THE LEGAL AND HALACHIC RAMIFICATIONS OF BRAIN DEATH

Prof. Steven H. Resnicoff

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.

SECULAR 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 the 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.

1. R. Ovadiah Yosef, *Yabia Omer* VII, *Orach Chayyim* 15.

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.

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 responsum 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.

3. Some of these authorities do not definitively declare that brain death is not halachic death. Instead, they rule only that brain death cannot be relied upon as halachic death to permit the extraction of organs, which, if the "donor" is still alive, could violate the prohibition against murder.

4. R. Moshe Feinstein, *Igrot Moshe, Yoreh De'ah* II no. 174 (Responsum A) and *Igrot Moshe, Choshen Mishpat* II no.71 (Responsum B). See also *Igrot Moshe, Yoreh De'ah* II no.146, where Rav Moshe rejects brain death because neither the Talmud nor the Codes mentions that the brain is an indicator of life.

5. R. Moshe Feinstein, *Igrot Moshe, Yoreh De'ah* III: no. 132 (Responsum C) and *Igrot Moshe, Yoreh De'ah* IV no. 54 (Responsum D).

6. Fred Rosner and R. Moshe David Tendler, "Definition of Death in Judaism," XVII *Journal of Halacha & Contemporary Society* 14 (Spring 1989) and R. Moshe David Tendler, *Responsa of Rav Moshe Feinstein, Vol. 1, Care of the Critically Ill* (Ktav, 1996).

7. R. J. David Bleich, *Contemporary Halakhic Problems* IV (Ktav 1995), pp. 343–345, n. 15.

R. J. David Bleich confirms that he was authorized to testify that R. Yitzchok 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 Soloveitchik 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. Eliezar Shach, R. Eliezer Waldenberg, and R. Shmuel Wosner, 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. Yehezkel 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 *(safek)* as to whether a brain death patient is halachically dead, taking the organs from such a patient

8. Ibid, p. 347, n. 56.

9. R. Aaron Soloveichik, "The Halakhic Definition of Death," in Fred Rosner and R. J. David Bleich (eds.), *Jewish Bioethics Law*, pp. 296–302.

10. For example, see R. Menashe Klein, *Mishneh Halachot* 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.'").

11. R. J. David Bleich, *Time of Death in Jewish Law* (Z. Berman 1991), pp. 176–177.

12. R. J. David Bleich, *supra*, p. 178, n. 9.

13. Ibid. p. 144.

14. R. Yehezkel Landau, *Noda bi-Yehudah, Hoshen Mishpat, Mahadura Tinyana* 59.

15. Abraham S. Abraham, *Nishmat Avraham, Yoreh De'ah* 252:8, n. 24 (citing view); *Assia* 53–54 (vol. 14a–b), p. 27.

16. R. Moshe Feinstein, *Igrot Moshe, Yoreh De'ah* III p.132.

17. R. Eliezer Waldenberg, *Tzitz Eliezer* X:25(5).

18. R. Yitzchak Weiss, *Minchat Yitzhak* V:7(6–9).

19. But see R. Yosef Babad, *Minchat Chinuch* 296.

would constitute a *safek* 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 (*Ohalot* 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] that twitches spasmodically [after being severed from the body]."[21] In responsum 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 nuclide 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

20. For general discussions of this principle, see R. Ovadia Yosef, *Yabia Omer* I:1 and R. Benzion M. H. Uziel, *Piskei Uziel Bi-She'elot ha-Zeman* 70.

21. I use R. Bleich's translation. See R. J. David Bleich, *supra* n. 7 p. 318.

22. R. Moshe Feinstein, *Igrot Moshe, Yoreh De'ah* III p.132.

23. Robert D. Truog, "Is it Time to Abandon Brain Death," *Hastings Center Report* (January–February 1997), 29–37, p. 29.

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,

mus functions.[25] There is no evidence that Rav Moshe was ever advised regarding these ongoing brain activities. Inasmuch as parts of the brain continue to function, the proposition that a negative nuclide scan indicates that the brain has already completely rotted is incorrect. In addition, examinations reveal that even the *possibly* dysfunctional areas of a brain dead patient have not completely rotted.[26] Additional medical reasons why satisfaction of the brain death tests fails to demonstrate a condition synonymous with decapitation are discussed by R. J. David Bleich.[27]

