

SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

SMOKING

A pronouncement by the Sephardic Chief Rabbi of Tel Aviv, Rabbi David Halevy, declaring cigarette smoking to be a violation of Jewish Law has received much publicity in the press and was reported in the *JTA Daily News Bulletin*, November 28, 1976, and *The New York Times*, December 11, 1976, page 2. Rabbi Halevy is reported to have ruled that the risk posed by cigarette smoking renders this act a violation of Deuteronomy 4:15 which bids man to preserve his health and that offering a cigarette to a friend is tantamount to "placing a stumbling block before the blind" (Leviticus 19:14). The same opinion was expressed a number of years ago by Rabbi Moses Aberbach, "Smoking and the Halakhah," *TRADITION*, Spring, 1969, and by Dr. Fred Rosner in "Cigarette Smoking and Jewish Law," included in his book, *Modern Medicine and Jewish Law* (New York, 1972). A similar view was advanced by Rabbi Nathan Drazin, "Halakhic Attitudes and Conclusions to the Drug Problem and its Relationship to Cigarette Smoking," *Judaism and Drugs*, ed. Leo Landman (New York, 1973).

In the opinion of this writer, it is not possible to sustain the argument that smoking, in addition to being foolhardy and dangerous, in-

volves an infraction of Halakhah as well.

Halakhic strictures against placing oneself in danger are not applicable to the case at hand for two reasons. The first argument is stated by Rabbi Moses Feinstein, *Iggrot Mosheh, Yoreh De'ah*, II, no. 49. In a responsum which is but seven and a half lines in length, Rabbi Feinstein peremptorily dismisses the contention that smoking constitutes a violation of Jewish law. The answer serves to delineate the nature of risk which is halakhically acceptable.

There is an obvious tension between the pertinent Talmudic dicta bearing upon actions which pose a hazard to life or health. *Shabbat* 32b declares, "A man should not place himself in a place of danger." Yet elsewhere, (*Shabbat* 129b and *Niddah* 31a as well as other places), the Talmud cites the verse "The Lord preserves the simple" (Psalms 116:6) as granting sanction to man to place his trust in Divine providence and to ignore possible danger. The Gemara itself dispels what would otherwise be an obvious contradiction by stating that certain actions which contain an element of danger are permitted since "the multitude has trodden thereupon."

The concept embodied in this dictum is not difficult to fathom. Willfully to commit a daredevil act

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while relying upon God's mercy in order to be preserved from misfortune is an act of hubris. It is sheer audacity for man to call upon God to preserve him from calamity which man can himself avoid. Therefore, one may not place oneself in a position of recognized danger even if one deems oneself to be a worthy and deserving beneficiary of Divine guardianship. Nevertheless, it is universally recognized that life is fraught with danger. Crossing the street, riding in an automobile, or even in a horse-drawn carriage for that matter, all involve a statistically significant danger. It is, of course, inconceivable that such ordinary activities be denied to man. Such actions are indeed permissible since "the multitude has trodden thereupon," i.e., since the attendant dangers are accepted with equanimity by society at large. Since society is quite willing to accept the element of risk involved, any individual is granted dispensation to rely upon God who "preserves the simple." Under such circumstances the person who ignores the risk is not deemed to be presumptuous in demanding an inordinate degree of Divine protection; on the contrary, he acts in the manner of the "simple" who pose no questions. An act which is not ostentatious, which does not flaunt societally accepted norms of behavior and does not draw attention to itself, is not regarded by Halakha as an unseemly demand for Divine protection. The risk involved may be assumed with impunity, if the individual desires to do so. Rabbi Feinstein states simply that cigarette smoking falls

within the category of permissible activity. There is little doubt that although the road is fraught with danger it is—at least for the present—indeed a path well trodden by the multitude.

In the opinion of this writer, another argument permitting cigarette smoking in terms of Jewish law may be drawn from the discussion of R. Ya'akov Etlinger, *Binyan Zion*, no, 137. Jewish law provides that those who return safely from a sea journey or from a trip across the desert must offer a *korban todah*, a thanksgiving sacrifice. This offering is brought in gratitude for having been delivered from danger. In our day, in the absence of the sacrificial order, this deliverance is acknowledged in the public recitation of *birkat ha-gomel* which is a *birkat hoda'ah*, or blessing of thanksgiving. In light of the recognized danger inherent in such travel, *Binyan Zion* questions the permissibility of taking such journeys in the first place. He responds by drawing a distinction between an immediate danger and a potential or future danger. Immediate danger must be eschewed under all circumstances; future danger may be assumed if, in the majority of cases, no harm will occur. One who embarks upon a sea voyage or caravan journey is in no immediate danger, although at some point in his travel danger may arise. Since, in the majority of cases, no harm will befall the traveler, the risk of future danger may be hazarded. It is for this reason, asserts *Binyan Zion*, that the sages, invoking the verse "The Lord preserves the simple" rule that a woman whose life may be

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endangered by pregnancy is permitted to engage in normal coital relations without any restrictions whatsoever. Justification for assuming the risks involved follows an identical line of reasoning: intercourse itself poses no hazard. The jeopardies of pregnancy lie in the future and may be assumed since, in the majority of cases posing such risks, no harm will actually result. Cigarette smoking would appear to be analogous to the cases ruled upon by *Binyan Zion*. No danger is present at the time the act is performed. The health hazards posed by smoking lie in the future. To be sure, certain physiological changes occur immediately upon inhalation of cigarette smoke, but such changes assume clinical significance only when they develop into symptoms of smoking related illnesses. Since even in light of presently available evidence it appears that the majority of smokers do not compromise their health and do not face premature death as a result of cigarette smoking there is, according to *Binyan Zion*'s thesis, no halakhic reason to ban this activity.

