

Laws Concerning Tattooing

SIMAN 180

THE PROHIBITION OF TATTOOING

§1 (A) Tattooing involves scratching the skin and filling the scratch with blue dye or special ink or any color that leaves a permanent mark.

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(A) **Tattooing.** The *Mishnah*^[1] rules that if one writes without scratching the skin underneath or scratches the skin without filling the scratch with color he is not liable; he is liable only if he both scratches the skin and fills it with color. And the *Rambam*^[2] writes, based on this *Mishnah*, that he is not liable; only if he both scratches the skin and fills the scratch with a color is he liable. What if one writes on his skin such as doctors commonly do, writing telephone numbers on the palm of their hands when paper is not available or when they are in a rush? Is this permissible or is there a Rabbinic transgression in doing so? For the *Mishnah* and the *Rambam* says of one who writes without scratching the skin underneath that he is not liable (or that he is exempt), intimating that he is liable by Rabbinic law. Moreover, *Tosafot*^[3] write: He has not transgressed Torah law but he has transgressed Rabbinic law.^[4]

The *Rambam*^[5] rules that one who cuts off his beard with scissors (as opposed to

shaving it off with a razor) is exempt from punishment (the *Mishnah*^[6] writes: He is only liable by Torah law if he shaves off his beard with a razor). The *Kesef Mishneh*^[7] comments that by writing “exempt” it would appear that the *Rambam* rules that this is by Torah law only, but it would still be forbidden by Rabbinic law (*this is the usual meaning of “exempt” — author’s note*). But, the *Kesef Mishnah* concludes that the *Rambam* merely followed the wording of the *Mishneh* writing exempt instead of permitted without being precise, but the *halachah* is that this is permissible. One may therefore say that both the *Mishnah* and the *Rambam* quoted above may not necessarily mean that it is not permissible by Rabbinic law to write on one’s skin, as is often done.

The *Minchat Chinuch*,^[8] however, writes that it is uncertain from the wording of the *Rambam* whether writing or scratching alone is Rabbinically forbidden or not. From the fact that he writes exempt it would appear that one who does so transgresses Rabbinic law although

5. עבדים פ"ב ה"ז

6. מכות פ"ג מ"ה

7. על הרמב"ם שם

8. מצוה רג ס"ק א

1. מכות פ"ג מ"ז

2. עבדים פ"ב ה"א

3. גיטין כ ע"ב ד"ה בכתובת

4. וראה בבית שמואל אהע"ז סי' קכ"ד ס"ק טז ובתפארת

5. ישראל מכות פ"ג מ"ז ס"ק מה

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the *Kesef Mishneh* believes that it is permissible without any transgression. On the other hand, *Tosafot* write that there is a Rabbinic transgression and the *Beit Shmuel* also writes that even if he only writes without scratching he has transgressed Rabbinic law. However, Rabbinic law only forbids writing that is permanently indelible, but if he merely uses ink to write on his body he does not transgress any law.

Rav Kaniewsky shlita^[9] concludes that both the *Rosh* and the *Meiri* rule that there is no transgression in writing without scratching or vice versa. And although *Tosafot* appear to rule that this is a Rabbinic transgression and so does the *Beit Shmuel*, nevertheless both the *Chatam Sofer*^[10] and *Dina DeChayei*^[11] write that there are many *acharonim*^[12] who rule leniently. Even then, this controversy is only with regard to one who scratches but does not write. However regarding one who writes without scratching there is no proof that this is Rabbinically forbidden at all. On the other hand, the *Minchat Chinuch*, *Sefer Kovetz* and *Dina DeChayei* all write that in the opinion of *Tosafot* there is a Rabbinic transgression. Therefore if one wishes to act leniently and write on his skin writing that is temporary, there are those on whose ruling he can depend. And the *acharonim* have al-

ready written that the present day custom is to act leniently.

The *Shevet HaLevi*^[13] writes that the words of the *Minchat Chinuch* are surprising for if one looks at what the *Tosafot HaRosh* writes, one will see that there is only a Rabbinic transgression if one scratches his skin without filling the area with ink. There is no mention of writing without scratching. The *Beit Shmuel* also only refers to writing without filling with ink, meaning scratching without filling with ink; that is Rabbinically forbidden. But writing without scratching is not mentioned and the language of the *Gemara* (*Gittin* 20b) is "wrote and scratched."

Finally, since the *Shulchan Aruch* and *Rama*, the *Chochmat Adam*,^[14] *Kitzur Shulchan Aruch*^[15] and *Ben Ish Chai*^[16] all do not mention writing alone on the skin without scratching, it would seem that writing alone does not involve any transgression.

Rav Shlomo Zalman Auerbach zt"l told me that one may write on one's skin with a pen. Doing so does not involve any transgression of even a Rabbinic prohibition for since he intends to erase it soon, the writing is not permanent. One may not, of course, apply this ruling to writing on *Shabbat*. See *Nishmat Avraham*, vol. 1 *Orach Chaim*, Siman 340D.

13. שו"ת, ד"ג ס"י קיא אות א

14. כלל פט סעי יא

15. ס"י קסט סעי א

16. שנה ב פ' מסעי סעי טו

9. פתשגן הכתב ס"י יח

10. על גיטין שם

11. על הסמיג ל"ת סא

12. ספר משנת חכמים ס"י נו ביבין ושמועה אות א.

תופעות ראם בדברי היראים ס"י שלח וספר הקובץ

ingly, being unable to resist temptation and those that I committed rebelliously. Give me my portion in the Garden of Eden and grant that I be in the World to Come which has been set aside for the righteous. ^(D)*(If he wishes to say the lengthy confession that is said on Yom Kippur, he may do so.)*

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THE LAWS CONCERNING A GOSSES

§1 ^(A)A *gosses* is ^(B)considered to be alive in every respect.

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(D) If he wishes to say the lengthy confession. The *Gra*^[19] writes that this applies even to one who is healthy, as the *Gemara*^[20] states. However for a dying patient it would be best to say the lengthy confession for it is better if he enumerates his sins^[21] (see *Nishmat Avraham*, vol. 1 *Orach Chaim*, Siman 618L). The *Darchoi Moshe*,^[22] quoting the *Kol Bo*, writes that if he wishes to say the lengthy confession he should say: My Lord and the Lord of my fathers, may my prayer come before You etc. I have been guilty, I have betrayed etc. *(This is said every day after the Shemoneh Esrei of Shacharit and Minchah by the Sephardi communities and on Yom Kippur by the Ashkenazi communities*^[23] — *author*.) It would be good if he enumerates not only his sins but also those occasions when he did resist the temptation to sin, for in this way he may remember other sins that he has forgotten, will regret having done them and thus repent completely.

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(A) A *gosses*. The *Rambam*,^[1] as translated by *Rav Kapach*, defines a *gosses* as one who is breathing his last breaths (the

standard translations have: whose death rattle can be heard). The *Rama*^[2] defines him as one who, when about to die, brings up sputum into his throat as a result of a tightness in his chest. On the other hand, we find^[3] that this period can take up to three days.

There is no accurate modern definition that I know of as to when a dying patient is a *gosses*. A loose, but practical, definition might be: a patient who has reached the terminal stage of his illness and for whom nothing further can be done, and who has been defined, after *halachic* consultation and ruling, as being in the category of DNR (do not resuscitate). When I asked *Rav Auerbach z"l* how to define a *gosses*, he answered: You are the doctor. Most doctors and members of burial societies with experience of the dying, sense when a patient becomes a *gosses*. However, although a patient may live for days after senior physicians and nurses have thought that he was a *gosses*, nevertheless the moment this decision is made, various *halachot* apply to him; see C below, p. 318.

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(B) considered to be alive in every respect. It is forbidden to hasten his death^[4] and, if his condition can be treated, one is obligated to set aside Sabbath laws for him.^[5] The *Mishnah Berurah*^[6] rules that if he is found alive under rubble, even if his brain is crushed so that he cannot live for more than a while, Sabbath laws are set aside to rescue him. See *Nishmat Avraham*, vol. 1 *Orach Chaim*, Siman 329D. Therefore as long as there is the slightest hope and possibility that a patient is still alive and treatable, every effort must be made to treat him, including full resuscitation where needed.^[7]

DEFINING DEATH. The *Mishnah*^[8] says: If a building collapses on *Shabbat* and it is uncertain whether someone under the rubble is alive or not... Sabbath laws are set aside to rescue him so long as there is a chance that he is alive. If he is found dead, he is left where he is until the termination of the Sabbath. The *Gemara*^[9] asks: To what extent should the rubble be moved (breaking Sabbath laws) to examine whether he is alive or not? One opinion is, as far as his nostrils, whereas another is, as far as his heart. *Rashi*^[10] explains that this refers to one who appears to be dead since he lies motionless. *Rav Pappa* says that this controversy (as far as his nostrils or as far as his heart) only refers to the situation when the victim's legs are reached first. It is in this situation that one opinion rules that when his heart is reached and can be examined, that is sufficient to determine whether he is still alive. The other opinion rules that one must continue to clear the

rubble until the victim's nostrils are reached, for there are times when his heart is no longer beating perceptibly, although he may still be breathing sufficiently for it to be discerned at his nose (see *Rashi*^[11]). But if his head is uncovered first, once his nose can be examined for signs that he is still breathing, no further examination is necessary, for the verse says:^[12] "All in whose nostrils was the breath of the spirit of life." This is also the ruling of the *Shulchan Aruch*.^[13]

It appears certain to the *Gemara* that there cannot be a beating heart in a person who is not breathing, and at first sight, it would appear from this *Gemara* and *Rashi* that it is sufficient to define death as the cessation of brain function (*Rashi*, reference 10) and breathing alone without any further need to even examine the heart. However, at that time when resuscitation was unknown, it would certainly be immaterial, as far as continuing to desecrate the Sabbath, to examine his heart. Nowadays, however, when there is a possibility of resuscitating someone who is not breathing or whose heart has stopped beating, or both, one certainly needs to take into consideration all three criteria mentioned in the *Gemara* and *Rashi* (reference 10) — namely that he lies motionless like a stone (*the cessation of brain function*), and is without heartbeat and respiration — before death can be pronounced. *Rav Auerbach z"l* wrote to me that since cardio-pulmonary resuscitation (CPR) and other modern measures were unknown then,^[14] it is possible that after the patient died "completely" (*that*

for the full text.

1. פי המשניות ערכין פ"א מ"ג. וראה שם בתו"ט
2. אהע"ז סי' קכא סעי' ז וח"מ סי' ר"א סעי' ב. וראה בפרישה כאן סי' ה ואניקולפריה תלמודית ערך גוסס כרך ה עמ' שצג
3. י"ד כאן סעי' ב. וראה בפ"ת סי' ק"ג

See "The Complete ArtScroll Machzor (Ashkenaz) for Yom Kippur," pp. 129 and 131

10. פה ע"א ד"ה עד היכן
11. שם ד"ה הכי גרסינן
12. בראשית ו'כב
13. א"ח סי' שכט סעי' ד
14. אך ראה בילקוט שמעוני פ' שלח לך על הפסוק וישלח אותם משה: צווח בהם תלמי צווחה אחת ונפלו על פניהם ארצה. התחילו מנפחים בפיהם ומנשבים

4. ר"מ"א כאן ושי"ך סי"ק א
5. מני"ח סוף מוסף השבת ד"ה והנה. ברכ"י א"ח סי' שכט סעי' ד. שו"ת שבו"ת יעקב ח"א סי' יג
6. סי' שכט סעי' ד בבית"ל ד"ה אלא
7. וראה בספר הלכה ורפואה ח"ב עמ' קפה
8. יומא פ"ח מ"ז
9. שם פה ע"א

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is, all three criteria are met), he would be considered dead retroactively from the moment he ceased to breathe. Thus we should not think that Chazal mistakenly defined a live person (*whose heart was still beating — author*) as dead (*since he was no longer breathing — author*) and thus buried him alive. See also *Nishmat Avraham*, vol. 1 *Orach Chaim*, Siman 329D, p. 219 in *Rav Auerbach zt"l's* name.

