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Lecture on Brain-Stem Death
&
Organ Donation in Jewish Law

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THE BRAIN DEATH CONTROVERSY IN JEWISH LAW

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Historically, death was not particularly difficult to define from either a legal or halachic standpoint. Generally, all vital systems of the body —respiratory, neurological and circulatory — would fail at the same time and none of these functions could be prolonged without the maintenance of the others. Today, with major technological advances in life support, particularly the development of respirators and heart-lung machines, it is entirely possible to keep some bodily systems "functioning" long after others have ceased. Since we no longer face the inevitable simultaneity of systemic failures, it has become necessary to define with greater precision and specificity which physiological systems are indicators of life and which (if any) are not, especially in light of the scarcity of medical resources and the pressing need for organs for transplantation purposes. In recent years, the concept of "neurological death" commonly called "brain death," "whole brain death" or "brain-stem death" (and, sometimes, inaccurately-termed "cerebral death") has gained increasing acceptance within the medical profession and among the vast majority of state legislatures and courts in the United States. Whether this standard comports with *halachah* is a matter of great controversy among rabbinic authorities.[1] The purpose of this article is not to take sides nor in any way resolve the halachic debate. Its purpose is more modest. This article will attempt to explain to the general reader: (1) what is "brain death" and how it is clinically determined; (2) some (not all) of the major sources on whether it is an acceptable criterion of death from the standpoint of *halachah;* (3) the viewpoints of contemporary authorities and (4) the halachic and legal ramifications of one view or the other.

What Is "Brain Death" And How Is It Diagnosed?

The concept of total "brain death" as an alternative to the older definition of irreversible circulatory-respiratory failure was first introduced in a 1968 report authored by a special committee of the Harvard Medical School[2] and was later adopted, with some modifications, by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical Research, as a recommendation for state legislatures and courts.[3] The "brain death" standard was also employed in the model legislation, known as the Uniform Determination of Death Act, which has been enacted by a large number of jurisdictions and the standard has been endorsed by the influential American Bar Association. While New York is one of the few jurisdictions that does not have a "brain death" statute, it has adopted the identical rule through the binding decisions of its highest court.[4]

The rapid, and near universal, acceptance of neurological criteria of death is probably attributable to three factors. First, moving the time of death to an earlier point facilitates organ transplants, and indeed makes such transplants possible. Organs, especially the heart and liver, are suitable for transplantation only if they are removed at a time when blood is still circulating. Once cardiac arrest stops circulation, rapid tissue degeneration makes the organ unsuitable for such use. Given the increasing success of these operations and the relative uselessness (from a secular standpoint!) of sustaining "brain dead" patients on respira-

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Editor's Note

As Rabbi Angel notes, the more accurate term for this phenomenon is "brain-stem death." Rabbi Breitowitz chose to employ "brain death," the term commonly used in the popular press, to enable the readers of his article to relate its contents to reports that appear in the media.

FOOTNOTES

1. *The literature on brain death — medical, legal, halachic—is huge and only selective citations can be given here. The best nonhalachic survey of the legal and medical issues can be found in a report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research,* Defining Death *(1981). Halachic treatment (as well as good discussion of related legal and medical approaches) can be found in a just-published book of Rabbi J. David Bleich,* Time Of Death In Jewish Law *(Z. Berman, 1991) which is a compendium of Bleich's previously-published Hebrew and English articles expounding his well-known opposition to "brain death" criteria. An excellent symposium (which also presents R. Tendler's opposing view) appears in volume 17 of the* Journal Of Halacha And Contemporary Society *(Spring 1989). Finally, the October 1991* Jewish Observer *contains an interesting exchange of correspondence between Rabbi Tendler and Chaim Zweibel, General Counsel of Agudath Israel of America.*
2. *A Definition of Irreversible Coma - Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, 205*JAMA *337-350 (1968).*
3. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Defining Death: Medical, Legal, and Ethical Issues in the Determination of Death (Government Printing Office, 1981).*
4. *See People v. Eulo, 63 N.Y. 2d 341 (1984).*
5. *Brain stem death occurs when, due to trauma,*

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tors, there is a natural temptation to redefine death so that organs become available to serve higher ends. It is no coincidence that the movement towards acceptance of "brain death" coincided with the development of cyclosporine and other anti-rejection drugs.

Additional considerations involve triage and allocation of scarce medical resources. It is extraordinarily expensive (in terms of equipment and labor) to maintain patients on respirators and other life support and using these resources for "brain dead" patients prevents their deployment for those who stand a better chance of recovery. Yet a third impetus towards redefinition is an understandable desire to spare families the agony and anguish of watching a loved one experience a protracted death.

For whatever the reason, the current definition of "death" is now a composite one: death is deemed to occur when there is either irreversible cessation of circulatory and respiratory functions (the "old" definition) or *irreversible cessation of all functions of the entire brain including the brain-stem.*[5] The principal utility of this second standard permits declaring as dead a comatose, ventilator-dependent patient, incapable of spontaneous respiration but whose heart is still beating due to the provision of oxygen via an artificial breathing apparatus.

At the outset, two points must be made absolutely clear. First, contrary to the misperceptions of many lay people, "brain death" is not synonymous with merely being comatose or unresponsive to stimuli. Indeed, even a flat EEG (electroencephalogram) does not indicate brain-stem destruction. The human brain consists of three basic anatomic regions: (1) the cerebrum; (2) the cerebellum; and (3) the brain-stem consisting of the midbrain, the pons, and the medulla, which extends downwards to become the spinal cord. The cerebrum controls memory, consciousness, and higher mental functioning. The cerebellum controls various muscle functions while the brain-stem controls respiration and various reflexes (e.g., swallow and gag). A patient may be in a deep coma and nonresponsive to most external stimuli but still very much alive. At most, such patients may have a dysfunctional cerebrum but, by virtue of the brain stem remaining intact, are capable of spontaneous respiration and heartbeat. Indeed, the most famous of these cases, Karen Ann Quinlan, was able to live off a respirator for almost a decade. While such persons may be popularly referred to as brain dead, they are more accurately described as being in a persistent vegetative state [PVS] and are very much alive under both secular and Jewish law. Removal of organs from such a donor would indisputably be homicide. This is even more true for the phenomenon known as being "locked-in" where the patient is fully conscious but unable to respond.

A second point to keep in mind is the relationship among respiration, circulation, and the brain. The heart, like any organ, or indeed cell, needs oxygen to survive and without oxygen will simply stop beating. Respiration, in turn, is controlled by the vagus nerve whose nucleus is located in the medulla of the brain-stem. The primary stimulant for the operation of the nerve is the presence of excess carbon dioxide in the blood. When stimulated, the nerve causes the diaphragm and chest muscles to expand, allowing the lungs to fill with air. Spontaneous respiratory activity can therefore not continue once there is brain stem destruction or dysfunction. The heart, on the other hand, is not controlled by the brain but is autonomous. It is obvious, of course, that unless the patient is hooked up to a breathing apparatus, destruction of the brain-stem will inevitably lead to cardiac cessation not because of any direct control the brain stem exercises over the heart but simply because the heart muscle is deprived of oxygen. Where, however, the patient's intake of oxygen is being artificially maintained, the heart may continue to beat and blood circulate for a considerable time after total brain-stem destruction.[6] The time lag between brain death and circulatory death is on the average only two to ten days, though there is at least one case on record where a woman's heart continued to beat for 63 days after a diagnosis of brain death.[7] (Indeed, she delivered a live baby through a Caesarean section). It is this crucial gap between cessation of spontaneous respiration and cessation of heart beat that defines the parameters of the phenomenon called "brain-stem death."

The steps taken in a clinical diagnosis of "brain death" vary from medical center to medical center and those differences may have significant halachic repercussions but will typically involve the following:[8] (1) a determination that the patient is in a deep coma and is profoundly unresponsive to external stimuli; (2) absences of elicitable brain-stem reflexes such as swallowing, gag, cough, sigh, hiccup, corneal, and vestibulo-ocular (ear); (3) absence of spontaneous respiration as determined by an apnea test;[9] and (4) performance of tests for evoked potentials testing the brain-stem's responsiveness to a variety of external stimuli. These tests are to be repeated between 6-24 hours later to insure irreversibility — with life support supplied for the interim — and a specific cause for brain dysfunction must be identified before the patient

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the brain swells and the pressure in the skull rises to exceed blood pressure. The brain is deprived of blood and oxygen and the brain tissue begins to liquefy [lyse]. While total dysfunction occurs minutes after deprivation of oxygen, total liquefication does not take place until some time after cardiac death, indeed sometimes several days after internment.

6. *A good description of the scientific aspects of brain death can be found in* 24 Tradition *1, 8-14 (Summer 1989) (Dr. Jakobovitz's annotations to the Chief Rabbinate's ruling) and in* Kielson, "Determining the Time of Death-Medical Aspects," 17 Journal of Halacha and Contemporary Society *7-13 (Spring 1989).*
7. *See sources cited in* Bleich, "Of Cerebral Cardiac Death", 24 Tradition *44, 61 n.5 (Spring 1989), reprinted in* Time Of Death In Jewish Law, *pp. 129-160.*
8. *Much of this information was derived from the articles cited in note 6 and a communication of Rabbi Moshe Tendler to the members of the RCA dated Summer 1991.*
9. *Apnea testing takes many forms. One standard test may involve providing the patient with 100% oxygen for 20-30 minutes through the respirator and then shutting off the machine, thereby allowing the carbon dioxide in the blood to rise but at the same time allowing for passive gaseous diffusion of oxygen through the tubes of the machine or through a tube inserted directly into the trachea. This allows the CO^2 in the blood to rise, enabling a test of the respiratory response without depriving the patient of necessary oxygen in the interim. While a normally-functioning brain-stem would induce respiration at a fairly low pressure of CO^2, a diagnosis of death will not be confirmed until the CO^2 pressure is considerably above the normal triggering point but nevertheless fails to elicit a respiratory response.*
10. *Note that a flat EEG (electroencephalogram) is not a necessary condition for a brain death diagnosis. A flat EEG does not in any event insure brain-stem death but at best, indicates only absence of (perceptible) upper brain activity. Conversely, even in patients with a brain death diagnosis, sporadic, minimal EEG activity has occasionally been found. The Harvard criteria regard a flat EEG as helpful and confirmatory but not essential to a brain death diagnosis.*
11. *Compare letter of Rabbi Tendler printed in*

will be declared dead.[10]

An additional test that is sometimes employed (when other clinical tests are deemed inconclusive) is radionuclide cerebral angiography [nuclide or radioisotope scanning]. A harmless radioactive dye is injected into the patient's bloodstream, typically through the intravenous tubing already in place. In brain dead patients, scanning will reveal an abrupt cutoff of circulation below the base of the brain with no visible fluid draining away. While many observers have described this test as nearly 100% accurate, others have claimed the brainstem circulation, especially in the medulla, is not well-visualized and absolute absence of blood flow to this region cannot be diagnosed with certainty.[11]

Note that a patient who is brain dead may theoretically continue to have muscle spasms or twitchings or even sit up. Whether this so-called Lazarus Reflex is an indicator of life will be discussed in due course; what is undisputed is that such movements are coordinated not from the brain but solely from the spinal cord. It should also be noted that there are several instances of clinically brain dead patients carrying live babies to term.[12] Again, this may or may not be significant.

Is Brain-Death An Acceptable Halachic Criterion Of Death?

This question breaks down into two distinct issues. First, is irreversible dysfunction of the entire brain a valid criterion of death? Second, even if the answer is yes, are the medical tests currently utilized in establishing such a condition halachically valid indicators of its presence? One could easily subscribe to "whole brain" death as a concept and yet reject the particular diagnostic tools employed.

There are anumber of halachic sources that are relevant to the question of "brain death," the most important being the *Mishnah* in *Oholot 1:6*, the Talmud in *Yoma 85a*, passages in *Teshuvot Chatam Sofer* and *Teshuvot Chacham Tzvi*, and various pronouncements of R. Moshe Feinstein in his *Iggrot Moshe*.[13] This is not the forum for a detailed examination of these sources other than to note that a number of them are equivocal and subject to a variety of interpretations.

Briefly stated, the *Mishnah* in *Oholot* establishes the dual propositions that, first, physical decapitation of an animal is a conclusive indicator of death and second, some degree of subsequent movement is not incompatible with a finding of death provided that such movement qualifies as spastic in nature (*pirchus be'alma)* like the twitching of the "severed tail of a lizard." The Talmud in *Yoma 85a*, dealing with a person trapped under a building, rules that a determination of respiratory failure establishes death without the need to continue to uncover the debris to check heartbeat. Proponents of "brain death" argue that a dysfunctional brain-stem is equivalent to a decapitated one, (physiological decapitation), that destruction of the brain stem inevitably means inability to spontaneously respire (meeting the criterion in *Yoma*) and that subsequent "movement," whether the Lazarus Reflex or the heartbeat, falls into the category of *pirchus* since such movement is not coordinated from a "central root and point of origin,"[14] i.e., the brain.

The counter-arguments are: first, physiological dysfunction is not the equivalent of anatomical decapitation. The only phenomenon short of actual decapitation that might similarly qualify is a total liquefication (lysis) of the brain, something that probably does not occur until well after cardiac arrest. Second, according to Rashi in *Yoma*, cessation of respiration is a conclusive indicator of death only when the person is "comparable to a dead man who does not move his limbs." While certain forms of postmortem movement may be characterized as merely spasmatic and would not qualify as "movement," the rhythmic coordinated beating of a heart and the maintenance of a circulatory system can hardly be characterized as *pirchus* since such heartbeat is life-sustaining and identical to that in an normally-functioning individual. Reference is also made to the *teshuvot* of *Chatam Sofer* and *Chacham Tzvi* who both write that it is only the cessation of respiration *and* pulse (heartbeat) that allows for a determination of death and the *Gemara* in *Yoma* merely creates a presumption that upon cessation of respiration and an appropriate waiting time, one is permitted to assume that heartbeat has stopped as well. Since this assumption is obviously not true in the case of "brain dead" patients hooked up to respirators whose heartbeats are monitored, such patients may not be declared as dead.

The position of R. Moshe Feinstein, whose *psak* could well have been definitive at least in the United States, is unfortunately a matter of some controversy. His son-in-law, Rabbi Dr. Moshe Tendler, a Rosh Yeshiva in RIETS and Professor of Biology, Yeshiva College, has vigorously argued that Rabbi Feinstein supported a total "brain death" standard based on the concept of decapitation in *Mishnah Oholot*.[15] His position finds strong support in *Iggrot Moshe, Yoreh Deah III* no. 132 which seems to validate nuclide scanning as a valid determinant of death. This is also the understanding of the Israeli Chief Rabbinate, R. David Feinstein, (who admits, however, to having no inside information on the topic) and R. Shabtai Rappaport, the editor of R. Moshe's responsa.[16]

Others, however, have interpreted his *teshuvot* very differently, pointing out that R. Moshe reiterated twice (indeed, in one instance two years after the "nuclide scanning" reference) that removal of an organ for transplantation was murder of the donor.[17] (R. Tendler's re-

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the October 1991 Jewish Observer *with the degree of skepticism expressed by Dr. Keilson,* supra *note 6, at 12. Indeed, some earlier studies had indicated that angiography only measures* deficit, *not cessation of blood flow even to the cerebrum and that up to 24% of normal blood flow could still be present. Modern refinements in these techniques probably allow for a definitive determination of zero blood flow to the cerebrum but "persistent perfusion and survival of the brain stem" remain a distinct possibility. See studies cited in Bleich,* supra *note 7 , at notes 13-21. I have no information as to the accuracy of any of those studies; I simply point them out for the edification of the reader.*

12. *See the sources in the medical literature cited by Bleich,* supra *note 7, at 62 n.5 (at 133, n.5 in the book).*
13. *See* Teshuvot Chatam Sofer, Yoreh Deah *no. 338;* Teshuvot Chacham Tzvi, *no. 77; and* Iggrot Moshe, Yoreh Deah *II, nos. 164, 174;* Yoreh Deah *III, no. 132;* Choshen Mishpat *II, nos. 72-73.*
14. *See* Peirush HaMishnayot *of Rambam to* Oholot *1:6.*
15. *See, for example, Rabbi Tendler's letter in October 1991* Jewish Observer.
16. *The Chief Rabbinate's ruling accepting "brain death" explicitly relies on R. Moshe for authority. See* Techumim *Vol. 7, 187-192 (5746) and Jakobovitz, "Brain Death and Heart Transplant: The Israeli Chief Rabbinate's Directives," 24* Tradition *1-14 (Summer 1989); R. David's understanding is quoted by R. Tendler in his own October letter to* JO; *and R. Shabtai Rappaport's letter appears in 12* Assia *no. 3-4 (Kislev 5750), pp.10-12.*
17. *See* Iggrot Moshe, Yoreh Deah *II, no. 174*

sponse: Both of those *teshuvot* refer to comatose patients in a persistent vegetative state who are capable of spontaneous respiration and are very much alive and not to those who are respirator-dependent). They also cite R. Moshe's express opposition to proposed "brain death" legislation in New York unless it contained a "religious exemption."[18] (R. Tendler's response: Although R. Moshe accepted the concept of "brain death," his support of an exemption was simply to accommodate the views of other religious Jews who disagree). Finally, they note that in the very *teshuvah* upholding the use of angiographic scanning, R. Moshe approvingly cites *Teshuvot Chatam Sofer*, Y.D. no. 338 (who insists on absence of *dofeik*, pulse, and indeed states that one is dead only if there is an inability to breath and no other sign of life is recognizable with them (*Vegam lo nikarim bahem inynei chiyut achairim).* Their conclusion: R. Moshe merely validated nuclide scanning as a criterion to verify *one* determinant of death, i.e., absence of respiration, but did not maintain that it alone was sufficient.[19] This author certainly lacks both the competence and the authority to resolve this dispute but presents it to the reader so that he may see why this area has been so fraught with unresolved controversy.

Contemporary Views

The following is a cataloguing of the major schools of thought among contemporary *poskim* and *rabanim* on the brain death issue and some of the recent events connected with this question.

