

Halakhic Realities  
Collected Essays on Organ Donation



# HALAKHIC REALITIES

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COLLECTED ESSAYS  
ON ORGAN DONATION

EDITED BY  
Zev Farber

Maggid Books

*Halakhic Realities*  
*Collected Essays on Organ Donation*

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***Eli and Renée Rubinstein***  
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*In loving memory of their parents*  
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## Foreword

**T**he International Rabbinic Fellowship (IRF), an organization of over two hundred rabbis and clergy, is very excited to present this second volume of the Halakhic Realities series, addressing the topic of organ transplants. Many of us have the awesome privilege and responsibility of counseling congregants dealing with organ transplant and other difficult end-of-life dilemmas. This work will assist rabbis and families alike as they navigate these challenges.

This volume is a true reflection of the IRF. We believe that the Torah of the beit midrash must help guide and provide support and encouragement to people in their lives. It is therefore very fitting that this volume combines essays of meticulous halakhic analysis with essays that focus on ethics, pastoral care, and family dynamics.

I am profoundly grateful to our associate, Rabbi Dr. Zev Farber, for his tremendous work in putting this amazing volume together. Zev's penetrating insight and immense knowledge have been invaluable in this project.

I would also like to thank our executive director, Rabbi Jason Herman, without whom the IRF could not do its *avodat qodesh*, as well as Eli and Renée Rubinstein, without whose generous donation this volume would not have been possible.



*Halakhic Realities*

Finally, I would like to thank Maggid Books; its publisher, Matthew Miller; its editor-in-chief, Gila Fine; and the editors who worked on this volume, David Greenberg, Nechama Unterman, and Tomi Mager, for their professionalism in helping us arrive at this point.

Rabbi Nissan Antine  
President, International Rabbinic Fellowship  
Rabbi, Beth Sholom Congregation, Potomac, MD

## *List of Abbreviations*

EH:	<i>Even ha-Ezer</i>
ḤM:	<i>Ḥoshen Mishpat</i>
OH:	<i>Orah Ḥaim</i>
YD:	<i>Yoreh De'ah</i>
IM:	<i>Iggerot Moshe</i> by Rabbi Moshe Feinstein
MT:	<i>Mishneh Torah</i>
b.:	Babylonian Talmud
j.:	Jerusalem Talmud
m.:	Mishna
t.:	Tosefta
BMJ:	<i>British Medical Journal</i>
NEJM:	<i>New England Journal of Medicine</i>
BAER:	brainstem auditory evoked response
NHBD:	non-heart-beating donation
RBND:	recipient but not donor
TCD:	transcranial Doppler

## *Introduction*

# From Brain Death to Organ Donation

**T**his volume follows on the heels of *Halakhic Realities: Collected Essays on Brain Death*, and is meant to complement it. It is difficult to draw a clear line between the question of how death should be determined and the question of whether we should be donating organs from brain-dead patients. This is because most organs can remain viable for transplant only if they are functioning at the time of retrieval. For this reason, readers will find some inevitable overlap between the two volumes. Nevertheless, the topic of organ donation deserves independent treatment.

The book has been organized into four sections. The first, titled “The Halakhic Question,” deals with the bread-and-butter question of the permissibility of donating organs and focuses mainly (though not exclusively) on brain-dead patients. Some of these essays analyze the question of how brain death is treated by the *posqim* (Najman and Picard), and for this reason have the most overlap with the previous volume. Other essays deal with questions of halakhic methodology (Klapper and A. Walfish), the significance of saving human life (Cherlow), and how much weight we should give alternative values, such as respect for the personhood of the deceased (Polen).

The second section, titled “The Ethical Question,” analyzes the question of organ donation philosophically and sociologically. One essay deals with the importance of facing modernity honestly (Hartman). Others discuss ways we can take responsibility for increasing the number of organ donors among those who know little about donation, are interested but afraid, or even simply haven’t put in the effort to sign up (Lau, Telushkin, and Yanklowitz). As we did with the previous volume, we include here interviews with the principal officers of the RCA in 1991 (Angel and B. Walfish), who crafted and pushed through the RCA health care proxy, still an important tool for rabbis and congregants today. Finally, the morally problematic stance of being willing to take organs but not give them is discussed at length (Korn and Telushkin).

The third section is titled “The Personal Question” and approaches the issue of organ donation from the perspective of the potential donor’s loved ones. One essay deals with the difficulty a family has relating to the paradoxical experience of seeing a relative with a warm body and heartbeat, and being asked to allow doctors to remove his or her organs because he or she is dead (Schick). Two essays relate powerful stories about families who went through the process of donating their loved ones’ organs (Flatow, B. Greenberg and Weil). Other essays approach the subject from the perspective of pastoral care professionals (Weiss and Weiner). These essays, although focused on organ donation and brain death, touch upon the more general issue of end-of-life care as well.<sup>1</sup>

The fourth section deals only with cadaveric organ donation (Farber and I. Greenberg). It begins with two chapters about the postmortem treatment of bodies for medical purposes (autopsy) and continues with a discussion of cornea donation and skin banks. Corneas and skin can be retrieved from *clinically* dead (not only brain-dead) patients, which allows for a discussion of issues relating to treatment of cadavers without

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1. End-of-life care really is a topic in and of itself that requires its own treatment. For an insightful description of some of the challenges families face in end-of-life situations, with an emphasis on Jewish families, see Randy Linda Sturman, *Six Lives in Jerusalem: End-of-Life Decisions in Jerusalem – Cultural, Medical, Ethical, and Legal Considerations* (International Library of Ethics, Law, and the New Medicine 16; Boston: Kluwer Academic Publishers, 2003).