The *Mishnah Berurah*, quoted above (reference 6), writes in the name of *rishonim*^[15] that Sabbath laws are set aside to rescue someone from under rubble, even if his brain has been crushed to such a degree that he can live only for a short while. At first sight it would appear that such a person is not to be considered dead and Sabbath laws must be set aside for him where necessary, even though he has a crushed brain and, presumably, no brain function. However *Rav Auerbach zt"l* wrote to me that there is no proof from this *Mishnah Berurah*; it could be that his sources refer to cases in which part of the brain is still functioning. *Rav Neuwirth shlita* told me that although the *Mishnah Berurah* says "brain" it could be that the part that was crushed was the skull and not necessarily the brain. See, however, *Rav Eliashiv shlita's* view below, Siman 339D(2), p. 322.

The *Chatam Sofer*^[16] rules that when a person lies as still as a stone, there is no heartbeat and he is not breathing, then, and only then, is he defined by our Torah as dead. See also the *Maharsham*^[17] and the *Tzitz Eliezer*.^[18]

The *Igrot Moshe*^[19] writes that the truth of the matter is that if the brain stops functioning this is not a sign of death. As long as a person breathes he is alive. It is

just that if the brain has ceased to work, death will follow, for he will stop breathing. There is no mention in *Chazal* or the *poskim* that there should be signs of brain function...^[20] However, if there is any evidence of life as evidenced by a cardiogram, he is to be considered absolutely alive even though he is not breathing... There is an obligation to do whatever necessary to treat him, if possible, even on *Shabbat*.

Rav Auerbach zt"l wrote to me that he finds it difficult to believe that one can breathe without there being any brain function.

Until relatively recently, before the advent of the concept of "brain death," the total absence of movement of any part of the body, breathing and heartbeat was the universally accepted definition of death both by the Jewish and the non-Jewish world.

BRAIN DEATH and BRAINSTEM DEATH. These terms will be used interchangeably in this discussion.

1. ANATOMY AND PHYSIOLOGY.

A brief description of basic anatomy and physiology follows, enough to be able to understand the concept of brain death.

(a) **Brain.** The brain is enclosed by the skull, leaving it through an opening at the base of the skull to become the spinal cord. It consists of a left and right *cerebrum* (*cerebral hemispheres*), and, below them, a left and right *cerebellum*. These link up to the midline *midbrain* containing, among other structures, the *hypothalamus* and *pituitary body* and, lower down, the *pons* and *medulla*. The *midbrain*, *pons* and *medulla* are collectively known as the *brainstem* and contain the *reticular formation* [associated with cortical activity (see *cerebrum*, below) and wakefulness]. The

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respiratory and *cardiac centers* are also situated in the *reticular formation* which lies within, and extends from, the *midbrain* to the lower end of the *medulla*. The *respiratory center* controls the muscles of breathing. The *cardiac center* is responsible for changes in the rate of heartbeat as required, such as occur in anticipation of exercise and stress. The basic heartbeat however is inherent to the heart muscle, which will therefore beat at a fixed rate even when completely severed from the body. The *medulla* becomes the *spinal cord* as it leaves the skull.

(b) **The cerebrum or cerebral hemisphere.** There are two, one on each side, and each is functionally divided into four main areas. From front to back, these areas are successively called: (1) The *frontal lobes*; they control skilled motor function including speech, mood, and thought. (2) The *parietal lobes*; they interpret sensory information from the rest of the body, such as the sensations of touch and pain, and control body movement. (3) The *temporal lobes*; they are responsible for memory and emotions, and many of the higher functions found only in man. (4) The *occipital lobes*; they interpret the images that the eye sees.

(c) **The cerebellum.** There are two hemispheres, one on each side. The *cerebellum* is in the main responsible for coordination of movements and maintenance of equilibrium.

(d) **The hypothalamus** lies at the base of the cerebral hemispheres, together with other structures and subserves three systems: the *autonomic nervous system*, the *endocrine system* and the *limbic system* and functions in the maintenance of *homeostasis*. Thus, it is concerned with temperature regulation, regulating the body's water balance, sleep and wakefulness and controlling metabolism (the rate

at which the body burns and utilizes food). By its influence on the nearby *pituitary gland* it also regulates other, distant, glands, such as the *thyroid* and *ovaries*.

(e) **Blood supply.** The blood supply to the brain comes from the *aorta* which supplies blood to the whole body. Four large vessels, two on each side of the neck, branch off from the *aorta* to bring blood to the brain. Ostensibly, if the blood supply in all four vessels is cut, the whole of the brain will not receive any blood and will therefore die.

2. **HISTORY.** As stated above, the classical definition of death was the absence of any signs of consciousness and muscular movement, together with cessation of respiration and heartbeat. Since most people died at home, this definition was accepted if a doctor, having examined the patient, confirmed that all these vital signs were indeed absent for a period of at least a minute. No instrumental confirmation, such as a cardiogram, was necessary.

With the advent of transplantation, particularly of the heart, the Harvard Ad Hoc Criteria for brain death was published in '68^[21] under the title: A Definition of Irreversible Coma. Its opening sentences state: Our primary purpose is to define irreversible coma as a new criterion for death. There are two reasons why there is a need for a definition: (1) Improvements in resuscitative and supportive measures have led to increased efforts to save those who are desperately injured. Sometimes these efforts have only partial success so that the result is an individual whose heart continues to beat but whose brain is irreversibly damaged. The burden is great on patients who suffer permanent loss of intellect, on their families, on the hospitals and on those in need of hospital beds already oc-

17. שו"ת, ח"ו סי' קכד

18. שו"ת, ח"ט סי' מו וח"י סי' כה פ"ד

19. שו"ת, יו"ד ח"ב סי' קמו

20. רצ"ע מהגמ' ופוסקים הנ"ל

באפם עד שנתישבה דעתם עליהם. וכותב שם הו"ת רענן: אנשי כנען היו מנפחים בפייהם כדי להחיותו.

15. בשם האו"ה בשם הסמ"ג וסמ"ק

16. שו"ת, יו"ד סי' שלה

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cupied by these comatose patients. (2) Obsolete criteria for the definition of death can lead to controversy in obtaining organs for transplantation.

A Presidential Commission set up in '81 formulated its criteria for the definition of death — brain death. It defined brain death as: the irreversible cessation of all functions of the *entire brain* including the brainstem (emphasis mine).^[22] The criteria laid down before this diagnosis could be confirmed were: irreversible deep coma not due to external causes such as drugs, *hypothermia*, irreversible cessation of respiration, and neurological confirmation of brain death. Thus brain death could not even be considered in a patient who showed any signs of consciousness or of any brain function, or who had any signs of spontaneous respiration. The fact that the heart was beating spontaneously did not exclude this definition, for, as explained above, it could beat spontaneously even when it lay outside the body. These patients were therefore, by definition, totally dependent on an external form of artificial ventilation — a respirator. In order to be absolutely certain that there was no spontaneous respiration whatsoever, an *apnea test* had to be performed.

Apnea test. The patient is completely disconnected from the respirator for many minutes, and multiple samples of blood are drawn to measure the level of carbon dioxide. If the test is positive, the blood level of carbon dioxide continues to rise, proving that the patient has not breathed at all during the test. He therefore fits the criterion of irreversible (if there were no other factors such as drugs, etc. which could have caused this temporarily) ces-

sation of breathing. However the test is not without its dangers and, in one study,^[23] 39% of patients developed marked falls in their blood pressure during its performance and four had to be given pressor drugs to counter this. In another study,^[24] a patient had a cardiac arrest.

The neurological definition of brain death requires a full examination by a neurologist, including tests to prove that the *brainstem*, and therefore, indirectly, the *respiratory center*, is not functioning. It is assumed that this would also mean that there is cessation of all functions of the entire brain, and not just that of the *brainstem*.

Cerebral blood flow. Tests to show that there is no evidence of blood supply to the brain are optional in some parts of the United States and obligatory in others. These tests include the injection of a small quantity of radioactive material into tubing (outside the patient's body) that leads to a cannula that was already present in the patient's vein (for the purposes of giving intravenous fluids and medications). Pictures taken of the brain would then show whether any of this radioactive material reached the brain. It should be noted though that although the injection of the radioactive material can be done without touching or moving the patient, "the patient's head has to be positioned against the detector with the chin depressed . . . A suitably constructed head-clamp or masking tape is used to immobilize the head."^[25] *Transcranial Doppler ultrasonography* and *cerebral angiography* are also not absolute in their sensitivity or specificity.^[26]

A patient who is clinically brain dead,

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therefore, is one who lies motionless in deep coma, not responding to any stimuli, however painful, and who breathes solely by means of a respirator. There is absolutely no medical or surgical treatment that can in any way change this status and he will remain in this situation until his heart stops. Therefore, as a *gosses* for whom nothing can be done, he may not be touched unless for his benefit. Thus he must be given food and fluids artificially, as well as all the nursing care that is necessary. It should therefore be obvious that any of the above tests that are done are done for one purpose and one purpose only — to confirm that he is brain dead so that either the respirator can be legally turned off or, alternatively, so that he can be used as an organ donor.

One can see that the definition of brain death, cessation of all functions of the entire brain — which has remained unchanged today — is confused with brainstem death, since one assumes that if the brainstem is dead, the entire brain must also be dead. In other words, in the comatose patient if his respiratory center is dead, he is considered, by the medical world, as dead.

Do all doctors and medical personnel accept this? I think that we can divide them into three groups: (1) Those, and this is the largest group, whose opinion is unknown. (2) Those who support this definition for the purposes of transplantation. This group can be redivided into two sub-groups: (a) Those who believe that the patient is dead, and (b) Those who believe that he is not, or at least are uncertain, but nevertheless will consider it ethical to use him as a donor of vital organs. They believe that since such a patient will never recover (I do not know of any recorded case in an adult), and, in fact most

will die soon, he can therefore, both ethically and morally, be used to save the life of another viable person. (3) Those who believe that a brain-dead patient is still alive.

Reasons given by clinicians for supporting the whole brain definition actually imply that these patients are still alive. For example: Their lives are not worth living, their prognosis is hopeless, or they cannot live more than a few days,^[27] implies this. A Conference of the Medical Royal Colleges of the United Kingdom '79 concluded that the state of brain death was a state of unsurvivable coma. It stopped short of equating it to death itself. In a letter to the editor on this subject,^[28] the following statement appears: Many anesthetists clearly have been very uneasy about the transplant lobby's rather rash assumption that organ donors do not require anesthesia. Many anesthetists do administer an anesthetic to these patients (*who are "dead" — author*), with good reason, as set out in your editorial (see below). It is time that all anesthetists realized that to not administer an anesthetic to a donor is to commit an act of possible barbarous dishonesty. Whatever the effect on donor numbers, one cannot condone such an action. The editorial^[29] referred to contains the following passages: The hemodynamic response (increase in blood pressure and heart rate) could be considered to represent an organism in distress and probably occurs at a spinal level although we are unaware of EEG studies during organ collection to confirm this. Faced with the knowledge of the persistence of higher brain and spinal function in some donors, the inability to test the *reticular formation* directly and the dramatic peroperative (*during operation*) hemodynamic changes that occur,

Nuclear Medicine Technology and Techniques, Bernier et al., Mosby Co. '81 p. 219
Emergency Med. Clinics of N. America .26
15:713, '97

JAMA 246:2184, '81.22
Arch. Neurol. 51:595, '94.23
Neurol. 28:661, '78.24

Edit. Anesthesia 55:105, '00.29

JAMA 261:2246, '89.27
Anesthesia 55:590, '00.28

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sedation and analgesia should be given with muscle relaxation for organ donation. It is imperative that public confidence is maintained in the transplant program. The act of organ donation is a final altruistic one and we should ensure the provision of general anesthesia at least sufficient to prevent the hemodynamic response to surgery.

3. EVIDENCE AGAINST TOTAL BRAIN DEATH IN BRAIN-DEAD PATIENTS.

The editorial quoted above lists the following objective evidence that the *hypothalamus* is still functioning in many patients who fulfill the criteria of brain death. (1) 23% of brain-dead adults did not have *diabetes insipidus* showing that the hormone controlling this is still being secreted by the *hypothalamus*. 23% of clinically brainstem-dead patients had EEG activity — which does not necessarily imply function — but 4% demonstrated sleep-like cortical EEG activity for as long as 7 days (*pointing to functioning of the reticular formation — author*). 27% and 26% of such patients demonstrated *brainstem auditory evoked response* (*showing that part of the brainstem was still functioning — author*) in two separate studies respectively. A third of such patients had perfusion (blood flow) of parts of the brain such as the *basal ganglia*, *thalamus* and/or *brainstem* as measured by *SPECT* (*a method of measuring perfusion to the brain after the injection of a small amount of radioactive material*). In addition, these patients maintain a normal body temperature, even though they have been “dead” for weeks or months.