1. As noted, Rabbi Dr. Moshe Tendler, has been the most vigorous advocate for the halachic acceptability of brain death criteria. In his capacity as chairman of the RCA's Biomedical Ethics Committee, Rabbi Tendler spearheaded the preparation of a health-care proxy form that, among other innovations, would authorize the removal of vital organs from a respirator dependent, brain dead patient for transplantation purposes. Although the form was approved by the RCA's central administration, its provisions on brain death were opposed by a majority of the RCA's own *Vaad Halacha* (Rabbis Rivkin, Schachter, Wagner and Willig).[20]

2. The Israeli Chief Rabbinate Council, in an order dated Cheshvan 5747, has also approved the utilization of "brain death" criteria in authorizing Hadassah Hospital to perform heart transplants but on a somewhat different theory than Rabbi Tendler. Positing that cessation of independent respiration was the only criterion of death (based on *Yoma* 85 but somewhat inexplicably also citing *Chatam Sofer*, Y.D. no. 338), the Rabbinate ruled that brain death was confirmatory of irreversible cessation of respiration. Theoretically, this would allow for a standard far less exacting than clinical brain death, perhaps nothing more than failure of an apnea test. Indeed, Dr. Steinberg, the principal medical consultant to the Rabbinate, dismissed any requirement of nuclide scanning since destruction of the brain's respiratory center may be conclusively verified without such test.[21] Since defining "death" exclusively in terms of inability to spontaneously respire would lead to the absurdity that even a fully-conscious, functioning polio patient in an iron lung is dead, a subsequent communication from R. Shaul Yisraeli, a member of the Chief Rabbinate Council, qualified the Rabbinate's ruling by imposing, as an additional requirement, that the "patient be like a stone without movement,"[22] (but apparently maintaining that heartbeat does not qualify as such movement). It is probable, though not certain, that R. Tendler's test of "physiological decapitation" and the Rabbinate's newly formulated test of "respiratory failure coupled with profound nonresponsiveness" amount to the same thing though the Rabbinate has not retracted from its noninsistence on nuclide scanning.

3. Rabbi J. David Bleich, Rosh Kollel at Yeshiva University and author of many papers and a recently published book on the subject, has stated that anything short of total liquification (lysis) of the brain cannot constitute the equivalent of decapitation. He further maintains, relying on Rashi in *Yoma*, the *Chatam Sofer*, and the *Chacham Tzvi*, that even total lysis would be insufficient in the presence of cardiac activity but dismissed the matter as being only of theoretical importance since cessation of heartbeat inevitably occurs prior to total lysis. He also asserts that his position is not based on stringency in case of doubt but rather on the certainty that the brain dead patient is still alive, a certainty that could be relied upon even to be lenient, e.g., a Cohen may enter a "brain dead" patient's room without violating the prohibition of *tumat met*.

4. Rabbi Aaron Soloveichik, Rosh Yeshiva of Brisk and RIETS, has gone slightly further than Rabbi Bleich. Even if the heart has stopped and the patient is no longer breathing, the patient is alive if there is some detectable electrical activity in the brain.[23] It has been noted, however, that there is no recorded instance of this phenomenon occurring.

5. Rabbi Hershel Schachter, Rosh Yeshiva and Rosh Kollel of RIETS, has taken a more cautious view. Conceding that the concept of "brain death" may find support in the decisions of R. Moshe, he concludes that such a patient should be in the category of *safeik chai, safeik met* (doubtful life). While removal of organs would be prohibited as possible murder, one would also have to be stringent in treating the patient as *met, e.g.*, a Cohen would not be allowed to enter the patient's room.[24]

6. Most contemporary *poskim* in Eretz Yisrael (other than the Chief Rabbinate) have unequivocally repudiated the concept of death based on neurological or respiratory criteria.[25] Of special significance are recent letters[26] signed by R. Shlomo Zalman Auerbach and R. Yosef Elyashiv, widely acknowledged as the leading *poskim* in Eretz Yisrael, (if not

(5728) and Choshen Mishpat II, *no. 72 (5738). The* teshuvah *in* Yoreh Deah III, *no. 132 cited in support of brain death criteria was authored in 5736.*

18. *Written statement of 8 Shevat 5737.*

19. *It should be noted, however, that the* teshuvah *concerning nuclide scanning was addressed to R. Tendler for his own guidance, surely entitling his understanding of the responsa to great weight.*

20. *The current status of the original RCA proxy is unclear. In light of the negative* psak *of Rabbis Auerbach and Elyashiv, Rabbi Marc Angel, the President of the RCA, circulated a cover letter to the membership cautioning that the proxy form should not be used until the individual* rav *has thoroughly studied the issue and consulted experts in the field. Rabbi Tendler has similarly stated that at least portions of the proxy form were merely a first draft to be circulated to* rabanim.

21. *Dr. Steinberg's paper, originally prepared to assist the Chief Rabbinate in their deliberations, appears in* Or Hamizrach *(Tishrei 5748).*

22. *Quoted in Bleich,* Time Of Death *at 167-168.*

23. *His views may be found in 17* Journal Of Halacha *at 41-50 (Spring 1989).*

24. *Rabbi Schachter's intermediate position may be found in the same journal at pp. 32-40.*

25. *These include R. Elazer Schach, Rosh Yeshiva of Ponevez; R. Yitzchok Weiss, recently deceased* Rav *of the* Eida Chareidis; *R. Yitzchak Kulitz, Chief Rabbi of Jerusalem; R. Eliezer Waldenberg, author of* Tzitz Eliezer; *R. Nisim Karelitz, Chief Rabbi of Ramat Aharon; R. Shmuel Wosner, Rabbi of Zichron Meir; and R. Nosen Gestetner. References to those decisions can be found in Bleich,* Time Of Death *at 144-145.*

26. *Letter of 18 Menachem Av 5751. A second*

the world) stating that removal of organs from a donor whose heart is beating and whose entire brain including the brain stem is not functioning at all is prohibited and involves the taking of life. Unfortunately, these very brief communications do not indicate if the *psak* is based on *vadei* (certainty) or *safeik* (doubt) nor do they address what the decision would be in case of total lysis.

Halachic And Legal Ramifications

Obviously, in a matter so fraught with controversy, every family confronted with the tragic situation of a brain dead patient must follow the ruling of its *posek*. To the extent the patient is halachically alive, removal of an organ even for *pikuach nefesh* would be tantamount to murder. The principle of *ain dochin nefesh mipnei nefesh* — that one life may not be set aside to ensure another life — applies with full force even where the life to be terminated is of short duration and seems to lack meaning or purpose and even where the potential recipient has excellent chances for full recovery and long life. If, on the other hand, the donor is dead, the harvesting of organs to save another life becomes a *mitzvah* of the highest order. In light of the overwhelming opposition to the "brain death" concept, caution and a stance of *shev v'al taaseh* (passivity) appears to be the most prudent course. How the "brain death" problem will play out in other areas such as inheritance, capacity of a wife to contract a new marriage, or the need for *chalitzah* if a man dies leaving a brain dead child will have to await further clarification.

There are, however, two other points that need to be considered. The argument is occasionally made that if *halachah* rejects the concept of "brain" or "respiratory" death, Orthodox Jews would be unable to receive harvested organs on the grounds that the recipient would be an accessory to a murder. As others have noted,[27] this conclusion does not follow. To the extent the organ in question would have been removed for transplantation whether or not this specific recipient consents, i.e., there is a waiting list of several people, the Orthodox recipient is not considered to be a causative factor *(gorem)* in the termination of a life. There is no general principle in *halachah* that prohibits the use of objects obtained through sinful means. It is true that if, because of tissue typing and the like, the organ is suitable for only one recipient and if that recipient declines the transplant, the organ will not be harvested, an Orthodox recipient may indeed be compelled to decline. But this is rarely, if ever, the case.[28]

A second point: as noted, "brain death" is the legal definition of death in the vast majority of the United States. New York is the only state that requires medical personnel to make a reasonable effort to notify family members before a determination of brain death and to make "reasonable accommodation" for the patient's religious beliefs.[29] In all other jurisdictions, doctors would be empowered unilaterally to disconnect a patient from life-support mechanisms once that patient meets the legal definition of death.[30] Hospital personnel may or may not defer to the wishes of the family but there is no duty on their part to do so or even to ascertain what those wishes are.[31]

Perhaps one point of consensus that may emerge in an area otherwise fraught with acrimonious controversy would be the desirability of enacting "religious accommodations" exceptions nationwide. After all, even the proponents of a "brain death" standard understand that others, in all honesty and conscience, may hold a different *halachic* view, one which they should not be compelled to violate. Hopefully, our community will be responsive to such an effort.

Conclusion

"You preserve the soul within me and You will in the future take it from me" (Daily Prayers). Only God who is the source of all life can take life away. We are enjoined to cherish and nurture life as long as it is present, no matter how fleeting or ephemeral. Yet it is precisely because each moment of life is so precious that God has imposed on man the awesome responsibility of defining the moment of death, the point after which the needs of the dead may, and indeed must, be subordinated to those of the currently living. No one has ever seen a *neshamah* leave a body and it is the unenviable task of our *gedolim* and *poskim* to tell us when this occurs. May *Hakadosh Baruch Hu* grant them the insight to truly make our Torah a *Torat Chayim*. ❑

Rabbi Breitowitz is the Rabbi of the Woodside Synagogue in Silver Spring, Maryland and Assistant Professor of Law at the University of Maryland Law School. He is the author of a forthcoming book, The Plight of the Agunah: A Study in Halachah, Contract and the First Amendments.

letter reaffirming this stance was issued during the Aseret Yemei Teshuvah 5752.

27. *See comments of R. Soloveitchik, cited in note 22.*
28. *According to a recently published article in the* Journal Of The American Medical Association *(Jan. 1992), the demand for hearts, kidneys, and lungs far exceeds the available supply.*
29. *See 10 N.Y. C.R.R., sect. 400-16 (1987). The regulation mandating religious accommodation is also reprinted in an excellent article by Zweibel, "Accommodating Religious Objections to Brain Death: Legal Considerations," 17* Journal of Halacha *49 (Spring 1989).*
30. *Of course, even in New York, only "reasonable accommodation" is required and one can well imagine triage considerations forcing patients off respirators prematurely.*
31. *Moreover, even where doctors defer to the family's wishes, insurance companies may refuse to pay the costs of sustaining what is legally regarded as a cadaver. This is likely not to be a problem in New York since the regulatory duty of "reasonable accommodation" prevents a determination of brain death.*

Contributions, Ed. Ehud Apanier (Keter: Jerusalem '87).

In closing, let it be said that no aspersions have been cast on the integrity of the *gaon* and *tzaddik* R. Gershon Hanokh of Radzin on his 100th *yahrzeit*. No personal attack was intended either by Rabbi Herzog *z"l* (apologies to the Ba'al ha-Tekhlet's nephew, R. Yeruham Leiner *z"l*, in *Hadarom*, Elul 5750, pp. 12-16) or Dr. Ziderman *she-yihyeh* in revealing the true chemical composition of the Radziner *techelet*, namely Prussian blue. Both have reiterated time and time again that the rebbe was evidently deceived by a chemist. To R. Gershon Hanokh's eternal credit is the *zechut* of having reopened the *sha'ar hatzizit*.

Rabbi Bezalel Naor
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BRAIN-STEM DEATH

To The Editor:

Your attempt to present a definitive, unbiased summation of the controversy surrounding the halachic validity of Brain-stem Death (B.S.D.) is most commendable. However, there are several errors in Rav Breitowitz's presentation that must be corrected...

I.

He should have removed any doubt concerning Rav Moshe's opinion. He cites "strong support" for my position but fails to mention that:

a) For almost a decade, during his lifetime, I articulated Reb Moshe's opinion that B.S.D. is halachically valid and no one challenged me during all that time.

b) The letter sent to the New York State Legislature over Reb Moshe's signature which was drafted by Rabbi Moshe Sherer of the Agudath Israel, unequivocally affirms the halachic validity of B.S.D.

II.

The Lazarus Reflex is cited as proof that a B.S.D. patient is not really dead. Yet the Lazarus Reflex occurs in guillotined prisoners who are surely dead and is so cited in the teshuva of the Chachom Zvi...To quote the Chachom Zvi, *"tenuah lechud, v'chaim lechud."* It can only be a spinal reflex, if the patient is decapitated!

III.

a) It is not "Rav Tendler's response" that the *Teshuva 146*, refers to cerebral death, not B.S.D. Rav Moshe said it clearly. The patient is one who *sheyachol linshom*, can breathe without a ventilator."

b) I did not deduce Reb Moshe's opinion from analysis of his writings. I reported it as *maaseh rav* — what he said, wrote, and ruled in the numerous cases referred to him for halachic *psak*.

c) The requirement of "respiratory failure" in the responsum of the Chief Rabbinate and standards for "physiological decapitation" are identical and not based "on somewhat different theories."

IV.

Rav Breitowitz is in error when he rejects Rav Angel's statement that if B.S.D. is not halachically valid, a Jew cannot receive a vital organ transplant. The fact that there are others who are ready and willing to remove these organs in no way mitigates the act of murder. (*Rambam Hilchot Rotzeach 2:1* and *4:6*). If ten "hit men" are hired to kill someone, the one who murders him is the murderer and is put to death despite the readiness of the nine to do likewise. Indeed it is in opposition to the thrice repeated ruling of Rav Shlomo Zalman Auerbach *shlita* that if it is forbidden to remove the heart it is forbidden to accept the donation.

V.

The halachic rulings of Rav Auerbach are most enigmatic. After issuing the blanket *issur* against heart transplants in Av 5751 which was published in *The Jewish Observer*, he wrote two letters concerning heart transplants in *Tevet* and *Shevat* 5752. In these letters he implicitly accepted the concept of B.S.D. but expressed concern over the need to inject a radioisotope affirming B.S.D by blood flow study. Fearing that this is tantamount to (*hazazas goseis*) removing the patient who is in extremis. No objection was voiced to declaring a heart-beating patient dead, if B.S.D. is affirmed.

In a most recent letter (Adar II 5752) he restates his position and insists that the heart not be removed until it has completely ceased its contractions. Yet he acknowledges an experiment done at his behest, in which a pregnant sheep was decapitated (an incontrovertible state of halachic death) and then a live lamb was delivered by caesarean section. During many hours the decapitated sheep's heart maintained normal beat, without loss of blood pressure. Rav Auerbach cited this experiment to retract his statement that ability to give birth to a live fetus is proof that the animal is not dead. He clearly admitted that the presence of the ventilator enables a dead animal to give birth to a live lamb. Surely this same logic and proof holds for the beating heart when on a respirator: A beating heart is not a sign of life, if there is total cessation of all brain function, as in a B.S.D. patient. Indeed in a decapitated prisoner, the heart continues to beat for some time, yet the uncontested halachic ruling is that he is dead.

In addition, Rav Auerbach has ruled that:

1. A ventilator can be removed from a patient in extremis (*goseis*) to permit him to die, since it is considered *hasaras moneah*, not euthanasia.

2. He ruled in an actual case at Hadassah Hospital (*Shevat 5752*) that a pregnant B.S.D. patient may be subjected to a caesarean section, although her heart was surely beating, in order to save her fetus. A B.S.D. patient can with his heart, two lungs and liver save the life of four people! We must await further clarification of the position of this great *posek*...

I am indebted to *Jewish Action* for their attempt to prepare a level field so that all can see the majesty of Torah law as it impacts on our society.

Rabbi Moshe David Tendler
Monsey, NY• • • • • • • •

Rabbi Breitowitz Responds:

Since I am in no sense an advocate of the anti-B.S.D. position, I will not attempt to refute each individual proof that Rabbi Tendler proffers nor do I desire to be caught in cross-fire that, to a large degree, is directed towards other targets. Nowhere in my article, for example, did I ever cite the Lazarus reflex as proof "that a B.S.D. patient is not really dead." I simply noted the reflex as a factor that "may or may not be significant." The pages of this magazine are also not the most appropriate forum for intricate textual analysis of technical halachic points. Nevertheless, some clarifying comments may be helpful.

I. The Position of R. Moshe Feinstein

A. *The Teshuvot:* The point of my article was that the written record of R. Moshe's *teshuvot, standing alone*, does not furnish unequivocal evidence that he in fact supported a B.S.D. standard. This is not to deny the possibility that he may have done so, but merely to state that one cannot definitively infer such a conclusion from his writings. I had previously cited *Iggrot Moshe*, Y.D. III, no. 132 which validates the use of nuclide scanning in connection with a determination of death as "strong support" for Rabbi Tendler's position. A close reading of the *teshuvah*, however, reveals that this conclusion is somewhat equivocal. The first mention of nuclide scanning appears in the third paragraph of the *teshuvah* dealing with victims of automobile accidents or falls. Here, R. Moshe concludes that even persons who apparently are incapable of spontaneous respiration (ventilator-dependent) *and have no other signs of life* should not be declared dead until nuclide scanning verifies lack of circulation to the brain. Nowhere does *teshuvah 132* utilize nuclide scanning (which, at best, demonstrates B.S.D.) as a sufficient criterion of death; it comes into play only if there are no other signs of life. Whether heartbeat and circulation of blood (which B.S.D. patients on respirators absolutely have) constitute such "signs of life" is precisely the controversy at hand. This interpretation of Y.D. III, no. 132 is not my own. Rabbi Tendler himself has acknowledged that the *teshuvah* may be susceptible to multiple interpretation. As quoted in the addendum to the recently published fourth volume of Dr. Abraham's *Nishmat Avrohom*, both R. Yosef Elyashiv and R. Shlomo Zalman

Auerbach interpret R. Moshe's validation of nuclide scanning as an additional *chumra* (stringency) to be employed only after the patient has met all the other signs of death: lack of spontaneous respiration, pulse (heartbeat), and nonspasmodic movement/reflexes. It must be made clear that these two *gedolim* who strongly oppose the notion of B.S.D. do not purport to disagree with R. Moshe; rather, in their view R. Moshe himself never necessarily upheld B.S.D. They regard their negative *psak* as entirely consistent with Y.D. III, no. 132. R. Elyashiv states this as being "explicit" in the *teshuvah;* R. Auerbach states this as a possibility; R. Aaron Soloveitchek also construes R. Moshe's opinion in this manner. Note too that R. Moshe in that very *teshuvah* cites Chatam Sofer Y.D., 338 who explicitly enumerates lack of pulse as well as respiration as a necessary prerequisite for a determination of death. Again, as noted in my article, this restrictive interpretation finds additional support in a *teshuvah* written two years after Y.D. III, 132 where R. Moshe reiterates that removal of a heart constitutes murder of a donor. See H.M. II, no 72. Since under American law hearts are not removed until the patient has been diagnosed as brain dead, this too suggests that B.S.D. is *not* equivalent to halachic death. (I would note, however, that H.M. II, 72 makes no mention of nuclide scanning and it is perhaps arguable that R. Moshe was concerned that doctors would act precipitously in removing an organ without a definite B.S.D. diagnosis but that once such a diagnosis could be made, removal of the heart would indeed be permitted. At best; however, this is ambiguous).[1]

B. *Maaseh rav*: Rabbi Tendler asserts that he did not "deduce R. Moshe's opinion from an analysis of his writings but reported it as *maaseh rav* – what he said, wrote, and ruled in the numerous cases referred to him for *halachic psak*." I am not in a position to question R. Tendler's claim; certainly as one who was very much in close contact with R. Moshe, particularly in matters of medical *halachah*, his views are entitled to great weight and respect. What I would like to know, however, is whether R. Moshe actually permitted the removal of an organ from a B.S.D. patient or merely allowed Orthodox Jews to receive heart or liver transplants. If the *maaseh rav* is limited to the latter, it tells us nothing regarding the *halachic* status of a B.S.D. patient since even if such patient is *halachically-alive,* the recipient would arguably be allowed to benefit from the organ once it was removed. See III, below. At most, such *maaseh rav* would simply indicate that R. Moshe no longer regarded transplants as murder of the *recipient*. I refer the reader again to the new edition of *Nishmat Avrohom*, comments Y.D. 339.

