THE LEGAL AND HALACHIC RAMIFICATIONS OF BRAIN DEATH

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Whether someone is dead has many important secular law consequences. As a matter of criminal law, a victim's condition determines, in part, whether a defendant who caused the condition is guilty of homicide. This condition also determines whether someone who subsequently mistreats the victim is guilty of a crime and, if so, of which crime. Whether a person is dead can also be decisive in determining his (or his beneficiaries') rights to various entitlements—whether public (such as the right to receive social security or medicare) or private (such as the right to receive annuities, insurance proceeds or pensions). Similarly, financial rights arising from wills, intestacy laws or conditional contracts all depend on whether a particular person is deemed to be alive or dead. In addition, a person's right to remarry depends on whether his or her spouse is dead.

These same penal and financial issues arise in connection with Jewish law (halacha), although sometimes with minor variations. In addition, there are some halachic concerns with no clear secular parallel, such as issues concerning tum'ah (ritual defilement) and the ineligibility, under certain circumstances, of a kohen (priest) who has killed somebody to participate in the priestly benediction.¹
How death is determined critically affects a variety of health care decisions discussed later. First, we will briefly consider whether the secular criteria for determining death are consistent with halacha, and second, we will identify specific problems posed by brain death.

SECOLAR CRITERIA AND HALACHA

Jewish law assumes that there are objective criteria that reflect the state of death, although halachic authorities disagree about what those criteria are. By contrast, secular law enjoys considerable flexibility as to how to define death. Secular laws are generally political decisions, the product often of compromise (and not infrequently of logically inconsistent compromise) of various overlapping and contradictory interests. Although there are exceptions, a typical politician does not ask what death really is, but asks which possible definition would best serve his interest. Indeed, many commentators explain that the primary sentiment driving the secular adoption of the brain death criteria was the ability to extract more transplantable organs.² It was believed that it would be more socially acceptable to take organs from the dead rather than from those living, so the definition of death had to change. Similarly, changing the definition of death would protect the people taking the organs from possible murder charges. The April 20, 1997 edition of the New York Times (Section 4, page 1) quotes Dr. Norman Fost, then a Visiting Professor at Princeton University, who cites these motivations:

The notion of brain death, Dr. Fost said, was concocted about 20 years ago by medical specialists who wanted to increase the supply of organs for transplants. "They said, 'Let's have a statute saying a person is dead when the brain is gone so we can take the heart out, and not be accused of killing anybody,'" he said.

Is "brain death" death in Jewish law? Most major rabbinic decisors in the United States and in Israel reject brain death as a basis for permitting the extraction of human organs.³ The position of R. Moshe Feinstein (Rav Moshe) is subject to dispute. In two responsa (let us call them responsa A and B) he explicitly states that a heart transplant constitutes double murder, murder of the donor and of the donee.⁴ Yet, if brain dead donors are halachically dead, how could transplants kill them? By calling a transplant a double murder, each of these responsa seems to indicate that brain death is not halachic death.

On the other hand, in at least two other responsa,⁵ Rav Moshe, according to some,⁶ indicates that brain death is death. Only one of these responsa (responsum C) was published before Rav Moshe's death. It was published between responsa A and B. Other authorities, however, including R. Shlomo Zalman Auerbach and R. J. David Bleich interpret responsa C as consistent with the position Rav Moshe took in responsa A and B to prohibit organ transplantation from a brain dead donor.⁷

Because of the controversy, one cannot be certain of Rav Moshe's position. Even so, many illustrious American rabbis reject brain death.

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1. R. Ovadiah Yosef, Yabia Omer VII, Oraach Chayim 13.
2. Jack M. Kress, "Xenotransplantation: Ethics and Economics," 53 Food & Drug Law Journal 353 (1998), p. 362. Interestingly, this goal-driven, and disingenuous, definition may have wholly unanticipated, and possibly undesirable, consequences in the other secular contexts in which determining death is legally significant.
R. J. David Bleich confirms that he was authorized to testify that R. Yitzhok Hunter, R. Yaakov Kaminetsky, and R. Yaakov Ruderman rejected brain death.8 R. Aaron Soloveichik,9 and others,10 clearly object to reliance on brain death. R. Bleich cites evidence that R. Yosef Dov Soloveichik also denied that brain death was halachic death.11

Moreover, a preponderance of prominent Israeli rabbis, including R. Shlomo Zalman Auerbach,12 R. Yosef Shlomo Eliashiv, R. Nathan Gestetner, R. Nissim Karelitz, R. Yitzhak Kulitz, R. Eliezer Shach, R. Eliezer Waldenberg, and R. Shmuel Mosser, rule that brain death may not be relied upon to extract organs.13 Consequently, irrespective of R. Moshe Feinstein’s position, a majority of the leading rabbis of our times refuse to use brain death criteria to permit organ extraction.