Persons who meet whole-brain criteria of death, if mechanically ventilated, typically remain normothermic (*have a normal body temperature — author*) ... digest and absorb food, filter blood through both liver and kidneys, urinate and defecate,

heal wounds, and may even gestate fetuses.^[80] (*This and other such statements are in sharp contrast to those written by others who claim that brain-dead patients typically show sharp variations in body temperature and have to be treated with hormone replacements. However it is precisely this disagreement that adds so much to the uncertainty of what the term brain dead really means and raises the question of how one can be so certain that the patient really is dead medically, let alone halachically.*)

Finally, even patients who are brain dead confirmed by *angiographic studies* (*radio-opaque dye injected into the aorta to fill all four vessels to the brain showing that no blood flows to the brain*) nevertheless retain *hypothalamic* function. It is assumed that a circulation sufficient to prevent necrosis, but too small to be demonstrated by *angiography*, was maintained.^[81] Thus, in at least 25% of brain-dead patients, the concept of “physiological decapitation” is meaningless.

HOW MANY OF THESE TESTS ARE DONE? A letter to Dr. Schulman in June '93 from the New York Regional Transplant Program states that their policy pertaining to brain death protocol is to follow hospital protocol in declaring a patient brain dead. In some institutions, they require cerebral blood flow or EEG's plus *apnea* tests as ancillary testing (*implying that in others no ancillary tests — not even the apnea test — are done before a patient is pronounced brain dead — author*). For the 155 donors that they followed, cerebral blood flow studies were not done in 77%, EEG was not done in 64% and *apnea* testing was not performed in 65% of donors. (See below letter by *Rav Auerbach zt"l*, page 310).

A common misconception is that all brain-dead patients will die, that is, the

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heart will also stop beating, within hours or days^[82] of the diagnosis. However a study^[83] of 175 brain-dead patients who had survived a week showed that approximately 80 survived at least two weeks, approximately 44 at least four weeks, approximately 20 at least two months and 7 at least six months. An editorial in the same issue comments: The data collected here actually underestimates brain-death survival potential because in one-third of cases (respiratory) support was withdrawn.

In addition, there have been a number of cases of pregnant women who were brain dead and later gave birth to a normal, healthy child by Caesarian section.^[84] In one case,^[85] a woman was diagnosed as brain dead when she was 15 weeks pregnant. She was fed by naso-gastric tube for 107 days and a live healthy child was delivered by Caesarian section at about 32 weeks. It would appear that these dead women could not only carry through a pregnancy for many weeks, but could even process the food they were given, allowing the fetus to develop and grow normally.

4. DISSENTING VOICES. As I have said above, the majority of physicians who have made their opinion known in the medical literature equate brain death with death. However there are dissenting voices who point out that the whole redefinition of death was only to allow organs to be removed from donors in a legal and socially accepted manner. Thus we find the following statement: The development of organ transplantation required that death be redefined so that physicians

who removed organs from patients whose cardiopulmonary function was being supported were not accused of murder.^[86] The only purpose served by the concept of brain death is to facilitate the procurement of transplantable organs ... The most difficult challenge ... would be to gain acceptance of the view that killing may sometimes be a justifiable necessity for procuring transplantable organs.^[87] See also above 2 (page 303), the Harvard Committee's stated purposes for redefining death.

5. THE HALACHAH.

(a) The Chief Rabbinate of Israel. On Nov. 3, '86,^[88] the then Chief Rabbinate of Israel published its decision on brain death and heart transplants. It said: The Chief Rabbinate of Israel is prepared to permit heart transplants (from accident victims) to be performed at the Hadassah Medical Center, Jerusalem under the following conditions ... The decision was based on a number of factors, among them that: We have received evidence that even Rabbi M. Feinstein *zt"l* recently permitted a heart transplant procedure in the United States. Further, we know of other leading rabbis (Rabbi Yitzchak Weiss, author of the *Minchat Yitzchak*) who have advised cardiac patients to undergo a transplant.

(b) Rav Shlomo Zalman Auerbach zt"l. The following is a summary, presented chronologically, of the *Rav zt"l's* opinion on this problem. The *Rav zt"l* wrote to me^[89] that a patient who requires a transplant may not agree to receive it in Israel for by doing so he causes the life of the donor to be shortened. Even if there will

Obs Gyn 74:434 '89 .35

JAMA 263:696, '90 .36

Hastings Center Report 27:29, '97 .37

Assia, Jewish Medical Ethics, 1:2 '89 .38

ראו נשמת אברהם כרך ב' י"ד סי' קנ"ט .39

Ann. Int. Med 110:814, '89. Neurology .32

51:1538, '98 quoting a President's Commission '81

Neurology 51:1538, '98 .33

Am J Obs Gyn 157:1097, '87. JAMA 248:1089, '84

'82. BMJ 290:1237, '85. JAMA 260:816, '88

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be other candidates who will be prepared to commit this sin and be in line for the transplant, it is nevertheless forbidden since the majority of donors in Israel will be Jews (see also above Siman 157E). At the time, the *Rav zt"l* told me that until there is a definitive ruling from the great *poskim* that such a patient is dead, one is obligated to feed and care for him as for any comatose patient. If it were possible that he needed something to be done for him which could only be done by setting aside Sabbath laws, this must be done. However one should not resuscitate him (*were his heart to stop — author*).

In Av 5751 ('90), the *Rav zt"l* told me that since the definition of brainstem death was not to be found in the *Talmud*, we are unable to make a new definition of this kind in our times. Only a *Sanhedrin* will have the power to rule whether brainstem death can be equated with death or not. Until then it is forbidden to remove the patient's heart or any organ as long as his heart is still beating.

That same month, the *Rav zt"l* and *Rav Eliashiv shlita* signed a letter which was published in the local religious press:

We have been asked to give our opinion, that of the Torah, regarding a heart transplant, or a transplant of other organs, to a *seriously ill* patient. As long as the donor's heart is beating, even if the whole of his brain, including the brainstem, no longer functions, what is known as "brain-death," our opinion nevertheless is that it is not permissible whatsoever to remove any one of his organs, and doing so involves bloodshed.

In Elul 5751 (August '91), Rabbi Tandler (Yeshiva University, New York) wrote to both *Rav Auerbach zt"l* and *Rav Eliashiv shlita* explaining in detail his views on the subject. They replied to him briefly: We have received your letter and after studying it closely we see no reason to

change our minds. It is not permitted at all to remove organs for the purpose of transplantation as long as the donor's heart is beating, and doing so constitutes shedding blood.

Rav Auerbach zt"l wrote to me: The *Gemara* (*Arachin* 7a) writes that when a pregnant woman dies a natural death, since the life of the fetus is (*more*) fragile, its death precedes that of the mother. Even if it appears that the fetus is still alive, the *Gemara* calls these spontaneous reflex movements like those of a lizard's tail which continues to move even after it has been cut off from the lizard. There is no way that the fetus can live after the death of the mother unless she is already in labor. This is also the meaning of the *Shulchan Aruch Orach Chaim*, Siman 330:5. *Tosafot* (*Chullin* 38b), on the basis of the *Gemara* in *Arachin*, question the possibility of a fetus outliving its mother and say that this can occur only if she was slain and did not die a natural death. Even if occasionally the fetus still lives after the natural death of its mother, this is only if it was delivered soon after the mother's death. Therefore, if (*as in the cases of the pregnant women who were brain dead, mentioned above, page 307*) she can at least receive and digest food and have the fetus grow in her womb (*after brain death — author*), and surely other internal organs must also be involved in this, we have proof that as long as she can be artificially ventilated, she is still alive. We must then say, in a like manner, that when *Chazal* tell us that an old person who breaks his neck or even only his spinal cord (*the cervical portion*), is considered dead, this applies only in their day when they did not have respirators. For in such a person both respiration and heartbeat will immediately stop and he is considered dead even though reflex movements are still present. Today, however, if he is prevented from dying by artificial

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ventilation, he is considered alive as long as part of him is alive and a heartbeat is present, even though this is only because he is being ventilated. This situation is comparable to the baby born after eight months gestation whom *Chazal* compared to a stone, whereas today, Heaven forbid that we consider him a stone since we can treat him in an incubator. The *Gemara* (see ref. 9) also states that a person who is buried under rubble, if on freeing him he is found not to be breathing, he is considered as dead and it is forbidden to desecrate the Sabbath any further for him. However today one must certainly continue rescue efforts and attempt to resuscitate him. This is so also in the situation of a brain-dead person who is attached to a respirator and thus prevented from dying. One cannot possibly think that the body is merely a host for the passage of food and the growth of the fetus. In this light, whoever removes the heart or liver from the body when the person is attached to a respirator sheds blood. It is possible that even the *Gaon* and righteous man, the author of the *Igrot Moshe* (*Y.D.* III 132), only meant to rule strictly. (A patient who does not respond to any stimuli and who has stopped breathing must not be pronounced dead as long as his heart is beating. And if one shows that there is blood flow to the brain he must be artificially ventilated even for a prolonged period.) But even if we say that he meant to rule leniently (*that if there were no blood flow to the brain, such a patient can be pronounced dead*), this must only be because he was unaware of the possibility that such a woman could digest food and that her fetus could continue to grow. Therefore, since the *Gemara* and *poskim* nowhere state that brain death can be considered death, such a person is considered as still being alive. As long as we have not seen clearly that an artificially ventilated pregnant woman after brain death, or an animal

that has been beheaded, can still allow a fetus to grow, we must certainly think that the artificial respiration prevents death, and not that she is already dead. Nevertheless, it would seem to me that if ever it could be absolutely proven that the whole brain and brainstem are destroyed it would be permitted to discontinue the ventilation without moving the patient, since the machine merely prevents him from dying, even if the machine was attached to him originally for his benefit.

Rav Auerbach zt"l wrote to me the following interim summary (*italics are mine*):

1. Although it would be very important to find, by decapitating a pregnant animal (*whether she will continue with her pregnancy, for if so this will show that continuing pregnancy is not a sign of life, at least in an animal*), nevertheless, it will not solve our doubt with regard to a human being. Even if it will be shown that the body (*of the decapitated animal*) is merely an incubator, we still have to clarify whether a (*brain-dead*) human would not be considered a *gosses* (*we would as yet have no certain proof with regard to a human being and perhaps the brain-dead patient should still be treated not as a corpse but as a gosses*). And even if we do not move him, nevertheless, the injection of material (*to see whether there is blood flow to the brain*) into all his blood vessels — which, of course is not done for his benefit — will hasten his death. (*I, and others, repeatedly told the Rav zt"l that we were talking about a small quantity of fluid, injected into tubing outside the patient's body, but he maintained that an injection into the body of a gosses was more serious than moving his limb.*) We also need to clarify *halachically* whether we may depend on a scientific test and not on the evidence of our eyes and remove organs from him while his heart is still beating.

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2. Nevertheless, since such a patient is defined as being a *gosses*, and there is no chance that he will ever be cured or breathe spontaneously, it would be permitted to turn off the respirator, which is preventing his soul from leaving the body, in accordance with the ruling of the *Rama* (§1). However this is only on condition that one knows with absolute certainty that there is no flow of blood to the brain which has decayed within the skull.

Letter to Rav Shraga Feivel Cohen (author of the *Badei HaShulchan*): Rav Cohen *shlita* wrote, in Tevet 5752 (Dec. '91), to both *Rav Auerbach zt"l* and *Rav Eliashiv shlita* asking why it should be permissible to receive a transplant in the United States since the recipient would possibly be curtailing the life of another Jew, the donor. *Rav Auerbach zt"l* replied as follows (abridged):^[40]

If the doctors will show by the injection of material to the brain that, in their opinion, the patient is certainly dead, and one can show that a pregnant, artificially ventilated sheep without a brain can continue to grow a fetus then the fact that a fetus can continue to live after the death of the mother will invalidate my proof (see *The sheep experiment, below — author*). One must then say that when *Chazal* stated that the fetus always dies first this would only be true if the mother were not artificially ventilated.