C. *The Miller Letter:* Rabbi Tendler also notes the fact that for almost a decade, he articulated R. Moshe's opinion "that B.S.D. is *halachically* valid and no one challenged [him] during all that time." Again, I cannot fully address the substance of this contention since the principle of *shetikah ke'hodaah* (silence is tantamount to admission) may not be determinative in matters of *psak halachah*. Rabbi Tendler is correct, however, that the full text of R. Moshe's 1976 letter to Assemblyman Miller, in opposition to proposed time of death legislation, is highly illuminating. The letter was drafted by Rabbi Moshe Sherer of Agudath Israel and went out with R. Moshe's signature. The letter first explicitly states:

"The sole criterion of death is the total cessation of spontaneous respiration."

This sentence alone does seem on its face to unequivocally affirm that B.S.D. (or even something less than B.S.D.) is *halachic* death. It is a significant piece of evidence to support Rabbi Tendler's construction that should have been included in my original article and I apologize for that omission. Nevertheless, even here, the next sentence appears to immediately modify the implication of the preceding one:

"In a patient presenting the clinical picture of death, i.e., no signs of life such as movement or response to stimuli, the total cessation of independent respiration is an absolute proof that death has occurred."

In other words, absence of respiration is a necessary confirmation of death only when coupled with absence of other vital signs. Arguably, heartbeat and circulation may be precisely the type of vital sign that prevents absence of breathing from being determinative.

II. The Views of R. Shlomo Zalman Auerbach:

A. *The Letters:* At the time of the writing of my article, the only pronouncements from R. Shlomo Zalman that I had seen were the brief communications of 18 Menachem Av, 5751, and *Aseret Yemai Teshuvah*, 5752, where he and R. Elyashiv both stated, without any explanation, that removal of organs from a donor whose heart is beating and whose entire brain, including the brain stem, is not functioning at all is prohibited and involves the taking of life. Since then, R. Auerbach has issued various *teshuvot* in Tevet, Adar, and Nisan of this year. While these later *teshuvot* eliminate some of the uncertainty surrounding the earlier pronouncements, they also indicate that no significant retraction from the earlier *psak* has occurred. Indeed, in a letter dated Iyar 5752, both R. Auerbach and R. Elyashiv explicitly reaffirmed their earlier stance, again in summary fashion.

In a letter dated 6 Nisan 5752, however, R. Auerbach does offer some significant elaboration of his position. He states that even after all tests have been performed – including tests involving circulation of the blood to the brain – and the doctors have definitively determined that the entire brain including the brain stem is dead, as long as the patient is attached to a respirator and the heart is beating, the patient is classified as a *sofeik goseis* (a doubtful case of a *halachically-alive* person whose death is imminent). As such, it is even prohibited to move the *goseis* and certainly prohibited to (possibly) murder him by removal of the heart.[2]

R. Shlomo Zalman does permit under these circumstances (a definitive diagnosis of brain stem death) shutting off the respirator.[3] If no respiration or heartbeat is detectable for a period of thirty seconds, the patient may then be *halachically* declared dead and his organs harvested. Significantly, while it had long been thought that such a waiting period would make transplants impossible (because of rapid deterioration of the heart muscle), a number of transplant surgeons have recently indicated that even after a 30-second delay, transplantations are still feasible though they lose their optimal effectiveness. In essence, R. Auerbach's *psak* paves the way for the legitimization of heart and liver transplants even according to those views that do *not* accept B.S.D. as definitive *halachic* death.

B. *The Sheep Experiment:* A word should also be said about the sheep experiment. The Talmud in *Archin* posits that a fetus cannot survive its mother's death. Since B.S.D. patients can carry babies to term, it was thought that this alone was conclusive proof that B.S.D. patients were *halachically-alive*. To test this hypothesis, an experiment was performed at R. Auerbach's request, whereby a pregnant sheep was decapitated and hooked up to a respirator. Heartbeat and blood pressure were maintained and a live lamb was successfully delivered by caesarean section. Since it is undisputed that under these circumstances, the mother sheep was dead, (decapitation results in death according to all authorities), the Talmud's ruling that the life of the fetus establishes vitality of the mother does not apply when the mother's vital functions can be mechanically maintained. At best, however, this merely negates what would otherwise have been an incontrovertible proof that the B.S.D. patient must be alive. *Not being able to prove that B.S.D. equals life is not the same as proving B.S.D. is death.* Thus, even after the experiment, we are still left with the possibility of *sofeik goseis* as R. Auerbach concludes.

C. *The Caesarean Birth:* It has also been reported that R. Auerbach permitted the performance of a caesarean on a B.S.D. patient although, if the patient is a *goseis,* such a procedure would undoubtedly constitute forbidden movement that is tantamount to murder. Although this *psak* was widely circulated in R. Auerbach's name, in his most recent letter of 6 Nisan he states that he never issued such a *psak* nor was he even asked.

III. If B.S.D. is not acceptable as halachic death and the removal of a vital

organs is either certain or doubtful murder, could an Orthodox Jew receive a heart or liver transplant?

Here, I departed from my reportorial style and stated that, in view of the fact that there were many more demands for organs than supply and if the Orthodox Jew would refuse a transplant, the organ in all likelihood would be removed anyway, acquiescence to an organ transplant could in no sense be considered a causative factor in a homicide. As noted in my article, this was not my *chiddush* but was also the position taken by Rabbi Aaron Soloveitchik as well as Rabbi Bleich and it seemed *l'aniyat daati* to possess considerable merit.

Rabbi Tendler questions this analysis by citing the example of ten hit men, where the one who actually does the killing is culpable despite the readiness of the nine to do likewise. The analogy, however, is inapt. Obviously, if one actively commits a *maaseh retzichah* (act of murder), one cannot assert as a defense that it would have been done by someone else anyway. The recipient of an organ, however, is not a *rotzeach*. It is the doctor who is the *rotzeach*. One who places his name on a list to receive a transplant is at worst only a *goreim retzichah* — an indirect cause. And while it is true that even a *geram retzichah* is forbidden, the existence of alternative recipients means that any given recipient cannot even be characterized as a *goreim*.

Rabbi Tendler is correct, however, that R. Shlomo Zalman has indeed rejected this line of reasoning and has ruled that in Israel, where a majority of those in need are Jewish, not only is it prohibited to remove a heart but it is prohibited to enlist as a potential recipient as well. In the letter of 28 Adar II, 5752, R. Auerbach distinguishes between recipients in Israel, where most of the transplant surgeons, donors, and potential recipients are Jewish and outside of Israel, where most are non-Jewish.[4] Where both the donor and the surgeon are, or can be presumed to be, non-Jewish, even R. Auerbach permits the Orthodox Jew to receive the transplant although the removal of the organ by the surgeon was a prohibited act of homicide.[5] In result, if not analysis, the conclusion stated in my article remains unchanged, at least for recipients in the United States.

IV. B.S.D. and the Israeli Chief Rabbinate:

"Respiratory failure" and "physiological decapitation" are indeed somewhat different theories. First, as originally formulated, the Rabbinate's ruling did not mention any requirement of "absence of movement." As such, a patient in an iron lung could conceivably have been declared dead although fully conscious, communicative, and capable of mental functioning of the highest order. This is far short of anything even remotely approaching brain death. Second, even after the clarification that its ruling applied only if in addition to lack of respiration, there must be total absence of movement, the Rabbinate did not require nuclide scanning; apnea testing alone could conclusively demonstrate irreversible destruction of the respiratory centers of the brain and would be sufficient to establish death. By contrast, a full-blown determination of "brain death" would require considerably more. In any case, I was certainly not positing that these standards are diametrically opposed but are simply "based on somewhat different theories," as in fact they are.

Rabbi Tendler and I are in agreement that there are a number of points in all these *psakim* that still need further clarification: the distinction between Israel and *chutz l'aretz*, between donors who are Jewish and those who are not Jewish, the relevance of the doctor's religious affiliation, whether R. Shlomo Zalman's dispensation to shut off the respirator is limited to B.S.D. patients or applicable to other types of terminal or even PVS (persistent vegetative state) situations,[6] how the ruling applies to other forms of treatment and sustenance (*e.g.*, hydration and nutrition), what are the implications of a state of *sofeik gesisah* for other areas of Jewish law (inheritance etc.), the *heter* for performing a life-threatening caesarean on a B.S.D. patient if, after all, such patient is at least a *sofeik chai;* and whether indeed there is such a *heter* at all. We have not yet heard the last word on this difficult subject. Hopefully, our *poskim* will offer us the necessary guidance to approach these delicate matters of life and death in accordance with the dictates of the Torah and the will of *Hakadosh Boruch Hu.* ❑

FOOTNOTES:

1. *Rabbi Tendler also cites Y.D. II, 146. That* teshuvah *indeed states that a patient* sheyachol linshom *— that is capable of breathing independently – cannot be declared dead merely on the basis of a lack of cerebral functioning. The language, however, does not establish the converse — that inability to respire spontaneously necessarily is equivalent to death. In any event, the language of* yachol linshom *does not appear in* teshuvah 132.
2. *It should be noted that while this position rejects B.S.D. as a definitive* halachic *definition of death, the* psak *equally rejects Rabbi Bleich's position that such patients are unquestionably alive. R. Auerbach thus joins those groups of authorities that treat the matter as one of* sofeik *(doubt) where a stance of passivity must be adopted.*
3. *This aspect of R. Auerbach's* psak *is somewhat problematical. If there is any chance at all that a B.S.D. patient may be* halachically-alive, *what justification could there be for shutting off the respirator and killing the patient? There are two possibilities: (1) R. Auerbach regards removal of a respirator as a passive withholding of life-sustaining treatment* (hasarat hamoneah) *which Rema in Y.D. 339 permits in the case of a* goseis *(in this sense he differs with R. Moshe who regarded shutting off a respirator as an act of prohibited intervention); (2) a patient whose heartbeat and circulation is maintained only because of mechanical respiration is in fact already dead. We need to shut off the respirator, however, to verify that fact. Shutting of the respirator does not therefore* result *in the patient's death but simply* confirms *that the patient was in fact dead all along. If the second reading is correct – and I believe it is — R. Shlomo Zalman would appear to concede in principle that true B.S.D. is in fact death, but unwilling to rely on any of the existing tests — including apnea and nuclide scanning — to confirm this fact.*
4. *R. Elyashiv apparently does accept the* non-goreim *argument but again limits it to non-Jewish donors.*
5. *It is not entirely clear what the basis for the distinction is. If one were to accept the* non-goreim *argument, it should follow that receiving the organ should be permitted even in Israel, whether or not the donor is Jewish. In prohibiting placing one's name on a list, R. Auerbach apparently maintains either that: (1) if the heart is removed because of A, A is indeed characterized as a* goreim retzichah *even if B would have made the same request; (2) alternatively, if A is not a* goreim retzichah, *he transgresses the prohibition of* lifnei ever *(causing another to commit a sin) by causing the surgeon to commit murder. All of these considerations apply equally to Jews or non-Jews. The distinction is apparently premised on the fact that where all the recipients are Jews subject to the laws of the Torah, no one individual Jew can legitimately take the position that he is committing no sin since others will sin if he doesn't. See* Mishna L'melech *Ch. 4,* Hilchot Malveh U'Loveh; *according to this explanation, however, the only relevant factor would be the identities of the other recipients, not the identities of the donors. R. Auerbach seems to require that both the donors and a majority of the recipients be non-Jewish. This point needs further clarification.*
6. *The letter of 6 Nisan indicates that the dispensation does not apply to other cases of* goseis *but does not explain why. This supports my conclusion in note 3 that the* psak *is* not *predicated on* hasarat moneah.

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משה פיינשטיין
ר"מ תפארת ירושלים
בנוא יורק

בע"ה

ר"ח כסלו תשמ"ח

למע"כ ידידי הנכבד מוהר"ר דר. ש.ש. בנדי שליט"א, נכדו של האי גברא רבה, הגאון מוהר"ר יוסף ברויאר זצ"ל, בברכת שלום וברכה וכט"ס.

אחדשה"ט

הנה נכדי, הרה"ג מוהר"ר מרדכי טענדלער שליט"א, דיבר לי באריכות בכמה מהספיקות והחקירות שנתחדש אצל ידידי, מחמת הפסק שערכאות הראשית בנוא יארק הכריעו, לקבל "מיתת המוח" כהגדרת מיתה.

למעשה, כפי ששמעתי מחתני, הרב הגאון מוהר"ר משה דוד טענדלער שליט"א, הערכאות רק קבלו הגדרה שגם מצדק לדינא, הגדרה שקוראים "ההארבערד קריטיראי" שנחשב ממש כ"מחתך ראשו" ר"ל של החולה, שהמוח כבר, ר"ל, ממש מתעכל.

והנה, אף שהלב עדיין יכול לדפוק לכמה ימים, מ"מ כל זמן שאין להחולה כח נשימה עצמאית, נחשב כמת, וכדביארתי בתשובתי באג"מ יו"ד ח"ג סימן קל"ב.

במקרה שבית חולים, או איזה מדינה, יתחיל להחשיב כמתים גם חולים שלדינא חיים, ויתחייב הרופא שמטפל בחולה זה, לצוות שיסלקו החולה ממכשירי נשימה, הנה מעצם הדין, נחשב כ"חד עברא דנהרא", שהרי בלעדו, יש עוד רופאים שכך יצוו, ומ"מ צריך שיסלק עצמו מטיפול החולה, וישאר ביד הבית חולים לצוות ברצונם.

אבל במקרה ש,ה חולה יהודי, מחוייב הרופא וה"ה שאר יהודים, לעשות כל שביכלתם להצילו, אף שרק מצילו לכמה ימים, שהרי כבר הוי כגוסס, וגם אם הצלה זו יתחייב הרופא להוציאו הון רב, לשלם להמשכת המכשירי נשימה השאר טיפולו, מחוייב כך לעשות, ובפי הגדרים של הארכת חיי שעה.

ואם יהיה איבה, יהיו מחוייבים כך לעשות גם לגוים.

ואסיים בברכה שנזכה בקרוב לקיום במלואו של "אני ה' רופאיך" בביאת משיח צדקינו.

בידידות,

משה פיינשטיין

משה פיינשטיין

RABBI M. FEINSTEIN
ניו יארק

* מכתב שמסר הנמען, ד"ר בונדי, בחורף תשנ"ב למשפחת טנדלר.
מכתב זה לא היה ידוע עד למסירתו, עם התעוררות הפולמוס הגדול על דעתו של הגרמ"פ בסוגיית המות המוחי. המכתב הוכתב באידיש ע"י הגרמ"פ ותורגם ע"י התלמיד שהדפיסו, חתנו של הרב מרדכי סוויצקי.
המכתב נקרא במלואו ע"י הגרמ"פ קודם שהוסיף עליו את חתימתו והותמו.

משה פיינשטיין
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הנה נכדי, הרה"ג מרדכי טענדלער שליט"א, דיבר לי באריכות בכמה מהספיקות והחקירות שנתחדש אצל ידידי, מחמת הפסק שערכאות הראשיות בנוא יארק הכריעו, לקבל "מיתת המוח" כהגדרת מיתה.

למעשה, כפי ששמעתי מחתני, הרב הגאון מוהר"ר משה דוד טענדלער שליט"א, הערכאות רק קבלו הגדרה שגם מוצדק לדינא, הגדרה שקוראים "ההארבערד קריטיראי" שנחשב ממש כ"מחתך ראשו" ר"ל של החולה, שהמוח כבר, ר"ל, ממש מתעכל.

והנה, אף שהלב עדיין יכול לדחוף כמה ימים, מ"מ כל זמן שאין להחולה כוח נשימה עצמאית, נחשב כמת, וכדביארתי בתשובתי בא"מ יו"ד ח"ג סימן קל"ב. במקרה שאיזה בית חולים, או איזה מדינה, יתחיל להחשיב כמתים גם חולים שלדינא חיים, ויתחייבו הרופא שמטפל בחולה זה, לצוות שיסלקו החולה ממכשירי נשימה, הנה מעצם הדין, נחשב כ"חד עברא דנהרא", שהרי בלעדו, יש עוד רופאים שכך יצוו, ומ"מ עדיף שיסלק עצמו מטיפול החולה, וישאר ביד הבית חולים לצוות כרצונם.

אבל במקרה שזה חולה יהודי, מחוייב הרופא וה"ה שאר יהודים, לעשות כל שביכלתם להצילו, אף שרק מצילו לכמה ימים, שהרי כבר הוי כגוסס, וגם אם הצלה זו יתחייב הרופא להוציאו הון רב, לשלם להמשכת המכשירי נשימה ושאר טיפולן, מחוייב כך לעשות, וכפי הגדרים של הארכת חיי שעה.

ואם יהיה איבה, יהיו מחוייבים כך לעשות גם לגויים.

ואסיים בברכה שנזכה בקרוב לקיומו במלואו של "אני ה' רופאיך" בביאת משיח צדקינו.

בידידות,

משה פיינשטיין

Rabbi Moshe Feinstein
Yeshivat Tiferet Yerushalayim
455 FDR Drive
New York, NY 10002

Rosh Chodesh Kislev 5745

To my dear friend Dr. S.S. Bondi, grandson of the great Rabbi Yosef Breuer,

My grandson, Rabbi Mordechai Tendler, has spoken with me at great length regarding several of your uncertainties and inquiries as a result of the recent ruling by NY State that accepts Brain Death as the definition of death.

In fact, the way I heard it from my son-in-law, Rav Moshe Dovid Tendler, the courts merely accepted the definition as described by the "Harvard Criteria," which is acceptable by the Jewish Law, which is that the patient's brain is "separated (from the body)", meaning the brain is in a state of decay.

Now, even though the heart is capable of pumping for several more days, nevertheless, as long as the patient is unable to breathe on his own, he is considered dead, as I have explained in my responsum in Iggerot Moshe Y.D. III, 132.

In a case of any hospital, or State, which considers a (*halachicly*) live patient to be dead, and the doctor treating the patient will be required to direct the staff to remove the patient from the ventilator, even though here, according to Jewish Law, the doctor's status is considered, [in Jewish Law terminology] as "standing on the same side of the river [as the perpetrator requesting the assistance]," since even without him, there are other doctors who will be commanded to do this, nevertheless it is preferred that he dismiss himself from the patient's care, and let it remain in the hands of the hospital to direct [their staff] as they wish.

In the case of Jewish patient, the doctor as well as other Jews, are obligated to do everything in their power to save the patient, even if only to extend his life by several days and despite the fact that he is considered a dying patient. And even if this requires the doctor to spend a great personal fortune to fund the ventilator and other treatments he is obligated to do so, within the halachic definitions of the imperative of extending momentary life. And if a situation of 'enmity' could occur [concerning a gentile patient] then they are obligated to do the same for gentiles as well.