To be sure, no one can conceivably argue that smoking is a *mitzvah* or worthy of encouragement on any other ground. In earlier periods of Jewish history, the Sages promulgated decrees against specific hazardous actions which they did not regard as biblically proscribed. For example, *Tosafot*, *Beitzah* 6a, describes the prohibition against drinking uncovered water lest a snake had previously partaken of the water and and deposited poisonous ven-

om therein as a *davar she-be-minyan*, a specific rabbinic promulgation. The hazards of cigarette smoking are quite probably greater than those of drinking uncovered water. Had tobacco been known and had smoking been prevalent in days gone by, the Sages of the Talmud might well have deemed it wise to ban smoking. In the absence of biblical grounds and in the absence of such a rabbinical decree, either in the past or in the present, it cannot be maintained that smoking constitutes a violation of Halakhah. Despite the technical inability of contemporary rabbinic authorities to promulgate formal *takannot*, binding in nature upon all of Israel, the extensive rabbinic powers of moral persuasion and exhortation might well be harnessed in urging the eradication of this pernicious and damaging habit.

INDUCED LABOR

Sha'arei Halakhah, no. 9 (Adar 5736), published by *Yeshiva Bet She'arim*, contains an item dealing with the propriety of induced labor contributed by that institution's Rosh Yeshiva, Rabbi Menashe Klein.

In recent years it has become increasingly frequent for some obstetricians to recommend that labor be induced by chemical means late in the ninth month of pregnancy. The major advantage of induced labor is that it enables the physician to plan in advance and to arrange his schedule in order to be available when needed. Delivery may be planned to occur during hours which are convenient without dis-

rupting sleep or recreation. Daylight delivery is also deemed to be medically desirable because expert staffs are available and are able to work at peak efficiency. Moreover, should an emergency occur, other specialists and support personnel are more likely to be available during normal working hours than at other times. Rabbi Klein reports that some persons have advanced a uniquely halakhic consideration arguing for this practice; viz., a desire to obviate the occurrence of childbirth on *Shabbat*, and the attendant violation of Sabbath regulations.

Rabbi Klein argues strongly against this practice. His major contention is that Jewish law constrains a person from placing his life in jeopardy. Childbirth is viewed by Halakhah as posing an intrinsic risk to the life of the mother. This is evidenced by provisions of Jewish law which mandate the suspension of various ritual laws during the post-partum period. Although the pregnant woman will ultimately experience the selfsame dangers of childbirth upon the conclusion of the nine-month period of gestation, Rabbi Klein argues that the prohibition against placing one's life in danger includes a constraint against preponing even an otherwise unavoidable hazard. Moreover, there is no obligation to intervene in natural processes in an artificial manner in order to avoid violation of *Shabbat* laws following childbirth. Rabbi Klein also marshalls aggadic and kabbalistic sources indicating that the entire nine-month period spent by the fetus in the mother's womb is beneficial to the

subsequent physical and mental development of the child. The Gemara, *Niddah* 30b, teaches that the child is taught the Torah in its entirety while in the mother's womb but is caused by an angel to forget what it has learned before parturition. Foreshortening this experience, argues Rabbi Klein, is certainly not to the benefit of the child.

There is, indeed, medical evidence indicating that induced labor poses hazards for the child. The drugs administered in inducing labor can lead to an increase in fetal morbidity during labor and after delivery. Then, too, there is the everpresent possibility of an error in the dating of gestation which may result in a premature birth leading to death or irreparable damage in the neonatal period. The medical journal, *Lancet*, November 16, 1974, pp. 1183-84, featured an editorial severely critical of induction of labor for reasons of convenience and labelled such procedure a pernicious practice. The medical argument for daylight delivery is also challenged in this editorial. Evidence is cited which demonstrates that, oddly, fetal complications, as judged by the need for incubation or oxygen administration, may be more common during the day than during the night.

These considerations apply *a fortiori* to delivery by Caesarian section when not indicated on medical grounds. Recent reports indicate that in some South American countries this procedure is preferred over natural childbirth in certain strata of society simply on the basis of cosmetic considerations since

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pregnancy terminated by Caesarian section leaves virtually no effect upon the feminine figure. From the halakhic point of view, such frivolous considerations certainly do not justify the increased risk associated with this surgical procedure. Moreover, the surgical incision, when not therapeutically indicated, constitutes an assault upon the body and is forbidden as an act of "wounding" (*chavalah*).

It is, however, perfectly clear that when medically indicated there is no restriction upon either induced labor or performance of a Caesarian section. The assumption of the risks involved in these procedures is clearly warranted in order to avoid other risks which are greater in nature. Labor may therefore be induced or speeded if nonintervention would result in greater risk.

ENTEBBE

The phenomenal rescue by Israeli commandos of hostages held by terrorists at the Entebbe airport was greeted by waves of joy and exuberance. The operation was widely heralded as a meticulously planned and miraculously executed tactical feat. Jews, in particular, saw in the success of the operation the handiwork of Divine providence.

Yet, in some limited circles, the Entebbe operation was seen in a completely different light. Some persons influenced by *Neturei Karta* ideology denied that soldiers of a secularist Jewish state could possibly be agents of Divine providence. The Central Conference of Orthodox Rabbis, known as the

Hitachdut ha-Rabbanim, issued a formal declaration dated 15 Ab 5736 expressing criticism of the operation and of the acclaim showered upon the Israeli forces. This statement has been widely, although probably erroneously, understood as implying that in this and similar situations it is forbidden to organize rescue missions which utilize the services of those who deny Providence but rather proclaim that their success is achieved by virtue of their own prowess through "my own power and the strength of my hand." The text of this statement was published in the weekly newspaper which serves as the organ of the Satmar community, *Der Yid*, Aug. 20, 1976.

In response Rabbi Menachem Mendel Schneerson, the Lubavitcher *Rebbe*, pointed out that, if understood in this manner, this *psak* would lead to the absurd conclusion that it is forbidden to avail oneself of the medical ministrations of a physician who is a non-believer. Rabbi Schneerson, noting that further hijackings remain a distinct possibility, issued a call to all rabbinic authorities to state their position with regard to this matter so that the Torah community might know how to react in the future. Subsequently, the Yiddish-reading public was treated to the bizarre spectacle of rabbinic *piskei din* appearing, apparently as paid advertisements, in successive issues of *Der Allgemeine Journal* dated November 5, November 12 and November 26, 1976.