An affirmative act of killing is forbidden even in an effort to save the life of another Jew. Normative halacha, as reflected in the views of R. Yechezkel Landau,14 R. Shlomo Zalman Auerbach,15 R. Moshe Feinstein,16 R. Eliezer Waldenberg,17 and R. Yitzchak Weiss,18 specifically forbids sacrificing even the life of a non-viable person to save the life of a viable person.19 Even if the rabbinic opposition to the brain death standard reflects only a doubt (safer) as to whether a brain death patient is halachically dead, taking the organs from such a patient would constitute a safer affirmative act of murder. Because murder is biblically prohibited, halacha requires that one act stringently in doubtful cases as if there were no doubt.20

Those who believe that brain death criteria are halachically valid rely either on the Mishnah (Oholot 1:6) or the Babylonian Talmud (Yoma 85a). There are several problems with these approaches.

The Mishnah states that “And likewise cattle and wild beasts... if their heads have been severed, are unclean as carrion even if they move convulsively like the tail of a newt [or lizard]...[after being severed from the body].”21 In responsa C. where, according to some commentators, Rav Moshe approves of brain death, Rav Moshe says that he was told that if the liquid injection pursuant to a nudivce scan did not reach the brain, “it would be clear that the brain had no relevance to the body and also that the brain was already completely rotted and it would be as if the head had been severed [from the body].”22

Numerous medical studies, however, have demonstrated that neither of these two empirical propositions is true. One commentator writes, “…there is evidence that many of the individuals who fulfill all of the brain death test criteria retain clear evidence of integrated brain function at the level of the brainstem and mid-brain, and may have evidence of cortical function.”23 Moreover, there is strong evidence that the hypothalamus continues to regulate body temperature and that posterior pituitary function, namely antidiuretic hormone secretion, continues.24

R. Shlomo Zalman Auerbach explicitly ruled that a so-called brain dead patient could not be considered dead while his hypothala

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8. Ibid., p. 347, n. 56.
10. For example, see R. Menahem Klein, Mishneh Halakhah VII:386; R. Herschel Schachter, “Determining Death,” XVII Journal of Halacha & Contemporary Society 32, 40 (“One must act strictly not to remove organs from a person who is ‘brain dead.’”).
13. Ibid., p. 144.
15. Abraham S. Abraham, Mishnah Aramah, Yoreh De’ah 252:8, n. 24 (citing view); Assia 53:49 (vol. 14a-8), p. 27.
17. R. Eliezer Waldenberg, Tzitz Eliezer X:25(5).
18. R. Yitzchok Weiss, Minchat Yitzchak V:7(6-9).
20. For general discussions of this principle, see R. Ovdia Yosef, Yadah Omer U:1 I and R. Ben Zion M. H. Uziel, Piskei Uziel Bi-Shelot ha-Zeman’ 70.
22. R. Moshe Feinstein, Igrot Moshe, Yoreh De’ah III p. 132.
24. For example, see D. Alan Shemon, “‘Brainstem Death,’ ‘Brain Death’ and Death: A Critical Re-Evaluation of the Purported Equivalence,” 14 Issues of Law & Medicine 1125 (Fall 1998), p. 139; Robert Truog, supra n. 23; R. J. David Bleich.
PROBLEMS POSED BY THE BRAIN DEATH STANDARD

