest such organs before brain death, even with the donor's prior consent, because removal of the organs would cause the donor's legal death. On the other hand, to wait beyond the donor's brain death until his heart has also stopped beating would be impossible; once cardiac activity has ceased, the vital organs will have deteriorated to the point where they are no longer suitable for transplantation. Vital organs are thus candidates for harvest only during that period when brain stem function has irreversibly ceased yet the heart continues to beat. Hence the linkage between brain death and organ donation.

(Parenthetically, it should be noted that organs such as kidneys and corneas may be suitable for transplantation even after the cessation of cardiac activity. The publicity generated by the new RCA health care proxy form relates specifically to the transplantation of vital organs such as the heart and liver, which can be done only so long as the heart still beats. Kidney and cornea transplants present different sets of medical, legal and halachic issues.)

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THE HALACHIC DEBATE

What is the halachic status of a person who has no brain activity and no independent respiratory activity, but whose heart still beats? If he is alive, then one may not disconnect his life-support machinery or remove his vital organs; to do so would be an act of murder. If, on the other hand, he is dead, then he should be buried as soon as possible, and his organs may be removed – with the consent of his relatives to save the life of another sick person.

It is this modern-day life and death *she'eila* (halachic question) that the Rabbinical Council of America has now purported to *pasken* (render judgment). In publishing its own version of a "health care proxy" as an alternative to the proxy/living will form developed by Agudath Israel of America (see "The 'Halachic Health Care Proxy': An Insurance Policy with Unique Benefits," *J.O.*, Tishrei 5751/September 1990), the RCA encourages people to make an "anatomical gift" of their "life saving organs," to take effect after their death; and offers the following "Torah Perspective" on organ donation:

> "The saving of a life takes precedence over all but three halachic imperatives – murder, idolatry and adultery. Therefore, no halachic barriers exist to donation of the organs of the deceased if they are harvested in accord with the highest standards of dignity and propriety. Vital organs such as heart and liver may be donated after the patient has been declared dead by a competent neurologist based upon the clinical and/or radiological evidence. *In accord with the ruling of the Rav, Reb Joseph Dov Soloveitchik, Shlita and Hagaon Harav Moshe Feinstein, z'tl and of the Chief Rabbis of Israel, death as determined by neurological criteria [i.e., brain death] fully meets the highest standards of halacha.*" [Emphasis added.]

One wouldn't know it by reading the RCA proxy form, but there is another "Torah Perspective" on this issue as well. Thus, four years ago when the *Rabbanut* issued the pro-brain death/pro-organ transplant ruling referred to and relied upon by the RCA – a *psak* we will soon revisit in greater detail – a number of distinguished *rabbonim* in *Eretz Yisroel* denounced the ruling in no uncertain terms. These authorities included the late *Dayan* Yitzchok Yaakov Weiss זצ"ל (head of the *Eida Hachareidis*, Jerusalem), and (יבדלו לחיים) Rabbi Elazar Menachem Schach (*Rosh Yeshiva*, Ponevezh), Rabbi Shmuel Wosner, Rabbi Nissim Karelitz, Rabbi Nosson Gestetner (all three, widely respected *Rabbonim*, of Bnei Brak) and Rabbi Eliezer Waldenberg (a noted authority on medical *halacha*, Jerusalem), שליט"א, each of whom wrote publicly that removal of a heart from a person who had suffered "brain death" but whose heart was still beating would be an act of murder. Reliable rabbinic sources report that Rabbi Yosef Sholom Elyashiv, שליט"א (one of the foremost *poskim* of our time), has also expressed his opposition to brain death. Here in the United States, rabbinic opponents of brain death include such a diverse group as Rabbi Menashe Klein, Rabbi Aharon Soloveitchik, Rabbi Dovid Cohen and Rabbi Yehuda Dovid Bleich.*

THE SOURCES RELIED UPON BY THE RCA

As we have seen, the RCA cites the rulings of Rabbi Moshe Feinstein זצ"ל and (יב"ל) Rabbi Yosef Dov Soloveitchik שליט"א, and also that of the Israeli Chief Rabbinate, in support of its position on organ donation. Here too, however, the RCA's statement is extremely controversial.

The question of whether Rabbi Moshe Feinstein did or did not support brain death has generated a great deal of scholarly attention and debate. Some scholars maintain that Rabbi Feinstein's writings – in particular, the *teshuva* Rabbi Feinstein wrote in 5736 to his son-in-law, Rabbi Dr. Moshe Dovid Tendler (*Iggros Moshe*, III *Yoreh De'ah* 132) – does support brain death, as the RCA statement recites. Others, however, contend that Rabbi Feinstein in fact did not support brain death or vital organ transplants. They point in particular to Rabbi Feinstein's 5728 *teshuva* to Rabbi Yitzchok Yaakov Weiss (*Iggros Moshe*, II *Yoreh De'ah* 174) – which he subsequently reaffirmed in a 5738 letter to Rabbi Kalman Kahane (*Iggros Moshe*, II *Choshen Mishpat* 72) – wherein Rabbi Feinstein employs extraordinarily strong language to condemn heart transplants as "*retzichas sh'tei nefashos mamash*," the murder of both the recipient and the donor.

Reliable sources have testified that in his later years, Rabbi Feinstein permitted people to *receive* heart transplants. Presumably, the improved success rate for heart transplants gave Rabbi Feinstein basis to reconsider his earlier written ruling that the transplant procedure was an act of murder upon the recipient. Still, there is no indication that Rabbi Feinstein also reconsidered that portion of his *psak* that spoke of removal of the donor's heart as an act of murder upon the donor; allowing a sick person to receive a heart that has already been removed from a donor does not necessarily imply that removal of the heart was permissible.