In such a situation (*where there is no blood flow to any part of the brain — author*), one can equate such a patient with a decapitated one or with an old person whose spine is broken. In the case in question, where one can certainly follow the rule of the majority that the donor will be a non-Jew, it will certainly be permitted for a Jew to be a recipient. However all the above applies only to the

United States and other places where the majority of the population are non-Jews. This does not apply to *Eretz Yisrael*. For here one must carefully consider whether the above test (*injection of material into the donor — author*) may be done. The patient is to be considered a *gosses* and hastening his death will be murder. And although Rav Tendler writes that the test is done without touching the patient's body, I have heard that it is virtually impossible not to move him. In any case this (*whether the patient's body is moved or not — author*) is a mistake, for the very injection of material that spreads throughout his body is much more serious than moving his body slightly or closing his eyes (*Chazal*^[41] have specifically written that *anyone who closes the eyes of a gosses has shed blood — author*) and is certainly forbidden (also there are those who are suspect not to carry out this test anyway). And, all these tests are of no benefit whatsoever to the *gosses* (*the donor — author*), but are only for the sake of others.

On the other hand, the above reasoning should also make it forbidden in the Diaspora, since a non-Jew is forbidden to kill another or to hasten the death of a *gosses*. Thus the recipient will have transgressed the prohibition not to place a stumbling block before the blind in a case of bloodshed. However the doctor will in any case remove the organs for someone else, whether or not the Jew puts himself on the waiting list. And, although the patient would not be permitted to put himself on the waiting list in *Eretz Yisrael*, this will nevertheless be permitted in the Diaspora (*since the non-Jewish doctor will, in any case, use the brain-dead patient as a donor for he believes that the patient is dead; see the original letter, reference 40 — author*). However all this is on condition

41. מסכת שמחות פ"א מ"ד
40. ראה בנשמת אברהם כרך ד עמ' קמה את המכתב המלא

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that the blood flow test is done twice (with an interim period of 24 hours), which, in any case they do not do. (See above 3, page 306 — *author*.) Thus the doubts remain.

However, Professor Abraham has now told me that once the doctors have established that the brainstem is dead, they believe that the patient is certainly dead even without doing this test. Since the doctors are mainly concerned with science and not with the *halachah*, known to every observant Jew, that he who even minimally moves a *gosses* sheds blood, the ruling, based on everything written above, will be that it is permitted to be a recipient in the Diaspora, but forbidden in *Eretz Yisrael*. Signed Shlomo Zalman Auerbach.

The sheep experiment, Shevat 5752 ('92). This experiment was done twice. In each case a full-term pregnant sheep was decapitated after all four of the large vessels to the brain were tied off. The sheep was artificially ventilated throughout the experiment and its heart continued to beat spontaneously throughout. In the first experiment, although the brain was completely sucked out, the sheep's heart continued to beat and the fetus remained alive for some three hours. The sheep was now decapitated but this was followed, some twenty minutes later, by disappearance of the fetal heartbeat. An emergency Caesarian section was done but the fetus was dead. In the second experiment, some twenty-five minutes after the decapitation there were spontaneous contractions of the whole body of the sheep, probably secondary to strong uterine contractions. Caesarian section was then done and a live lamb delivered. Thus, both experiments show that, provided a sheep is artificially ventilated, its fetus can continue to live after the mother was decapitated.

Rav Auerbach zt"l then wrote to me: This disproves what I thought on the basis of the *Gemara*,^[42] that the fetus always dies first. We must now say that if the mother is artificially ventilated the fetus can certainly remain alive even after the mother has died. However this does not in any way change my previous conclusion that there is still the fear, nevertheless, of moving a *gosses*. Therefore (*receiving a transplant — author; see letter to Rav Cohen, above*) will be permitted in the Diaspora and forbidden in *Eretz Yisrael*.^[43]

In Adar 5752 ('92), at *Rav Auerbach zt"l*'s request, three senior and experienced doctors, Robert Schulman of New York (internist/endocrinologist), Jacob Fleischman of Los Angeles (internist/infectious diseases) and Jacob Schacter of New York (cardiologist) wrote to him, in answer to his question, as to how long after a brain-dead patient was disconnected from his respirator would they be willing to define him as dead. They wrote:

After much discussion between ourselves and other doctors, regarding defining the moment of death, we have come to the following conclusion provided two conditions set out below are met. (1) All the tests necessary to show that there is no spontaneous respiration and that the brainstem has been completely and irreversibly damaged have been done. (2) Other tests have also been done to show that there is absolutely no flow of blood to the brain (although these are forbidden by *Halachah*), so that it is absolutely certain that the patient is brain dead (the whole brain including the brainstem). If the respirator is then disconnected so that the patient does not breathe at all, the heart stops beating after some minutes. We believe that 15-20 seconds after the heart has completely stopped, at that mo-

43. ראה המכתב במלואו בנשמת אברהם כרך ד עמ' קע

42. ערכין ו ע"א

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ment the patient is dead in every way and we would be prepared to sign his death certificate.

The *Rav zt"l* replied to them as follows: Even if the doctors have done all the necessary tests, including cerebral blood flow studies, in a critically ill patient, and they have decided that the whole brain including the brainstem is dead, nevertheless as long as he is being ventilated artificially, he is still considered a possible *gosses* by Torah law, and the law is well known that if one moves a *gosses* it is as if he has shed blood. And it is more certain that one may not take any organ from him, as long as the heart is beating, even if it only does so because the patient is artificially ventilated, nevertheless he is still a possible *gosses* and this is forbidden. In my opinion, if after all the tests of the brain and brainstem have already been done (*against the Halachah — author*) and the doctors have definitely decided that he is dead, the only way in which a person, who keeps the Torah, can definitely find out whether the patient is dead, is to disconnect the respirator and then, if the heart is not beating at all and the patient lies like a stone, only then can he be considered dead. All this is in accord with what I have been told by expert doctors who are also Torah observant that they would be willing to sign a death certificate in such a case, thirty seconds after the heartbeat has completely ceased.

Therefore, in the Diaspora, where the majority of doctors and patients are non-Jews who depend on medical science and do not fear moving a *gosses*, and, after doing all the tests regarding the brainstem they consider the patient to be dead, even though he is still being ventilated artificially and his heart is beating, only there (*in the Diaspora — author*) will it be

permitted to be a recipient of an organ transplant, but not in *Eretz Yisrael* where the majority of both patients and doctors are Jews who are bound by all the laws of the Torah.

All this I have written according to my humble opinion although I know that there are those who think differently.

Signed with trembling, with the honor of the Torah and with great respect, Shlomo Zalman Auerbach.

In a letter addressed to Rabbi Tendler, dated Nissan 5752 ('92), *Rav Auerbach zt"l* also writes (in part):^[44] After the doctors have established that the patient's brainstem is dead, it would still be permissible for them to continue to perform other tests, if in their opinion, they will be for the patient's benefit. They may not perform tests for any other reason, for one may not actively hasten the death of a *gosses* even to save another's life. My heart tells me that whatever is done within the patient's body or in his blood, is worse than moving him slightly, and is forbidden.

With the growing evidence that there were still parts of the brain, such as the *hypothalamus* and *pituitary body*, that remain functional after brain death is diagnosed, the *Rav zt"l* wrote me the following letter in Av 5753 (July '93):^[45]

However lately I have been told that it is possible that even with a patient such as I have spoken about, whose heart has stopped for thirty seconds, that the part of the brain known as the hypothalamus, that influences all the parts of the body, is still functional. If the patient were reconnected to the respirator and the heart could be restarted, it would continue to function for many days. Therefore, I am not certain that *halachically* the thirty-second wait can be still be considered suf-

45. נשמת אברהם ח"ה עמ' צו

44. המכתב במלואו פורסם במגזת שלמה ח"ב סי' פג אות ו' (ב) עמ' שכה

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ficient; one would have to wait until it is a certainty that this part of the brain has also died, since an important part of the brain might still be alive and functional. If so, although it would be permissible to write a death certificate after the thirty-second wait, one should not remove any organs. Therefore I am writing to you explicitly that I retract from what I have previously written and it is as if I have not said anything.

In the spring of '94, *Tradition*^[46] published a letter to the editor on brain death. In the last paragraph of the letter the authors write:

All Rabbinic authorities agree that the classic definition of death in Judaism is the absence of spontaneous respiration in a patient with no other signs of life. A brief waiting period of a few minutes to a half-hour after breathing has ceased is also required. Brain death is a criterion for confirming death in a patient who already has irreversible absence of spontaneous respiration. The situation of decapitation, where immediate death is assumed even if the heart may still be briefly beating, is certainly equated with organismal death, classic Jewish sources, as well as the responsa of Rabbi Moshe Feinstein, *z"l*. This view is now supported by more and more rabbis including Rabbi Shlomo Zalman Auerbach, the Israeli Chief Rabbinate, Rabbi Feinstein's sons David and Reuben, and seemingly, Rabbi Eliezer Y. Waldenberg.

As a result of the above letter, Dr. Robert Schulman of New York^[47] wrote to both *Rav Auerbach zt"l* and to *Rav Waldenberg shlita* asking them whether they had indeed changed their ruling regarding brain death. *Rav Auerbach zt"l*^[48] answered (in a letter dated 10th Kislev 5755 — 13 Nov '94 — text as in *Tradition*):

I received your letter and I am informing you that I have not changed my mind from what I had originally written to you in '92 as published in *Assia* [Elul 5754 (August '94) pp. 26-28]. I still believe that a person who is brain dead has the status of a *gosses* according to the law of our Holy Torah. When a person moves a *gosses* it is as if he has spilled blood, and, obviously, one cannot remove any organ from him. I have written this same statement to Prof. Avraham (ibid. p. 28), (*letter above page 312: However, lately I have been told — author*) and this too was published in *Assia* (August '94) and was explained in the article of Dr. Steinberg (ibid. pp. 10-16).

See below for *Rav Waldenberg shlita's* reply.

Rav Neuwirth shlita,^[49] eulogizing *Rav Auerbach zt"l*, writes: The letter caused *Maran zt"l* much pain and anguish ... And I add that this opinion is not only that of *Maran zt"l* but all the great of Israel unanimously concur with him, for example, *Rav Eliashiv shlita*, *Rav Ovadiah Yosef shlita* and *Rav Waldenberg shlita*.

(c) *Rav Yosef Shalom Eliashiv shlita*. When I first spoke to *Rav Eliashiv shlita* on this subject many years ago, I pointed out to him that, with the majority of these patients (considered brain dead), the heart would also stop beating within forty-eight hours. He answered that I had convinced him that most of these patients would die in an extremely short time, but that there was no evidence that they were now dead. Therefore, as long as the heart is beating, it is forbidden to do anything to hasten his death. I later asked *Rav Eliashiv shlita* how such a patient should be defined if he did live for many months. He answered me that he would be defined as a possible *gosses*.

The *Dayanim* of the *Beit Din* of London

48. נשמת אברהם ח"ה עמ' צט. אסיא שם עמ' 48. See *Tradition* 28:102, Spring '94.

49. המעין כרך לה ניסן תשנ"ד עמ' 3

28:94, Spring '94. 46

47. אסיא חוברת נו תשרי תשנ"ו עמ' 121

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and Great Britain asked *Rav Eliashiv shlita* whether they were permitted to allow Jews to sign an organ-donation card since they feared that Jews would not receive transplants if they refused to be donors. The *Rav shlita* ruled that there was no basis for this fear, and that the signing of such cards is not permitted.^[50]

In a reply to *Rav Shraga Feivel Cohen shlita* (see above) *Rav Eliashiv shlita* wrote,^[51] dealing at length with the *halachic* ramifications of a *gosses* and the rule of the majority. He concluded that in this case one may depend on who the majority of the population are (*regarding the donor — author*).

(d) Rav Eliezer Yehudah Waldenberg shlita. *Rav Waldenberg shlita*^[52] rules that a patient who is brain dead is considered to be alive in every respect.