I will conclude with the blessing that we may fully experience the fulfillment of the verse *"Ani Hashem Rof'echa"* - I am God, your Healer, with the coming of the Messiah.

Regards,
Moshe Feinstein

דוד פיינשטיין

קביעת מות עם לב פועם — דעת ה"אגרות משה"

ר"ח כסלו תשנג

כבר כתבתי שמה שכתב אאמו"ר זצ"ל בא"מ יו"ד חלק ג' סימן קלב היא תשובה אמיתית ואין להרהר אחריה שאין בה שום חשש זיוף וכן הוא דעתו ואיזה פרטים דשם שמעתי ממנו ממש ומה שכתבתי באיגרת של ג' פ' שמות תש"ן לא חזרתי ממנו ואין צורך לחזור ולחזור כל פעם שאיזה אדם טוען שאין תשובה זו אמת או איגרת זו אמת ואני מבקש מכל הרואים איגרת זו שלא להצריך לי לכתוב אחרת.

ממני דוד פיינשטיין

ביום הג"ל בנוא יארק
לבירור הדברים אם הוא שוכב כמת ואין בו שום תנועה אף שהלב פועם מאחר שאינו נושם הוא כמת גמור זה נוסף אדלעיל ליותר בירור

דוד פיינשטיין

דוד פיינשטיין
RABBI DAVID FEINSTEIN
477 F. D. R. DRIVE
NEW YORK, N. Y. 10002

ר"ח כסלו תשנ"ג

בדבר כתובה שמה שכתב אאמו"ר זצ"ל דאה"ע יו"ד חלק ג' סימן קל"ג היא תשובה
אמיתית ואין להרהר אחריה שאין זה שום חשש זיוף וכן הוא פשוט ואינה פרטים דשם
שמדבר ממש ממש ומה שכתבתי דאיגרת של ג"פ שאומר שאין לא הגרתי ממנו
ואין צורך להזכיר ולחזור בו בעצם שאינה אדמיטעט שאין תשובה זו אמת אלו איגרת
זו אמת ואני מבקש מכל הרואים איגרת זו שלא להזכיר לי לכתוב אחרת.

אמוני דוד פיינשטיין

דוחק גדול בזה ודרך
לבירור הבדלים אלו הוא אוכל כמה ואין בו שום תועלת אלא שהלב פוגע מאחר שאינו
נושא הוא כמה גמור זה נוסף אדעתי ליותר בירור
דוד פיינשטיין

הנה בא"מ יו"ד כלל ג' סימן קל"ה כתב שאף בלא שאינו נושם אבל עדיין יש לעיין הנשימה אלין
מאחר שהמכונה עדיין אינו מת, ולדברים אלו מלבד מה שראוי כמו שאמרתי, מכל מקום אבל בהתשובה
הלזו מוסיף שיש עוד הקדמה וידיעת המות והסתמא דלא נשום עוד כמה שנפסק הקשר שיש למות
עד הגוף עיין שם דזה אבל כל זה שאמרתי מפי אבל בלא נכתב דכתיב אמת ואין להרהר אחריו
ולזה באתי על החתום היום ג' פרשת שמות שנת תש"ן
נאום דוד פיינשטיין

Dovid Feinstein
Determining Death with a Beating Heart – Opinion of "Iggrot Moshe."
November 26, 1992

I have already written that what our master, my father, my teacher [Rabbi Moshe Feinstein] wrote in Yore Deah III:132 is authentic and no one should question it, for it is not a forgery and this was his opinion. Some of these details I actually heard from him myself and what I wrote in a letter on Tuesday, Parshat Shmot, 5750 [1990, shown below] I have not rescinded and it is unnecessary to repeat this over and over each time some person claims that this is not an authentic response, or that this letter [of 1990] is false. I ask all that see this letter not to require of me to write others. (i.e., more letters)

Dovid Feinstein

Same day as above in New York
For further clarification: If he lies like a dead person and there is no movement, even if the heart is beating, since he cannot breathe [irreversibly] he is completely dead. This is added to the above to make it clearer.

Dovid Feinstein.

[Translated by Robert J. Berman]

"In Igros Moshe (Yoreh Deah, vol. 3, siman 132) he [Rabbi Moshe Feinstein] wrote that a dead person is one who isn't breathing, but one - to whom [autonomous*] breathing can be restored by a machine - is not dead. And these words, besides having seen in writing, I have heard from him verbally. But in that responsa he adds that there is more in establishing and knowing [the time of] death, and presumably he means to say, not breathing anymore because the connection between the brain and the body has been broken, see there in the paragraph which begins: "But." This, I did not hear from him verbally, but it is written truthfully, and there is no reason to doubt it. On this issue I have come to sign, on Tuesday, parshas Shemos, the year 5750.

Dovid Feinstein

* This was clarified in person by Rabbi Dovid Feinstein to Robert Berman and Rabbi Yossie Newfield in New York, August 2, 2004.

TRANSCRIPTION OF VIDEO

Rabbi Dovid Feinstein:
My father's position was very simply that the stopping of breathing is—the point of—that's death. It doesn't matter if the heart is functioning or it doesn't function. As long as he stops breathing he's considered dead. That's the way he explained the *Gemara* in *Yoma*, that's the way he said they always did in Europe when the *Chevra Kadisha* would test if a person is dead or not. He always used to test his breathing and nothing else.
I'll repeat again the same thing: If the breathing has stopped, then he's considered dead. And that's it, nothing else.

Interviewer:
Even if the heart's still beating...

Rabbi Dovid Feinstein:
Right.

Interviewer:
Right.

Rabbi Dovid Feinstein:
And anything else is, not a criterion, that's all. Now if all those guidelines go with those guidelines, he would agree with it and if it doesn't, he doesn't agree with it.

But I'd understand, though, I mean once the person is dead and someone's available to give the organ, why not?

Interviewer:
Right. Do you think Rav Moshe would have encouraged people to sign organ donor cards?

Rabbi Dovid Feinstein:
I doubt it, but I don't know.

Interviewer:
In your opinion, what's the reason that Rav Moshe's opinion on brain death is so shrouded in—into mystery, or is it many different sides on how to understand Rav Moshe?

Rabbi Dovid Feinstein:
There's only one way. I don't think anybody argues that point. It's very simple. Cessation of breathing. I don't think anybody ever said differently.

Interviewer:
Right but when Rabbi Mordechai Tendler wrote up the Health Care Proxy for the RCA, when Rabbi Moshe Tendler wrote up the Health Care Proxy, many people came out that were saying not necessarily he is, that he has a real understanding of Rav Moshe. Many people were saying, were voicing that opinion.

Rabbi Dovid Feinstein:
It never changed. It depends how you want to word it. If I tell you cessation of breathing, and you say, oh, that's brain death, is that, I don't agree with that; I don't know anything about brain death. Quote me correctly. That's all, nothing else. And that's the whole argument against Rabbi Tendler.

Interviewer:
Cause he translated cessation of breathing as brain death.

Rabbi Dovid Feinstein:
Yeah, fine. He might be 100% right. I'm not even disputing the point. But what's the difference. He could say, this brain death cannot breath and therefore he's considered dead. That's the way it should be worded. He was very *makpid* that his words should not be changed. Quote him as is. He cannot breath. Nothing else.
Interviewer:
So it was just due to the wording . . .

Rabbi Dovid Feinstein:
That's it. So I'm saying so, that was the dispute, the original dispute, there were people disputed to Rabbi Tendler's opinion that brain death is stopping of breathing. That's all. And if he's 100% right, no one's going to argue with him.

Interviewer:
So... so, you're saying, in your opinion, if we could—if it's proven medically, what Rabbi Tendler's saying, that that would definitely be Rav Moshe's opinion.

Rabbi Dovid Feinstein:

Right, a hundred percent.

Interviewer:
But you're not sure that it has been proven, you're saying.

Rabbi Dovid Feinstein:
I don't—I have no idea. I'm not saying I'm sure, I'm not sure. It's not my field. I don't know. My father ZT"L's position of what constitutes death is when a person cannot breathe on his own. It doesn't matter if his heart is working or is not working.

Interviewer:
Would it then be your opinion that Rav Moshe then would encourage organ donation in that situation?

Rabbi Dovid Feinstein:
One has nothing to do with the other. If you're talking about here's a patient available for a heart transplant, fine. He would definitely encourage it. If you're talking about putting it into the place-- into the, ah, tank or whatever you want to call it, I doubt if he would agree with it. I can't vouch for it, but I doubt it. I think my whole purpose here is just to verify the position of--stopping of breathing. And I think, ah, my services are ended.

Interviewer:
Thank you very, very much. I appreciate it.

שלמה משה עמאר
הראשון לציון הרב הראשי לישראל

Shlomo Moshe Amar
Rishon Lezion Chief Rabbi Of Israel

בעה"י, יום שני בשבת י"ג אדר ב' התשס"ח.

דעת-תורה.

בישיבתנו היום לפני מרן הגאון פוסק דורנו מופה"ד
רבינו אלישיב יוסף שליט"א.

התייצבו הפרופסורים הרב אברהם שטיינברג הי"ו והד"ר יגאל
שפרן הי"ו. ועוד, ואחר שמסרו סקירה מפורטת ומקיפה
מדבר הבדיקות הנעשות בימינו אלה, לקביעת המות,
ואחר בירורים שונים.

מרן שליט"א חיווה דעתו דעת תורה, שמעיקר הדין
המות נקבע, עם מות המוח כולו כולל גזע המוח, והפסקת
הנשימה באופן בלתי הפיך.

ובלבד שהכל יעשה ע"פ נאמנים, שיקימו ועדה מיוחדת
הכוללת ת"ח בקיאים בענין זה, שתברר בדקדוק ובאמונה
שאכן נתקיימו כל הצעדים הדרושים, ונערכו כל הבדיקות
הראויות בזה, באין יוצא מן הכלל.

וגם באה דרישה מרן שליט"א, שתנתן צוואה מפורשת
לכל אדם או למשפחתו, שלא ינתקוהו מן המכשירים, ולא
יטלו ממנו אברים, ולא תעשה שום פעולה מהסוג הזה,
עד אחר הפסקת פעולות הלב לגמרי. ודרישתו
תבוצע בקפידא!

ולראיה חתימנו באתה ביום הנ"ל. ש.מ.עמאר

[illegible]
[illegible]

[ON THE STATIONARY OF THE SEPHARDIC CHIEF RABBI'S OFFICE]

Shlomo Moshe Amar
Rishon LeZion Chief Rabbi of Israel

17TH Adar II, 5768 [March 24th, 2008]

Rabbinic Ruling

In our meeting today in the presence of Rav Ovadiah Yosef, Professor Rabbi Avraham Steinberg and Professor Rabbi Yigal Shafran gave a detailed overview and summary concerning the establishment of death vis-a-vis brain death, which included various clarifications.

Rav Ovadiah Yosef ruled that death is established upon death of the brain, including the brain-stem, and irreversible cessation of [autonomous] respiration [even if the heart is still beating]. But only on the condition that this determination [of brain death] be done by trustworthy people that include a committee of Torah scholars that are experts in this area [of medicine and halacha surrounding brain death], that they will check that all the appropriate steps were taken to make this determination.

At the same time, Rav Ovadiah ruled that families who reject brain death as halachic death have the right to request that the ventilator not be removed and that no organs be recovered for transplantation. His instructions should be followed punctiliously.

Signed by,

Rav Shlomo Amar

Rav Ovadiah Yosef

פרופ׳ אברהם שטינברג

חוק מוות מוחי-נשימתי – דעת הגר״ע יוסף

1. בפגישה שנערכה בביתו של הרב עובדיה יוסף שליט״א* ביום י״ז אדר ב׳ תשס״ח (24.3.08) בנוכחות הרב שלמה עמאר, הרב פרופ׳ אברהם שטינברג, הרב יגאל שפרן, והשר אלי ישי, הצגתי לרב יוסף את עיקרי חוק קביעת מוות מוחי-נשימתי, שעולה היום להצבעה במליאת הכנסת לקריאה שניה-שלישית.
2. הרב עובדיה יוסף שאל על עמדת הרב אויערבאך בסוגית מות המוח. הסברתי את עמדתו. הרב יוסף תמה למה צריך הוכחה שכל תאי המוח מתו, די בכך שאיננו נושם ושמוחו מת.
3. הצגתי לרב יוסף את המכתב בכתב יד של הרב דוד פיינשטיין על עמדת הרב משה פיינשטיין בנידון.
ספרתי לרב יוסף על פגישתי בבית הרב שלום יוסף אלישיב יחד עם חה״כ משה גפני. הרב יוסף תמה מדוע אין הרב אלישיב מקבל את המוות המוחי נשימתי, שהרי על פי הגמ׳ יומא הקובע הוא נשימה ולא פעילות הלב. [כמו כן הסכים הרב יוסף לתוספת בחוק, על פיה משפחות שאינן מקבלות את המוות המוחי מכחינת ההלכה, יוכלו לדרוש המשך טיפול נשימתי עד הפסקת פעילות הלב. אך הוא תמה על ההסדר שנציגי דגל התורה יצביעו נגד החוק אבל יאפשרו לו לעבור, כי לדעתו צריך להכריע לכאן או לכאן.]
4. הרב יוסף פסק נחרצות שלדעתו מוות מוחי-נשימתי הוא מוות על פי ההלכה, והורה לשר אלי ישי שכל נציגי ש״ס בכנסת יצביעו בעד החוק.
5. השר ישי ביקש לקבל בכתב את פסיקתו של הרב יוסף מחשש למהומות ולפשקווילים, אך הרב יוסף אמר שאין לחשוש מאלו, ויש להודיע על דעתו בנחרצות.

ביום י״ט אדר ב תשס״ח (26.3.08) נשאל הרב עובדיה יוסף על ידי הרב עמר בקשר לתרומת איברים מנערה בת 18 שנה (חנה חובב), שנקבע אצלה מוות מוחי לאחר מנינגוקוקל מנינגיטיס (אני הייתי בקשר הדוק ובדקתי את הפרוטוקול של קביעת המוות המוחי, וכן בוצע TCD שהתאים למוות מוחי). הרב עובדיה יוסף התיר הוצאת איברים חיוניים להצלת חולים בפנינו במצב מסוכן.

* בבוקרו של היום בו נערכה ההצבעה על החוק בקריאה שניה ושלישית.

These are pages 77 and 78 taken from the Halachic Medical Journal ASSIA (Vol. 22) Sivan 5770 [2010]

[Author] Professor Rabbi Avraham Steinberg, MD

The [Knesset] Law of Brain-Respiratory Death – The Opinion of Rav Ovadiah Yosef

1) At the meeting that took place in the house of Rav Ovadiah Yosef, on the 17th of Adar II, 5768[1] (March 24th, 2008), in the presence of Rav Shlomo Amar, [the author] Rabbi Dr. Avraham Steinberg, Rabbi Yigal Shafran, and Minister Eli Yishai, I explained to Rav Yosef the main points of the proposed bill "Establishing Brain-Respiratory Death" that is to be voted upon in the Knesset for the 2nd and 3rd reading. [The bill was subsequently passed]

2) Rav Ovadiah Yosef inquired as to the opinion of Rav [Shlomo] Auerbach on the subject of brain death. I explained his position. Rav Yosef was bewildered as to why he [Rav Auerbach] felt the need to require the death of every brain cell, as it would be enough that the person is not breathing and that his brain [as an organism] is dead.

3) I showed Rav Yosef the handwritten letter of Rav Dovid Feinstein concerning the opinion of Rav Moshe Feinstein on the subject.

   I informed Rav Yosef of my meeting in the home of Rav Shalom Yosef Elyashiv together with Member of Knesset Moshe Gafni. Rav Yosef wondered why Rav Elyashiv does not accept brain-respiratory death since according to the Talmud Yoma [85.] death is determined by [cessation] of [autonomous] breathing and not the [lack of] heartbeat. {Rav Yosef, however, did agree to add an addendum to the law to accommodate families that do not accept brain death according to halacha allowing them to request [and receive] further ventilation until cessation of heartbeat. But he [Rav Yosef] was surprised that the Degel Hatorah party representatives were instructed to vote against the law but allow the law to pass [by not causing the government to fall], because Rav Yosef felt one must decide one way or the other.}

4) Rav Yosef ruled vehemently that brain-respiratory death is death according to halacha, and he instructed Minister Eli Yishai that all Shas members of Knesset need to vote in support of this law.

5) Minister Yishai requested to receive in writing the ruling of Rav Yosef out of concern for criticism and doubt [lit: disturbances and posters criticizing their decision], but Rav Yosef said there is no concern about these things and said that his opinion should be widely disseminated.

   [Two days after the meeting described above] On the 19th of Adar II, 5768 (March 26, 2008) Rav Amar asked Rav Yosef about a specific case of organ donation from an 18 year old woman (Chana Chovev) who was brain dead from Meningococcal Meningitis (I was closely involved [with the case] and I reviewed the protocol [that they were properly followed] for determining her brain death and the TCD [Trans-cranial Doppler test results] that were done confirming her brain death). Rav Ovadiah Yosef permitted the removal of her critical organs to save the lives of other people who were in danger of dying.

[1] On the morning of the vote on this law in the second and third reading [in the Knesset].