If someone who is brain dead is halachically alive, secular adoption of the brain death standard could, in a number of ways, lead to the murder of Jews and non-Jews. A goses is someone who is dying and is imminently terminal. His life is likened to the flame of a flickering candle. It is forbidden to touch or move such a person for any purpose other than to help the goses, lest such touching or movement extinguish the flame. According to some rabbinic decisors, including R. Shlomo Zalman Auerbach, people on respirators who are believed to be brain dead have the halachic status of safek goses, to whom these prohibitions would apply. Nevertheless, upon a finding of brain death, secular law would allow a hospital certain rights such as to cease treatment or to extract organs. Consequently, the hospital conducts tests to determine whether the patient is or is not brain dead. Such testing is not designed to benefit the patient who is tested, but in order to authorize the giving of his organs—or his hospital bed—to someone else. According to R. Shlomo Zalman Auerbach, these tests, either because they inevitably involve some touching or movement of the patient, or because they involve the injection of radioactive material (even small amounts, and even through existing intravenous lines), are absolutely prohibited and involve possible murder (shechitut damam).

Moreover, once a patient is deemed brain dead, secular law may permit doctors to take the patient's vital organs. As a matter of halacha, and irrespective of the goses question, the taking of such vital organs would kill the patient. In some jurisdictions, patients might be killed whether or not they, or any of their family members, consent to an organ donation. The current law in the District of Columbia, for instance, provides that if a brain dead patient's family is unavailable and there is no evidence that the patient or his family opposes organ donation, the Chief Medical Officer may authorize donation of the patient's organs. Although no other American jurisdiction currently has adopted this approach, the rule of presumed consent in several foreign countries is that organs may be extracted from those who are brain


27. Ibid., at 316–350. See also R. J. David Bleich, supra n. 24, at 1178–1182.
29. R. Tzvi Ashkenazi, Tesahrit Chacham Tzvi 77.
30. R. Moshe Sofer, Tesahrot Chacham Sofer, Tovch De’idah 333.
31. Rabbenu Bahya, Commentary on Deut. 6:5.
32. Note that if the absence of spontaneous respiration were sufficient to establish a person’s death, a perfectly conscious, but paralyzed, person would have to be declared dead.

dead unless the person has previously made specific objection. Under halacha, a patient’s consent is irrelevant. A person cannot kill someone merely because the victim consents, even if the victim is conscious and gives consent at the time he is killed. How much more so is this true when the victim may not fully understand when he gives consent or may wish to change his mind. In fact, in cases in which health personnel would not extract a brain dead patient’s organs without consent, the person giving consent may well be guilty of violating the biblical prohibition against placing a stumbling block before one’s neighbor known as lifnei iver (Lev. 19:14). If, as a matter of halacha, the brain-death standard involves murder, similar questions regarding the above biblical prohibition, as well as associated rabbinic prohibitions, arise in connection with the various roles that health care personnel play in the organ extraction process. Moreover, another biblical obligation, “Do not stand idly by the blood of your fellow” (Lev. 19:16), generally requires one to save the life of any person, including a brain dead patient. Similarly, there is a duty to admonish fellow Jews and to try to prevent them from transgressing Jewish law. There are various ways in which these principles could be triggered when organs are extracted.

According to R. Shlomo Zalman Auerbach, a person who registers to be an organ recipient in Israel may also violate the biblical lifnei iver prohibition. Rav Auerbach believes that the extraction of organs from a brain dead patient violates the prohibition against committing murder. The general rule is that if a wrongdoer would violate halacha even without one’s assistance or participation, one who provides such assistance does not violate lifnei iver, although he might be guilty of a rabbinic infraction, a discussion of which exceeds the scope of this paper. The author known as Mishneh le-Melech, however, argues that if the wrongdoer would not sin without the assistance of some other Jew, then any Jew who assists the wrongdoer violates lifnei iver. R. Auerbach assumes that the halacha is in accordance with Mishneh le-Melech. Furthermore, R. Auerbach contends that if no Jews would register as organ recipients in Israel, there would be so few potential recipients that it would be unlikely that organs would be extracted from brain dead patients. R. Auerbach argues that Jews who register in Israel as prospective recipients, by swelling the rolls of such recipients, cause the practice of routine organ extraction and violate lifnei iver. Implicit in R. Auerbach’s analysis seems to be the assumption that the culpability for violating lifnei iver by causing the doctor who extracts the organs to commit murder is tantamount to the culpability of murder itself. Otherwise, a patient with no other way to save his life should be able to violate the lifnei iver prohibition, following the general principle that one should violate the law rather than be killed.