Rabbi Feinstein's unequivocal written rulings that removal of a donor's heart is murder imply either that he rejected the entire concept of brain death, or that he did not consider the tests used to ascertain brain death halachically sufficient, or that the transplant doctors could not be

* The reader is cautioned not to conclude that any list of names in this article is comprehensive. It is based on my own records and files, which may be quite incomplete. I would be glad to share my "*marei mekomos*" for any of the assertions in this article, or copies of pertinent documents from my file, with interested parties, who may contact me through *The Jewish Observer*.

relied upon to wait for brain death before removing the donor's heart. Under any of these explanations, the RCA's reliance upon Rabbi Feinstein would seem to be misplaced. Moreover, as his son Rabbi Dovid Feinstein שליט"א pointed out to me, there is certainly nothing in any of Rabbi Feinstein's rulings that encourages people to do what the RCA document encourages them to do: fill out a standardized form to make a general "anatomical gift" of their "life saving organs" after death.

The debate over Rabbi Feinstein's views revolves around the written legacy of the *teshuvos* he left behind. In contrast, Rabbi Yosef Dov Soloveitchik, יבדל לחיים, does not appear ever to have written on this subject. In attributing a pro-brain death/ pro-organ transplant view to Rabbi Soloveitchik, the RCA apparently relied on the testimony of someone who claimed to be familiar with his views. However, informed sources report that prominent members of Rabbi Soloveitchik's own family have written a formal letter to the RCA firmly denying that Rabbi Soloveitchik ever issued a ruling supporting brain death.

Tragically, Rabbi Feinstein is no longer with us; and Rabbi Soloveitchik (may he have a *refuah shleima*) is in no position to speak for himself today. There is thus no way definitively to resolve the debates over their respective halachic positions. In attributing such unequivocal views to these authorities directly in the body of its new health care proxy document, the RCA has apparently decided to resolve those debates without even acknowledging their existence.

The RCA's citation to the Israeli Chief Rabbinate's ruling as further support for its position is also problematic, though for a different reason.

The Chief Rabbis did indeed express their view that heartbeat alone, without independent respiratory activity, is not a halachic sign of life; and that therefore irreversible cessation of brain function is an acceptable means of establishing death. However, in issuing the *psak* authorizing transplant surgeons at Hadassah Hospital in Jerusalem to remove hearts from brain dead persons, the Chief Rabbis insisted upon a number of stringent conditions. including (among others) the performance of an additional medical test to confirm the prospective donor's brain death, and participation by a representative of the *Rabbanut* in making the medical determination. No such safeguards appear in the RCA document.

The debate over brain death has been going on for many years, and there is a great deal more that can be said on the subject. For now, however, what is written here should suffice to demonstrate how controversial an issue it is, despite the unequivocal nature of the RCA's statement.

OTHER NOTEWORTHY ASPECTS OF THE RCA FORM

In light of the highly controversial nature of the RCA's ruling with respect to brain death and organ donations, it is quite understandable that a great deal of public attention has been drawn specifically to that aspect of the RCA's new "health care proxy." However, by no means is the brain death/ organ donation provision the only component of the new RCA form that is halachically controversial.

Most notable in this regard is the broad authority the RCA health care proxy confers upon an individual or his health care agent to decline life-sustaining treatment. Thus, the RCA form allows a person to check a box indicating his advance desire to decline virtually all forms of life-sustaining procedures if he ever develops, for example, "brain damage or some brain disease that in the opinion of my physician and several consultants cannot be reversed and that makes me unable to recognize people or to communicate in any fashion, but I have no terminal illness, and I can live in this condition for a long

time" [*i.e.*, an advanced stage of Alzheimer's Disease]. Moreover, the document declares, "a quality of life that is burdensome to the patient may justify passive Euthanasia . . . Only *the patient and his/her proxy can declare a quality of life unacceptable.*" [Emphasis added.]

The implications of these provisions are staggering. They suggest that *halacha* embraces the notion of personal autonomy in medical decision making – permitting an individual to decide in advance that his life will not be worth living, and hence not worth preserving, when its quality is severely diminished. Moreover, they suggest that a designated relative or friend, no less than the individual himself, can make that same decision when the individual is no longer capable of deciding for himself. I am no halachic expert, but these implications are contrary to virtually everything I have studied or heard on the subject.

Another puzzling aspect of the new RCA form is the fact that it fails to state explicitly that all health care decisions are to be made in accordance with *halacha*. In fact, the document labels as "*optional*" the instruction that the health care agent should consult with Orthodox halachic authority prior to making his decision. If one chooses not to exercise that "option," in what substantive way does this form differ from similar forms developed by totally secular groups?

A MATTER OF INTEGRITY AND COURAGE

Rumor has it that there is considerable dissatisfaction within the RCA itself over the substance of the new proxy document, and also over the means by which it was adopted as the organization's official form. The document was apparently published without prior consideration by the RCA's own *halacha* committee, at least several of whose members, if not the majority, are reportedly not prepared to go along with certain of the controversial halachic statements and implications contained therein.

In addition, the current Chief Rabbi of England, Lord Immanuel Jakobovits– himself a noted scholar in the field of medical *halacha*, and a member of the RCA– has taken sharp issue with the RCA's adoption of its new health-care proxy. And, as noted above, eminent members of Rabbi Yosef Dov Soloveitchik's family have formally objected to the RCA's reliance upon Rabbi Soloveitchik in support of its stance on brain death/organ donations.

Perhaps the post-facto ferment within the RCA will result in an internal reconsideration of the propriety of publishing a form, designed to be used by masses of people, that embodies such controversial halachic positions and even appears to depart in several ways from accepted halachic consensus. Such reconsideration would be a welcome development indeed– an act of integrity and courage in an era so sorely lacking in both. ■