*Introduction: From Brain Death to Organ Donation*

the usually dominant question of the dead or living status of the patient that brain death cases require.

This book has not been edited for content, and each author expresses his or her own opinion. In editing the book, I have tried to balance avoiding unnecessary repetition, on one hand, with allowing authors to develop their points naturally, on the other.<sup>2</sup> As is to be expected, I found myself in agreement with some essays more than others; nevertheless, I have learned from each one. It is my hope that the work will serve as a catalyst for future discussions, as well as a resource for rabbis and laypeople trying to navigate the exceedingly complex life-and-death issues surrounding the donation of organs.

Rabbi Zev Farber, Ph.D., editor  
*Rosh Hodesh Tevet 5777*

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2. Throughout the essays, I have added notes referencing where one can read similar or alternative discussions of the same point in different essays in this book or in the previous volume, on brain death. These notes generally are my own and not the authors', since I have had access to the entire book while the authors have not. I hope this makes the book as a whole more user-friendly.

# Section I

## *The Halakhic Question*

## Chapter 1

# Transplantation and Halakha: An Overview

Dina Najman

### I. ORGAN TRANSPLANTATION: A HISTORICAL OVERVIEW

Organ transplantation is the procedure of replacing diseased organs, parts of organs, or tissues, with healthy organs or tissues. The era of transplantation began about ninety years ago, when Professor Alexis Carrel transplanted a heart into a dog and was able to demonstrate a technique for connecting blood vessels.<sup>1</sup> For several years, researchers continued trying to transplant organs into animals, but without success. The main obstacle to successful transplantation was immunological rejection.

In 1954, Dr. John P. Merrill led a team that successfully transplanted a kidney from Ronald Herrick into Richard Herrick, his identical twin. Dr. Merrill recognized the immunological problems and developed pharmaceuticals to assist in this transplantation.<sup>2</sup> In 1967, Dr. Christiaan Barnard's overly celebrated heart transplant repeated Carrel's earlier steps

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1. Alexis Carrel, "Technique and Results of Vascular Anastomoses," *Surgery, Gynecology and Obstetrics* 14 (1912): 246. This journal now is known as the *Journal of the American College of Surgeons*.

2. Robert E. Fuisz, *Essays in Medicine: The Brigham, John P. Merrill and the Evolution of Nephrology* (New York: Medcom Learning Systems, 1973).

## Section I – The Halakhic Question

of connecting blood vessels and furthered the possibility of transplanting organs from one person to another.

Barnard was the senior cardiothoracic surgeon at Groote Schuur Hospital in Cape Town, South Africa.<sup>3</sup> He transplanted the heart of a brain-dead woman into a man with a severely damaged heart. Although Barnard was the first to successfully transplant a human heart, he was in close competition with several accomplished surgeons in the United States. One of them, Dr. Norman Shumway, commented that “it made the use of brain-dead victims acceptable for organ transplantation.”<sup>4</sup> In fact, there was much uncertainty and debate at the time as to when and how to determine the moment of death. The recipient, Louis Washkansky, died of pneumonia eighteen days after the surgery due to his suppressed immune system.

The response to the surgery was overwhelming, and many doctors all over the world started transplanting hearts. This excitement began to recede from 1968 to 1970, a period when 162 patients underwent heart transplants and 144 of them died. Dr. Denton A. Cooley, a well-known transplant surgeon, performed fifteen to twenty cardiac transplantations, and only two patients survived more than two years.<sup>5</sup>

Over the past few decades, this dismal picture has shifted drastically. Medical advancements in antirejection treatments have resulted not only in successful outcomes in organ transplantation surgeries, but in the availability of various organs as well. Today there are transplant specialists who are able to transplant livers, hearts, pancreases, corneas, intestines, hands, and many other organs and tissues. These improvements in organ transplants shift the discussion from the theoretical possibility that organ donation could save lives to the medical fact that organ donation saves lives.<sup>6</sup>

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3. Raymond Hoffenberg, “Christaan Barnard: His First Transplants and Their Impact on Concepts of Death,” *BMJ* 323 (2002): 1478–80.

4. Lawrence K. Altman, “Christiaan Barnard, Surgeon for First Heart Transplant, Dies,” *New York Times*, September 3, 2001.

5. Denton A. Cooley et al., “Transplant Innovation and Ethical Challenges: What Have We Learned?: A Collection of Perspectives and Panel Discussion,” supplement, *Cleveland Clinic Journal of Medicine* 75, no. S24–32 (November 2008). doi:10.3949/ccjm.75.Suppl\_6.S24.

6. For more information on the success of organ transplantation research, see <http://www.webmd.com/a-to-z-guides/organ-transplant-overview>.



## II. SCARCITY OF RESOURCES AND THE LACK OF JEWISH DONORS

With the success of organ transplant procedure, a different problem has arisen: scarcity of resources. How will society procure the organs necessary for the multitude of patients in need of transplantation?

As of 2005, according to an article in the *New England Journal of Medicine*, the rate of organ procurement from cadaver donors had stagnated.<sup>7</sup> Unfortunately this has not improved over the past decade. According to the United Network for Organ Sharing (UNOS), 119,986 people in the United States are waiting for organ transplants. In 2011 an average of eighteen people died each day due to the shortage of donated organs. Additionally, a new name is added to the national organ transplant waiting list every ten minutes. There were merely 8,126 deceased organ donors in the United States in 2011. There were 6,019 living donors. During the first half of 2016 (January to June), 7,767 people donated.<sup>8</sup> This continues to be a problem within the United States.