Other rabbinic decisors, however, disagree with R. Auerbach on this issue and permit persons to register in Israel as prospective organ recipients. Even according to R. Auerbach, if someone in Israel could receive an already extracted organ without having previously registered as a potential recipient, he is permitted to accept the organ. Moreover, R. Auerbach permits a Jew to register as a potential recipient in the

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We have no yardstick to measure the value and importance of life, even in terms of Torah and mitzvot, for we violate the Sabbath even for an aged invalid afflicted with boils, even though he is deaf and dumb and completely insane, and even though he is incapable of performing any mitzvah and his life is merely a burden and great suffering to his family and prevents them from studying Torah and doing mitzvot—and even if, in addition to their great anguish, his family becomes more and more impoverished—even so it is a mitzvah for Gedole Yisrael [Great rabbis of Israel] to be involved in saving him and in violating the Sabbath [if necessary to do so].

Furthermore, it seems to me that even if this invalid is suffering so much that, as a matter of halacha, it is a mitzvah for one to ask [Hashem] that the invalid die, as the Ra"i writes in Nedairim and as cited in the poskim [rabbinic decisors], nevertheless, even at the moment one asks and prays to Hashem that the invalid die, even then one is obligated to get involved and try to save the invalid's life, even if it is necessary to violate the Sabbath repeatedly.42

A crucial pillar on which the initial proponents of the brain death criteria predicated their proposal was the assumption that those who are brain dead would inevitably die within an extremely limited period of time, certainly no longer than several days.43 Yet a recent study by a former proponent of the brain death standard, contradicts these

42. R. Shlomo Zalman Auerbach, Minchat Shlomo 91. Similarly, even if a person suffers so much that he tries to commit suicide, normative halacha requires that others try to save him and, if necessary, violate the Sabbath to do so. See, e.g., R. Moshe Feinstein, Igrot Moshe, Yoreh De'ah 11 no. 174, sec. 3 and Yoreh De'ah 11 no. 90; R. Yitzchak Herzog, Heichal Yitzchak, Even ha-Ezer 1 no. 3; R. Eliezer Waldenberg. Tzitz Eliezer VIII no. 15, Kuntras Meshihaot Nefesh, perek 4 and XVII, Kuntras Ren'asah beShabbat, perek 11 (citing authorities); R. Ovadia Yosef, Yabia Omer VIII, Orah Chayyina 37; R. Menashe Klein, Meshiach Halachot VIII:56 and IX p. 399.


41. A discussion of the constitutional law issues, however, exceeds the purview of this paper.
assertions by quoting approximately 175 cases of brain death with survival of at least 1 week, 80 of whom survived at least 2 weeks, 44 whom lived at least 4 weeks, 20 of whom at least 2 months, and 7 at least 6 months. One brain dead patient was still alive after 14-1/2 years! The author relates, “BD is nearly always a self-fulfilling prophesy of somatic demise through organ harvesting or discontinuation of support.”

As a matter of halacha it does not matter, even if the assumption is true that a brain dead patient imminently dies. Someone who is about to die soon is alive now. The author known as Minchat Chinuch says that even if Elijah the Prophet would tell us that a particular person were about to die, it would still be murder to kill him. Dr. Abraham S. Avraham, in a recent visit to Chicago, said that if someone jumped off the Sears Tower he probably would not have much quality of life on the way down. Yet, if a person on the fifteenth floor shoots through the window and kills him on the way down, that person is guilty of murder.

THE DEATH OF JEWS AND NON-JEWS

Even if organs are not extracted, such as when a brain dead patient—or his family—clearly objects to the extraction, secular reliance on brain death can lead to termination of treatment, which results in the patient’s halachic death.

Some people vigorously promote the concept of medical “futility”—disingenuously defining a treatment “futile” whenever it does not produce a result acceptable to the doctor, even if the treatment succeeds at keeping the patient alive. Some doctors may be understandably motivated by the desire to utilize their energies—and the hospital’s resources—to produce what seems to them to be societally beneficial results. Such physicians, however, choose their own values over halachic values.

Pursuant to the medical futility approach, even if brain death were not legally accepted as death, brain dead patients might be denied continued life-preserving treatment. However, courts are reluctant to accept such medical futility arguments. Indeed, there is considerable judicial support for a patient’s right to be treated—so long as the law recognizes that the patient is alive. Consequently, acceptance of the brain death standard can lead to the fatal termination of treatment to halachically live patients. Questions regarding lifnei ivri, its associated rabbinic rules, the duty to rescue (lo ta’amod al dam re’eche), the duty to admonish, and the duty to prevent Jews from transgressing halacha all arise in various termination of treatment scenarios. Halacha does, in very specific and unusual cases, allow termination of certain types of treatment. However, this question is not explored in this essay.