The ideological aspects of this matter are beyond the scope of this Department. The rabbinic opinions

which have appeared do, however, raise one issue which involves a purely technical question of Halakhah, having nothing at all to do with the theological question of whether or not secularists may be employed as agents through whom providential guardianship is exercised. Each of the published rabbinic opinions not only confirms Rabbi Schneerson's position but states that in the event that any of the rescued hostages should ever return to the Entebbe airport where the rescue occurred that person is obligated to pronounce the benediction "Blessed is He who performed a miracle on my behalf at this place." A similar blessing, "Blessed is He who performed a miracle, on behalf of my father in this place," must also be recited by children of those hostages who visit the site of their parents' deliverance. It appears to this writer that the question of the necessity and, indeed, the permissibility, of pronouncing such a benediction is far from a settled issue.

The formula of the blessing "who has performed a miracle on my behalf" indicates that only an event which is miraculous in nature occasions such a benediction. A blessing pronounced other than in the context decreed by Jewish law constitutes a *brachah le-vatalah*—an impermissible invocation of the Divine Name. Providential deliverance from danger does occasion a *birkat ha-gomel*, a blessing of thanksgiving upon such deliverance. The blessing "who has bestowed upon me all manner of beneficence," is pronounced on a single occasion following deliverance from danger, but is not associated with

the site of deliverance and is not repeated each time one visits the site of former danger. It is only a miraculous deliverance which occasions repeated blessings at the time of each subsequent return to the site of the miracle.

The crucial question is this: How is the term "miracle" to be defined? The notion of a miracle, in so far as halakhic ramifications of such phenomena are concerned, is discussed by Rabbi Zvi Hirsch Chajes in his *Darkei Mosheh*, published in *Kol Sifrei Maharitz Chajes* (Jerusalem 5718), I, 460-461. In this work, Rabbi Chajes is concerned with the conditions requiring the promulgation of the recitation of *hallel* as a commemoration of Divine beneficence. Rabbi Chajes declares that *hallel* which is ordained for this purpose must commemorate a miracle performed on behalf of the entire community of Israel and further defines a miracle as an act involving the suspension of causal laws governing the natural order. Events that occur in accordance with the laws of nature, no matter how fortuitous they may be, are not miraculous; a miracle, by definition, involves a change in "the order of creation."

As evidence that *hallel* is ordained to commemorate only a miraculous beneficence, Rabbi Chajes cites the discussion recounted in the Gemara, *Shabbat* 22b, concerning the *hallel* of *Chanukah*. The Gemara queries, "What is *Chanukah*?" and proceeds to narrate the historical miracle of the cruse of oil. The narrative concludes with the statement that the eight-day period of *Chanukah* was subsequently or-

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dained as a period of *hallel* and thanksgiving in commemoration of this wonder. Conspicuously absent in this discussion is any reference to the glorious military victory of the Hasmoneans over the Greek forces which vastly outnumbered them. Rashi, obviously seeking to explain this glaring omission, comments that the query, "What is *Chanukah*?" must be understood as meaning "[In commemoration] of which miracle was it ordained?" The ensuing discussion must then be understood as establishing a halakhic justification for the recitation of *hallel*. It is thus apparent from the discussion that it is the miracle of the oil which justifies commemorative recitation of *hallel*, whereas the miracle of the military victory does not. The reason, explains *Maharitz Chajes*, is that the military victory, amazing as it was, was achieved entirely in accordance with the laws of nature and did not in any way involve a suspension of the "order of creation." In contradistinction, the miracle of the cruse of oil clearly did involve a suspension of the natural order.

The implication of this thesis with regard to the question of recitation of *hallel* on *Yom ha-Atzma'ut* is obvious. Rabbi Moshe Zvi Neriah, in an article which appeared in *Ha-Torah ve-ha-Medinah*, V, 228-240, and was reprinted by Nachum Rokover, *Hilkhos Yom ha-Atzma'ut ve-Yom Yerushalayim*, pp. 182-197, while stating that, because of other considerations, *hallel* should not be recited on *Yom ha-Atzma'ut*, nevertheless argues that the definition of the term "miracle" advanced by *Maharitz Chajes* is too

restrictive, particularly in so far as the recitation of *hallel* is concerned. Among the questions which he raises is the propriety of the recitation on *Purim* of the blessing "who has performed miracles for our fathers in those days at this season." The events recorded in the Book of Esther, argues Rabbi Neriah, while undoubtedly the product of Divine guardianship and deliverance rather than fortuitous coincidence, nevertheless do not reflect a suspension of natural law.

In point of fact, this question was raised many centuries ago by Avudraham. In his resolution of this problem, Avudraham appears to state that Ahasuerus did not exercise free will in complying with the requests of Esther and that the populace, in not fulfilling the decree to which the royal seal had been affixed ordering them to rise against the Jews, were similarly deprived of the ability to exercise freedom of will. Deprivation of free will is viewed by Avudraham as an act of intervention in the natural order and as tantamount to suspension of a fundamental law of nature. [See Rambam, *Shemonah Perakim*, chapter 8, *Mishneh Torah*, *Hilkhos Teshuvah* 6:3.] The very fact that Avudraham poses this question demonstrates that he defined the term "miracle" in much the same manner as does *Maharitz Chajes*.