Following the letter to the editor in *Tradition* mentioned above, *Rav Waldenberg shlita*^[53] replied to Dr. Schulman on the 25th Cheshvan 5755 (Oct. 30 '94 — text as in *Tradition*):

I received your letter today and I hasten to reply. I was amazed to read in your letter that I have reversed my *p'sak* forbidding transplanting a heart or any other organ for a seriously ill patient where the heart of the donor beats, even if his brain, including the brain stem, is not working at all, which is called brain death. I publicly inform you that as my opinion was then, my opinion is now: to forbid such a thing according to the *halakha*, and with great emphasis. I have not reversed my opinion and have already repeated this and have again published my

opinion to forbid this in my book *Tzitz Eliezer* (volume 19). To strengthen my position, I wrote an addendum in the back of the book in which I published the opinion of my friends, the Gaon Rabbi Shlomo Zalman Auerbach and the Gaon Rabbi Elia-shiv, who also forbid this. I am puzzled! How is it possible for a living person to contradict another living person? In this matter I state publicly that the letter which was published in *Tradition* regarding my opinion has no basis in fact at all.

(e) Other gedolei hador who do not accept brain death as a definition of death. *Rav Yitzchak Weiss zt"l*,^[54] *Rav Vosner shlita*,^[55] *Rav Ovadiah Yosef shlita*,^[56] *Rav Shach zt"l*, and *Rav Kulitz shlita* (the Ashkenazi Chief Rabbi of Jerusalem)^[57] all agree that such a patient is not dead.

(f) Rav Moshe Feinstein zt"l. Four *responsa* were published in the *Igrot Moshe* during the *Rav zt"l's* lifetime — two dealing with the criteria of death and two with transplantation. A fifth *responsum* came to light posthumously.

(1) Criteria of death. In the first,^[58] 5730 ('70) he writes: In truth, it is certain that the absence of brain function does not mean that he is dead. For as long as he breathes he is alive. It is only that if the brain has ceased to function this will lead to death, for he will cease to breathe. It is possible that there are medications that are either known, or even those that are as yet unknown, that will restore the brain's function. Besides, one may pray to *Hashem* to cure him for he is still considered alive, though dangerously ill, and one may pray for him; he is not dead

See *Tradition* 28:102, Spring '94.

54. מובא בשו"ת צ"ץ אליעזר ח"ו סי' סו
 55. שו"ת שבט הלוי ח"ו סי' רלה
 56. בהרצעה פומבית לפני כמה שנים
 57. מובאים ע"י הרב דוד בליקר שליט"א באור המורה תשרי תשכ"ח
 58. שו"ת אג"מ יו"ד ח"ב סי' קמו

50. ראה בנשמת אברהם כרך ד עמ' קלח
 51. ראה בנשמת אברהם כרך ד עמ' קמח את המכתב המלא
 52. שו"ת צ"ץ אליעזר ח"ו סי' סו וח"ט סי' נג בסוף.
 53. אסיא חוברת מר-מה כסלו תש"ן, עמ' קטו. וראה גם בשו"ת צ"ץ אליעזר ח"ט סי' מו וח"ט סי' כה פ"ד
 53. שו"ת צ"ץ אליעזר ח"ב"א סי' כה. נשמת אברהם כרך ד עמ' צח. אסיא חוברת נו תשרי תשנ"ו עמ' 122

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which would make it forbidden to pray for him since that would be a prayer in vain. Therefore one who kills him is plainly a murderer ... There is no mention in the *Gemara* or *poskim* that there should be a sign of life in the brain and the premise that nature has changed is unapplicable here. For in the times of *Chazal* the brain functioned as it does now and from it came all the vitality of the body. Nevertheless, a person was not considered dead because his brain had stopped functioning and this is clearly so even today. And, regarding your discussion to decide leniently, that even if the doctors see evidence of the heartbeat in a cardiogram ... that this is not meaningful, and he should be considered dead once he has stopped breathing ... this, in my opinion, is not so ... Therefore, it is forbidden to establish that such a person (*is dead — author*) and, on the contrary, everything that is possible to do to treat him must be done, including treatment on *Shabbat*.

In a second *responsum*,^[59] 5736 ('76) *Rav Feinstein zt"l* writes: Patients who cannot breathe and are artificially ventilated ... with regard to other signs of life he does not feel anything ... as long as the respirator is working it is forbidden to disconnect it from the patient for he might still be alive and disconnecting him will kill him. However, when the respirator stops, because its supply of oxygen is finished, it should not be reconnected to him for a period of about a quarter of an hour. If he is no longer alive, he will have stopped breathing and one will know that he is dead ... however those who are injured in traffic accidents ... even if they can no longer breathe spontaneously, and there are no other signs of life, it is still possible that they are still alive. Since you say that there is now a possibility of injecting a substance that will tell us

whether the connection between the brain and the rest of the body has been severed and also since the brain is already completely necrotic, it is as if he has been decapitated ... even though he is not breathing spontaneously at all, death must not be established until this test has been done. If they see that there is still a link between the brain and the body, even though he is not breathing, he should be ventilated artificially even for a long period of time. Only if they see, by this test, that there is no connection between the brain and the body, may death be established since he is not breathing.

The above two *responsa* concern the establishment of death, and the problem of transplantation is not dealt with. Although the test for cerebral blood flow is mentioned in the second *responsum*, *Rav Feinstein zt"l* rules that it must be used as an even stricter criterion of death in a post-accident artificially ventilated patient. Second, the *Rav zt"l* was told that a patient in whom the test shows no connection between brain and body, the brain is completely necrotic and it is as if he has been decapitated, and his ruling is based on this information. We now know this to be incorrect in many brain dead patients (see 3 page 306).

(2) Transplantation. The first *responsum*^[60] concerning transplantation was written in 5728 ('68): Regarding heart transplantation that a few doctors have started performing, I do not wish to write at length with proofs, theories and discussions ... Therefore I will write a practical reply which will be clear and absolute and will not lead to any discussion on it. Heart transplants that the doctors have started to do recently is absolutely the murder of two souls. They actively kill the donor since he is still alive ... and also the recipient since most have died within hours of

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the transplant and a few within days.

In a second *responsum*^[61] in 5738 ('78) *Rav Feinstein zt"l* writes: I have already sent you a telegram that this is forbidden and will be considered as the active murder of two souls, as I have already written in 5728 ('68) and published in my work *Igrot Moshe Y.D. II, Siman 174* (reference 60 above), and, as I wrote then, one should not discuss the subject at length lest people make a mistake and think that there may be some latitude to possibly permit it ... I have gone into the matter ... and know that there has not been any change for the better since the advent of transplantation and no recipient has lived for some years. Even the months that they have lived have been a life of suffering and pain ...

A third letter, dated 5745 ('85) and written to Dr. Bondi, appeared in the summer of 5752 ('92)^[62] and concerns the ruling of the State of New York to accept brain death as the definition of death. It states: As I have heard from my son-in-law ... they have only accepted what is right in *Halachah*, the definition known as the "Harvard criteria," by which the patient is considered exactly as if "he has been decapitated" and his brain completely necrotic. Therefore, although the heart may still beat for some days, nevertheless if the patient can no longer breathe spontaneously, he is considered to be dead, as I have stated in my *responsum* in *Igrot Moshe Y.D. III, Siman 132*.

If one looks at this letter, as it stands, *Rav Feinstein zt"l* accepted brain death as the death of the person. But, as he clearly writes, this is based on the Harvard criteria by which, he was told, "the patient is considered exactly as if he has been decapitated and his brain completely necro-

tic." As I have written above (see 3 page 306), this assumption is far from true in many patients, since a "decapitated brain" cannot allow the continuing growth of a fetus or, for that matter, keep the body temperature at 37°C or control the influence of hormones in the person. In addition, in a postmortem study of 503 patients, the authors write:^[63] It was not possible to verify that a diagnosis made prior to cardiac arrest by any set or subset of criteria would invariably correlate with a diffusely destroyed brain. (*That is to say that whatever criteria was used to define a patient as being brain dead — that is "his brain was completely necrotic," postmortem examination of the brain would not invariably confirm this and, in some patients, parts of the brain were still intact — author.*)

Rav Auerbach zt"l, in response to this last letter of *Rav Feinstein zt"l*, writes:^[64] As to the transplantation of organs from a person who is (brain) dead to a *dangerously ill* patient, in hospitals in the Diaspora the majority of doctors and patients are non-Jews, who act only in accordance with medical science and the law of the land. Therefore, if according to this law the patient is considered dead, they will immediately remove the organs that are required for transplantation from him. In my opinion, it will be permitted there, even for a Jew who is observant of Torah and *mitzvot*, to place himself on the waiting list to be a recipient. However in *Eretz Yisrael*, where they (*the population who are mainly Jews — author*) are bound to act in accordance with the Laws of the Holy Torah and the *Halachah*, even if it is shown by the tests that we have today that the brain is completely dead, an artificially ventilated patient is still consid-

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ered as a possible *gosses* and cannot be a donor for a transplant. Nevertheless, since he can be shown over many hours not to have any spontaneous respiration, and since it was the doctors who put him on a respirator, it may be regarded as prolonging the end of the period of *gesisah*, preventing the soul from leaving the body. Therefore it will be permitted to disconnect the patient from it. And, although this is also stated in the *Igrot Moshe Y.D. III, Siman 132*, nevertheless one could, with difficulty, explain it differently. Therefore I was pleased to see the Gaon's letter to Dr. Bondi where he writes this clearly and explicitly. However although he wrote "right in *Halachah*," "as if he has been decapitated" and "although the heart may still beat for some days," nevertheless, I think that all these phrases only show that he intended to rule that "it is permitted to disconnect the patient from the respirator." The letter was written in Kislev 5745 when the whole Torah world was discussing the question of whether transplantation was permissible or not. If he had thought that such a patient was considered dead even with regard to being a donor and his organs could be removed, it is astonishing that he did not mention that there is also a *mitzvah* to take organs from him to save the lives of *seriously ill* patients. And, although the *Gaon zt"l* wrote plainly in *Igrot Moshe* in the year 5738 (reference 61) that a heart transplant murders two souls, nevertheless in the present letter, written years later, in 5745, when he already knew about the important test (*cerebral bloodflow — author*), he certainly should have mentioned that it is permitted to remove the organs. Therefore, I think that he did not want at all to depend on this test to per-

form a positive act and remove organs from the patient.^[65] [*This letter was written before Rav Auerbach zt"l's letter to me in July '93; see above, page 312 — author.*]

6. SUMMARY. The consensus of opinion of the *gedolei hador* is that a brain-dead patient is not dead and he cannot be used as a donor, even to save the life of a *seriously ill* patient. As the *halachah* stands, it is forbidden to be either a donor or a recipient of organs in *Eretz Yisrael* from a brain-dead patient, but it is permitted to be a recipient in the Diaspora. The view of *Rav Moshe Feinstein zt"l* has been discussed.

7. THE NAME GAME. In the search for suitable donors two other groups of patients have been suggested. Although they do not fit the present criteria of brain death, it has been suggested that the criteria be extended so that they can also be labeled dead and thus be used as donors for transplantation. Thus definitions can be changed to suit the demands.

(1) Chronic vegetative state. This state has been defined as chronic wakefulness without awareness.^[66] It is a chronic neurologic condition characterized by lack of awareness of external stimuli with preservation of vital vegetative functions such as cardiac activity, respiration and maintenance of blood pressure.^[67] These patients are generally able to breathe without mechanical support and their cardiovascular, gastro-intestinal and renal functions are usually sound.^[68] Should they be used as donors? We find the following statement in a medical journal: If the legal definition of death were to be changed to include comprehensive irreversible loss of higher brain function, it would be possible to take the life of a patient (or more accurately to stop the heart,

Quoted in *Crit. Care Med.* 20:1705, '92. 63

ראה נשמת אברהם כרך ה עמ' צד 64

61. שם ח"י"מ ח"ב ט"ו עב

62. אסיא חוברת נג אלול תשנ"ד עמ' 24

Ann. Neurol. 33:386, '93. 67

Lancet 350:795, '97. 68

Lancet 350:1320, '97. 69

65. ראה שם להמשך המכתב בו דרב זצ"ל חזר וכתב על הענין של המתנת חצי ריקה

JAMA 263, 426 '90. 66

§1 (CONTINUED): For (C) one who closes the eyes of a *gosses* when he is about to die has shed blood.