Ruling of the Chief Rabbinate of Israel

Organ Donation

The Council of the Chief Rabbinate of Israel met this day, the first day of the month of Cheshvan on 5747 (1986), and unanimously affirmed the following recommendations by the Committee of Transplantation as follows:

1. The Chief Rabbinate was requested by the Ministry of Health to determine its Halachic position concerning heart transplantation in Israel. To that end, the Chief Rabbinate appointed a joint committee of Rabbis and physicians who studied the halachic and medical issues in depth. The committee consulted with renowned physicians in the field of transplantation from Hadassah Hospital and Shaare Zedek Hospital, both located in Jerusalem.
2. In the early years of heart transplantation (17 years ago), both Rabbi Moshe Feinstein and the Chief Rabbi of Israel, Rabbi Unterman forbade heart transplants and ruled it to be a double murder: that of the donor and that of the recipient. In the past decade there has been a fundamental change concerning the medical facts that concern heart transplantation as follows:
    a. The successes of heart transplants among recipients now reach 80% (that live at least one year) and 70% that live up to 5 years.
    b. It is now possible to reliably determine that the cessation of breathing of the donor is final and irreversible.
    c. Testimony has been brought before us that Rabbi Moshe Feinstein, in his later years, permitted heart transplants in America. We are also aware that many great Rabbis now recommend to heart patients to undergo the procedure.
3. Since this question concerns life and death, we are obligated to take a clear decisive halachic position such as that *"Yikov Hadin et HaHar - The law will cut through the mountain."*
4. Relying upon the Talmud Yoma (85A) and the ruling of the Chatam Sofer (Yoreh Deah, 338) death is determined by irreversible cessation of breathing. (See Responsa "Igrot Moshe," Chelek 3, 132). Therefore, concerning a donor it should be ascertained that the cessation of breathing is irreversible. This can be determined by proof of complete brain destruction, including the brain-stem which controls autonomous breathing.
5. It is accepted in the medical establishment, that in order to determine irreversible cessation of breathing (as outlined in paragraph 4) there ought to be 5 met conditions:
    a. Knowledge of the cause of injury.
    b. Complete cessation of natural breathing.
    c. Detailed clinical proof that the brain-stem is destroyed.
    d. Objective proof of the destruction of brain-stem though scientific tests, such as the BAER.
    e. Proof that complete cessation of breathing, and inactivity of the brain-stem, have continued for 12 hours - all the while the patient being cared for properly.
6. After investigating the criteria for establishing death, as was suggested by physicians in Hadassah Hospital in Jerusalem on 8th of Tammuz 5745 and given to the Chief Rabbinate on 5th of Tishrei 5747, we find that it is acceptable according to Halacha - if the objective clinical test BAER was performed on the brain-stem.
7. In light of everything that has been said above, the Chief Rabbinate of Israel is prepared to allow heart transplants (from accident victims) in the Hadassah medical center in Jerusalem based on the following conditions:
    a. Establishment of the all the conditions for determining death of the donor as mentioned above.
    b. Participation of a representative of the Chief Rabbinate of Israel as a full member in the medical team that determines the death of the donor.
    c. The representative will be chosen by the Ministry of Health from among a list that will be supplied to the Ministry of Health by the Chief Rabbinate of Israel once a year.
    d. Permission was given in advance by the donor, or alternatively by his/her family, to donate the heart.
    e. Establishment of a Review Committee under the aegis of the Ministry of Health but with participation of the Chief Rabbinate of Israel to oversee all heart transplants.
    f. The Ministry of Health will establish national regulations according to the above protocol.
8. Until the acceptance of all the specific conditions as outlined in Paragraph 7, there will be no permission for heart transplants in Israel.
9. If there will be acceptance of all the specific conditions as outlined in Paragraph 7, then a Review Committee of the Chief Rabbinate will be established to verify full compliance of the conditions as stated above.

Appendix (not included here):

a. Criteria to determine brain-death by recommendation of Hadassah Hospital Jerusalem.
b. Protocol for implementing a BAER exam.

הרבנות הראשית לישראל
THE CHIEF RABBINATE OF ISRAEL

הנוסח המלא של החלטת מועצת הרבנות הראשית בנושא ההשתלות

מועצת הרה"ר בישיבתה היום, א' דר"ח מרחשון תשמ"ז, אישרה פה אחד את המלצות ועדת ההשתלות כדלקמן:

1) הרבנות הראשית לישראל נתבקשה על ידי משרד הבריאות לקבוע את עמדת ההלכה ביחס להשתלות לב בישראל. לשם כך מינתה הרה"ר ועדה משותפת של רבנים ורופאים אשר למדה בעיון את ההבטים הרפואיים וההלכתיים הנוגעים לשאלה. הועדה נעזרת ביעוץ וחוות דעת של גדולי הרופאים בתחום זה בבתי החולים הדסה ושערי צדק בירושלים.

2) בתחילת עידן השתלות הלב (לפני 17 שנה) נפסק ע"י הגאון הרב משה פינשטיין זצ"ל והרה"ר לישראל הגרא"י אונטרמן זצ"ל לאסור השתלת לב מדין וציחה כפולה של התורם והמושתל כאחד.

ב-10 השנים האחרונות חל שינוי יסודי בנתונים העובדתיים והרפואיים הנוגעים להשתלות לב כדלקמן:

א) הצלחת הניתוח אצל המושתל מגיעה לכ-80% של "חיי עולם" (הוותרות בחיים לפחות שנה לאחר ההשתלה), וכ-70% נשארים בחיים חמש שנים.

ב) ניתן כיום לקבוע באופן אמין ובטוח שהפסקת הנשימה של הנפטר היא סופית ובלתי ניתנת להחזרה.

ג) הובאו לפנינו עדויות שאף הגר"מ פינשטיין זצ"ל התיר בזמן האחרון ביצוע הכתלת לב בארה"ב, וכן ידוע לנו על רבנים גדולים המיעצים לחולי לב לעבור השתלת לב.

3) מאחר והשאלה נוגעת לפיקוח נפש ממש, חובה עלינו להכריע בהלכה זו באופן ברור בבחינת וקוב הדין את ההר. used for both positions/ for + against brain-stem def.

4) בהסתמך על יסודות הגמ' ביומא (פה) ופסק החת"ס חיו"ד ש"ת, נקבע המות על פי ההלכה בהפסקת הנשימה. (וראה שו"ת אגרות משה חלק יו"ד ח"ג סי' קל"ב). לכן יש לוודא שהנשימה פסקה לחלוטין באופן שלא תחזור עוד.

זאת ניתן לקבוע ע"י הוכחת הרס המוח כולו, כולל גזע המוח, שהוא הגורם המפעיל את הנשימה העצמית באדם.

5) המקובל בעולם הרפואה שקביעה כנ"ל (בסעיף 4) דורשת 5 תנאים:
   א) ידיעה ברורה של סיבת הפגיעה.
   ב) הפסקה מוחלטת של הנשימה הטבעית.
   ג) הוכחות קליניות מפורטות שאכן גזע המוח הרוס.
   ד) הוכחות אובייקטיביות על הרס גזע המוח באמצעות בדיקות מדעיות כגון BAER.
   ה) הוכחה שהפסקת הנשימה המוחלטת ואי פעילות גזע המוח, נשארים בעיניים למשך 12 שעות לפחות, תוך כדי טפול מלא ומקובל.

6) לאור שעיינו בהצעה לקביעת המוות כפי שהוצעה על ידי רופאי ביה"ח הדסה בירושלים בתאריך ח' תמוז מ"ה הוגשה לרה"ר בתאריך ה' בתשרי תשמ"ז, אנו מוצאים אותה כיכולה להיות מקובלת על פי ההלכה אם תתווסף לה בדיקה אובייקטיבית מדעית (BAER) של גזע המח.

7) לאור האמור, הרבנות הראשית לישראל מוכנה להתיר השתלת לב (מנפגעי תאונה) במרכז הרפואי הדסה בירושלים בתנאים הבאים:
   א) קיום כל התנאים לקביעת מותו של התורם כפי שאמור למעלה.
   ב) שיתוף נציג הרבנות הראשית לישראל כחבר מלא בצוות הקובע את מותו של התורם.
   נציג זה ימונה על ידי משרד הבריאות מתוך רשימת שתוגש למשרד הבריאות ע"י הרה"ר, פעם בשנה.
   ג) תינתן מראש הסכמה בכתב של התורם או משפחתו למתן תרומת הלב.
   ד) הקמת ועדת מעקב עליונה מטעם משרד הבריאות בשיתוף עם הרה"ר (Review Committee) לבדיקת כל מקרי השתלות הלב בישראל.
   ה) משרד הבריאות יקבע בתקנות ארציות את כל ההלים הנ"ל.

8) עד לקבלת התנאים המפורטים בסעיף 7 אין עדיין שום היתר לביצוע השתלות לב בישראל.

9) אם ינתן היתר עפ"י התנאים המפורטים בסעיף 7, אזי תוקם ועדת מעקב של הרבנות הראשית שתפקידה לוודא מילוי מלא של תנאי ההיתר.

נספחים: א. הקריטריונים לקביעת מוות מוחי לפי הצעת הדסה ירושלים;
ב. פרוטוקול לביצוע BAER.


הנעשה והנשמע
ב"ה, אייר – סיון תשס"ח / מאי – יוני 2008 גיליון מס' 29 מחיר: אירופה: 1.5 € אנגליה: 1 £ ישראל: 6.2 ₪
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כך קובע הפוסק הנודע הגאון הרב זלמן נחמיה גולדברג, בראיון ל"הנעשה והנשמע"

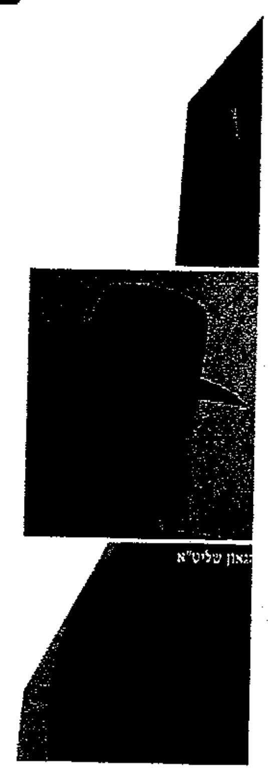
הראיון

הגאון הגדול הרב

סופר הנעטר והנושמע בשיחה עם הגאון של

הרב זלמן נחמיה גולדברג שליט"א בראיון ל"הנעשה והנשמע":

"חותני הגרש"ז אויערבך זצ"ל זכה למעמדו הכלל-ישראלי ולהערצה בלתי מסויגת משום שאת כל זמנו הקדיש לאחרים"



גאון שליט"א

האם עדיף רב הבקיא בהלכה, או ברב שיידע להנהיג את קהילתו ביד רמה? האם יש מקרים בהם ניתן להעלים עין ממכשולות מסויימים? וכיצד ינהג רב קהילה שהוא גם סמכות בלעדית במקום - האם יוכל לפסוק בעצמו בדיני ממונות? ומה באשר לסוגיית הגיור המסעירה את יהדות העולם. האם הגיעה השעה ליצירת ספרי יוחסין? והאם יש היתר היותר לחתום על כרטיס להשתלת איברים? (מסתבר שכן) - על אלה ועוד מיגוון נושאים בהלכה והשקפה התייחס הפוסק הנודע בשיחה מיוחדת לבטאון מרכז רבני אירופה

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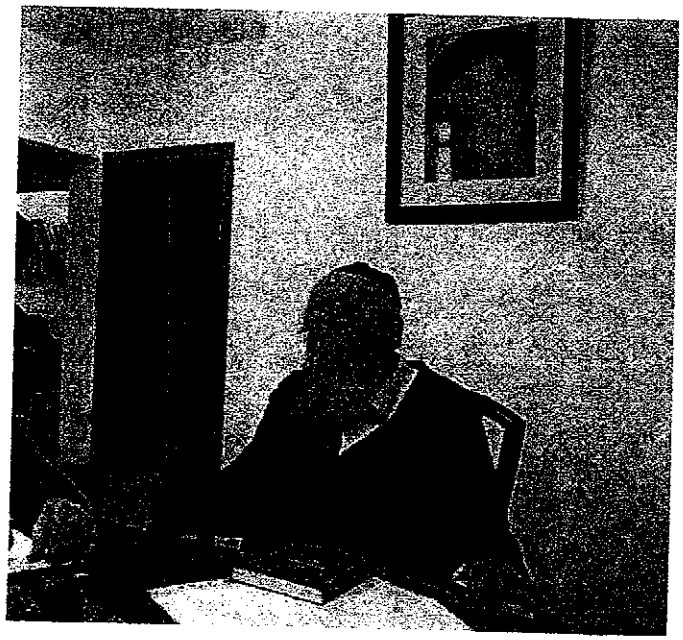
הראיון



אנו מתקבלנו אל תוך מעונו של הגאון רבי זלמן נחמיה גולדברג שליט"א. בחדר רחב-ידים שכתליו מעוטרים באלפי ספרים המכסים אותם מהמסד ועד הטפחות. הסתיים כעת שיעור ב"מנחת יחיעך". מבט קצר על המשתתפים הראה מגוון רחב מאוד של לומדים מכל קצווי הקשת – מחובשי כיפה סרוגה ועד לתושבי מאה שערים. אם תלוצ' זהו סודו של הגאון הגדול הנהשב כאחד מגדולי הפוסקים, ומיחידי הסגולה בהוראת "חושן משפט".

נעימותו וחביבותו יחד עם נאונותו מהווים שילוב מיוחד במינו שאף מחיצה אינה עומדת בפניו. הרב שימש ומשמש עשרות שנים כדיין ואף כיתן כחבר בית הדין הגדול, וכעת הוא עומד בראש בתי דין זמכוני הוראה שונים. יחד עם זאת הוא מרביץ תורה ומורה הוראה לאלפים, וספריו "לב המשפט", "משפט ערוך", "אור המועדים", "חזון קדושים", וספרים רבים נוספים, נחשבים ספרי יסוד לכל הבאים בשערי "חושן משפט" ושאר חלקי השולחן ערוך.

לרגל תג השבועות ניאות הרב להשיב לשאלותינו בנושאי רבנות ותתומים נוספים, ואף לציין מספר נקודות חשובות ביחס לחותנו הגדול מרן הגאון רבי שלמה זלמן אויערבך זצ"ל, אשר השפיע עליו יותר מכל.

◆ האם אפשר להגדיר את תפקידו העיקרי של רב קהילה?

תפקידו של הרב הינו מגוון ביותר – לפסוק הלכה כמובן, להנהיג, למסור שיעורים, לקרב בצורה יעילה, לתקן תקנות, או בלשון הגמרא – "כל מילי דמתא עליה רמיא". בימים עברו היתה הפרדה בין תפקיד הרב לתפקיד המו"ץ, אולם כיום בדרך כלל אין זה כך, אלא הרב נושא בשני התפקידים גם יחד. חכמתו של הרב אינה מתבטאת בפסיקת הלכות על אתר, אלא בראיית העולל ובדאגה לכך שלא יתרחשו מכשולות שונים בעתיד. למשל בנושא הכשרות, יש לדאוג לכך שמלכתחילה לא ימכסו לקהילה מוצרים מפוקפקים, ולא להסתפק בכיבוי השריפה רק כשהיא מתרחשת.

◆ במקרה שאי אפשר לשלב בין השניים, האם עדיף רב הבקיא בהלכה, או בוב שייודע להנהיג את קהילתו ביד רמה?

תלוי באופי הקהילה ובמאפייניה. ברור שישנן קהילות הזקוקות למוסך הלכה בעל שיעור קומה, ומאידך ישנן קהילות הזקוקות לרועה נאמן היודע להדריכן בדרך הישרה. הכל תלוי ברמתם הרוחנית של בני הקהילה, וזאת יכול לדעת רק מי שמכירה מקרוב.

◆ כיצד אפשר לדעת מתי לקרב ומתי לרחק את מי שסרח?

הגמרא בקידושין מספרת, כי לפני פטירתו של רבי נזרקה נבואה מפי ואמר כי בבבל היו שני אחים שצדו דגים בשבת ורבי אחי ברבי יאשיה נידה אותם וכתוצאה מכך הם הלכו והשתמדו. הרמ"א (יו"ד סי' שלב) פוסק שרבי סיפר זאת כדי להורות שאין לחשוש מכך שהמנודה ייצא להרבות רעה אלא יש לנדותו כהלכה, ואילו הט"ז לומד ההיפך – שרבי הורה שיש לחוש לכך ולא למדות את מי שעלול לצאת לתרבות רעה כתוצאה מהנידוי. ה"יחתם סופר" (שו"ת יו"ד סי' שכב) פוסק כהרמ"א, אבל מוסיף שאם הוא עלול לקחת עמו את ילדיו הקטנים עלינו לחוש לכך ולא לנדותו, ומוסיף שם בתשובה עוד הגבלות וחילוקים. כך שהנושא תלוי במחלוקת תלכתית ממש.

◆ מהי ההנהגה הראויה לזמנינו?

קשה לומר כיצד לנהוג בזמנינו. הרי לצערנו בדרך כלל מדובר בכאלו שכבר חיים כגויים גמורים, כבר לא ניתן להרחיקו יותר... נפסק להלכה שכשיהודי עובר עבירה והרע את חזקת כשרותו, עליו לעמוד בתנאים מסוימים כדי שנוכל לסמוך עליו שוב. אבל מי שכבר היה לנמרי מעורב בין הגויים ובא לחזור בתשובה מקבלים אותו מיד, שכן עצם הדבר שבא להתקרב כבר מוכיחה שברצונו להיות טוב. כך שהכל תלוי במקום ובזמן ולפי העניין. זהו תפקידו של הרב לדעת מתי יש להשתמש בשכאל דוחה ומתי בימין מקרבת.

◆ יש מקרים בהם ניתן להעלים עין ממכשולות מסוימים?

ההלכה כבר מתייחסת לנושא של "מוטב יהיה שוגגין ואל יהיו מזידין", ומשתמשת בדוגמא של "תוספת יום הכיפורים" שכן עניין זה אינו מפורש בכתוב. הדבר תלוי בכוח הקהילה והרב צריך לבדוק האם מזיבר בקריטריונים של "מוטב יהיו שוגגין", כלומר, דין שאינו מפורש ותנאים נוספים.

◆ ישנן קהילות בהן קיים בית הכנסת אחד לשתי חעדות – אשכנזים וספרדים, כיצד ינהגו בבית הכנסת?

ה"יחתם סופר" בתשובה דן בנושא של בתי כנסת שהתאחדו, ופוסק שיש לנהוג לפי מנהג בית הכנסת שאליו הצטרפו המתפללים מבית הכנסת שנסגר. מה גם שבדרך כלל אותו ביחכ"ס שנסגר הוא זה שהיה בו מיעוט מתפללים. כך אנו רואים גם בתוספות (עירובין מא.) שרבי אלעזר בן צדוק אמר 'אני הייתי מבני סנאה בן בנימין', ולכן לא צם בי באב שהיה יום חגם. ויהרי רבי אלעזר בן צדוק היה כהן! אלא מתרצים תוס' שאולי נשא רבי אלעזר אשה מבני משפחתם. מכאן מוכח שבענייני מנהגים אפשר ללכת אחר משפחת התותן או אחר העיר או העדה אליה הצטרפת. אבל כל זה רק לעניין מתני ונוסח התפילה. בשאר ההלכות והמנהגים על כל אחד לנהוג כמנהג עדתו, והרב יכול לפסוק לכל אחד כפי מנהג עדתו. אין צורך בשני רבנים – ספרדי ואשכנזי. מעולם לא הבנתי מה צורך יש בשני רבנים... רב אחד גדול בתורה מספיק בהחלט לשני העדות.

◆ ומה הדין כשמלכתחילה הקימו בית כנסת משותף לכולם?

במקרה שמלכתחילה ישנו בית כנסת אחד ינהגו כפי מנהג הרב שהוא המרא דאתרא. מסופר כי בזמן העלייה הגדולה לארה"ק, היה אחד שעסק בחיזוק ולימוד תורה בקרב עדות המזרח. באחד מן הימים הוא בא למו ה"חזון איש" ושאלנו בפיו – מכיון שתלמידיו שואלים ממנו שאלות בענייני הלכה למעשה, והוא אינו בקיא בהלכות לפי מנהג ספרד, כיצד יוכל לפסוק להם? השיב לו ה'חזון איש" שיוכל לפסוק כפי הידוע לו וכפי מנהגו והם יוכלו לנהוג כמוהו משום שהם תלמידיו!

לעתים ישנה התלבטות גדולה מאוד, האם לעודד

את בני הקהילה לעלות לארץ ישראל, או שמא לשמר את הקהילה הקיימת במקומה. מהי ההנהגה הראויה?