Insofar as the blessing "who has performed a miracle on my behalf" is concerned, *Shulchan Arukh*, *Orach Chayyim* 218:9, records two conflicting opinions. The first view asserts that this blessing is to be pronounced only in the event

of a miracle which is "yotzei me-minhag ha-olam," i.e., an event which cannot possibly be regarded as "natural." Lest this term be misunderstood, *Mishneh Berurah* defines the phrase by means of instantiation and cites the Gemara's example of a person lost in a desert who is saved from death by miraculous gushing of water from the sand. *Bi'ur Halakhah* defines the term even more explicitly as an event which "transcends the way of nature such as the miracles [which befell] our forefathers." A second, differing view is cited by *Shulchan Arukh* and rejected. The latter view does not require that the event involve the suspension of natural law. *Magen Avraham* 218:12, commenting on this dissenting view, questions its source and states that he could find no authority who advances such a position. He further remarks with amazement, "Certainly with regard to [that which occurs in accordance with] the custom of the world and its nature one cannot recite the blessing 'who has performed miracles on my behalf!'" Rabbi Elijah of Vilna, *Bi'ur ha-Gra, ad locum*, refutes this position by means of a *reductio ad absurdum*: It would follow that, according to this opinion, every woman who has experienced childbirth should recite this blessing upon visiting the site at which her child was delivered and that a similar blessing should be recited by her progeny throughout all subsequent generations! These authorities all agree that providential events occurring through the medium of natural phenomena do not occasion the blessings associated with "mir-

acles."

It is astonishing that, with a single exception, the various *piskei din* published in *Der Allgemeiner Journal* make no mention of the definitive ruling of *Shulchan Arukh* or of later authorities regarding the definition of a miracle. Allusion to this question is made in only one statement, that issued by the venerable Rabbi Shlomo Yosef Zevin and his colleagues within the *Chabad* movement in Israel. It is, to be sure, unthinkable that this renowned encyclopedist would have overlooked this point. Rabbi Zevin's *psak din* contains a statement in parentheses indicating that it is signed by persons who accept as binding the opinions codified in the *Shulchan Arukh ha-Rav*, and refers specifically to the ruling which appears in an appendix to the first volume of the *Shulchan Arukh ha-Rav*, "*Seder Birkat ha-Nehenin*," chap. 13. [*Shulchan Arukh ha-Rav* is a halakhic compendium authored by R. Shneur Zalman of Liadi, the founder of the Lubavitch dynasty.] This authority rules in accordance with the second opinion recorded in *Shulchan Arukh*, namely, the view which deems an extraordinary or fortuitous deliverance from impending disaster as constituting a "miracle." However, as noted earlier, this view is rejected by the *Shulchan Arukh* and by other later authorities.

With Rabbi Zevin's elucidation the matter may be placed in proper perspective. Any follower of the *Chabad* movement, or one who consistently follows the opinions of *Shulchan Arukh ha-Rav*, who may have been among the hostages in

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Entebbe, or whose parent or grandparent may have been among the hostages, may, of course, follow the ruling of *Shulchan Arukh ha-Rav* in this matter as well. Others would find it difficult to follow an opinion specifically rejected by the author of *Shulchan Arukh* and by the vast majority of later authorities including *Magen Avraham*, Rabbi Elijah of Vilna and *Mishneh Berurah*.

There is no question that those released from Entebbe are obligated to pronounce *birkat ha-gomel* as an expression of thanksgiving for their deliverance. Among those required to recite this blessing are those who have been imprisoned and threatened with execution. The released hostages are clearly in that category.

Rabbi Ovadiah Yosef, the Sephardic Chief Rabbi of Israel, in a contribution which appears in the Elul 5736 issue of *Or Torah*, questions whether a similar blessing may be pronounced by relatives and close friends of the hostages. *Bet Yosef*, *Orach Chayyim* 219, cites the opinion of Rashba who maintains that the blessing may be pronounced vicariously only by a student (or son) upon the deliverance of his master (or parent) from danger, but not by other relatives or friends. Rema, *Orach Chayyim* 219:4, disagrees, as apparently does *Shulchan Arukh*, and rules that this blessing may be recited by any individual who genuinely shares in the feeling of exhilaration and thanksgiving.

The late *Brisker Rav* found support for this opinion in the utterance of Jethro, "Blessed be the Lord, who has delivered you out of

the hands of the Egyptians and out of the hands of Pharaoh, and has delivered the people from under the hand of the Egyptians" (Exodus 18:10). This declaration, remarked the *Brisker Rav* was tantamount to the *birkat ha-gomel* and was pronounced by Jethro upon the deliverance of Israel, a deliverance in which he himself did not personally share. Scripture carefully records, "And Jethro rejoiced for all the goodness which the Lord had done to Israel" (Exodus 18:9), indicating that the blessing can be pronounced by others not personally affected by the event only if the blessing is occasioned by genuine jubilation as demanded by Rema and as explained by *Taz*, *Orach Chayyim* 219:3.

However, in light of the controversy between *Bet Yosef* and Rema, Rabbi Ovadiah Yosef invokes the halakhic principle which provides that in the presence of doubt a blessing is not to be recited and rules against pronouncement of the blessing by relatives and friends of the hostages. This is also the decision of *Mishneh Berurah* 219:18.

Nevertheless, Rabbi Yosef opines that friends and relatives may recite the *shehechyanu* blessing if they have not seen the hostage for a period of thirty days. Indeed, *Shulchan Arukh* provides that this blessing may be recited by any person who is overjoyed at seeing a friend or relative following an absence of thirty days. *Birkei Yosef* 225:3 indicates that this usage has largely lapsed in an age of rapid and efficient communications. Under such conditions "no news is good news" and the joy of being reunited

after an absence is not as great as it was in earlier times. However, argues Rabbi Yosef, absence under conditions of danger such as experienced by the hostages in Entebbe certainly warrants recitation of the *shehechyanu* by those who sincerely rejoice at being reunited with their loved ones.

May the Redeemer of Israel ever preserve His people from tyranny and oppression and may He hasten the ultimate Redemption speedily in our days.