Unfortunately, the Jewish population in general has been shown to be one of the least likely groups to donate. In the United States, a Jew can benefit from other populations in the country that do donate to hospitals and organ banks. In Israel, however, even such free-riding is not possible.

Israel's rate of organ donations from the deceased remains low.<sup>9</sup> According to a 2010 report by the National Transplant Center (Aguddat Adi) and the World Health Organization, Israel had thirty-one organ donations for every million residents. While this ratio is higher than that in Greece (fifteen donations per million) and Lebanon (eighteen per million), Israel remains well behind other Western countries, such

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7. Robert Steinbrook, "Public Solicitation of Organ Donors," *NEJM* 353 (2005): 441–44.

8. See LiveONNY's "About Organ Donation" page, <http://www.donatelifeny.org/about-donation/data/> and <https://optn.transplant.hrsa.gov/resources/>. See also United States Department of Health and Human Services, <https://optn.transplant.hrsa.gov/need-continues-to-grow/>.

9. Dan Even, "Dramatic Increase in Organ Transplants Recorded in Israel in 2011," *Haaretz*, January 12, 2012.

## *Section I – The Halakhic Question*

as Austria (ninety-one per million), the United States (ninety per million), France (seventy-two per million), Great Britain (sixty-four per million), Germany (sixty-two per million), and Turkey (forty-three per million), as well as Iran (thirty-five per million).<sup>10</sup>

The number of Israelis waiting for transplants at the beginning of 2012 was the following: 729 waiting for a kidney, 135 for a liver, ninety-six for a heart, seventy for lungs, one for a heart and lung, ten for a kidney and pancreas, seven hundred for a cornea. Last year, 105 Israelis died while waiting for an organ transplant.

As an incentive, Israel instituted the Priority Law, which took effect in April 2012. The Priority Law gave those with donor cards (known as Adi donor cards in Israel) priority to receive an organ if they ever required a transplant.<sup>11</sup> As a result, there were 632,300 organ donor signatures. While this was a rise from 71,229 the year before, the percentage of the Israeli population willing to volunteer to donate organs remains low.

To illustrate the difficulty with the situation in which Israel finds itself due to its low donation rate, it is worthwhile to consider Israel's relationship with the European organ exchange program, Eurotransplant. Member countries of Eurotransplant contribute what they can to an organ pool. The prerequisite standard for participation in Eurotransplant is 10 pmp (per million population). Due to Israel's failure to contribute enough organs to the Eurotransplant organ pool, Israel has not succeeded in convincing Eurotransplant to establish a protocol for cooperation and exchange with it, which has contributed to the shortage in Israel of organs for people on the long waiting list for transplants.<sup>12</sup>

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10. See Even, "Dramatic Increase."

11. Incidentally, the number of cardholders drastically increased following a campaign for this new law. Anyone who had signed the Adi card before April was to become immediately eligible for the benefit, but those who signed after the law went into effect would be required to wait three years after signing to be given priority.

12. For the prerequisites to becoming a Eurotransplant member, see the page on their website, <http://www.eurotransplant.org/cms/index.php?page=prerequisites>.

The need for transplantable organs in Israel far exceeds the country's readiness to donate, and therefore Israelis in need of transplants are traveling abroad to receive organs. Most go the United States, since European countries have discouraged foreign recipients, because there are not enough organs for the native population. Israelis are now traveling to the United States, and the national insurance companies in Israel are paying hundreds of thousands of dollars for them to be accepted in the United States.

There are critical consequences to the lack of donation in the Jewish community. In Israel, there are few organs available for transplantation. Aside from the handful of individuals who can afford to come to the United States for transplants and the very few people who have had transplant surgery in Israel, there is little hope for most Israelis in need of transplants.

It would be false to say that responsibility for the shortage in Israel lies with religious Jews, because even secular Israelis do not donate. There happens to be a widespread belief among Jews, religious as well as non-religious, that organ donation is wrong. This sentiment is prevalent also among Jews who live in the United States, where they are among the least prepared to consent to organ donation.

That the Jewish community, with its tradition of *tzedaka* (charity), *gemilut hesed* (acts of loving-kindness), and value of *piqu'ah nefesh* (saving a life), cannot meet its needs for lifesaving organs is enough to demand a serious examination of the halakhic and social issues involved in organ transplantation. Furthermore, we should be uncomfortable with the current, morally ambiguous situation, in which the Jewish community benefits from the organ pool but does not contribute to it.

### III. THE IMPORTANCE OF SAVING LIVES

#### **The Requirement to Save One's Fellow's Life**

Before entering the halakhic discussion of transplants, it should be emphasized that to save a person's life is a noble act. It is a Jewish value

## Section I – The Halakhic Question

that one should attempt to do whatever is appropriate and necessary to save another's life. The Talmud identifies two separate sources from the Torah for this requirement (b. *Sanhedrin* 73a):

מנין לדואה את חברו שהוא טובע בנהר או חיה גוררתו או לסטין באין עליו שהוא חייב להצילו? תלמוד לומר: "לא תעמד על דם רעך". From where does one know that if one sees one's friend drowning in the river or being dragged by a wild animal or if brigands are coming upon him, one is required to save him? The verse teaches: "Do not stand idly by the blood of your fellow" (Lev. 19:16).

והא מהכא נפקא? מהתם נפקא: אבדת גופו מניין? תלמוד לומר: "והשבתו לו!" Is it really learned from here [i.e., the previous source]? It is learned from there: How does one know that one must return a person's lost body [i.e., his life]? The verse teaches: "You shall return it [literally, "him"] to him" (Deut. 22:2).