SECULAR LEGAL PROTECTION

Fewer legal protections exist against the brain death standard than against other proposed criteria for death. Nonetheless, I will briefly mention, without fully developing or exploring, some possibilities.

First, based on the scientific evidence regarding hypothalamic and pitu-

44. Ibid.
45. Ibid. p. 1542.
46. R. Yosef Babad, Minchat Chinuch 34.
ritary function, one can argue that the statutory language, “the irreversible cessation of all functions of the entire brain, including the brain stem, is death,” is not satisfied. Second, one may contend that the brain death standard unconstitutionally impairs one’s right to free exercise of religion.

Third, if a state has enacted a version of the Religious Freedom Restoration Act (RFRA), one might assert that imposition of the brain death standard violates that statute. The original federal statute known as RFRA was designed to invalidate any state or federal act that infringes upon a person’s religious freedom in the absence of a “compelling state interest.” But the Supreme Court held RFRA to be unconstitutional as applied to the states. Some states, however, enacted their own version of RFRA which might protect citizens against the application of brain death criteria.

Fourth, one might lobby for a statutory exception to the brain death criteria. Such an exception should be properly crafted to ensure both that it is constitutional and that the protection it gives is meaningful, rather than just theoretical. Meaningful protection would prevent insurance companies from refusing to cover expenses for the treatment of a brain dead patient.

Only one state, New Jersey, currently has such a statutory exception. The language of the exception refers only to religious objections. In one case, the court allowed a Paterson hospital to terminate life-support for a brain dead Catholic patient after determining that the objection of the patient’s family was not based on Catholic doctrine. Such a limiting construction of the statute is subject to constitutional attack.

51. It is at least arguable that a state could not constitutionally provide preferential treatment to a religiously based conception of the time of death over some other sincere belief as to the time of death.

The New Jersey statute raises another interesting problem when it states:

26:6A-6. Exemption to accommodate personal religious beliefs

The death of an individual shall not be declared upon the basis of neurological criteria pursuant 3 and 4 of this act when the licensed physician authorized to declare death has reason to believe, on the basis of information in the individual’s available medical records, or information provided by a member of the individual’s family or any other person knowledgeable about the individual’s personal religious beliefs that such a declaration would violate the personal religious beliefs of the individual. In these cases, death shall be declared, and the time of death fixed, solely upon the basis of cardiorespiratory criteria pursuant to section 2 of this act.

Thus, a woman who is religiously indifferent as to the definition of death may be declared dead based on brain death criteria even if her surviving husband’s religious beliefs reject brain death. Only the patient’s beliefs are relevant under the statute. Thus, the husband could find himself unable to obtain medical insurance to continue to have his wife treated and, in fact, may find it difficult to find medical facilities or practitioners willing to provide treatment even if he is paid for it personally.

Where its religious exception applies, however, the New Jersey statute prevents insurers from denying coverage based on brain death criteria. Nevertheless, from the language of the statute, which, in part,

52. It is also unclear exactly what the statute means when it refers to the “religious beliefs of the individual.” What if a woman considered herself a religious Jew but had no specific belief regarding the religious validity of secular brain death criteria? What if the rabbi from whom her husband seeks guidance advises the husband that the brain death criteria are not acceptable under Jewish law and the husband accepts this advice? Would it matter if the rabbi were the head of the congregation to which the woman belonged? These are all questions to which the answers are not intuitively obvious.
refers to “existing policies,” it is arguable that this protection only applies to policies entered into prior to enactment of the statute. 54

By regulation, New York State has a requirement that hospitals provide a procedure “for a reasonable accommodation of the individual’s religious or moral objection to the determination of death.” 55 Nevertheless, a legal case applying that provision revealed that very little real accommodation was necessary. 56 After a short period of time, the hospital was allowed to discontinue treatment.