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since the patient would be defined as dead) by a "lethal" injection, and then to remove the organs needed for transplantation, subject to the usual criteria for consent. Another approach would be not to declare such individuals legally dead, but rather to exempt them from the normal legal prohibition against "killing" in the way that was considered for anencephalic infants.^[69]

(2) **Anencephalic infants.** These infants are born without an upper brain but have a normally functioning brainstem and breathe spontaneously. They will usually die shortly after birth. It has been proposed that the definition of brain death be widened to include them; that is, the absence of higher brain function should be enough to define them as dead at a time that they are breathing spontaneously and have a normal heartbeat.^[70]

In the context of changing the name (that is, the definition of death), when the situation demands it, the following sentence in a medical paper^[71] nicely characterizes it: The Neur tribe viewed defective newborns as non-human "hippopotamuses" who were mistakenly born to human parents and who would be put in the river, which was viewed as their natural habitat.

(C) **one who closes the eyes of a *gosses*.** And he who touches him sheds blood. For Rebbe Meir used to say: It is like a light that is about to go out; the

moment one touches it he extinguishes it.^[72] This is also the ruling in the *Gemara*,^[73] *Rif*^[74] and the *Rambam*.^[75] *Rebbe Akiva Eiger*^[76] writes that nevertheless if the house where the *gosses* lies is on fire, he may be moved out; that is, if it is for his benefit, the *gosses* may be moved. *Rav Neuwirth shlita* agreed with me that this is true even if the *gosses* is unconscious since he might regain consciousness or, alternatively, he was only mistakenly thought to be completely unconscious. There is no question that a doctor, or anyone else for that matter, who wishes to treat, help or save him, may touch or move him as is necessary. Moreover, he is obligated to do so if he thinks he can save his life. Even a *Cohen*, who is forbidden to enter a room containing a *gosses*,^[77] is required to do so if he thinks that he may save his life. Even if there is doubt whether the patient has already died or not, he must enter, for even the smallest possibility of saving life sets aside that which is forbidden (unless the three cardinal sins are involved — see Siman 157 §1 above).^[78] Moreover, even if a non-*Cohen* is present who is also capable of treating the patient, the *Cohen* must enter and help to treat,^[79] for it is not by everyone that a patient is destined to be cured.^[80] See also Siman 370:2 below.

However if nothing more can be done to save him, one must be very careful, particularly in a hospital, that routine taking

.76 הידושי באן

.77 יו"ד סי' שע

.78 שו"ת חת"ס יו"ד סי' שלח. גשר החיים ח"א פ"ב סי' ב

.79 פ"ת יו"ד סי' שע סי' ס"א

.80 יו"ד סי' רכא סעי' ד ט"ז ושי"ך סי' ב

NEJM 321:388, '89; NEJM 322:669, '90; .70 JAMA 259:2284, '88

Arch. Neurol. 49:570, '92 .71

.72 אבל רבתי. מסכת שמחות פ"א ה"ד

.73 שבת קנא ע"ב

.74 דף סה ע"ב מדפי הרי"ף

.75 ה"ל אבל פ"ד ה"ה. וראה שי"ך סי' ה

GLOSS: It is also ^(D)forbidden to hasten his death, for example,

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of temperature, pulse and blood pressure should no longer be carried out nor should blood be drawn for laboratory tests. In such a situation, since the results of these actions will not change his treatment, they should not be done since they involve moving him. If, however, the patient is conscious, and will realize that these routine actions have been stopped, and the knowledge and its resultant despair and hopelessness may aggravate his condition, they may be done carefully. However all nursing care that is necessary for his physical and mental comfort, such as washing, cleaning him and changing the bed linen must be done. *Rav Neuwirth shlita* agreed with all this.

On the other hand, *Rav Auerbach zt"l* was asked whether it was permissible to move a *gosses* in the emergency room whose bed, or one of his limbs, was in such a position that it was impossible to move another *seriously ill* patient to where he could receive appropriate treatment (for example, to move him to the intensive care unit or to connect him to a respirator). The *Rav zt"l* answered: As to moving a *gosses* so that another's life may be saved, since there is a great need to try and save life, one may move the arm of a *gosses* carefully or his bed even though moving him would involve much effort. For since this will be done carefully and it is only a possibility that his death will be hastened, it is permitted. This is not like removing an instrument from his mouth or from his body for use in another patient, which is forbidden.^[81]

The *Rav zt"l* explained to *Rav Neuwirth shlita* and myself that the ruling of the *Shulchan Aruch* refers to moving him for no reason or for the benefit of a non-

seriously ill patient. But if, in order to save a *seriously ill* patient, the *gosses* must be moved, part of his body or his bed may be moved. He also told us that it would be permitted to stroke the hand of a *gosses* who was frightened so as to calm him. However, if the *gosses* is a child, his mother would not be permitted to take him into her arms in order to hug him although she does so to calm him. He added that the permission to move a *gosses* had nothing in common with the injection of a substance into the body of a *gosses* (even if he were to do it without touching him) to ascertain whether his brain was dead.

Rav Wosner shlita^[82] was also asked the above question. He wrote: The *halachah* that it is forbidden to touch or move a *gosses* refers to touching his body, for example, closing his eyes or moving an arm that is hanging over the bed. In our situation, his body is not touched but his bed is moved... It is obvious to me that *Chazal* ruled strictly (by Torah law) with regard to touching a *gosses* for fear of hastening his death. It is also well known that, in reality, even if one does move a *gosses*, he will not necessarily definitely die sooner... Besides, the experts know that there are many uncertainties as to when the process of *gesisah* begins. In any case, in this situation there is only a remote chance that very carefully moving the bed in which the *gosses* lies will hasten his death, but by doing so it will be possible to save someone who can certainly be saved. In such an instance the Torah ruling would be that one ought to do so.

(D) **forbidden to hasten his death. PROLONGING THE LIFE OF A GOSSSES AND OF ONE WHO IS SUFFERING. EUTHANASIA.** The *Minchat*

.83 מצוה לד

.81 אסאי חוברת ג"ה טבת תשנ"ה עמ' 48

.82 שם עמ' 44, שו"ת שבט הלוי ח"ט סי' רמז

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Chinuch^[83] writes: Even if the prophet Elijah were to say that a person would live only for another hour or minute, nevertheless the Torah does not differentiate between killing a child who has many years to live and killing an aged person of one hundred. The killer is always guilty; even if the victim was marked to die in a minute, he is guilty for the minute of life that was still left to him. The *Gesher HaChaim*^[84] explains that since there is neither a measure nor a boundary to the worth of a life, one cannot differentiate between a tiny fraction of life and a period one hundred million times greater. Therefore in Torah law there is no difference between killing a young healthy individual and killing a *gosses* who is one hundred years old. *Rav Jakobovits zt"l*^[85] writes: The worth of a person's life is immeasurable and therefore cannot be divided; each and every fraction of it is infinite. Therefore, seventy years of life have exactly the same value as thirty years or a year, an hour or even a second. This exacting definition of the sanctity of the life of a person is not only based on pure mathematics or logic, but is based, to no lesser extent, on moral values. If the value of a human life is lessened because his end is near, the life of man will lose all of its absolute value, being replaced by a relative one — relative to his life expectancy, the state of his health, his value to society, or any other arbitrary index. It will then be necessary to grade people, and no two people will ever have the same worth. Once we curtail the life of a dying patient because it is no longer of value, we are in fact curtailing the infinite worth of each and every individual's life, assigning them limited boundaries.^[86]

Rav Jakobovits zt"l^[87] continues: The sanctity of life therefore is such that under no circumstances will it be permissible to curtail life because of pain and suffering, even if by a second. Even if death's victory in a short time is absolutely obvious, the patient's life remains of infinite value and killing him is no less a crime than killing a perfectly healthy person.

Even if the patient is suffering and is in severe pain, we have no right to kill him or to bring about his death to put an end to his suffering. On the contrary his suffering is for his benefit, as the *Gemara*^[88] and the *Rambam*^[89] write: The (final) punishment of a *sotah* who has merits . . . will be postponed so that she does not die immediately (on drinking the bitter waters — author). Instead, she wastes away, being afflicted with severe illnesses until she dies a year or two or three later depending on her merits, dying eventually with swelling of her abdomen and the falling (wasting) away of her limbs.

1. RAV AUERBACH zt"l. The *Rav zt"l* told me that one must differentiate between treatments that fulfill the natural needs of a patient or those which are routine and conventional on the one hand and those which are not routine. Thus, one may neither stop nor desist from giving a patient who, for instance, has widespread cancer in his body and is close to death, oxygen, food or nutritional fluids as needed, even if he is suffering and is in severe pain. If he is a diabetic, one may not stop his insulin so as to hasten his death. One may not stop a blood transfusion or any other medication, such as antibiotics, that are needed for his treatment. One must not desist from giving him any of the above, with the purpose of causing

87. הרפואה והיהדות שם
88. טוטה כ ע"א
89. הלי טוטה פ"ג ה"ב

84. ח"א פ"ב סעי' ב הערה 3
85. הרפואה והיהדות עמ' 152
86. וראה ברעת וקנים מבעלי החוס' בראשית ט"ה, מובא בב"י יו"ד סי' קנ"ו

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his earlier death. On the other hand, there is no obligation to actively treat such a patient, when the treatment itself will cause him suffering over and above his present suffering, and when the treatment is unconventional, if there is no expectation of curing his underlying illness but merely of prolonging his life a little. This is certainly so if the patient does not wish to receive such treatment because of the severe pain and terrible suffering.

The *Rav zt"l* also told me that narcotics such as morphine may be given to a patient who is terminally ill when this is necessary to alleviate his pain, even if there is a possibility that this might hasten his death, provided that the morphine is given only in order to alleviate his pain and suffering and not with any ulterior motive of shortening his life. If each dose on its own will not certainly curtail his life, then although many repeated doses will do so, he should be treated. However a patient for whom even a single dose will cause respiratory arrest, may not receive a single dose, even if he is suffering agonizing pain, unless he will be artificially ventilated should he stop breathing.^[90] See also the *Tzitz Eliezer*^[91] and *Rav Nebenzahl shlita's* comment.^[92]

I should point out in this context that expert advice must be sought, from a specialist in treating pain, at an early stage in the treatment of painful disease. The advice of a psychiatrist must also be sought for treating depression and other psychiatric conditions in these suffering patients.

Rav Auerbach zt"l writes:^[93] Although it is obviously clear that the lives of those who are paralyzed are not really "lives" in

our simplistic way of thinking, and the suffering of the patient and his family is great, nevertheless we are commanded and required to actively do what we can to prolong their lives. If he takes ill we are bound to hasten to save him and, if necessary, set aside Sabbath laws for him. For we have no yardstick by which to measure life, its value and importance, even in terms of Torah and *mitzvot*. We must set aside Sabbath laws even for an elderly patient smitten with a repulsive disease although he is deaf and dumb and a complete *shoteh*, and is incapable of performing any *mitzvah*. His life is merely a burden on, and causes great suffering for, the family, prevents them from studying Torah and keeping *mitzvot*, and, in addition to their great suffering, is a strain on their resources. In spite of all this, it is a *mitzvah* for even the great of Israel to try and do what they can to save him and set aside Sabbath laws if necessary. Moreover, even if the patient has such great suffering that the *Halachah* would permit one to pray that he die, as the *Ran* rules,^[94] and this is also the opinion of some *poskim*,^[95] nevertheless at the same time as one prays and asks *Hashem* that the patient die, he is obligated to do what he can to save him and set aside Sabbath laws on his behalf repeatedly . . . However, since the lives of those who are paralyzed are painful and bitter, and there are those who would prefer death, therefore in the case in question, where the success of surgery on the spine is not certain and may, in fact, leave the patient paralyzed all her life, there is no obligation to actively treat her by operation, particularly since, in her case, the success of the surgery is

95. ערוה"ש יו"ד שלה סעי' ג. שו"ת אג"מ חו"מ ח"ב סי' עג ס"ק א. וע"ע בשו"ת ציץ אליעזר ח"ה רמת רחל סי' ה"ח"ט ס"ז
See Siman 335M, p. 264 above (to pray that the patient should die).