כמובן שישנה מצווה לעלות לארץ ישראל, המוטלת חן על בני הקהילה וחן על הרב, ואותה אי אפשר לעקור! אבל לעתים יקרה שאם יעלו חלק מבני הקהילה או הרב עצמו, הדבר יהרוס את הקהילה ותהיה התרופפות בענייני הדת, או אז יש לשקול את הדברים לגופו. זכורני כי בזמנו היה אחד מבני ירושלים שהתבקש לכהן כרב באחת מקהילות חו"ל שהייתה במקום מאוד מרוחק ומנוכר. חותנו הסתובב אצל גדולי ירושלים וביקשם שישכנעו את חתנו לבל ייסע, ואכן הם עשו כדבריו. אבל חותני מרן הגרש"ז אויערבך זצ"ל התבטא - 'אינני יודע אם הם צדקו, יתכן שעדיף היה אם היה נוסע ומחזק את אותה קהילה'!

מה עוד שלעתים דווקא כאן בארץ ישראל, בתיעדר המסגרת הקהילתית, קיים חשש מציאותי שהעולים ייחלשו בדתם! מסופר כי שאלו את רבי אלחנן וסרמן זצ"ל מדוע הוא מתנגד לתנועה הציונית, הרי ישנה מצווה של ישוב הארץ!! השיב רבי אלחנן - שישנה גם מצווה של ברית מילה, ובכל זאת, במקרה שמתו אחיו מחמת מילה, אין מלים אותו 'גם כאן', אמר רבי אלחנן, 'הוכיחה העלייה לארץ שהיו רגים שמתו מחמתה מיתה רוחנית'. כן שהרב צריך להיות עם יד על הדופק ולברוק כל מקרה לגופו.

◆ **אם הנושא כבד הזכה, האם יש מקום בהלכה לטיולים לחו"ל?**

על בני ארץ ישראל ישנו איסור מיוחד לצאת לחו"ל. כפי שאנו רואים בגמרא שהאמוראים היו מלווים את חבריהם שבא ללמוד תורה בא"י וחזרו לבבל, שהיו מלווים אותם רק עד עכו, משום ששם היה גבול ארץ ישראל. כאן המקום גם לעורר על תופעת הטיולים והנסיעות לבתי מלון בחו"ל שאין לה שום מקום ל'פי ההלכה! הדבר מובא בשו"ע הלכות חוה"מ (סי' תקלא) לגבי הבא ממדינת הים ולא רבים שמים לב לכך. אין שום היתר לצאת לחו"ל אלא לצורך פרנסה (ומחלוקת לגבי הרווחה) או ראיית פני חבירו שיש בזה קצת מצווה (ולצורך מצוות נוספות בלבד!). למעשה גם על טיולים בארץ ישראל לא הייתי ממליץ לאור האסונות המחרידים שאנו שומעים כל תקופה.

◆ **במקרה שתקציב הקהילה מוגבל, מהו סדר העדיפויות בתלוקתו?**

אין ספק שמקווה עומד בעדיפות הראשונה. אבל יש לעיין במקרה שקיים מקווה המרוחק מעט ממקום הקהילה ויש לטרוח בנסיעה אליו, ולכן יש כאלו שלא יטבלו מחמת כך, האם רוב בני הקהילה מחויבים לוותר על דברים אחרים כדי לבנות מקווה במקום קרוב, רק בגלל אותם יחידים. זוהי שאלה גדולה ועל פוסקי הדור להכריע לפי הנידון.

חותנכם מרן הגרש"ז אויערבך זצ"ל זכה שפסקיו נפוצו והתקבלו בכל ריחבי תבל, עד עצם היום הזה יוצאים עוד ועוד ספרים חמביאים ומבארים את משנתו. במה התייחד הגרש"ז יותר מן שאר הפוסקים?

חותנו, מלבד התמדתו, נאונותו וצדקותו, היה תמיד בבחינת "ראה מעשה ונזכר הלכה". כל דבר שראה, הוא מיד החל לחשבו בהיבטים החלכתיים. זכורני שראה ילד משחק בפיסות עץ ודבק ומיד החל לדון עמי מה דין המשחק בשבת. היה לו מבט ייחודי ומקורי מאוד - פעם דן עמי כיצד אפשר לשים צמר גפן ספוג ביין בפי הנימול בשבת, מדוע לא יהיה זה כהנחת עלוקה על הגוף שאסורה בשבת, הרי התינוק מיד מוצץ וסוחט את היין. חריצותו ויסודיותו בענייני הלכה הייתה מופלאה ממש - עוד בצעירותו כשאמו חדקדקה למכשיר שמיעה, הוא התיישב לחקור את הנושא לעומקו וחיבר ספר שלם על השימוש בו בשבת. כיום העיסוק בענייני הלכה התפשט ב"ה, אבל אז זה לא היה מקובל כל כך, ביחיבות כמעט ולא עסקו בלימוד הלכה בעיון.

◆ **ובכל זאת, ישנה נקודה מסוימת שיפלה להסביר את התופעה המיוחדת המכונה "רבי עלמה זלמן". מדוע ספריו ופסקיו כל כך התקבלו?**

ישנם דברים שהם מכבשונו של עולם, אינני יכול לדעת מה מתרחש בשמים ומדוע הוחלט דווקא כך. ישנם אישים שהחשגחה העליונה חפצה שספריהם ופסקיהם יתקבלו, כמו ה"חפץ חיים" למשל. אבל בכל זאת ניתן לומר הסבר כלשהו - ה'חתם סופר" מפרש את הפסוק "המכסה אני מאברהם.. כי ידעתיו אשר יצוה את בניו וגו'", כי באמת אברהם אבינו ע"ה לא הגיע למדרגת נבואה כזו שהש"ית יודיע לו את כל אשר הוא עומד להביא על האומות, אבל לא מפני שלא היה ראוי, אלא מפני שהיה עסוק בלהזהיר את בניו ואת שאר האנשים את דרכי ה' ולכן לא הספיק להגיע למדרגות אלו בעצמו. לכן אמר הקב"ה - וכי אכסה ממנו את אשר אני עומד לעשות? הרי את זמנו הקדיש למען אחרים! זוהי סגולה מיוחדת לאלו שעסוקים בזיכוי הרבים כמו ה'חפץ חיים" והחותני זצ"ל שהקב"ה מסייע בידם שקורותם תפוץ על פני הארץ. אף אחד לא מפסיד מכך שהוא מקדיש את עצמו למען הכלל! חותני התייגע כל כך בעיון ובפסיקת הלכה כדי שכלל ישראל יי[illegible]אי לנהוג לכן אין זה פלא שכל כך אהבו אותו ואת תורתו. ומכאן מוסר השכל לכל רב ומנהיג שמקדיש את זמנו לטיפול בעניינים השוטפים של הקהילה, לבל יזאג מכך שתיצרע התקדמותו האישית!

> "בתי הדין החדשים שהוקמו בשנים האחרונות, הוא אכן תוצאה ישירה של העיסוק המוגבר בחו"מ וצמיחת תלמידי חכמים חדשים בתחום, אך גם מריבוי סכסוכים ודינים ודברים בדיני ממונות. האמת היא שזה מצביע על מגמה חיובית - לאחר שנים שהציבור לא היה מודע לאיסור החמור והנורא של הליכה לערכאות עליו נאמר "מרים יד בתורת משה", חלה סוף סוף התעוררות בנושא וכיום הציבור נדרש יותר לדיני תורה"

על פי זה חשבתי לפרש את מאמר הגמרא "כל המשמח חתן וכלה זוכה לתורה שניתנה בחמשה קולות", וכי מדוע שכרו רב כל כך? אלא שמבטלין תלמוד תורה להכנסת כלה, ואם יחסוך אדם לביטול תורתו, מרגישים אותו חז"ל שבעבור זה יזכה לתורה. אגב, ידוע שהחת"ס עצמו האריך מאוד בתפילה. פעם לאחר תפילתו אמר לו אחד - בזמן שעמדתם בתפילה אנוכי הסמקתני ללמוד דף גמרא... השיב לו החת"ס - כל המאריך בתפילתו מאריכין לו ימיו ושנותיו.

הרי שחסר לו המזון בתכלית הלימוד ואין הכי נמי, אם הלומד מצליח להבין בעצמו את הכוונה האמיתית של כל דין ודין, הרי שניתן לומר עליו שזכה לבחינת שימוש תלמידי חכמים.

◆ **באיזה חלק של השו"ע יש להתמקד יותר?**

כמובן שראשית כל יש לדעת "אורח חיים" ו"יורה דעה", הרי בלעדיהם לא יוכל איש להרים את ידו ואת רגלו. אך בלימוד "אבן העזר" ישנה תועלת מיוחדת בחו"ל, ובמיוחד בארה"ב אשר ידוע לי שרבים מאוד מהמתגוררים בה אינם מתגרשים כדת משה וישראל, פשוט משום שאינם מודעים לכך שבכלל ישנם גירושים שכאלו. לו היו יודעים שעל פי ההלכה הם צריכים להתגרש בדרך מסוימת שבלעדיה הם צפויים לבעיות חמורות רח"ל, לא היה אכפת להם להוסיף גם גט על פי ההלכה. אין לי ספק שלו היו לומדים יותר 'אבן העזר', הייתה נוצרת גם יותר מודעות בקרב אחינו הרחוקים ואז גם בזכות ריבוי הבקיאים כך שאני בטוח שלא יגרע מאומה מתורתי, ואספיק ללומדה בשנים שיתווספו לי!

◆ **בשנים האחרונות נרשמה פריחה בלימוד ההלכה, מה ההסבר לכך? וכיצד אפשר להצליח בלימוד ההלכה?**

זהו דבר חיובי ביותר, רק טוב צמח מפריחת לימוד ההלכה באיכות ובכמות. כפי שציינת, הדבר אכן מתבטא הן בעצם העיסוק המוגבר בהלכה והן בריבוי חיבור ספרי הלכה. לגבי הצלחת הלימוד, ראשית חייבים ללמוד כל עניין ממקורו. ספרי הקיצורים הינם יפים לבעלי בתים או לסיכום הלימוד בלבד, אבל בשום אופן אינם מהווים תחליף לדרך היסודית והקדמונית של לימוד בעיון משרשי ההלכה במקורותיה בש"ס ופוסקים ראשונים.

ישנם כאלו החושבים שאם הם יסתפקו בספרי האחרונים המסכמים ומקצרים הרי שהם חוסכים זמן. זוהי טעות נמורה! הלומד יוכל להיווכח בכך בעצמו למשל כאשר ילמד שולחן ערוך - אם לפני כן למד את מקורות ההלכה בש"ס ובראשונים, הוא יגיע מעצמו לרוב ביאורי וחידושי ה"פרי מגדים"! הדבר מוכיח שאין תחליף לבהירות והעמקות הנקנים בלימוד יסודי. בנוסף לכך, לאחר שילמד בצורה כזו, יוכל לחזור ולשנן במהירות עצומה את סיכומי ההלכה ואף לזכרם היטב. הרי מרן המחבר תיקן את חלוקת כל ה"שולחן ערוך" ללימוד חודשי! בדפוסים הראשונים הייתה חלוקה זו מצוינת בדפי השו"ע, כיום נשאר ציון שכזה רק במקום אחד ב"חושן משפט" סוף סימן מ"ג בגלל טעות המדפיסים אשר חשבו כי הציון - "עד כאן יום כ"א", כוונתו לכ"א ימים... בכל אופן, הרי ברור שלהספיק את כל השולחן ערוך בחודש אחד אין זה מהדברים הקלים... אלא אם כן התייגעת כבר על לימוד שורשי ההלכה, או אז החזרה תהיה מהירה הרבה יותר.

"זוהי סגולה מיוחדת לאלו שעסוקים בזיכוי הרבים כמו ה"חפץ חיים" וחותני זצ"ל שהקב"ה מסייע בידם שתורתם תפוץ על פני הארץ. אף אחד לא מפסיד מכך שהוא מקדיש את עצמו למען הכלל! חותני התייגע כל כך בעיון ופסיקת הלכה כדי שכלל ישראל יידע כדאי לנהוג, לכן אין זה פלא שכל כך אהבו אותו ואת תורתו. ומכאן מוסר השכל לכל רב ומנהיג שמקדיש את זמנו לטיפול בעניניה השוטפים של הקהילה, לבל ידאג מכך שתיגרע התקדמותו האישית!"

רב ומורה צדק בוודאי אינם יכולים להסתפק בלימוד ספרי קיצורים הטובים אולי רק כעזרה ראשונה. הרי הרב ניצב מול שאלות וספקות בלתי צפויים ובלתי מצויים. לא לכל שאלה יש תשובה ברורה בפוסקים. אבל אם הרב למד את טעמי ומקורות ההלכה, הוא יוכל בעצמו להשוות, לברר ולהבין דבר מתוך דבר. פעם הביאו לפני מאן דהו שטען שאין צורך בלימוד הסוגיות ומסתפק הוא בלימוד הלכה למעשה. שאלתיו - הרי הלכה פסוקה היא שיש להניח תפילין של יד בישיבה ושל ראש בעמידה (לספרדים), אם כן מה דינו של המגיע לביהכ"ס ואין לו מקום לשבת, כיצד ינהג? האם לא יניח בכלל?... זוהי כמובן דוגמא מוקצנת להמחשה של שאלות שאינן יכולות להיות מוכרעות מלימוד מקופיא.

◆ **מהו המושג "שימוש תלמידי חכמים", וכיצד הוא מסייע ללימוד ההלכה?**

שימוש תלמידי חכמים, הכוונה היא להגיע לתכלית ההבנה בדברי רבו. בגמרא מובא שחזקיה אמר "אין ריאה לעוף", כלומר שלעוף כלל אין ריאה. ומקשה הגמרא הרי אנו רואים שיש לעוף ריאה, ומתרצת שהכוונה היא לדין מסוים. הביאור בדבר הוא, שחזקיה שמע מרבותיו את המשפט "אין ריאה לעוף" אבל לא הספיק לשמשם ולהבין את תכלית כוונתם, לכן סבר שהדברים כפשוטם. אדם יכול ללמוד וללמוד ואף להיות בקיא, אבל אם לא שימש את רבותיו היטב והבין מתוך דבריהם למה הם התכוונו בדיוק, בהלכות אהע"ז היו ניצבות בפניהם יותר אפשרויות נוחות ומהירות להתגרש על פי הלכה. בכלל, אני מייעץ לכל אלו הנוסעים לשמש במשרות תורניות בחו"ל, להיות בקיאים בהלכות גיטין ובכך תצמח לכלל ישראל תועלת עצומה שאין לתארה במילים!

אגב, חלק גדול מתחום הדיינות הוא לא רק בידיעת ההלכה על בוריה, אלא לדעת את הדרך הנכונה והמסבה כיצד לעשות שלום בית, או לחילופין לשכנע לקבל את הגט במהירות ובמעילות.

בשעתו שלחתי מכתב לכ"ק אדמו"ר מליובאוויטש זצ"ל ובו שטחתי בפניו את הצעתי לפעול למען היוחסה הבאה - לאחר שיתגרש זוג יהודי בגירושין אזרחיים בכל בית משפט אזרחי בחו"ל, יוגש לבעל מסמך ובו יחתום כי הוא ממנה את רב פלוני לסדר עבורו גט כדת משה וישראל. ישנם רבים מאוד שנישאו כדת וכדין אך אינם טורחים או שאינם יודעים על גירושים על פי ההלכה. בצורה כזו אפשר לחסוך אלפי פסולי חיתון! מהרבי זצ"ל אמנם לא קיבלתי תשובה, אך גם לא תשובה לשלילה. לדעתי זהו עדיין רעיון שאפשר ליישמו לאחר שידונו בו גדולי התורה די בכל אתר ואתר.

◆ **לאחרונה יותר ויותר לומדים החלו לעסוק בלימוד**

◆ "חושן משפט", יוצאים לאור ספרים חדשים, ומוקמים בתי דין פרטיים לרוב, האם זו תופעה חיובית?

אני תמיד טוען שמי שרוצה לצמוח בתורה, כל מי שחפץ להיות ראש ישיבה או מגיד שיעור טוב, כדאי לו מאוד ללמוד חושן משפט, זהו לימוד ערב, מושך את הלב ומחדד את המוח. בחושן משפט טמונים כל הלימודים הישיבתיים העמוקים, 'קצות החושן', 'נתיבות המשפט', 'רבי עקיבא איגר'. והרי מפורש שנינו "הרוצה שיחכים יעסוק בדיני ממונות". אין זה פלא שלאחר שהציבור 'גילה' את התענוג והתועלת בלימוד חו"מ הוא כל כך התפשט והתרבה.

ריבוי בתי הדין החדשים שהוקמו בשנים האחרונות כפי שציינת, הוא אכן תוצאה ישירה של העיסוק המוגבר בחו"מ וצמיחת תלמידי חכמים חדשים בתחום, אך גם מריבוי סכסוכים ודין ודברים בדיני ממונות. האמת היא שזה מצביע על מגמה חיובית – לאחר שנים שהציבור לא היה מודע לאיסור החמור והנורא של הליכה לערכאות עליו נאמר "מרים יד בתורת משה", הלה סוף סוף התעוררות בנושא וכיום הציבור נדרש יותר לדיני תורה. אבל עדיין המלאכה מרובה, תפקידו של הרב להסביר ולהתריע באוזני עדתו על החומרה והעבירה הנוראה בהליכה לערכאות. נכון שלעתים מדובר בציבור שהלוואי וקודם ישמרו שבת כהלכתה או יאכלו מאכלים כשרים... אבל במקרה כזה, ואפילו בציבור חשוב יותר ניתן להצביע על התועלת המעשית שבדין תורה – שהרי בערכאות משפטיות הדיונים נמשכים בדרך כלל זמן רב מאוד, העניינים מסובכים יותר ועל הצדדים להחזיל מכיסם ממון רב עבור עורכי דין. מדוע לא לחסוך זמן וכסף ולפנות לדין תורה בו בדרך כלל נמנעים ממשיכת זמן ומעורכי דין יקרים?!

◆ לעתים מדובר בקהילה שאין בה בית דין קבוע, האם רב הקהילה יוכל לפסוק בעצמו בדיני ממונות?

הרי דין תורה אמיתי הוא אחד מהדברים הקשים ביותר. כיום כמעט ולא פוסקים בדיני תורה עד לדקדוק ומיצוי הדין אלא פוסקים 'פשרה'. מכיון שכן, יכול הרב בעצמו לדון דיני ממונות ולפסוק בסכסוכים עסקיים מקומיים, אם יצרף אליו שני תלמידי חכמים או אפילו לבדו. רק שעלי להדגיש – פשרה אין הכוונה לפסוק 'חצי חצי'... זה כל אחד יכול לפסוק. על הפשרה להיות 'קרובה לדין', וברור שיש צורך בבקיאות בדיני חושן משפט כדי לדעת לצד מי הצדק נוטה.