The Talmud here sees the saving of a person's life as the fulfillment of the mitzva to return lost objects and the duty not to stand idly by.

### **Radbaz and the Question of Pain and Risk**

The above description of saving human life, however, raises the question of risk. To what extent is one required to risk his or her life for someone else? Rabbi David ben Zimra (Radbaz) took up this question in a responsum (*Responsa of Radbaz* 3:627; no. 1052 in some editions). He was presented with this question: If a ruler threatens a person, telling him that he will either cut off the said person's hand or kill one of his fellow Jews, is the person required to allow his hand to be chopped off in order to save a fellow Jew? The questioner thinks that the person would be obligated but wants to know Radbaz's opinion.

זו מדת חסידות... ותו דילמא  
ע[ל] י[נדי] חתיכת אבר, א[ף]  
ע[ל] פי שאין הנשמה תלויה בו,  
שמה יצא ממנו דם הרבה וימות,  
ומאי חזית דדם חבירו סומק  
טפי? דילמא דמא דידיה סומק  
טפי! ואני ראיתי אחד שמת  
ע[ל] י[נדי] שסרטו את אזנו  
שריטות דקות להוציא מהם דם  
ויצא כ[ל] כ[ך] עד שמת, והרי  
אין לך באדם אבר קל כאוזן,  
וכ[ל] ש[כנ] אם יחתכו אותו...

This would purely be an act of piety...  
Furthermore, perhaps if one cuts off a  
limb, even one that is not necessary for  
life, so much blood will come out that he  
will die, and what makes you think that  
the blood of his fellow is redder? Perhaps  
his blood is redder! I actually saw some-  
one die because they lightly scratched his  
ear for the purpose of bleeding him, yet  
so much blood came out that he died,  
and there is no less substantial organ on  
a person than an ear. How much more  
so if they were to cut it off!...

ותו דכתוב: "דרכיה דרכי נועם",  
וצריך שמשפטי תורתנו יהיו  
מסכימים אל השכל והסברא,  
ואיך יעלה על דעתנו שיניח אדם  
לסמא את עינו או לחתוך את  
ידו או רגלו כדי שלא ימיתו את  
חבירו?

Furthermore, the verse says, "its ways are  
ways of pleasantness" (Prov. 3:17), and  
the laws of our Torah need to be reason-  
able and intelligent, so how could it enter  
our heads that one must allow his eye to  
be gouged out or his hand or leg cut off  
to save his fellow from being killed?

הלכך איני רואה טעם לדין זה  
אלא מדת חסידות, ואשרי חלקו  
מי שיוכל לעמוד בזה.

Therefore, I see no rationale for this rule  
other than as an act of piety. Contented in  
his portion is one who can abide by this.

ואם יש ספק סכנת נפשות, הרי  
זה חסיד שוטה, דספיקא דידיה  
עדיף מוודאי דחבריה.

However, if there is a possibility that [the  
removal of his limb] will endanger his  
life, then he is a pious fool, since a  
possible loss of life on his side should  
be more significant [to him] than the  
definite loss of his fellow's life.

In a different responsum, Radbaz goes on to explain that one is not  
obligated (and may not even be allowed) to give up his life for another

## Section I – The Halakhic Question

person. Radbaz states that injuring oneself for another is permissible. However, one may not risk his or her life if the chances of survival are less than 50 percent.<sup>13</sup> Radbaz considers that to be the maximum percentage risk that a normal person would be willing to take. Furthermore, if one does risk his or her life, it is viewed by Radbaz purely as an act of piety (*middat ḥasidut*).

In summary, endangering one's own life to save another may be deemed halakhically problematic if doing so poses a serious risk to the lifesaver. The life of one person, even the life of a voluntary lifesaver, cannot be overlooked for the purposes of *piqu'ah nefesh* of another.

But assuming that there is little if any risk to the act, one is obligated to try to save someone's life. For example, if a person is in a car accident and he or she is bleeding to death, others have an obligation to try to stop this person's bleeding, to donate blood, to expend time and give money, and to do what is necessary to bring this person to a facility to aid his or her condition. Even on Shabbat, one has this obligation. Consequently, it would seem that if one is able to save a person safely by donating an organ and it does not violate one of the three exceptional prohibitions (see below), this should be viewed as an act of *piqu'ah nefesh*.

### Resurrection and Organ Donation

Some have claimed that donating organs is prohibited because of the fear that when the time of resurrection of the dead (*teḥiyat ha-meitim*) arrives, the person's body will be missing parts. This is a nonsensical argument. If God can bring a person back to life, God certainly can restore this person's organs. Furthermore, everyone's organs and tissues disintegrate into the ground and would require miraculous restoration anyway. Therefore, this argument should not be considered valid and will not be a factor in the ensuing discussion.

## IV. THE RECIPIENT

### Overview of the Parties

We can identify four main parties to take into consideration when discussing organ donation:

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13. *Responsa of Radbaz* 5:1582.

- The *recipient* is a person whose organ is failing or damaged and needs a transplant to survive or at least to regain quality of life.<sup>14</sup>
- The *donor* gives an organ for replacement to the recipient. This is the most complex area of the halakhic and ethical discussion.
- The *physician* must determine whether the benefit outweighs the risk of the procedure and have the expertise to perform the transplant surgery.
- The *community* or *society* must consider how it addresses the relationship between donor and recipient with regard to retrieving and allocating organs as well as funding of transplantation procedures.