90. וראה מנחת שלמה תנינא סי' פו אות ב
91. שו"ת, ח"י"ג סי' פו
92. אסיא חוברת כה, סיון תש"מ עמ' 39
93. מנחת שלמה ח"א סי' צא אות כד
94. נדרים מ ע"א

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itself doubtful.

The *Rav zt"l* told me that there is no obligation to do anything to a terminally ill patient that will cause him severe pain even if the patient is comatose and not evidently suffering. The *Rav zt"l* was of the opinion that a comatose patient who could not respond to pain should be considered as if he were in pain.

Many years ago I spoke to the *Rav zt"l* regarding a patient with a spreading muscle paralysis (ALS). This disease causes complete paralysis of all the muscles of the body, usually starting at the periphery of the body and spreading, over an unpredictable time, to involve the chest muscles, so that eventually the patient will die, unless he is artificially ventilated. In some cases, the disease is accompanied by extreme sensitivity of the skin and muscles of the body so that every slight touch causes severe pain. The patient is completely conscious, hears, understands and is aware of everything that is going on, but, as he cannot speak, his only means of communication is with an up-down or side-to-side movement of his eyes. Because of weakening of the chest muscles, he is prone to recurrent attacks of pneumonia. There is as yet no known treatment for the disease. I asked the *Rav zt"l* whether, when the time came that he needed to be artificially ventilated to keep him alive, there would be an obligation to do so. The *Rav zt"l* answered me that it would be permissible not to connect him to a respirator. I asked him whether when the patient was terminal, it would be permitted not to treat yet another attack of pneumonia with antibiotics, in view of his great suffering, both physical and mental. The *Rav zt"l* wrote to me that one would be required to treat him with oral antibiotics. As to intravenous antibiotics, if this

involved additional pain as a result of multiple injections, the patient should be asked whether he would want to be treated. If he wished to reject treatment, one possibly should respect his wishes. In any case Sabbath laws should not be set aside for the purpose (see below *Rav Eliashiv shlita's* ruling).

The *Rav zt"l*^[96] writes: There are many who have difficulty with the problem of treating a *gosses*. Some think that just as we set aside Sabbath laws (even) for *chayei sha'ah* (a short span of life), so we must force a *gosses* to receive treatment since he does not own himself to be able to concede even a moment of his life. However it would appear that if the patient is suffering great pain and torment, or even severe mental distress, although we must give him food and oxygen, even against his will, we may nevertheless desist from giving him medication that will cause him suffering, if this is his wish. If, however, the patient is Heaven-fearing and has not become deranged, it would be most desirable to explain to him that an hour of repentance in this world is better than all of the World to Come. This is what the *Gemara*^[97] means when it says that it is a privilege to suffer for seven years rather than die quickly.

2. RAV ELIASHIV *shlita*. The *Rav shlita* rules that a doctor must do everything he can to prolong the life of a patient even if there is no treatment for his basic disease as long as the patient has not become a *gosses*. However if the patient is suffering greatly and asks that his life not be prolonged with such treatments, it is permitted to passively let him die. One must do everything for a patient who is comatose including a full resuscitation, even if he has been defined as brain dead, as long as it is not obvious that he is suffering,

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even if the treatment is only meant to prolong his life. As proof the *Rav shlita* quotes the *Mishnah Berurah*^[98] who rules in the name of *rishonim* that if someone is found buried under rubble on *Shabbat*, even if his brain is crushed and he only has a short while to live, nevertheless, one rescues him so that he may live a little longer. (I have already noted in 339B above that *Rav Auerbach zt"l* wrote to me concerning this *Mishnah Berurah* that it could be that part of the brain was still functioning. *Rav Neuwirth shlita* told me that it could be that the part that was crushed was the skull and not necessarily the brain.)

Rav Eliashiv shlita was asked about a patient with ALS (see above) who asked not to be connected to a respirator. In a *responsum* (written in his name by *Rav Yosef Ephrati shlita*) the *Rav shlita* rules: A patient who is beyond cure, and all that medical science can offer him is a prolongation of *chayei sha'ah* at the cost of additional suffering due to the treatment itself, may refuse the treatment. If, however, the treatment is not accompanied by additional suffering, it is forbidden to listen to him. I also heard this personally from *Rav Eliashiv shlita*.

In a recent (August '01) conversation that I had with *Rav Eliashiv shlita* concerning a terminal patient, he ruled that since the patient was conscious and suffering, one was permitted to desist from intubating him or dialyzing him since these measures would only serve to prolong his *chayei sha'ah*. However the patient, who himself was a great sage, should be given the choice to decide what he wished his doctors to do. I asked him whether this ruling would change if the patient lost consciousness and he an-

swered: No, there would be nothing to gain by any further treatment such as artificial ventilation or dialysis.

3. RAV WALDENBERG *shlita*. The *Rav shlita* writes^[99] that as long as the patient has any spontaneous life even though he is a *gosses*, the majority of whom will certainly die, he is nevertheless given blood, antibiotics, oxygen and intravenous nourishment, just in case he will be revived, since a minority may live. Even if this will only prolong his independent life, this must be done. It is forbidden to stop any of the above and the doctor is obligated to continue to treat him with whatever treatment is necessary to prolong his independent life except at the time when his soul leaves his body.

4. RAV MOSHE FEINSTEIN *zt"l*. The *Rav zt"l* writes:^[100] It is certainly forbidden to do anything to prolong the *chayei sha'ah* of a patient when this is accompanied by suffering. In another *responsum*,^[101] the *Rav zt"l* writes: If the doctors have no further means to cure the patient or even to lessen his suffering, but only to prolong, by a little, his life of suffering, they should not give such a treatment... There are wicked people who say that a patient who is a *shoteh*, or was comatose because of injury and is lacking "quality of life" should not be treated. This is not so. There is an obligation to treat someone who is so mentally affected that some insensitive people call him a "vegetable," and say that he need not be treated if he becomes ill without suffering and can be cured to continue to live a long life. However it should be obvious and clear that if he were to become physically ill, one is obligated to do everything necessary to save him, regardless of his wisdom or intelligence.

100. אג"מ יו"ד ח"ב סי' קעד ענף ג
101. אג"מ חו"מ ח"ב סי' עד אות א

98. סי' שכט סעי' ד ביה"ל ד"ה אלא
99. שו"ת צ"ח אליעזר ח"י"ד סי' פ וראה גם שם סי' פא.
100. וראה גם בה"ג סי' פט אות יא

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The Rav *zt"l* also discusses a patient whose basic illness is incurable but medication can be given to prolong his life with its suffering, even for many years but not for a normal lifespan. He writes:^[102] If he now becomes *seriously ill* with a second disease, which does not cause additional suffering, he must be treated for it, even against his will, although he will still be left with the original disease and its suffering. However if the (second) illness causes additional suffering and neither it nor its suffering can be treated, so that people would prefer death rather than living a life of such suffering, it would appear that there is no obligation to treat him, if he does not wish such treatment which will merely prolong a life of suffering. And even if the patient's wishes are unknown, one may assume that he would not want it and there would not be an obligation to treat. The Rav *zt"l* also writes:^[103] A *seriously ill* patient whom the doctors think will live only seven days or less, who becomes ill with another life-threatening illness, such as pneumonia, must be treated as necessary, even though there is no cure for the underlying disease.

In yet another *responsum*,^[104] the Rav *zt"l* was asked whether there is an obligation to treat a patient with incurable cancer who would then only live a life of suffering for a few months. The Rav *zt"l* replies that if there was no alternative treatment, the patient should be told this and asked if he wishes to have the treatment. For if he prefers to live with suffering rather than die, he must be given the treatment, but if he does not wish to live with suffering the treatment must not be given, unless this is done to gain time so as to give the doctors an opportunity to bring in specialists.

5. SUMMARIZING THE ABOVE

(where differences of opinion exist Rav *Auerbach zt"l*'s opinion is quoted):

(1) Every patient must be fed and given fluids, oxygen and anything else, such as blood and insulin, as necessary, since these are intrinsic and natural requirements of every human being. If these can only be given artificially, for example, oxygen by mask or nasal cannula, food by *naso-gastric tube* or even *gastrostomy*, fluids intravenously, this must be done. Antibiotics and all routine treatments must be given as necessary. Rav *Auerbach zt"l* told me that if the patient was a *gosses* and would die from his disease before he would die from lack of the above, if he rigorously refused to have them given, one could desist from doing so. However treatment, once started, cannot be discontinued, if doing so will hasten his death.

(2) A patient with a chronic, incapacitating but non-terminal disease should be treated as any other patient, including the administration of full resuscitation if necessary even if only for *chayei sha'ah*. Thus the very aged and senile, someone with advanced *Alzheimer's disease* or a *shoteh* must all be treated like any young robust and healthy individual.

(3) A terminally ill patient should receive all that is enumerated in the first section of the summary. However if he requires extraordinary treatments — for example surgery, intubation and cardiac massage — for complications of his underlying disease, which will only prolong his *chayei sha'ah* but at the cost of additional pain and suffering to what he already has, one may desist from such treatments.

(4) A DNR (Do not resuscitate) decision can be made only if **all** the following three conditions have been met: (a) the patient is terminally ill with a non-treatable disease; (b) he is suffering greatly, physically

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or mentally; and (c) any further treatment will only prolong his *chayei sha'ah* and add to his suffering.

(5) The suffering of the family must never ever be a part of the decision making process.

(6) All nursing care necessary for his comfort must be given.

Remember! The decision "Do not resuscitate (DNR)" does not mean "Do not treat."

No decision to withhold treatment of any kind should be made without consultation with a *posek* who must be made aware, in detail, of the patient's condition and of the pros and cons of the treatment concerned.

Finally, in all situations, the patient must be given much TLC — Tender, Loving Care.

CONCLUSION. In conclusion, I cannot emphasize strongly enough that these are life and death decisions that can be made only by a *posek* who must be made fully aware of the medical facts as decided by a full team of medical experts. Although allowing a patient to die is not the same as actively killing him, it is nevertheless a very serious sin. Unlike the world at large that is more and more coming to believe that there is no difference between withholding and stopping nourishment, oxygen and treatment in a terminal — and even not so terminal — patient, and that both are permissible, *Halachah* clearly differentiates between the two. Stopping is never permissible and withholding may be, but only in very particular circumstances, and then only with the express ruling of a recognized and medically informed *posek*. No two patients and no two circumstances are exactly alike and only a *posek* can decide when one may allow a patient to die and when one must continue to fight even for a few more mo-

ments of life, even if only artificially maintained. As physicians, we should approach these very difficult problems of life and death with humility and realize our fallibility and lack of absolute knowledge. We must accept completely the tenets of our Torah as expounded by our Sages, with the readiness to listen to, and put into practice, what they tell us. We must be willing to control our emotions, including those of pity and compassion, within the boundaries set by the Torah. We, who hold life and death in our hands, must therefore continually remind ourselves that the Almighty only gave us permission to treat.

See also *Nishmat Avraham*, vol. 1 *Orach Chaim*, Siman 330Q and *Assia*, "Jewish Medical Ethics," vol. 1 p. 38, May '89.

6. LIVING WILL. It is quite commonplace in Western society for people to sign, or be asked to sign, a living will. The purpose of such a will is to let those treating the patient know what he wishes them to do or not do for him in the event of illness, if he is unconscious or unable to communicate with them because of the loss of his mental faculties, such as occurs in advanced *Alzheimer's disease*. These wills may allow even detailed advanced directives, for example, being given food and fluids by artificial means, dialysis, intubation, resuscitation. They may include directives as to when the doctors should desist from or stop anything that will prolong his life. He may also appoint a member of his family, a friend or his lawyer to act on his behalf. He may also be asked to donate his organs for medical research or for transplantation.