A MORE GENERAL HARM

Finally, let us consider a more general result from the adoption of the brain death criteria. There used to be stability as to what death was—it was the irreversible cessation of cardiac and respiratory functions. The change to the brain death criteria, particularly because it was driven by policy goals to promote organ transplantations, seems to have pushed society down the proverbial slippery slope. Suddenly, the various vested interests realize one can play with the definition of death.

The Uniform Definition of Death Act, adopted in the vast majority of states, provides the traditional and brain death criteria as two separate and sufficient bases on which to declare a person dead. The President’s Commission promoted these two definitions as gauging essentially the same thing, pursuant to a “unitary theory” of death, maintaining that the irreversible loss of spontaneous breathing and heartbeat were essentially “surrogates” for the complete loss of brain functions. 57 Yet what has happened? Some scientists propose the use of

54. The argument would be that the statute, by introducing “novel” criteria for determining death, was not intended to restrict the preexisting policy rights of insureds. Nevertheless, it might be statutorily permitted to issue subsequent policies which would explicitly deny coverage once brain death criteria were satisfied.
55. N.Y. Comp. Codes R. & Regs., Tit. 10, Section 401.16.

organs from non-heart-beating donors. The University of Pittsburgh allows the taking of organs as soon as two minutes after the heart stops beating. The Institute of Medicine recommends a five minute delay. Both approaches permit extraction of organs even when, as a medical matter, it may be possible to resuscitate the donors. What about the requirement that the cessation of cardiac and respiratory function be “irreversible”? Is it enough that this cessation be “ethically” irreversible? If the donors have signed “do not resuscitate” orders, does this make resuscitation “ethically” irreversible? Is this what the drafters of the statute intended? One commentator points out that brain death criteria are not satisfied so soon after cessation of heart beat. 58 If the irreversibility of the cessation of pulmonary function is not determined by medical reality, but by the fact that no one wants it reversed, this statutory criterion cannot be a surrogate for brain death. Is this not orthographic gerrymandering?

Under Jewish law, most patients have to be resuscitated, and removing their organs instead of resuscitating them is forbidden. In Jewish law, anencephalic neonates, born with functioning brain stems, are full human beings. Killing them to take their organs is murder. Yet a statutory proposal in California would define anencephalic neonates as dead when born. Another secular approach argues that such neonates should not be considered “human,” but mere tissue. These secular arguments have increased in number and vehemence since the original definition of death was tampered with.

The Council on Ethical and Judicial Affairs of the American Medical Association once stated that it is ethically permissible for an anencephalic neonate to be an organ donor—a position the Council later retracted. Some people suggest that one should use organs from patients in “permanent vegetative states.” All major rabbinic authorities rule that such people are alive. Taking their organs would be murder. Even the term “vegetative” is offensive. There is nothing “vegetative” about a human life. In addition, the word “permanent” is inaccurate, because some such patients recover.

58. Ibid.
To demonstrate the real danger of the slippery slope, R. J. David Bleich cited a number of prominent scientists who had made alarming suggestions. One had a solution for children born with disabilities. He said we should redefine the birth process, and say that a child is only born three days after he exits the womb. Thus, if a child came out disabled, one could end its life for up to three days and not be guilty of murder, because the child had not yet been born.

One of my sons suggested that the same twisted logic could be used to define death as occurring three days after someone satisfies the common law criteria for death. Then any death of those who do not die without causing their deaths, because the deaths would not occur until three days later. I did not dream that I would ever hear anybody seriously suggest anything so outrageous. Then I read an article by Robert D. Truog in the Hastings Center Report. He says:

... perhaps the greatest objections to the higher brain formulation emerge from the implications of treating breathing patients as if they were dead... The thought of burying or cremating a breathing individual, even if unconscious, would be unthinkable for many people, creating a significant barrier to acceptance of this view into public policy.

One way of avoiding this implication would be to utilize a “lethal injection” before cremation or burial to terminate cardiac and respiratory function. This would not be euthanasia, since the individual would be declared dead before the injection. The purpose of the injection would be purely “esthetic.”

I find Truog’s words chilling. The slope is indeed both steep and slippery. We must be vigilant and must be concerned not only with our own personal actions, but also with the actions of those around us. We do not want to murder anyone or to be accomplices to murder. We do not want secular law to enable others to murder either. May Hashem protect us and may we find favor in His eyes.

59. Robert D. Truog, supra n. 23.
60. Ibid.