TIME OF DEATH LEGISLATION

Various states have enacted legislation supplanting the classical definition of death with more flexible criteria. The new statutes are designed to establish "brain death" as the legal criterion of the termination of life. In particular, the 1975-1976 legislative session saw attempts to pass a law in the State of New York establishing a new legal definition of death embodying the criteria of "brain death." Although the bill was not passed during the 1976 session of the legislature due to the hectic atmosphere of the closing days of the legislative session, the bill was reintroduced in 1977 and will undoubtedly be reintroduced in future sessions. This activity has led to the reopening of discussion concerning a precise definition of the time of death according to Jewish law. Some sectors of the Jewish community are particularly alarmed because of the possible violation of the religious and civil liberties of Jews who deem action compatible with the provisions of the proposed

legislation to be tantamount to homicide according to Jewish law.

In the spring of 1976, a short statement authored by Rabbi Moses Feinstein, dated 5 Iyar 5736, dealing with criteria of death according to Jewish law was circulated by the Rephael Society, the medical section of the Association of Orthodox Jewish Scientists. Accompanying this document was a statement by Rabbi Moses Tendler going somewhat beyond the position of Rabbi Feinstein. An article by this reviewer espousing a view at variance with that expressed in those statements appears in the Tevet 5737 issue of *Ha-Pardes*. A position similar in its essential points to that of this writer was presented by Rabbi Aaron Soloveitchik in the course of a public lecture, the second annual Harold Rosenbaum Memorial Lecture, held at Yeshiva University on November 18, 1973, under the sponsorship of the Rephael Society of the Association of Orthodox Jewish Scientists. Regrettably, a transcript of the lecture has as yet not been published; the discourse is, however, available on cassettes.

Rabbi Feinstein points to the fact that the traditionally accepted criterion of death is the total absence of respiration. The crucial question is whether a patient maintained on a respirator may be deemed dead even though other vital signs may be present. Rabbi Feinstein opines that total irreversible cessation of independent respiratory activity is sufficient to establish that death has occurred. The practical problem is that of determining that total cessation of independent respiration has indeed occurred. Even

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though the patient is maintained on an artificial respirator, it is quite possible that at least minimal respiration would be possible without the aid of a respirator. If the patient is capable of even minimal breathing, Rabbi Feinstein declares that it is mandatory to provide every possible mechanical assistance and it is, accordingly, forbidden to remove the respirator. In usual medical practice it is not uncommon to remove or turn off the respirator in order to determine whether or not the patient retains any respiratory potential. Rabbi Feinstein refuses to sanction this practice since it may cause the demise of a weakened patient capable of some minimal respiration but requiring the assistance of a mechanical respirator in order to sustain life.

Rabbi Feinstein states, however, that once the respirator has been turned off for any reason, the respirator may be withheld and the patient monitored for signs of breathing. If the patient is carefully observed for a period of approximately fifteen minutes during which time absolutely no breathing motion is manifest, the patient, in Rabbi Feinstein's opinion, may be pronounced dead. If, however, any signs of independent breathing, no matter how feeble, are perceived, the respirator must be reactivated. [The basis for establishing a fifteen-minute monitoring period is not readily apparent. Support for a period of twenty minutes, thirty minutes or one hour may be found in earlier sources. See "Establishing Criteria of Death," *TRADITION*, Winter, 1973, p. 97 and p. 111,

n. 15.]

Rabbi Feinstein adds that this procedure may be followed only in the case of a patient suffering from a lingering and debilitating illness. Absence of respiration may not be accepted as conclusive evidence of death in cases of accident or traumatic injury or in cases of drug-induced coma since in such cases cessation of respiration may be reversible. Accordingly, in such cases the respirator must be immediately restored even if it becomes disconnected. In the case of a traumatic injury, Rabbi Feinstein states that total cessation of independent respiration may be relied upon as an indication that death has occurred only if it can also be determined by means of radioisotope scanning techniques that cessation of circulation of blood has taken place. If, however, it is found that blood continues to flow to the brain, the patient should be considered to be alive despite the absence of other vital signs. In the case of patients who have ingested toxic substances such as sleeping tablets or other drugs no determination of death can be made on the basis of absence of spontaneous respiration until blood tests reveal that toxic substances have been eliminated from the body.

Rabbi Feinstein's position presents a number of difficulties:

1) His statement appears to contradict his previously held opinion as expressed in *Iggrot Mosheh, Yoreh De'ah*, II, no. 146. The Mishnah, *Yevamot* 121a, records an incident related by R. Meir concerning an individual who fell into a well and emerged some three days

later. In explaining this phenomenon, Rashi comments, "R. Meir is of the opinion that a person may live and remain in water for one or two days." Although his explanation is at variance with commonly accepted scientific postulates, Rabbi Feinstein understands this incident as demonstrating that in some rare instances a person may survive for at least a limited period of time even without breathing. In the same responsum he asserts that life may be present even in the absence of both perceivable respiratory and cardiac activity and, accordingly, a patient should not be pronounced dead if there are clinical indications of the presence of any vital forces.

2) Rabbi Feinstein states that although a patient incapable of spontaneous respiratory activity need not be placed on the respirator, the patient may not be removed from the respirator for purposes of determining that he indeed cannot breathe spontaneously. Rabbi Feinstein gives no reason for this distinction. Rabbi Tendler, however, indicates that removal of the respirator may induce physiological stress of a nature which can readily hasten the demise of a respirator patient. If this is indeed the reasoning underlying Rabbi Feinstein's statement, it is difficult to understand why the patient who has been subjected to such stress in disconnecting him from the respirator for purposes of suction, or for purposes of servicing the respirator, should not be immediately replaced on the respirator. The physiological stress which may hasten death is the result of human action; the person performing the action is certainly

obligated to do everything possible to mitigate the potentially fatal result of the action for which he bears responsibility. To cite a parallel in another area of Jewish law, cooking on *Shabbat* is a culpable offense only if the food is heated to a specified temperature. A person who places a pot of water on the stove on *Shabbat* is surely obligated to remove the pot before it cooks in order to absolve himself of culpability. It would appear that the person disconnecting the respirator—even if he does so for the benefit of the patient or for purposes of servicing the respirator—is likewise obligated to rectify as far as possible any physiological stress caused the patient through his action.