### Self-Wounding

May a recipient undergo transplant surgery? This was a vigorously debated question during the early years of transplantation surgery. To answer this question, one must first ask whether a Jew is permitted to subject himself or herself to surgery at all.

The Talmud (b. *Bava Qamma* 91b) records that it is prohibited for a Jew to wound himself or herself, and Maimonides codifies this prohibition (MT Laws of Oaths 5:17; Laws of Injuries and Damages 5:1). Nevertheless, it is a well-known principle that, for purposes of saving one's life, it is permitted to allow oneself to be wounded. In other words, therapeutic wounding is not the same as violent wounding: it is not categorized as an act of *ḥabbala*. There is no better example of therapeutic wounding than surgery.

Receiving a transplanted organ is no different from any other medical procedure. The question that arises is whether the treatment itself will be therapeutic for the organ recipient. If the treatment is known by the medical world as an effective and medically successful option, then it is

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14. In some situations, failure of certain organs or tissues will not cause the patient to die, but cause the patient to have a serious disability or diminished quality of life. In the case of a kidney, for example, dialysis is an arduous regimen and organ donation can improve the quality of life enjoyed by a person with kidney failure, as well as increase his or her lifespan. An individual who is blind due to defects in the cornea can receive a transplanted cornea and enjoy greatly improved quality of life thanks to restored vision.

## Section I – The Halakhic Question

halakhically permissible. Currently, from a practical perspective, there are many transplantation procedures that serve a therapeutic purpose.<sup>15</sup>

### Lifesaving Treatments

Organ transplantation has been proven to be a lifesaving procedure. Even so, in any given context, an organ recipient must evaluate the risk involved, for according to halakha it is forbidden to do something that shortens a person's life, even his or her own life (*Shulḥan Arukh* YD 339:1). This applies even to a *goses*, a person expected to die within a very short period of time.<sup>16</sup>

#### *b. Avoda Zara*

In Tractate *Avoda Zara* (27b), the Babylonian Talmud questions whether one may go to a doctor who is an idol worshiper if one is dying. The Talmud's assumption is that this pagan doctor may kill the patient:<sup>17</sup>

אמר רבא [מר] ר' יוחנן, ואמר ר' יוחנן, ואמר ר' יוחנן, ואמר ר' יוחנן: ספק חי ספק מת - אין מתרפאין. מהן, ודאי מת - מתרפאין מהן. Rava said in the name of Rabbi Yoḥanan (some say: Rav Ḥisda said in the name of Rabbi Yoḥanan): If someone is in possible danger of dying, he may not go to a pagan doctor. If one definitely is dying, he may go to a pagan doctor.

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15. It was a different discussion thirty-five to forty years ago, when organ donation was in its experimental phase. Given the then-questionable long-term efficacy of the treatment (balanced with how long a patient with failing organs could live without the experimental treatment), was a recipient halakhically permitted to partake in these experiments? Was a patient permitted to subject himself or herself to an organ transplantation procedure?

16. While some say the typical *goses* is one expected to die within three days, many halakhic authorities understand that this is a difficult determination for modern times, when medical technological advancements facilitate prolongation of life while the patient is connected to ventilators and the like.

17. The negative attitude of the rabbis toward pagan doctors (and pagans in general) is a fascinating and a sometimes problematic topic, but beyond the scope of this essay. For further reading, see Chaim Jachter, *Gray Matter: Exploring Contemporary Halachic Challenges* (Teaneck, NJ: Kol Torah Publications, 2008), 3:28.



מת? האיכא חיי שעה! לחיי שעה לא חיישינן. Dying? But there are the person's short-term prospects! We do not concern ourselves with short-term prospects.

Rabbi Yoḥanan distinguishes between possibly dying and certainly dying. In a case of the former, the patient should not be sent to the pagan doctor; in the latter, he should be sent to this doctor, for the patient will die anyway. The talmudic editor makes clear that this statement holds true despite the fact that the pagan doctor may be a killer and take the patient's life before his or her time: since the patient is dying, all he or she has left is very short-term, and for short-term prospects, the risk is worth it, since the doctor may actually save the patient.

The Tosafot compare the situation in this pericope to an alternative discussion in a different pericope regarding short-term life. In Tractate *Yoma* (8:7), the Mishna discusses the case of a person trapped under rubble:

מי שנפלה עליו מפולת, ספק הוא שם, ספק אינו שם, ספק חי, ספק מת, ספק עובד כוכבים, ספק ישראל - מפקחין עליו את הגל. מצאוהו חי - מפקחין עליו, ואם מת - יניחוהו. When someone is caught under falling debris [on Shabbat or a holiday] and it is unclear whether he is there or is not there, and it is further unclear [assuming he was caught in the collapse] whether he is alive or dead, and it is unclear whether he is Jewish or an idol worshiper, the rubble should be cleared for his sake. If they find him alive, they continue to clear the rubble; dead, they leave him [until after Shabbat or the holiday].

The Babylonian Talmud (*Yoma* 85a) comments on this case:

“מצאוהו חי - מפקחין.” “If they find him alive, they continue to clear the rubble.”  
“מצאוהו חי? פשיטא! לא, צריכא דאפילו לחיי שעה.” Obviously [they clear the rubble]! No, this comment is necessary to teach [that we clear the rubble on Shabbat] even if it will buy the person only a few moments of life.