◆ 'התברכנו' בסכסוכים ממוניים רבים מאוד. ישנם תחומים שהרב יכול לציין כטעונים תיקון?

עלינו להתרגל לכך שדיני 'בין אדם לחבירו' אינם שייכים לתחום המוסר אלא לתחום ההלכה! כשם שלא יעלה על הדעת לעגל פינות בדיני יורה דעה, כך אסור לעשות זאת בחושן משפט, ולעתים זה אף יותר חמור. הרמב"ם לגבי עדות כותב "לפי שאימת האיסורים על הרשעים ואין אימת הממון עליהן".

עלינו לעקור מציאות כזאת ולהתחיל בכך כבר בחינוך מהגיל הרך, להחדיר ולשנן – "המרים יד על חבירו" זוהי הלכה! "המלבין פני חבירו" זהו איסור מפורש! אין אלו דברי מוסר בעלמא. ידוע שרבי ישראל סלנטר ראה פעם שוחט שחדל ממלאכת השחיטה ופתח חנות, משום שחשש מאיסורי טריפה. התפלא רבי ישראל וטען בפניו, הרי בחנות אפשר להיכשל באיסורים רבים יותר, ומנה בפניו את כל החששות הממוניות בדיני משא ומתן.

ידוע ההסבר שבדיני ממונות קשה יותר לקבל את הדין, כי השני מרוויח, מה שאין כן כשהרב מטריף את הבהמה – אז רק אני מפסיד אבל אף אחד לא מרוויח... אבל ה"בית הלוי" הוסיף שהאנשים אינם כה רעים. ההסבר נעוץ בכך שבדיני ממונות כשפוסקים לחובתו של אדם, הרי למעשה אומרים לו – אתה לא בסדר, אתה הוא זה שכשל. וזוהי הרגשה קשה מנשוא.

◆ מה דעת הרב בנושא הגיור בארץ ישראל ובחו"ל?

המצב הנוכחי של הגיור בבתי דין בארץ ישראל מתנהל בצורה די משביעת רצון. הדיינים חוקרים ובודקים עד שידם מגעת, והתעודה אינה ניתנת בקלות. אין לבני אנוש אפשרות לדעת את אשר בליבו של אדם והאם הוא מרמה או לא. אבל לפחות עלינו לדאוג לכך שהגר יהיה מודע לכל המצוות אליהם הוא יהיה מחויב, שיתווה שבתות מלאות ויידע מה זו שבת על כל הלכותיה החמורות, וכן על זה הדרך. יש להקים מוסדות מיוחדים ובהם ישהו הגרים במשך תקופת מה, ובאותה תקופה הם יתוודעו לכל ההלכות והמנהגים שעליהם לקבל על עצמם.

הרי יש הסוברים שבגירות, אם הוא חשב בשעת מעשה שאין הוא באמת מתכוון לקבל עליו עול תורה ומצוות, אין גירותו גירות, ואין זה ככלדברים שבלב שאינם דברים. לפי דעה זו אכן יש בעיה חמורה בגרים המתגיירים רק מן השפה ולחוץ, ועלינו להשתדל בכל היכולת שהדבר לא יקרה. כמובן שאם היתה אפשרות להחזיק את תעודת הגירות ולא ליתנה עד לאחר שחולפת תקופה ורואים כי הגר עומד בצדקתו, כפי שפוסק הרמב"ם שיש לבדוק אחריו, היה זה מושלם. אבל לעתים זה כמעט בלתי אפשרי, על כן אין לו לדיין אלא מה שעיניו רואות.

לעתים עלינו להזדקק לקולות שונה, כמו פסיקת רבי חיים עוזר זצ"ל לגבי אדם הנשוי לגויה והיא באה להתגייר, שמעיקר הדין אסור לגיירה. אבל הגרח"ע מסתמך על שו"ת הרמב"ם שמוטב שיאכלו תמותות ולא נבילות (כמובן בהסתמכות על הגבלות שונות, ואכמ"ל). פסיקה זו באה לשימוש רב לנוכח העלייה מרוסיה המשופעת לדאבוננו בזוגות מעורבים. או מחלוקת לשיטת רבי עקיבא איגר אסור ללמד גוי תורה אף אם בא להתגייר. אמנם בימינו לא נוכל לעמוד בזה, שהרי בעבר היה הגוי בא ויוצא בקרב יהודים שומרי תורה ומצוות והיה לומד מעצמו, אבל כיום מי יוכל להתגייר אם לא נלמדו כקודם, ועל כן אנו מסתמכים על המהרש"ם שמתיר.

◆ האם יש מקום ליצירת ספרי יוחסין 'משלנו'?

זה אולי רעיון נחמד, אבל לדעתי אין זה מעשי כלל. טכנית זהו דבר קשה מאוד, כיצד אפשר לאחד את כל קהילות העולם למאגר אחד, מי יעמוד בראשו? מי נחשבת שומר תורה ומצוות? מי יממן? ומי יפסוק במקרה של מחלוקת? כל אלו שאלות שיש לתת עליהן את הדעת בכובד ראש, והושבני שדי קשה למצוא להן פתרונות.

כאן המקום לעורר אודות הרבנים שמחתנים כל זוג שבא לפניהם ללא שהם טורחים לברר מאומה. זוהי תקלה ומכשול עצום! גם אם הזוג לא הצליח להביא מסמכים המוכיחים על מוצאו, יהדותו או גירותו, תשתדל לפחות לפרסם את דבר השידוך בכל מקום אפשרי כדי שאם מאן דהו יודע על פקפוק ביהדותם או בכשרות נישואי הוריהם, הוא יוכל לבוא ולהעיד על כך.

◆ הרב נודע כמי שעסק רבות בנושא של קביעת רגע המוות, האם אפשר לחתום על כרטיס להשתלת איברים?

קביעת רגע המוות הינו נושא סבוך וחמור עד למאוד, ואין כאן המקום והזמן להתייחס אליו בפרוטרוט. חותני הגרש"ז זצ"ל החמיר בו מאוד. ואחרים חלקו עליו וכל אחד יעשה כדברי רבותיו. סבורני שגם יהודי שומר תורה ומצוות יכול לחתום על כרטיס להשתלת איברים, אבל בתנאי שיוסיף שהדברים ייעשו רק על פי הכרעת חכם מוסמך, ומוטב אף שיציין בפירוש מי הוא אותו חכם.

Jewish Medical Ethics: Monetary Compensation for Donating Kidneys

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Key words: ethics, Jewish, organ donation

Abstract

The Israel Health Ministry is preparing legislation that would allow a person to receive monetary compensation in exchange for donating a kidney for a lifesaving transplant. Such a bill would be the first of its kind and would seem to establish a policy that is in contrast with both existing international professional ethics and major Christian and Islamic religious ethics. In an attempt to investigate the extent to which such a bill would be consistent with traditional Jewish ethics, we reviewed the opinions of major traditional Jewish ethicists/halakhists, with emphasis on contemporary opinions, and found that compensating an organ donor for his or her time, discomfort, inconvenience and recovery is fully consistent with traditional Jewish law and ethics. While non-altruistic sale of kidneys might be theoretically ethical from a Jewish perspective, ultimately its ethical status is inextricably connected to solving a series of pragmatic issues, such as creating a system that insures that potential vendors/donors are properly informed and not exploited, controlling and supervising medical screening and support of the donors to insure that their health is not permanently endangered, protecting minors and incompetents, and regulating payments so that they reasonably reflect compensation for pain and suffering.

IMAJ 2004; 6: 185–188

Siegel-Itzkovich [1] recently reported that the Israel Health Ministry is preparing legislation – the first of its kind – that would allow a person to receive monetary compensation in exchange for donating a kidney for a lifesaving transplant. Such a policy would be in contrast with both existing international professional ethics and major Christian and Islamic religious ethics, although medical ethicists like Veatch [2] have recently revisited the issue, arguing for accepting financial incentives for organ procurement, and McCarrick and Darragh [3] have provided a short introduction to the range of recent opinions expressed on this issue. In any event, the Israeli bill – which would designate the money not as payment for sale but as compensation to the donor for his or her time, discomfort, inconvenience, and recovery – is fully consistent with traditional Jewish law and ethics, as we have outlined elsewhere [4].

In 2000, the Consensus Statement on the Live Organ Donor [5] reported that "direct financial compensation for an organ from a living donor remains controversial and illegal in the United States" and took note of the position of the Transplantation Society that "Organs and tissue should be given without commercial consideration or commercial profit." This position reflected not only the view of the medical community, but that of the overall Christian and Islamic community as well.

The United States Conference of Catholic Bishops [6] held that "The transplantation of organs from living donors is morally permissible . . . [but] the freedom of the prospective donor must be respected, and economic advantages should not accrue to the donor." Likewise, Catholic theologians Ashley and O'Rourke [7] state, "if society is to live in a humane manner, generosity and charity, rather than monetary gain and greed, must serve as the basis for donation of functioning organs." Bishop Dimitrios of Xanthos (personal communication, 29 October 2001) reports, "The Greek Orthodox Church accepts the possibility of any kind of transplant, if it is not a commercial transaction. Only philanthropy is a proper motive for giving and receiving organs. Otherwise it commodifies human organs and thus deprives the action of ethical quality." The Church of Scotland [8] "totally endorses the moral judgment of the British Parliament in passing a Bill which makes it a criminal offence to buy, sell, or advertise human organs . . . . If the tissue or organ to be donated is the gift of God and if the imperative of the Gospel is to love our neighbor unconditionally, then donation must be made freely on the grounds of need, not conditionally on the grounds of creed, or lucratively on the grounds of greed." Breidenthal (personal communication, 1 December 2001) reports that in the Episcopal tradition, "to sell a kidney to a needy recipient is better than selling one's body as a sexual object, because the purpose of the sale is better. But the selling remains morally wrong – indeed, it may even be more wrong, since the need of the sick person is an example of what God (who alone 'owns' our bodies) intends us to use our bodies for, namely, to glorify God and serve our neighbor."

Badawi [9] reports that in 1996 a council of scholars from all the major Muslim Schools of Law in Great Britain concluded that "Human organs should be donated and not sold. It is prohibited to receive a price for an organ." Al-Munajjid [10] reported that the Islamic Fiqh Council (*Majma' al-Fiqh al-Islami*) has issued a *fatwaa* (religious ruling) which states that, "It is not permitted to trade in human organs under any circumstances. But the question of whether the beneficiary may spend money to obtain an organ he needs, or to show his appreciation, is a matter which is still under scholarly debate."

In general, all these positions share the ethical objections outlined by Dossetor [11] to a system under which the state would regulate organ purchase from voluntary kidney vendors. (The state would not be concerned with the motivation of the vendor, but would check that the donor is competent and fully informed.) First, he argued, vital human organs would become market commodities, thereby compromising society's attitude towards individual human dignity. Second, the medical profession as a whole would have compromised its deontologic commitment that all individuals have value beyond price by adopting a utilitarian ethic that maximizes the good for the largest number. Third, such a system would allow society to accept the premise that poverty and desperation can be the basis for desperate, irreversible, one-time-only self-sacrificial acts, provided that the individuals claim to know the implications of their actions. Fourth, it ignores the strength of communal opinion, which insists on limits to personal autonomy for reasons other than physical harm to others. Fifth, it is an affront to those who see society as being based on transcendent values in which each human being has a sanctity, however hard it is to define what that means.

Halakhah (Jewish Law) certainly has no principled objection to any of these arguments, but it nevertheless comes to a different conclusion. In reaching a specific halakhic judgment, authorities often have to balance competing values and precedents. As Lichtenstein [12] notes, "A sensitive *posek* [halakhic decisor] recognizes both the gravity of the personal circumstances and the seriousness of the halakhic factors . . . . He might stretch the halakhic limits of leniency where serious domestic tragedy looms, or hold firm to the strict interpretation of the law when, as he reads the situation, the pressure for leniency stems from frivolous attitudes and reflects a debased moral compass."

Among the considerations that the *posek* must take into account is the effect that a particular decision might have on society as a whole. Thus, for example, the Talmud [13] records that each Friday afternoon Rabbi Huna would send someone to the market to buy up all vegetables unsold before the onset of the Sabbath in order that the farmers not give up on selling produce and thereby leave the community without vegetables. But despite the fact that the Bible and Talmud have a concrete and robust concern for charity on the private as well as public level, Rabbi Huna would throw the produce in the river rather than distribute it to the poor. He reasoned that such charity would have had negative societal impact, as the poor would begin to rely on these gifts rather than provide for themselves. The imperative for charity must be balanced against the realistic needs of a healthy community.

Halakhah acknowledges limits to personal autonomy for reasons other than physical harm to others. It assumes transcendent values in which each human body has a sanctity by virtue of it having housed a being created in God's image, and demands subservience to halakhic obligations and responsibilities, including the prohibition to gratuitously harm one's own body. Another basic principal is the biblical command [14] "Do not stand idly by the blood of your neighbor," which obligates a person to save another who is in danger.

The Talmud [15] records an argument regarding the responsibility of two travelers in the desert who are in danger of death. One has only enough water for himself and the other has none. Let them share the water and both die, says Rabbi Ben-Petora; however, normative *Halakhah* accepts the view of Rabbi Akiva that he who has the water should keep it for himself. He reasoned that the Bible (Lev. 25:36) commands that "Your brother shall live with you," indicating that your life takes precedence. The obligation to save another does not extend to sacrificing one's own life.

While *Halakhah* surely concerns itself with the motivation underlying religious observance, it generally adopts the position that the religious value of a *mitzvah* (a good deed) is not obviated by the absence or diminution of proper motivation. Of course, the deed acquires greater religious value as the virtuousness of the intention increases. But inadequate motivation does not undermine the inherent ethical value of the act itself, or provide an exemption to the obligation to perform a particular *mitzvah*.

Live organ donations

In the sixteenth century, ibn Zimra (known by the acronym Radbaz) [16] took up the question of a ruler who had threatened to kill one person if another did not allow the amputation of a non-essential organ. Radbaz, quoting Proverbs 3:17 that "[the Torah's] ways are ways of pleasantness," rules that the *Halakhah* could not possibly demand the amputation of a limb even to save another person. Nonetheless, it is a most "pious act" to do so voluntarily, provided it does not endanger one's own life. If, however, the procedure actually endangers the volunteer, the donor is dismissed as a "pious fool" for doing a dangerous thing. This is the dominant opinion in halakhic literature.

On this basis, Weiss [17], one of Jerusalem's late senior *poskim*, held that live kidney donations are forbidden, because they constitute too dangerous an enterprise for the donor. However, Yosef [18], former Chief Rabbi of Israel and senior contemporary *posek*, indicated that that ruling was based on the medical information available at that time. Now that medical authorities maintain that the risk for the donor is reasonable, such donations are permissible. Goren [19], late Chief Rabbi of Israel, likewise maintains that this medical judgment determines the permissibility of the donation. The current normative halakhic position is that such donations constitute a most pious act.

Goren writes that donation of a kidney in consideration of financial reward does not change its positive characteristic. His reasoning is based on the *Halakhah* concerning the obligation to not stand idly by your neighbor's blood. One is obligated to save someone in mortal danger even if it involves financial loss. However, if the rescued person has the financial means, the "good samaritan" can recover his expenses, despite the fact that he was obligated to act, and such financial considerations do not affect the religious quality of his act. "We have no halakhic basis on which to prohibit one from donating a kidney in consideration of financial gain," he wrote, "inasmuch as this reflects an agreement between the donor and recipient."

Abraham [20], expressing the view of Aurbach, another of Jerusalem's late senior *poskim*, writes that one cannot say that a person who contributes his kidney in consideration of financial gain

is doing something contemptible rather than praiseworthy. The vendor/donor has no obligation to contribute an organ and, if he nevertheless does so, it remains most commendable even if his primary purpose was not wanting altruistically to save a life but rather to obtain finances to pay off his debt or obtain medical services for himself or his family members. But, adds Abraham, what does that say of a society that allows a person to reach such a desperate state that he must sell an organ to get out of financial debt or obtain necessary medical services. Shafran [21], director of the Jerusalem Rabbinate's Department of Halakaha and Medicine, similarly notes, "Selling organs does involve an ethical problem, but it is one that relates to the general society and not to the individual buyer or seller. How did society reach a point where people are willing to sell their organs? This is a question of society's ethics, but it involves no technical halakhic prohibition."

Lau [22], former Chief Rabbi of Israel, sees a different ethical issue in allowing the sale of organs, namely that the organs might eventually become available only to the rich. But with regard to the question of financial consideration for donating one's organs, he sees no ethical issue at all. A person who is injured by another is allowed to collect not only for his medical expenses and lost income, but also for pain and suffering. One who volunteers to be injured in order to save another does not forfeit similar compensation. It is true that poor people are at a disadvantage in competing for limited resources, but that is true for a wide range of medical issues. Any possible underground exploitative industry in organ sales, he adds, should be prevented by appropriate governmental supervision.

Discussion

All these halakhic authorities reject out of hand the notion that payment for a kidney donation deprives the action of ethical quality. They agree that a donation motivated by generosity and charity, rather than monetary gain and greed, is a most "pious act," but they deny that this is the only ethical basis for donation of functioning organs.

Auerbach's position – that one's donation remains most commendable even if his primary purpose was not wanting altruistically to save a life but rather to obtain finances to pay off his debt or obtain medical services for himself or his family members – coincides with Dossetor's "indirect altruism." An impoverished father, in Dossetor's example, wants to help his seriously ill daughter. If she had renal failure, he would gladly donate his kidney with no thought of financial compensation. However, she does not have renal failure but a white-cell malignancy that requires expensive treatment. The father sells his kidney to obtain the money to pay for her medical treatment. Dossetor sees this as morally acceptable, despite his objection to allowing the sale of kidneys, but objects to allowing it for pragmatic reasons.

It is difficult, though, to separate indirect altruism from non-altruistic financial gain. Dossetor quotes the case of an impoverished Indian widow with two unmarried daughters for whom it is essential that she have a dowry. The sale of her kidney allowed her to provide dowries that enabled them to marry. In a society in which spinsters may lead a sorry and dangerous existence, this was a life-fulfilling, altruistic act. However, this logic would move most kidney sales into the category of indirect altruism, as few healthy impoverished donors intend to use the money obtained capriciously.

Wilkenson [23] has argued that the commodification argument against organ sale is not persuasive. The *poskim*, however, avoid the issue of commodification by framing the payment as the "fine" imposed on someone who commits a bodily assault on another, which includes payment for pain and suffering in addition to medical expenses and lost income.

In general, these *poskim* concur with the arguments put forth by Radcliffe-Richards and her colleagues [24]. There is a possibility of exploitation of potential donors/vendors; but it is the responsibility of governments to protect such individuals by regulation, as they now do in many other areas. Rich people will have opportunities for medical care unavailable to poor people, but that is the reality in many areas of medical care throughout the world. It might reflect poorly on a society that it allows a person to reach such a desperate state that he must sell an organ to get out of financial debt or obtain necessary medical services; but outlawing such sales will not correct the underlying social inequities. Interestingly, the proposed Israeli protocol, as reported by Friedlaender [25], gives poorer patients an equal opportunity to receive unrelated donor kidney transplants by having the Israeli National Transplant Center, and not the recipient, pay the donor.