One other point should be noted. Although the opinion is far from unanimous, Rabbi Feinstein, *Iggrot Mosheh, Yoreh De'ah*, II, no. 174, has ruled that according to Rema, *Yoreh De'ah* 339:1, it is not necessary to prolong the life of a *goses*. Nevertheless, overt intervention for the purpose of hastening death is strictly forbidden. A distinction is drawn between passive nonintervention and active intervention. Removal of a respirator is regarded as an overt act by most contemporary authorities whereas not returning the patient to the respirator is passive in nature. If not only medications but also oxygen need not be administered to a *goses*, it would follow that a *goses* need not be attached to a respirator. This consideration is, however, germane only in the case of a patient actually in a state of *gestisah*.

3) Rabbi Feinstein, in this statement, as opposed to his responsum

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in *Iggrot Mosheh*, does not take cognizance of spontaneous cardiac activity as an indication of life. This appears to be contradicted by *Chatam Sofer, Yoreh De'ah*, no. 338, and *Chakham Zevi*, no. 77. This point will be developed more fully in the ensuing discussion.

Rabbi Feinstein is firm in his opinion that the irreversible cessation of spontaneous respiration is halakhically both a necessary and sufficient condition of death. Radioisotope scanning in cases of traumatic accident is required by him only as confirmatory evidence of the irreversible nature of respiratory cessation. In oral communications Rabbi Feinstein has repeatedly stated that he, in no way, is prepared to accept any form of "brain death" as compatible with the provisions of Halakhah, a position which is formulated explicitly and unequivocally in *Iggrot Mosheh, Yoreh De'ah*, II, no. 146.

Moreover, it should be noted that the practical effects of Rabbi Feinstein's position, as expressed in this statement, are extremely limited. Modern-day respirators are not prone to malfunctions and need not be disconnected for servicing. While respirators are indeed frequently turned off for short intervals, this is done not as a matter of medical or mechanical necessity but to determine whether or not the patient is capable of independent respiration or in order to facilitate suctioning. The latter may readily be accomplished without turning off the respirator. Scrupulous observance of the injunction against unnecessarily disconnecting the respirator would, to a very

large extent, preclude utilization of Rabbi Feinstein's criterion of death.

Rabbi Tendler is prepared, at least hypothetically, to accept additional criteria as well. Rabbi Tendler states, "... if blood flow studies are refined sufficiently to give full confidence in their results, evidence that the region of the medulla is not being profused would in my opinion be a fully valid indication that death had occurred." In the absence of reliable blood flow tests, Rabbi Tendler endorses the criteria set forth by the Ad Hoc Committee of the Harvard Medical School. The Harvard Committee seeks to define irreversible coma as a criterion of death. The Harvard recommendations serve to establish operational criteria for determination of the characteristics of a permanently non-functional brain, or what is referred to colloquially as "brain death." The recommended criteria are: 1) lack of response to external stimuli or internal need; 2) absence of movement or breathing as observed by physicians over a period of at least one hour; 3) absence of elicitable reflexes. A fourth criterion, a flat or isoelectric electroencephalogram is recommended as being "of great confirmatory value" but not of absolute necessity. The procedure advocated by the Harvard Committee calls for repetition of the relevant tests following a lapse of twenty-four hours.

This writer, *Ha-Pardes*, Tevet 5737, addresses himself to the clarification of two questions upon which are contingent the acceptability of currently proposed criteria: 1) Is there any form of "brain death" which conforms to

halakhic criteria of death? 2) Is the absence of spontaneous respiration a sufficient criterion of death in the presence of ongoing cardiac activity?

1) A discussion of the compatibility of the criterion of brain death with the provisions of Jewish Law was first presented in the Tishri 5731 issue of *Ha-Darom* by Rabbi Gedalia Rabinowitz and Dr. M. Koenigsberg. The authors predicated their argument upon the Mishnah, *Oholot* 1:6: "And likewise cattle and wild beasts . . . if their heads have been severed, they are unclean [as carcasses] even if they move convulsively like the tail of a newt (or lizard) that twitches spasmodically [after being cut off]. Rabbi Rabinowitz and Dr. Koenigsberg argue that "brain death" is to be equated with decapitation which the Mishnah accepts as synonymous with death. This position was sharply opposed by Dr. Ya'akov Levy, an Israeli physician who has written extensively on topics of medical Halakhah, in a letter which appeared in the Nisan 5731 issue of *Ha-Darom* as well as in articles in the Tishri 5730 and Nisan 5732 issues of *Ha-Ma'ayan*.

This writer, *Ha-Pardes*, Tevet 5737, has argued that the currently proposed criteria differ significantly from decapitation as described in the Mishnah. Decapitation involves destruction of the entire brain. It might be argued with cogency that total cessation of circulation of blood to the brain will result in destruction of brain tissue. Total destruction of the brain might then be equated with decapitation, and the patient pronounced dead

after total destruction has occurred. [Cellular decay or destruction of tissue is indeed viewed as tantamount to excision and removal by Rabbi Chaim of Volozin, *Chut ha-Meshulash*, no. 11, section 3; *Bet Ephraim*, *Even ha-Ezer*, no. 2, p. 10; *Chatam Sofer*, *Even ha-Ezer*, nos. 17 and 19; Rabbi Yitzchak Elchanan Spektor, *Ein Yitzchak*, *Even ha-Ezer*, no. 9, sections 15-17; and *Shem Aryeh*, no. 6. These authorities base themselves upon *Yam shel Shlomoh*, *Yevamot* 8:9, who develops this thesis in interpreting the position of Rambam, *Isurei Bi'ah* 16:9. Cf. also Rambam, *Hilchot Schechitah* 7:15, and *Dagul me-Revavah Tinyana*, *Yoreh De'ah*, 48:5. This view is, however, disputed by Rabbi Yeruchem Yehudah Perilman, *Or Gadol*, no. 3, p. 32a, who dismisses Maharshal's position and the position of those who follow him as a *sevarat ha-keres*, an unsubstantiated visceral hypothesis devoid of basis in rabbinic sources. Total lysis, involving liquification of the brain tissue may, however, be tantamount to decapitation even according to *Or Gadol*.]