However, *Halachah* lays down quite clearly that one does not have any jurisdiction over or ownership of, one's body, be it in life or after death.^[105] Therefore

104. שם אות א

102. שם אות ב

103. שם סי עה אות ד

ה'ל' נוקי גוף ונפש סעי' ד. שרית אגני' יו"ד ח"ג סי' קמ. וכוך שמעתי מהגרשו"ז אויערבאך זצ"ל

105. רמב"ם הל' חובל ומזיק פ"ה ה"א והל' רוצח פ"א ה"ד. רדב"ז על הרמב"ם הל' סנה' פ"ח ה"ז. שו"ע הרב

when the period of dying is long drawn out, ^(E)it is forbidden to remove the pillow or cushion from under him because it is said that the feathers of certain fowl cause a prolongation of dying. Similarly, he should not be moved from where he is lying. How-

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one does not have the power to decide what may or may not be done to him when he is ill, certainly in decisions of life and death, and certainly not with regard to whether his life should be prolonged or curtailed, even if this is only done passively (that is by desisting from feeding or treating, for example). Neither may one donate any of his organs after death (however defined) without prior consultation with a recognized Orthodox *posek* whose views are those of *gedolei Yisrael*.^[106] Therefore, if one does wish to write such a will, it must contain only the statement that:

In the event of my being unable to participate in decisions of life and death concerning myself, I appoint Rabbi ... who will make all such decisions for me and who must be consulted at each step of my illness and for each separate decision, and his decision will be binding on all my caregivers as if they were mine. If Rabbi ... is not available, Rabbi ... should be consulted in his absence.

The Rabbis chosen must be recognized as those whose *halachic* outlook and decisions are based on those of *gedolei Yisrael* and who will consult with them in these difficult decisions. They must be consulted at the time that the will is prepared.

(E) it is forbidden to remove the pillow or cushion from under him.

ענף ג (עמ' רצ), וח' ח'ב' ס' עג (עמ' שה) וס' עד (עמ' שיב). ח' בית הלוי על הרמב"ם הל' רוצח פ"ב ה"ז-ח. שו"ת תורת חסד אדע"ז ס' מב ס"ק ה. שו"ת צ"ץ אליעזר ח"ט ס' יז פ"ו ופ"י ס"ק ה

110. פ' עקב ס' תתעא ומשלי ס' תתקמג

The *Aruch HaShulchan*^[107] explains that the *Shulchan Aruch* first tells us that it is forbidden to do anything that will hasten the patient's death, for example, removing the pillow from under his head. Even if one thinks that it is a *mitzvah* to hasten his death for his benefit, for instance, if he is a *gosses* for a long time and is obviously suffering greatly, nevertheless it is forbidden to do so, for this is *Hashem's* Will. Moreover, not only is it forbidden to pull the pillow away from under his head, thus moving his head a substantial distance, but even to move him a little is forbidden. And, even if one does not move him at all but does something that will hasten his death, this is also forbidden. Any of these will lead to an earlier death even if it is not done to him directly. On the other hand, if something prevents his soul from leaving his body, it may be removed, for since the impediment is external and not intrinsic to the patient, why should he suffer?

The *Gemara*^[108] tells of the elderly inhabitants of the town of Luz (where no one ever died) who, when they tired of living, walked outside the walls of the town and died. This is not considered like committing suicide, or doing something that is suicidal, for their action only led, indirectly, to death by "natural causes." See also the *Gemara*^[109] that tells us of the martyrdom of the *Tanna*, Rabbi Chanina ben Teradyon. The *Yalkut Shimoni*^[110]

106. שמעתי מהגרש"ז איערבאך וצ"ל. וראה גם בשו"ת אג"מ י"ד ח"א ס' קכט ענף ה וי"ד ח"ג ס' קמ

107. ס' ד

108. סוטה מו ע"ב. אך עיין בבראשית רבה פ' ויצא ס"פ סט שהגירסא שם היא "מוציאים אותם"

109. ע"ז יח ע"א. וראה בשו"ת אג"מ י"ד ח"ב ס' קעד

ever if there is something external to the patient or on his body that prevents his soul from leaving him, ^(F)it may be removed, since by doing so one does not do a positive action to shorten his life, but merely removes an impediment to his dying.

§4 A dying patient ^(G)must not be left alone to die. (It is a

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relates the story of a very elderly woman who came to Rebbe Yosi ben Chalafta complaining that she was tired of living a life bereft of pleasure since she could no longer taste food or drink. On questioning her as to what *mitzvah* she was careful to keep each day, she answered that even when she had something she wanted to do she would forgo it in order to go early to *shul* every morning. He told her not to do so for three days. She did as she was told and on the third day she took ill and died.

None of these examples should be mistaken for permission to take life or to hasten death, whether it be one's own or someone else's. They are all examples where an action, although premeditated and certain to lead to death, nevertheless only leads to an entirely natural death, and not one directly caused by man.

(F) it may be removed... but merely removes an impediment to his dying. A patient was admitted with an acute myocardial infarction (heart attack) and cardiac arrest requiring cardiac resuscitation and artificial respiration. Two days later his heart stopped again requiring another resuscitation that left him comatose. He went into kidney failure and stopped passing urine. His blood pressure was extremely low and he required intravenous drugs to raise it to normal, and to keep him alive. After this situation continued for another half day, and when all expert advice was unanimous that there

was no hope of recovery because of the extensive cardiac damage with the consequent complications, he was defined as a *gosses*. Every time that the bag containing the drug that kept his blood pressure up to normal was changed, his pressure fell immediately and it was obvious that he was being artificially and "cosmetically" kept alive. The family asked me to ask *Rav Auerbach zt"l* how long they were obligated to let this situation continue, prolonging his dying and his *gesisah*. The *Rav zt"l* answered that, in this particular situation, there was no longer an obligation to change the bag when the present one ran out, for this would come under the category of "removing the impediment to dying."

(G) must not be left alone. The *Taz*^[111] writes that this is because the soul becomes desolate upon leaving the body. The *Beit Lechem Yehudah*^[112] writes that if one is with a dying patient, and there is no one else present who can decide when the patient has died in order to straighten his limbs, close his eyes and do whatever else is necessary, he must not leave him even if he will miss the opportunity to pray.

Rav Auerbach zt"l wrote to me that if a *Cohen* is alone with a patient who is a *gosses*, he must leave the place (*not be under the same roof — author*). However, *Rav Newirth shlita* told me that this ruling needs further study for there is a controversy as to whether it is permissible or

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forbidden for a *Cohen* to enter a house where there is a *gosses*^[113] and the *Rama* rules that it would be "best to act strictly." And, although the *Shach*^[114] quotes the *Bach's* ruling that the *halachah* is that the *Cohen* must be careful not to enter, the *Shach* himself rules that if the *Cohen* was sleeping, there would be no need to awaken him so that he should leave. (If a corpse were there, then the *Cohen* must be awakened so that he can leave immediately — author.) If the *Cohen* is told and he is completely undressed, he may get dressed before leaving. Moreover, it would be possibly true to say that there is no obligation for the *Cohen* to leave. The language of the *Shulchan Aruch* is that it is forbidden for a *Cohen* to enter, meaning that it is only specifically entering such a room that is forbidden. However it would be proper to act strictly and leave the room, since other *poskim* have not differentiated between entering the room and remaining there (end of quote from *Rav Neuwirth shlita*).

Rav Auerbach zt"l wrote to me again: But there are *poskim* who rule according to the opinion in the *Gemara*^[115] that a *Cohen* is forbidden by the Torah to be in the same room as a *gosses*. Therefore, although we rule according to the opinion that this is not forbidden by Torah law, nevertheless we should be concerned that the *Cohen* may come to set aside Torah law (if the *gosses* dies while he is still in the room — author). Thus the *Shach* rules that it would be right for him to act strictly and leave.

On the other hand, *Rav Auerbach zt"l* told me that if the *gosses* is conscious and afraid to be left alone, and there is a possibility that were he to be left alone this fear

would hasten his death, it is forbidden for the *Cohen* to leave him.

The *Pitchei Teshuvah*^[116] writes that a doctor who is a *Cohen* may enter the place where there is a *gosses* in order to treat him, even if another doctor who is not a *Cohen* is already present. The *Chatam Sofer*^[117] also writes that it is obvious, even according to those *poskim* who rule that a *Cohen* may not enter a place where there is a *gosses*, nevertheless, a *Cohen* who is a doctor may, since in this case there is a possibility of *pikuach nefesh*. The *Cohen*-doctor should enter and help to treat, if he is needed. Moreover, even after the patient was thought to have died, if any slight movement is discerned, the *Cohen*-doctor must hurry in even though there is only a remote possibility of saving his life. And, concludes the *Pitchei Teshuvah*, although the *Chatam Sofer* was uncertain as to the ruling about the *Cohen*-doctor treating a *gosses* if another non-*Cohen* doctor was present, he should help in treating the *gosses*, for the patient may not be worthy to be cured by everyone.

Incidentally, *Rav Auerbach zt"l* told me that when Rabban Shimon ben Gamliel was beheaded by the Romans,^[118] Rebbe Yishmael, the *Cohen Gadol*, who was next in line for execution, took the head in his lap and cried bitterly. The *Rav zt"l* asked rhetorically: How could he do this, he was a *Cohen* and forbidden (by Torah law) to defile himself by touching the dead? (He could have wept without touching the corpse — author.) The *Rav zt"l* answered that it is obvious that he asked, and received permission, to do so. In this way his execution was delayed by a few more moments and it was permissible to do this to gain a few more moments of life.^[119]

mitzvah to stand by him at the time ^(H) *his soul leaves the body as it says: "Can one live eternally, never to see the pit? Though he sees that wise men die..."* [Psalms 49:10].)

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(H) his soul leaves the body.

ARTIFICIAL RESPIRATION. Mouth-to-mouth (in adults) or mouth-to-nose (in children) respiration has been known to modern medicine for about forty years. Many think that the first description of this is to be found in the *Tanach*, in the stories of the prophets Elijah^[120] and Elisha,^[121] each of whom revived a dead child in this way. However the text shows that this is not true. Elijah prayed to *Hashem* after having stretched himself over the boy three times. Elisha came some time after the boy had died. He also prayed to *Hashem*, lay upon the boy, placing his mouth upon his mouth, his eyes upon his eyes and his palms upon his palms. He stretched himself out over him and warmed the boy's flesh. He then walked up and down and again stretched himself out over the boy's body until the boy sneezed seven times and opened his eyes. In both cases no mention is made of mouth-to-mouth breathing and, in any event, in the natural way of things, lying on someone who is not breathing would hardly be conducive to a successful resuscitation. According to most of our Sages,^[122] in both cases the boys were dead and what the prophets did was to

pray to *Hashem* to resurrect them. However a source for mouth-to-mouth and mouth-to-nose respiration can be found in *Chazal*.^[123] We are told that when the spies came to Hebron, Talmy the King yelled (in surprise at these grasshoppers who looked like men)^[124] — author) and the spies fell on their faces to the ground. They (the inhabitants) started to puff into their mouths and blow into their noses (in order to resuscitate them^[125]) until they revived.

Incidentally, the practice of intubation — whereby a hollow tube is inserted into the windpipe of a non-breathing patient so that he can be ventilated artificially, either by manually operating a balloon connected to the tube or by connecting the tube to a respirator — is also only known to medicine during the last one hundred years or so. However the *Tur*, who lived some seven hundred years ago, writes^[126] that when a baby was born dead, the midwife would take a hollow reed (*shefoferet*), place it in the baby's throat and then puff into it, thus reviving him. The name *Shifra* (who, *Chazal* tell, us was *Moshe Rabbeinu's* mother *Yocheved* and was one of the two midwives in *Egypt* some 3400 years ago — author) comes from the word *shefoferet*.

117. שו"ת, יו"ד סי' שלח.
118. אבות דרבי נתן פ"ח ה"ג.
119. וראה באג"מ א"ח ח"ד סי"ט אות ה'

113. יו"ד סי' שע ס"א א
114. ס"ק ד
115. נזיר מג ע"א
116. סי' שע ס"ק א. ועיין שם בהנחלת צבי

120. מלכים א יז-יח-כב
121. מלכים ב ד יח-לה
122. ראה נשמת אברהם כרך ד יו"ד סי' שלט ס"ק ה (עמ' קנט)
123. ילקוט שמעוני רמז תשמב פ' שלח לך על הפסוק
124. ראה במדבר יג ג
125. זיה רענן שם
126. בעל הטורים שמות א:טו