## Section I – The Halakhic Question

Commenting on the pericope in *Avoda Zara*, the Tosafot note a dissonance between this source and the pericope in *Yoma* and offer a solution:

“לחיי שעה לא חיישינן.” והא דאמרינן ביומא: “מפקחין עליו את הגל” בשבת לחוש לחיי שעה, אלמא חיישינן. “We do not concern ourselves with short-term prospects.” But we say in *Yoma* that the rubble should be cleared for his sake on Shabbat, and [this teaches] that we do concern ourselves with short-term life. Consequently, we do concern ourselves [with prolonging even short-term life].

ואיכא למימר דהכא והתם עבדינן לטובתו, דהתם אם לא תחוש, ימות, והכא אם תחוש ולא יתרפא מן העובד כוכבים, ודאי ימות, וכאן וכאן שבקינן הודאי למיעבד הספק. One could argue that in both cases we are doing what is best for the person. Over there [i.e., in the rubble case], if we do not concern ourselves with this, he will die. Over here [i.e., in the pagan doctor case], if we do concern ourselves with this, he will not receive treatment and certainly will die. In both cases, we avoid the definite outcomes and risk the possible outcomes.

In comparing the passage in *Avoda Zara* with the passage in *Yoma*, the Tosafot want to know why if the doctor potentially could kill the patient, the rabbis would risk even the person’s short-term prospects. In *Yoma*, the rabbis are concerned enough about these final hours, or even moments, that they allow the desecration of the Sabbath!

The Tosafot answer that in both cases, the halakha does not look at the situation from the point of view of short-term prospects. Rather, it examines the case from the perspective of what is the greatest benefit for the individual at risk. In the scenario in *Yoma*, it is to the individual’s benefit that the community be concerned that a person live even for a short time. Therefore, it is permissible for a person to violate Shabbat

by moving the debris aside in an attempt to save another's life, even for just a few moments. In the case of the dying patient going to the pagan doctor, it is to the patient's benefit that he or she live as long as possible. Thus, the concern about losing that short-term life is not the priority. If this person potentially will live longer – if the pagan doctor is able to treat this dying patient and extend his or her life – there is no concern that short-term life will be shortened.

Nahmanides (*Torat ha-Adam*, Essay on Pain, “Danger”) explains the passage in b. *Avoda Zara* in similar terms:

לספיקא דחיי שעה מקמי אפשר  
דחיי טובא לא חיישינן. We are not concerned with the prospect  
of short-term survival in the face of the  
possibility of prolonged life.

Referencing both Nahmanides and the Tosafot, Rabbi Ya'aqov Reischer (*Shevut Ya'aqov* 3:75) explicates this principle:<sup>18</sup>

אם אפשר שע[ל] י[נדי] רפואה  
זו שנותן לו יתרפא לגמרי מחליו,  
ודאי לא חיישינן לחיי שעה. If it is possible that the person will be completely  
cured of his illness by this medical  
procedure, certainly we do not concern  
ourselves with short-term prospects.

Therefore, if the risk of a particular surgery is small, not only is a person allowed to partake in treatment, but the patient is obligated to do anything that will improve his or her chances of recovery.

This approach to treatment is different from secular ethics, where the patient is not obligated to seek medical treatment because the patient has an autonomous right to refuse treatment. If a recipient needs to undergo a treatment, and it is almost certain that without the intervention the patient's life will be seriously compromised, then as Rabbi Reischer comments, we set aside the certainty of death in favor of the possibility of a cure. Therefore, it is permissible for a recipient to undergo this treatment, because we have a biblical obligation to protect our physical well-being.

18. Also referenced in *Pithei Teshuva* YD 339:1.

### Biblical Requirement to Maintain One's Health

In two separate verses, the Torah teaches that one is required to watch one's health and well-being carefully.

ונשמרתם מאד לנפשותיכם. Be very careful with your lives. (Deut. 12:15)

רק השמר לך ושמר נפשך מאד. Only be very careful and protect your life greatly. (4:9)

Maimonides understands the idea of looking out for oneself to be an injunction to remove all danger to one's physical well-being (MT Laws of Murder 11:4):

וכן כל מכשול שיש בו סכנת נפשות - מצות עשה להסירו ולהשמר ממנו ולהזהר בדבר יפה יפה, שנאמר: "השמר לך ושמור נפשך". ואם לא הסיר והניח המכשולות המביאין לידי סכנה, ביטל מצות עשה ועבר על "לא תשים דמים [בביתך]". So it is with every stumbling block that entails mortal danger: it is a positive commandment to remove it and to guard against it and to be careful of it, as it says: "be very careful and protect your life greatly." And if one does not remove it and leaves these obstacles that cause danger, he has abrogated a positive commandment and transgressed the prohibition "Do not place blood [in your home]" (Deut. 22:8).

Therefore, for example, if a patient has no functioning kidneys and has complications with dialysis, he may be obligated to undergo transplantation. In fact, Dr. Abraham S. Abraham (*Nishmat Adam* 157:4, 349:3:3:4) states that a person who is in danger from a dialysis complication is instructed to remove the dangers from himself via a kidney transplant.

In order for halakha to recognize a procedure as an acceptable treatment and encourage the patient to undergo it, it must have been demonstrated that people who had undergone the procedure may live more than one year post-operation. This is because an individual who lives longer than a year is regarded as one who has the potential for "long-term

life.”<sup>19</sup> Thus, such a procedure can be considered life-sustaining even if one does not know with certainty whether any given individual will actually live that long. Today most transplant protocols have outcomes in which the patient lives longer than a year. Therefore, the permissibility and possibly even the obligation of receiving an organ through transplant surgery can be based on the biblical injunction of maintaining one’s health.

### Receiving Organs from a Dead Donor

There are three important halakhot that pertain to the organs that a recipient could receive from a donor who is dead.