However, in point of fact, there is at present no clinical method of determining that total destruction of brain tissue has occurred. Radioisotope techniques, when and if sufficiently refined, may be employed only to determine that profusion of the brain has ceased. Cellular decay of the brain does indeed commence upon cessation of blood flow but requires an indeterminate period of time to become complete. Cessation of circulation to the brain cannot, in itself, be equated with total cellular destruction of the

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brain.

Moreover, radioisotope scanning techniques cannot, in their current state of refinement, be utilized in order to determine that even perfusion of the brain has totally ceased. Investigators responsible for the development of these techniques claim only that such methods may be used to indicate cessation of circulation to the cerebrum, which is the seat of the so-called "higher functions" of the human organism and are careful to describe the phenomena which they report as "cerebral death" rather than as "brain death." [See P. Braunstein *et al.*, "A Simple Bedside Evaluation for Cerebral Blood Flow in the Study of Cerebral Death," *The American Journal of Roentgenology, Radium Therapy and Nuclear Medicine*, Vol. CXVIII, no. 4, August 1973, pp. 757-767 and Julius Kolrein *et al.*, "Radioisotopes Bolus Technique as a Test to Detect Circulatory Deficit Associated with Cerebral Death," *Circulation*, Vol. 51, May 1975, pp. 924-939.] These phenomena are entirely compatible with continued circulation and perfusion of the medulla and the brain stem. In fact, radioisotope techniques do not even demonstrate total cessation of circulation to the cerebrum, but only that effective circulation has decreased below the level necessary to maintain its integrity. Even if scanning methods currently used are accurate, they do not indicate that all circulation to even a part of the brain, i.e., the cerebrum, has been interrupted, but only that the rate of flow is below that necessary to maintain viability. Thus, in a summary of findings

which forms part of a recent study, these techniques are described as "indicative of significant circulatory deficit to the cerebrum" (Kor-ein, p. 924).

The Harvard criteria are even less satisfactory than blood flow tests as halakhic criteria for establishing that cellular decay of the brain has taken place. The Harvard criteria serve to establish only the dysfunction of a limited part of the brain; they do not constitute evidence that even a portion of the brain has been destroyed. *Oholot* 1:6 can be cited only to substantiate an argument that destruction of the *entire* brain is tantamount to death.

2) This writer's article contains a citation of sources which demonstrate that the absence of spontaneous respiration cannot be viewed as a criterion of death in the presence of spontaneous cardiac activity. *Chatam Sofer, Yoreh De'ah*, no. 338, states that a patient may be pronounced dead only if three criteria are manifest: 1) the patient lies as an "inanimate stone"; 2) no pulse beat is discernible; and 3) respiration has ceased. *Chatam Sofer* adds the forceful statement: "These are three clinical symptoms of death which have been transmitted to us from the time that the nation of God became a holy people. All the forces in the universe will not cause us to deviate from the position of our Holy Torah."

It is clear that *Chatam Sofer* refuses to accept absence of spontaneous respiration as an indication of death unless accompanied by both total absence of movement and ab-

sence of heartbeat as evidenced by pulsation. *Chatam Sofer's* position is readily deducible from the comments of Rashi, *Yoma* 85a, who, in his comments upon the stated requirement for an examination of the nostrils in order to determine that cessation of respiration has occurred, remarks that such examination is to be made if the person is "like a corpse which does not move its limbs." The clear implication of this statement is that, in the presence of such movement, absence of respiration is not a determining criterion of death.

Rashi's position may, in turn, be inferred from the Mishnah, *Oholot* 1:6. Were it to be the case that absence of respiration is, in all cases, in and of itself, a fully reliable criterion of death the clarificatory clause, "even if they move convulsively like the tail of a newt that twitches spasmodically" which serves to establish a novel halakhic category, viz., *pirkus* or convulsive movement, would be totally superfluous. It is manifestly evident that following decapitation there can be no respiration. At the very most the Mishnah need but have stated "even if they move convulsively they are unclean [as carcasses] because respiration has ceased." It is evident that the Mishnah seeks to differentiate between two types of movement; movement which is devoid of vital significance, and movement which is indicative of life. The residual movement of a decapitated person or animal is described as a mere spasm and hence not indicative of life; the inference being that other forms of movement are indeed indicative that life is still pre-

sent. Since muscular movement is, under ordinary circumstances, an indication of life, it follows *a fortiori* that spontaneous cardiac activity is an absolute criterion of life. The beating of the heart in addition to being a form of muscular movement in the literal sense is certainly a more significant vital sign than ordinary forms of muscular movement.

It may be inferred from yet another statement of Rashi that death may be deemed to have occurred only upon cessation of cardiac activity. In commenting upon the requirement that the nostrils be examined for signs of breathing, Rashi states that this is necessary "for at times life is not perceivable at the heart, but is perceivable at the nose." In these comments Rashi takes pains to explain that absence of a perceivable heartbeat is not, in itself, evidence of death, not because the heartbeat is irrelevant, but because nonperception of a heartbeat is, in itself, inconclusive. Respiration is more readily perceivable than a heartbeat and hence the negative finding of an examination for respiration is a more reliable indicator. It is quite understandable that a faint heartbeat may not be detected (particularly without the aid of a stethoscope) because of the intervening rib cage, muscle tissue and fat, whereas even faint respiration can be perceived by placing a feather or straw to the nose of a patient. Conversely, in the absence of mechanical assistance, there can be no heartbeat after respiration has ceased. Thus, the absence of perceived respiration is an indicator not only of the cessation of respira-

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tory activity but of the cessation of cardiac activity as well. Indeed, *Chakham Zevi*, no. 77, citing these comments of Rashi, states unequivocally that respiration, in itself, is not the criterion of life, but is simply an indication that the heart is yet beating. It then certainly follows that the patient cannot be pronounced dead other than upon the irreversible cessation of both cardiac and respiratory activity. The presence of a heartbeat is thus a conclusive indication of life even in the absence of brain function or spontaneous respiration.