Conclusion

While non-altruistic sale of kidneys might be theoretically ethical, ultimately its ethical status is inextricably connected to solving a series of pragmatic issues, such as creating a system that insures that potential vendors/donors are properly informed and not exploited. Without such arrangements, ethical non-altruistic kidney donations remain but a theoretical possibility.

Exactly what specific social safeguards beyond informed consent must be instituted are not spelled out by these halakhists, but presumably they would mirror those created by secular legislatures in areas such as adoption, surrogacy, or even employment. These would include control and supervision of medical screening and support of the donors to insure that their health is not permanently endangered; protection of minors and incompetents; and regulation of payments so that they reasonably reflect compensation for pain and suffering. It remains to be seen whether the pending Israeli legislation will accomplish these goals. In this respect, Shafran sees an internal contradiction in principle between allowing payment for surrogacy, for example, and outlawing the sale of organs, both of which involve a person taking payment for the "use" of their body.

In the meanwhile, a practical immediate solution lies in the direction of increased cadaver donations. In this respect, it is worth noting the halakhic ruling given in 1978 by Goren [19]: "When there is a deathly ill patient waiting for a kidney transplant and there is a cadaver whose kidney is an appropriate match for transplantation, it is a *mitzvah* and obligation for the family of the deceased to allow the transplant, as this is a matter of saving a life and 'not standing by the blood of your neighbor.' "

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Organ Donation & Brain Death in Halacha

Halachic Organ Donor Society
www.hods.org

THE NEED

- 100,000 Americans and 1,000 Israelis waiting for organs
- Every year 7,000 Americans and 100 Israelis die "on the list"
- Israel was thrown out of European Network of Organ Sharing
- Israelis and Jews are arrested every year for buying and selling organs
- Jews have a bad name internationally on the issue of organ donation
- In 2001, only 3% of Israelis had organ donor cards while in America it was more than 40%
- In 2011, only 17% of New Yorkers have cards while the country average is 45%
- In 2001, only three Orthodox rabbis had organ donor cards

REASONS JEWS DON'T DONATE

[Mnemonic is SETH] (but I don't recommend going in that order)

- Emotionally Difficult to Donate (same for non-Jews)
- Halachic Prohibitions (3) Concerning Corpse
- Superstitions (2) Scaring Jews Not to Donate
- Timing of the Donation: At Brain-Stem Death

Halachic Prohibitions About a Corpse

1. *Issur Nivul Hamet*
2. *Issur Hana'at Hamet*
3. *Issue Halanat Hamet*

PIKUACH NEFESH OVERRIDES THESE COMMANDMENTS

that is the why Rabbi Yechezkel Landau (known by his magnum opus the Nodah B'yehuda) writes we can do autopsies if the results will most likely help us save someone else's life (*"choleh lefanecha"*)

Emotions

Emotionally it is difficult however...

- consider that if your loved-one needed an organ you would want someone else to 'get over' the emotional inhibition and donate their organ
- Rav Moshe Feinstein writes (I.M. Y.D. V.III, Siman 174) *"...though it is the nature of people to be very distressed over their deceased (loved one)... nevertheless, there is a mitzvah not to be overly distressed [about donation] in order to save a life with the organ of the deceased."*

SUPERSTITIONS

1. AYIN HARAH

1. The rationalist understanding is that the term ayin harah is simply a metaphor for jealousy (see Rav Shlomo Aviner's video at www.hods.org)
2. If you really believed in it you should not sign a *ketubah*, life insurance, health insurance, flood insurance, theft insurance, etc
3. If *ayin harah* really worked, there would be plenty of organs to go around because there are thousands of people with organ donor cards.

SUPERSTITIONS

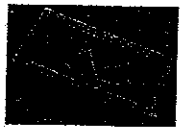
2. Belief that you need to be buried with your organs in order to be resurrected

1. No source
2. Counter-factual as all organs (and even bones) eventually decompose
3. Seems unfair to Jews incinerated in the Holocaust and blown up in their tanks
4. Insulting to God as if he is almighty he can resurrect you anyway

- Jewish Ossuaries

1st Century BCE – 1st Century CE

During Second Temple period, J… …wn chests, even the high priest d…



No Bones About it: Only bones, no organs

Timing of Donation

- Most organs are taken from "Brain-Stem Dead" patients/corpses.

  If you view brain-stem death to be death, you can donate, but if not, then you can't.
- Even though a person is brain-stem dead (aka Whole Brain Dead) it is possible to keep the heart still beating with the help of a ventillator.

What is Brain Stem Death?

- Watch this 7 minute film

http://hods.org/english/hissues/YouTube_video%20page.asp

Anatomy
The Brain, by and large, consists of brain-stem and cortex
Terms
Life-Support Machine: Avoid using, inaccurate and it implies a football could be alive
Respirator: Avoid using it, implies spontaneous human respiration
Ventillator: Accurate, a machine that vents air in and out
Coma: Cortex is not working, not dead, might wake up
Persistent Vegetative State (PVS): aka "Vegetable" Long term coma, most likely never wake up, but still alive
Brain Death: everybody throws around this term to mean different things, avoid it
Brain-Stem Death: (aka Whole Brain Death) both brain-stem and cortex are dead

Talmudic Sources

- Mishna Ohalot Chapter 1, Mishna 6 (in Rambam Mishna 7) ***"Decapitation is Death"*** and the logic is that a person who is brain dead is as if he is decapitated

אדם אינו מטמא, עד שתצא נפשו
הותרו ראשיהן–אף על פי שהן מפרכסין–טמאין

- Talmud Yoma 85a a person who looks dead, unconcsious, doesn't respond and can't breathe on his own, is dead. Others think this statement only applies if the heart has already stopped breathing.

תנו רבנן עד היכן הוא בודק עד חוטמו ויש אומרים עד לבו...
אבל לענין פקוח נפש אפי' אבא שאול מודי דעיקר חיותא באפיה הוא דכתיב (בראשית ז) כל אשר נשמת רוח חיים באפיו אבר רב פפא מחלוקת ממטה למעלה אבל ממעלה למטה כיון דבדק ליה עד חוטמו שוב אינו צריך דכתיב כל אשר נשמת רוח חיים באפיו

HODS Accomplishments

- Israel went from 3% to 12%
- Israelis dying on waiting list went from 120 a year to 80 a year
- Went from 2 rabbis to 183 rabbis with organ donor cards
- HODS responsible for at least 200 life-saving transplants that were not otherwise going to happen

ACTION LIST

1. Email your family asking them what they think
2. Email your rabbi asking him what he thinks
3. Consider getting an organ donor card at www.hods.org
4. Learn more by watching videos at www.hods.org

Brain Death Anatomy and Physiology

Joel S. Cohen, M.D.
Associate Professor of Clinical Neurology
Albert Einstein College of Medicine

Historical Perspective

Prior to the advent of mechanical respiration, death was defined as the cessation of circulation and breathing

Historical Perspective

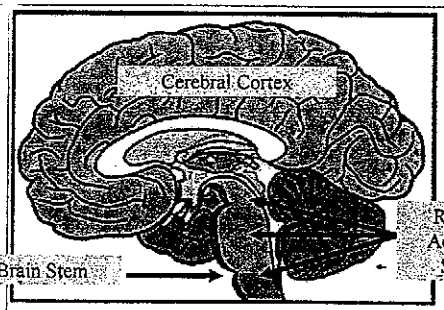
- 1959 *Coma de'passe'* Mollaret and Goulon
- 1968 *Irreversible Coma/Brain Death* Harvard Medical School Ad Hoc Committee
- 1981 Uniform Determination of Death Act - President's Commission for the Study of Ethical Problems in Medicine
- 1994 American Academy of Neurology Guidelines for the determination of Brain Death
- 2005 NYS Guidelines for Determining Brain Death

Brain Death Current Consensus

- Absent Cerebral Function
- Absent Brainstem Function
- Apnea

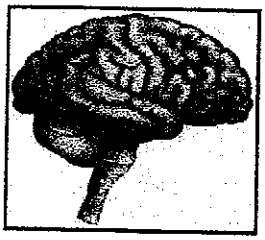
Normal Brain Anatomy

Normal Brain Anatomy

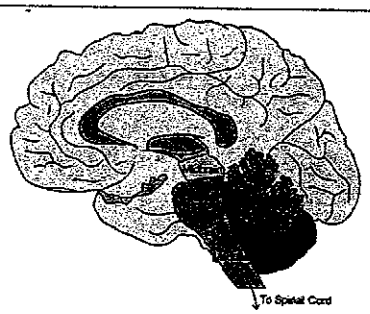


Cerebral Cortex

- Cognition
- Voluntary Movement
- Sensation



Brain Stem



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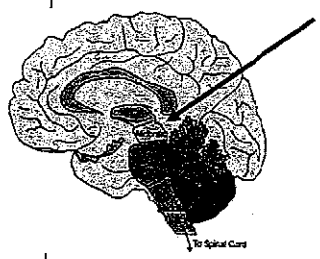
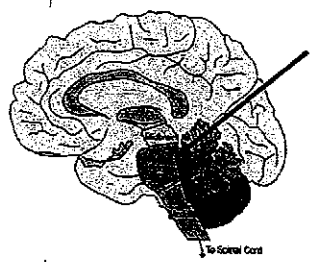


Midbrain

Cranial Nerve III

- pupillary function
- eye movement

Brain Stem

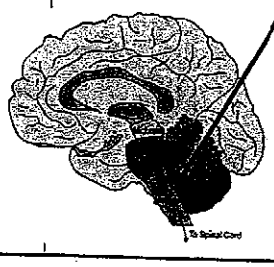


Pons

Cranial Nerves IV, V, VI

- conjugate eye movement
- corneal reflex

Brain Stem



Medulla

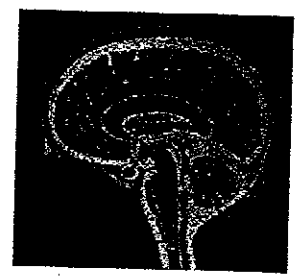
Cranial Nerves IX, X

- Pharyngeal (Gag) Reflex
- Tracheal (Cough) Reflex

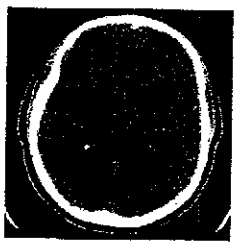
Respiration

Reticular Activating System

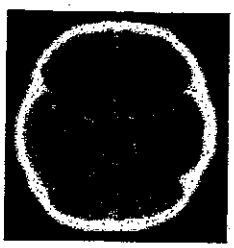
- Receives multiple sensory inputs
- Mediates wakefulness



Causes of Brain Death

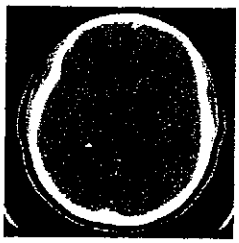


Normal

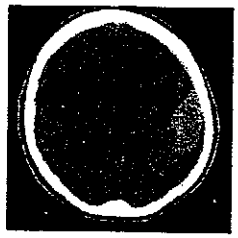


Cerebral Anoxia

Causes of Brain Death



Normal



Cerebral Hemorrhage

Causes of Brain Death

Normal

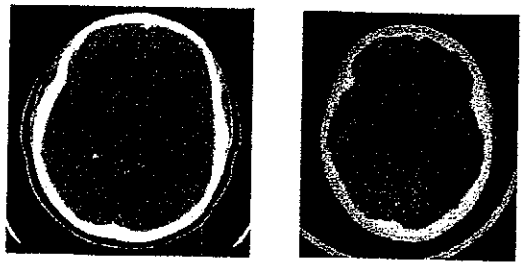
Subarachnoid Hemorrhage

Causes of Brain Death

Normal

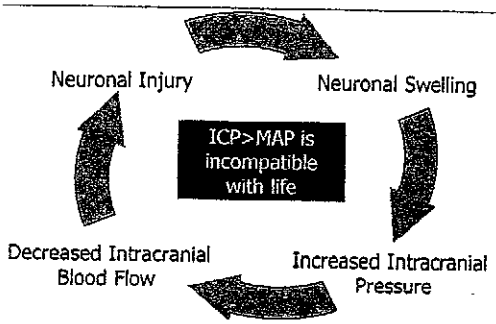
Trauma

Causes of Brain Death



Normal Meningitis

Mechanism of Cerebral Death



Conditions Distinct From Brain Death

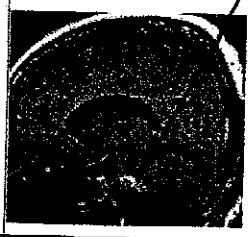
- Persistent Vegetative State
- Locked-in Syndrome
- Minimally Responsive State

Persistent Vegetative State

- Normal Sleep-Wake Cycles
- No Response to Environmental Stimuli
- Diffuse Brain Injury with Preservation of Brain Stem Function

Locked-in Syndrome

Ventral Pontine Infarct



- Complete Paralysis
- Preserved Consciousness
- Preserved Eye Movement

Minimally Responsive State

Static Encephalopathy

- Diffuse or Multi-Focal Brain Injury
- Preserved Brain Stem Function
- Variable Interaction with Environmental Stimuli

Brain Death Neurological Examination

Clinical Prerequisites:

- Known Irreversible Cause
- Exclusion of Potentially Reversible Conditions
  - Drug Intoxication or Poisoning
  - Electrolyte or Acid-Base Imbalance
  - Endocrine Disturbances
- Core Body temperature > 32° C

Brain Death Neurological Examination

- Coma
- Absent Brain Stem Reflexes
- Apnea

Coma

No Response to Noxious Stimuli

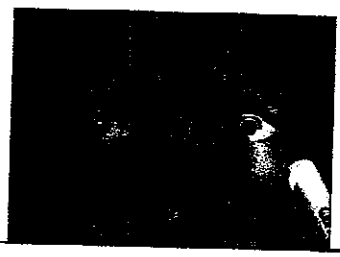
- Nail Bed Pressure
- Sternal Rub
- Supra-Orbital Ridge Pressure

Absence of Brain Stem Reflexes

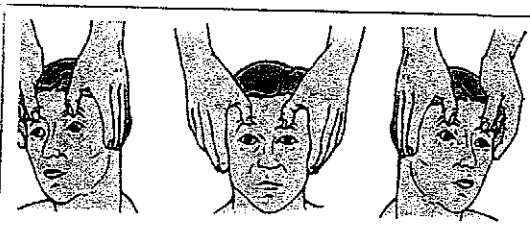
- Pupillary Reflex
- Eye Movements
- Facial Sensation and Motor Response
- Pharyngeal (Gag) Reflex
- Tracheal (Cough) Reflex

Pupillary Reflex

Pupils dilated with no constriction to bright light



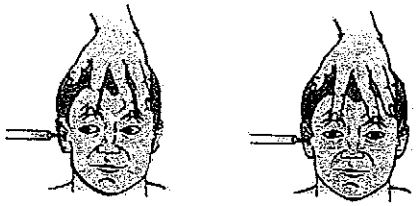
Eye Movements



Occulo-Cephalic Response

"Doll's Eyes Maneuver"

Eye Movements

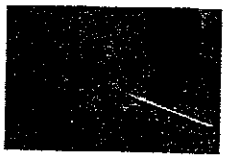


Oculo-Vestibular Response

"Cold Caloric Testing"

Facial Sensation and Motor Response

- Corneal Reflex



- Jaw Reflex
- Grimace to Supraorbital or Temporo-Mandibular Pressure

Apnea Testing

Prerequisites

- Core Body Temperature > 32° C
- Systolic Blood Pressure ≥ 90 mm Hg
- Normal Electrolytes
- Normal PCO2

Apnea Testing

1. Pre-Oxygenation
   - 100% Oxygen via Tracheal Cannula
   - PO2 = 200 mm Hg
2. Monitor PCO2 and PO2 with pulse oximetry
3. Disconnect Ventilator
4. Observe for Respiratory Movement until PCO2 = 60 mm Hg
5. Discontinue Testing if BP < 90, PO2 saturation decreases, or cardiac dysrhythmia observed

Confounding Clinical Conditions

- Facial Trauma
- Pupillary Abnormalities
- CNS Sedatives or Neuromuscular Blockers
- Hepatic Failure
- Pulmonary Disease

Observations Compatible with Brain Death

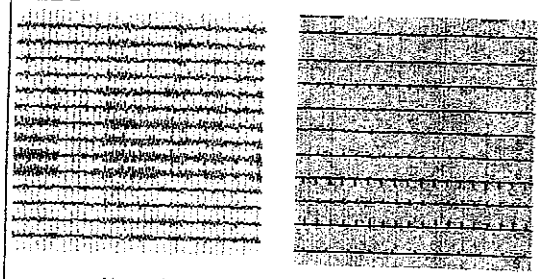
- Sweating, Blushing
- Deep Tendon Reflexes
- Spontaneous Spinal Reflexes- Triple Flexion
- Babinski Sign

Confirmatory Testing

Recommended when the proximate cause of coma is not known or when confounding clinical conditions limit the clinical examination

Confirmatory Testing

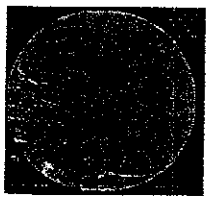
EEG



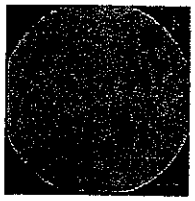
Normal Electrocerebral Silence

Confirmatory Testing

Cerebral Anglography



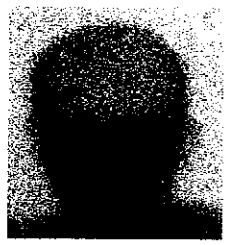
Normal



No Intracranial Flow

Confirmatory Testing

Technetium-99 Isotope Brain Scan

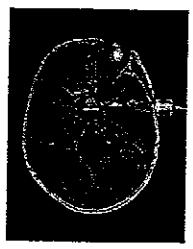


Confirmatory Testing

MR- Angiography

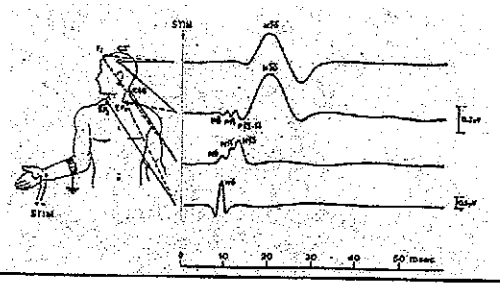
Confirmatory Testing

Transcranial Ultrasonography



Confirmatory Testing

Somatosensory Evoked Potentials



Concern for man and his fate must always form the chief interest of all technical endeavors. Never forget this in the midst of your diagrams and equations.

Albert Einstein

VIDEO on Brain-Stem Death

Visit http://hods.org/english/h-issues/YouTube_video%20pages/Animation.asp