#### *Leaving a body unburied*

The Torah (Deut. 21:22–23) states:

וְכִי יִהְיֶה בְּאִישׁ חַטָּא מִשְׁפֵּט מוֹת  
וְהוּמָת וְתִלִּית אֹתוֹ עַל עֵץ. לֹא  
תִלִּין נְבִלָתוֹ עַל הָעֵץ כִּי קְבוּרָה  
תִּקְבְּרֶנּוּ בַיּוֹם הַהוּא כִּי קָלִילָת  
אֲדֹלָהִים תִּלְוִי וְלֹא תִטְמֵא אֶת  
אֲדֹמַתְךָ אֲשֶׁר ה' אֱלֹהֶיךָ נֹתֵן  
לְךָ נַחֲלָה.

If a man commits a mortal sin and he is executed, he should be hanged upon a wooden pole. However, do not leave his body upon that pole, but you must surely bury him that day, for a hanged body is a curse to God. Do not make impure the land that the Lord your God is giving you as an inheritance.

The Talmud (b. *Sanhedrin* 46b) bases the obligation to bury a dead body immediately and in its entirety on this verse:

אמר רבי יוחנן משום רבי שמעון בן יוחאי: מנין למלין את מתו שעובר עליו בלא תעשה? תלמוד לומר: "כי קבור תקברנו". מכאן למלין את מתו שעובר בלא תעשה.

Rabbi Yohanan said in the name of Rabbi Shimon b. Yoḥai: How do we know that leaving one’s dead unburied violates a prohibition? The verse teaches: “You must surely bury him.” From here [we learn] that leaving one’s dead unburied violates a prohibition.

19. The term is “*hayyei olam*” (literally, “eternal life”); for a more complete discussion of this concept, see *IM ḤM* 2:75.

## Section I – The Halakhic Question

איכא דאמרי: אמר רבי יוחנן משום רבי שמעון בן יוחי: רמז לקבורה מן התורה מניין? תלמוד לומר: "כי קבור תקברנו". מכאן רמז לקבורה מן התורה.

There are those who say: Rabbi Yohanan said in the name of Rabbi Shimon b. Yoḥai: What is the biblical source indicating that the dead must be buried? The verse teaches: "You must surely bury him." This is the biblical source for burial.

### *Deriving benefit from the dead*

There is a halakhic principle mentioned in the Talmud in a number of places (b. *Avoda Zara* 29b; *Arakhin* 7b) that *meit asur ba-hana'a*, i.e., it is forbidden to derive any benefit from a dead body.

Rabbi Ya'aqov Emden explains that this prohibition of deriving benefit from the dead is only rabbinic and may be waived for medical treatment.<sup>20</sup>

### *Desecrating a corpse*

The Talmud (b. *Bava Batra* 154a) records a dispute about whether a certain person died when he was still a minor. The disputants ask Rabbi Akiva whether it is permitted to dig up the body and settle the question. Rabbi Akiva does not allow this, and one of his reasons is that it is forbidden to desecrate the body (*i attem rasha'im le-navvelo*).

## **The Primacy of Saving Lives**

Despite the importance of the above three halakhot, they are all overridden by the mitzva of *piqu'ah nefesh*, saving a life. As emphasized earlier, one is permitted to violate Shabbat for purposes of saving a life. Here too if an organ transplantation procedure has been demonstrated to be a lifesaving procedure, an organ recipient is permitted to violate the three prohibitions concerning a dead individual in order to save his or her life. Furthermore, a physician who assists in this procedure is facilitating the act of *piqu'ah nefesh*.

The Talmud (b. *Sanhedrin* 74a) states that one may transgress any prohibition of the Torah in order to escape death, except idolatry, forbidden sexual relations, and murder. Thus, we see that delaying the

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20. Ya'aqov Emden, *She'eilat Yabeitz* 1:41 (Altona, 1739).

burial of the dead, deriving benefit from the dead, and desecrating the dead by retrieving organs certainly are permitted in order to save the life of the recipient.

### **The Source of the Organs**

Transplanted organs or tissues can be obtained from the patient himself (known as autograft), from another human donor (allograft), or from an animal (xenograft). Transplanted organs may be artificially grown or natural, whole (such as the kidney, heart, and liver) or partial (such as heart valves, skin, bone, and now liver and lung lobes as well). Some of these organs can come from live donors but are most often available from deceased donors.

#### *Artificial tissue and organs*

Scientists are working on creating artificial organs and tissues to replace malfunctioning human ones. With this type of technology, there would be no halakhic question regarding a skilled surgeon and well-known technique once the procedure of implanting the artificial organ had been shown to be successful. Use of medicine to save a life is supported by various sources in the Torah, such as “that a person should do and live by” (Lev. 18:5) and “and he shall surely be healed” (Exod. 21:19).

Unfortunately, to this day there is no organ that we can create so that it is identical to the organ with which we are created. If we were to try to mimic an organ, the heart would be a great option, since the heart is an independent simple pump. It pumps blood in and out. Yet medical technology has yet to perfect the pump that works as well as the human heart. A liver or kidney would be even more complex. Therefore, practical discussion of artificial organs that save lives is not yet possible.

The day when researchers are able to devise the technology to fully and adequately replace our organs or tissues, we as a world not only will be in a better position regarding halakhic questions but will ultimately be able to solve the problem of scarcity. (In fact, we are moving in that direction with advancements in stem cell research, e.g., trachea transplants.)