Rabbi Aaron Soloveitchik in an as yet unpublished but nevertheless widely circulated responsum, draws attention to a statement of Rabbenu Bachya in which this authority unequivocally declares that cardiac activity and not respiration is the primary criterion of life. In his commentary on Deuteronomy 6:5 Rabbenu Bachya states, "... and because [the heart] is the first organ in the creation of man and the last among the organs of the body to die therefore [Scripture] states 'with all your heart,' i.e., until the last moment of death."

One further point germane to the clarification of acceptable criteria of death is raised by Rabbi Aaron Soloveitchik. On the basis of these sources it would appear that, in the absence of other bodily movement, the patient may be pronounced dead immediately upon the irreversible cessation of both cardiac and respiratory activity and that no further indicators are necessary. One must be mindful that Rema, *Orach Chayyim* 330:5, states that we are not competent to determine

with precision that respiration has indeed ceased. [Cf. "Establishing Criteria of Death," *TRADITION*, Winter, 1973, pp. 96-100]. Rabbi Aaron Soloveitchik has, however, taken the more extreme position that if brain function, as recorded by an electroencephalogram, continues to be manifest, the patient must be considered to be alive even if no other vital signs are present. This position is, in terms of halakhic import, compatible with that of *Mishkenot Ya'akov*, *Yoreh De'ah*, no. 10, who asserts that some residual life may be present even after the heart is removed or ceases to function. Rabbi Soloveitchik, however, bases his argument on the contention that brain waves which can be recorded on an electroencephalogram constitute "movement." Since "movement" is present, the patient cannot be considered to be as an "inanimate stone" and hence one of the necessary criteria of death as enumerated by *Chatam Sofer* is absent.

It is, however, not clear that subvisual motion is considered "movement" from the point of view of Halakhah. In other areas of ritual law it is well-established that Halakhah concerns itself only with readily perceivable phenomena. [See *Tiferet Yisra'el Avodah Zarah* 2:6 and *Arukh ha-Shulchan*, *Yoreh De'ah* 83:15 and 84:36.] It may be the case that brain waves are too ephemeral to be considered "movement" in the eyes of Halakhah.

Rabbi Feinstein, *Iggrot Mosheh*, *Yoreh De'ah*, II, no. 146, discusses the different but related case of a patient who manifests no perceivable heartbeat but evidences cardiac

activity as recorded by an electrocardiogram. Rabbi Feinstein (in this responsum) declares that the patient must be considered to be alive, not because he manifests "movement" as recorded by an electrocardiogram, but because life may be present even in the absence of both perceivable respiration and cardiac activity. *Semachot* 8:1 reports the bizarre incident of a person who was interred in a crypt after having been pronounced dead on the basis of accepted criteria of death, but was subsequently found to be alive on the third day following interment. The individual is reported to have enjoyed another twenty-five years of life and to have sired children. Rabbi Feinstein understands this source as demonstrating that life may be present even in the absence of observable cardiac or respiratory activity. He explains that ordinarily this possibility need not be taken into consideration since the likelihood of this occurring is extremely remote. However, he maintains, if residual vital forces are in any way manifest, e.g., cardiac activity as evidenced by means of an electrocardiogram (or, arguably, brain waves as recorded by an electroencephalogram), the patient must be deemed to be alive. This line of reasoning appears to be similar to that of *Mishkenot Ya'akov*.

In terms of practical application, the matter is entirely academic insofar as electroencephalographic findings are concerned since, in point of fact, brain waves cease to be discernible almost immediately following cessation of cardiac activity. The theoretical point is, of course, of paramount significance

with regard to the question at hand. The consideration of factors such as brain waves as criteria of life can be entertained only because absence of respiration does not, in itself, always establish conclusively that death has occurred.

In his written responsum, Rabbi Soloveitchik presents a somewhat different argument which serves to establish the same point. Rabbi Soloveitchik cites Rambam's commentary on *Oholot* 1:6 to demonstrate that even cessation of both cardiac and respiratory activity is not in itself an absolute sign that death has occurred. In commenting on the phrase "even if they move convulsively like the tail of a newt," Rambam comments that such convulsive movements are not indicative of life because this "power of locomotion is not diffused among all the organs from a single root or source." Rabbi Soloveitchik infers from this comment that as long as there is present any vital activity which is not local in nature the patient is alive. Movement directed by the central nervous system is in the nature of locomotion which is "diffused among all the organs." The patient must therefore be considered to be alive on the basis of brain activity alone even if no respiration or pulsation is present. Thus, concludes Rabbi Soloveitchik, the patient may be considered dead only in the absence of all three vital activities, i.e., only after respiratory, cardiac and neurological activity have completely and irreversibly ceased.

It is unlikely that Jewish opinion will succeed in stemming the legislative tide indefinitely. It is also un-

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realistic to believe that time of death statutes will *accurately* reflect even the most liberal of halakhic opinions. Moreover, no responsible rabbinic authority would want his view to prevail on the basis of the coercive power of the secular state. There is, moreover, one point over which all can agree, *viz.*, that no person should be compelled to act, or to be the object of an act, which is to him morally odious. It is to this end that spokesmen representing various sectors of the Jewish community have vigorously advo-

cated that such legislation, if enacted, contain a provision allowing for exemption from newly legislated legal definitions of death for reasons of conscience, a provision strongly endorsed in a statement issued by Rabbi Feinstein on 8 Shevat 5737. If passed, the newly enacted criteria would not apply in determining the time of death in face of the announced opposition of the patient or of his next of kin. Thus, civil and religious liberties would be preserved for all.