The Talmud in *Yoma* 85a deals with the case of a person who, on *Shabbat*, is buried under the rubble of a fallen structure. Although digging would otherwise be prohibited on *Shabbat*, it is permitted here in order to possibly save a life *(pikuach nefesh)*. If, as one uncovers the person, one discovers that he is dead, one must stop digging until after *Shabbat*. Although the text alone is subject to various interpretations, Rashi's commentary, apparently uncontradicted by any early authorities, seems to be that evidence of cardiac activity, even after cessation of respiration, would indicate that the person is still alive.[28] Authors known as *Chacham Tzvi*,[29] *Chatam Sofer*,[30] and Rabbenu Bahya[31] are among the authorities who expressly list cessation of cardiac activity as a necessary condition for declaring someone dead. In addition, all of the contemporary authorities who reject brain death also agree that the absence of spontaneous respiration is not conclusive proof of death.[32]

"Moral Debate and Semantic Sleight of Hand," 27 *Suffolk University Law Review* 1173 (1993), at 1178–1182.

25. *Assia* 53–54 (vol. 14a–b), p.t 28.

26. R. J. David Bleich, *supra*, p. 323, n. 7.

27. Ibid, at 316–350. See also R. J. David Bleich, *supra* n. 24, at 1178–1182.

28. R. J. David Bleich, *supra* n. 7, at 337–338.

29. R. Tzvi Ashkenazi, *Teshuvot Chacham Tzvi* 77.

30. R. Moshe Sofer, *Teshuvot Chatam Sofer, Yoreh De'ah* 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, polio victim would have to be declared dead.

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 *(shefichut damim)*.

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.[33] 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

33. D.C. Code 1981, Section 2-1502.

dead unless the person has previously made specific objection.[34] Under halacha, a patient's consent is irrelevant. A person cannot kill someone merely because the victim consents,[35] 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.[36] 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.[37] The author known as *Mishneh le-Melech*, however, argues that

34. Kress, *supra* n. 2, at 363 (citing Austria, Belgium, Singapore and Spain as examples).

35. *Assia* 53–54 (vol. 14a–b), at 27–28.

36. R. Simha Bunam Lazerson, "Fixing the Moment of Death in Accordance with Halacha," *Assia* 55 (vol. 14c), pp. 72–73; *Assia* 53–54 (vol. 14a–b), pp. 23.

37. As to the scope and application, generally, of this rabbinic interdict, see Steven H. Resnicoff, "Jewish Law Perspectives on Suicide and Physician-Assisted Dying,"

if the wrongdoer would not sin without the assistance of *some* other Jew, then *any* Jew who so assists the wrongdoer violates *lifnei iver*.[38] 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.[39]

Other rabbinic decisors, however, disagree with R. Auerbach on this issue and permit persons to register in Israel as prospective organ recipients.[40] 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

XIII *Journal of Law and Religion* 289 (1998–99) and Steven H. Resnicoff, "Helping a Client Violate Jewish Law: A Jewish Lawyer's Dilemma," in Hannah G. Sprecher (ed.), *Jewish Law Association Studies X* (Global Publications 2000), 108–227.

38. R. Yehuda Rosanes, *Mishneh le-Melech, Hilchot Malveh ve-Loveh* 4:2.

39. Although R. Moshe Isserles rules that one may violate *lifnei iver* rather than allow oneself to be killed, *Shulchan Aruch, Yoreh De'ah* 157:1, not all authorities agree. See, e.g., Shalom Tavil, *Sha'arei Shalom, Sha'ar* 6, *Halaccha* 6 (citing various views) and R. Auerbach may agree with them. In addition, it is also possible that R. Auerbach distinguishes between the case of the *Shulhan Aruch*, in which a human coercer threatens to kill a person unless the person commits *lifnei iver*, in which R. Isserles rules leniently, and the case of a hopeful organ recipient, where the "threat" of death arises from some objective condition, in which no leniency may exist. See, e.g., R. Meir Simcha ha-Kohen, *Ohr Somyach, Yesodei ha-Torah*, 5:6 (contending that Maimonides distinguishes between cases involving human coercers and case involving objective threats).

40. R. J. David Bleich, *supra* n. 7, p. 343, n. 51 (citing authorities).

United States, because he assumes the organs would be extracted even if no Jews were to register.

In the United States, current technology does not permit someone to effectively donate vital organs after halachic death since the organs deteriorate too quickly. Donating organs before halachic death is proscribed under halacha because it involves murder of the donor. Receiving a vital organ that was wrongfully taken from someone before that person's halachic death is permitted so long as the recipient did not cause the organ to be taken. Receiving an organ that was already taken from a patient does no further harm to that patient and may save the recipient's life.

Some secularists argue that there should be a "price" for registering as a potential organ recipient. They suggest that, in distributing organs, preference be given to prospective recipients who have registered as donors, or even that non-donors be effectively excluded from receiving donations. It is contended that it is fair and right to require this so-called "reciprocity"—that one should receive an organ only if one is willing to give one. In my view, however, such an approach is fundamentally unfair and may well be unconstitutional.[41] This so-called reciprocity does not, in fact, ask the same thing from everyone. If a person—such as a religious Jew—believes that brain death is not death, then requiring him to agree to be an organ donor coerces him to consent to being murdered. On the other hand, for someone who believes in brain death, the requirement is infinitely less important. Furthermore, it is halachically improper for a Jew in the United States to register as an organ donor if this consent is necessary for doctors to take his organs, because, by consenting, the donor violates the *lifnei iver* prohibition. Thus, the purported "reciprocity" rule would mean that a Jew could only obtain the benefit of obtaining an organ donation in exchange for an affirmative abridgement of his religious freedom.

Considerations about the "quality" of the victim's life do not change the fact that taking the organs of a brain dead but not halachically dead person is murder. R. Shlomo Auerbach states:

41. A discussion of the constitutional law issues, however, exceeds the purview of this paper.

> 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 *Gedolei 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 *Ran* writes in *Nedarim* 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* II no.174, sec. 3 and *Yoreh De'ah* III no. 90; R. Yitzchak Herzog, *Heichal Yitzchak, Even ha-Ezer* I no. 3; R. Eliezer Waldenberg, *Tzitz Eliezer* VIII no.15, *Kuntras Meshivat Nefesh, perek* 4 and XVII, *Kuntras Ren'fuah beShabbat, perek* 11 (citing authorities); R. Ovadia Yosef, *Yabia Omer* VIII, *Orach Chayyim* 37; R. Menashe Klein, *Mishneh Halachot* VIII:56 and IX p. 399.

43. D. Alan Shewmon, "Chronic 'Brain Death': Meta-Analysis and Conceptual Consequences," *Neurology* 51 (December 1998), p. 1538.

assertions[44] 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."[45]

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 Chinnuch* 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.[46] 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.

44. Ibid.

45. Ibid. p. 1542.

46. R. Yosef Babad, *Minchat Chinnuch* 34.

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 iver*, its associated rabbinic rules, the duty to rescue *(lo ta'amod al dam re'echa)*, 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.[47] Nonetheless, I will briefly mention, without fully developing or exploring, some possibilities.[48] First, based on the scientific evidence regarding hypothalamic and pitu-

47. In *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1989), the United States Supreme Court held that the State of Missouri had an important interest in the "life" of a patient who was diagnosed as in a permanent vegetative state (pvs). Both the State and the patient's family agreed that the patient was a person. The Supreme Court held that the State's interest in the patient's life permitted the state, before allowing termination of treatment to a pvs patient, to require that the patient's family provide convincing evidence that the patient would have wanted treatment stopped. The Cruzan case, although not every justice's view, can be used to oppose any state effort to define pvs patients as dead. See Douglas O. Linder, "The Other Right-to-Die Debate: When Does Fourteenth Amendment 'Life' End?," 37 *Arizona Law Review* 1183 (1995).

48. For a more comprehensive discussion of these arguments, see, e.g., Charlotte K. Goldberg, "Choosing Life After Death: Respecting Religious Beliefs and Moral Convictions in Near Death Decisions," 39 *Syracuse Law Review* 1197 (1988); Chaim Dovid Zwiebel, "Accommodating Religious Objections to Brain Death: Legal Considerations," XVII *Journal of Halacha & Contemporary Society* 49 (Spring 1989); R. J. David Bleich, *supra* n. 9, pp. 99–102.

itary 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.[49] 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.[50] Such a limiting construction of the statute is subject to constitutional attack.[51]

49. N.J. Stat. Ann, Section 26:6A-5.

50. Jennifer Van Doren, "Man Removed from Life Support, Family Plans Negligence Suit," *The Record*, 2/20/98, 1998 WL 5796480.

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.[52] 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 paid for it personally.

Where its religious exception applies, however, the New Jersey statute prevents insurers from denying coverage based on brain death criteria.[53] 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.

53. N.J. Stat., Section 26:6A-7.

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 400.16.

56. Matter of Long Island Jewish Medical Center, 168 Misc.2d 576, 641 N.Y.S.2d 989 (1996).

57. Jerry Menikoff, "Doubts About Death: The Silence of the Institute of Medicine," 26 *Journal of Legal & Medical Ethics* 157, 158 (1998).

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.

EPILOGUE

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 a person could suffocate those he does not like 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*.[59] 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 "aesthetic."[60]

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

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

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.