## *Section I – The Halakhic Question*

### *Xenografting*

The dilemma that researchers face with xenografting is that the human immune system is so different from that of any other species. At this stage in research, any foreign organ from a non-human species that is placed in the body will be rejected by the human immunological system and not function as well. This is a problem that researchers are working to solve.

The closest animal to a human being from the immunological perspective is the pig. If there comes a day when we can reprogram a pig by genetic engineering – an option undergoing heavy research today – this will be a wonderful alternative to human organs. Halakhically, this would not be a problem. First, the prohibition regarding pigs involves eating pig (Lev. 11:7; Deut. 14:8), not incorporating pig organs into one's body. Second, even if this were prohibited, if a person's life could be saved using the organs of a pig, it would be permissible without question or limitation. As mentioned earlier, to save a life one may violate all the prohibitions of the Torah except three, consumption of pig not being one of the three.

Nevertheless, as of now, neither an artificial organ nor xenografting is a possibility for saving someone's life in the long term. Currently, when a person's organ fails, the patient requires human organ sources for organ replacement.

### **Human Organs**

There are two sources of donated human organs. The first possibility is to provide the recipient with an organ from a living donor who willingly donates part of his or her body to another human being for the purpose of saving another's life or improving the quality of life enjoyed by another human being. The second option is to retrieve an organ either from a person determined to be dead due to cessation of cardiac activity (i.e., a person proclaimed dead because the heart has stopped beating) or from a person determined to be brain-dead as a result of suffering brain damage that has caused total and irreversible cessation of spontaneous respiration. After the pronouncement of death, organs are taken from the body.



### What if the Recipient Is a *Kohen*?

A final question regarding the recipient is whether he is a *kohen*. Is the organ, like the dead body, considered *ṭamei le-meit* (ritually defiled due to contact with the dead)? Furthermore, can other *kohanim* be in the room with an individual who received a heart from a dead individual?

Maimonides (MT Laws of the Impurity of the Dead 1:8) states that the issue of *ṭum'a* does not arise with anything that is absorbed in a living body. Additionally, according to a responsum by Rabbi Isser Yehuda Unterman discussing corneal transplants (*Sheveṭ mi-Yehuda*, 1:313–22), as long as the transplant succeeds in the recipient's body, the organ is no longer dead: it becomes part of the living body into which it has been transplanted. Rabbi Unterman (pp. 314–15) writes:

אף על פי שהגוף שממנו נלקח  
הבשר עדיין מת הוא, מ[כל]  
מ[קום] לא משגחינן בזה, דאין  
האיסור על הבשר מפני שבא  
מגוף מת אלא מפני שהוא עצמו  
בשר מת, וכשנתחבר עם גוף חי  
והחיות מתפשטת עליו במרוץ  
הדם ובהרגשה - נעלם האיסור  
מפני שחלפה סבת האיסור...  
אין כל איסור הנאה במת שקם  
לתחיה, כיון שעכשיו הוא חי.

Even though the body from which the organ was taken is still dead, this is irrelevant, because the prohibition against using the organ rests not on the fact that it came from a dead body, but on the fact that it itself is a dead organ. Once it has been implanted into a living person and life permeates it through the flow of blood and sensation, the prohibition disappears, because the basis for the prohibition no longer exists.... When an organ is living, no prohibition that relates to a dead organ applies.

Hence, there would seem to be no problem whatsoever with *ṭum'a*.

### V. THE DONOR

There are three categories of donors: the live donor, a donor declared dead due to cessation of heart function, and a donor declared dead because of irreversible cessation of spontaneous respiration.

## *Section I – The Halakhic Question*

### **Live Donor**

Organs taken from live donors are those organs that a person can live without after they are removed, e.g., one kidney, blood, bone marrow, part of the lung, and part of the liver. (The two lungs have five lobes between them, the liver regenerates itself in both the donor's and the recipient's body, and blood and bone marrow as well regenerate themselves.) Since there is no long-term loss to a patient, this is halakhically permissible. As this book is focused on the issue of organ donation from deceased patients, I will leave this topic for a different venue.

### **Deceased Donor**

When it comes to cadaveric donations (organs from individuals declared dead), the determination of the exact moment of death in an individual person depends on the social-philosophical-legal and religious acceptance of specific criteria.

There are a number of different definitions of the moment of death:

- the death of all body cells (biological death);
- absolute and irreversible cessation of all cardiac, circulatory, and respiratory activities and functions (cardiopulmonary death);
- total and irreversible cessation of all brain activities, including in the brainstem (brain death);
- death of the conscious mind (upper-brain death);
- irreversible cessation of respiratory control in the brainstem (brainstem death).

It is clear that in Jewish law there is a moment when death is established even though some body cells and tissues may still be alive. There is great disagreement among modern rabbinic decisors about the organ or function that determines this moment.

Biologically, a person is fully dead only when each cell in the body is dead. This situation occurs approximately three days after a heart stops beating. There is no true moment of death, physiologically speaking. Rather, there is a process of gradual dying: different tissues and organs die at different times due to different needs of

oxygen, blood, or energy supply. There are organs that will die if they do not constantly receive blood, whereas there are other organs that can receive no blood supply and yet be fully viable for hours to days. At a given moment, one part of the body will have died while another part will remain alive. With the death of which of these organs does the death of a person occur?

As a society, we establish the definition of life and death based on whatever criteria we choose. From a biological perspective, it is an arbitrarily defined moment. Therefore we don't ask scientists to define death. The question becomes societal: When would we call the *hevra qaddisha*, the Jewish burial society? When would it be appropriate to retrieve organs? This social debate is not only a halakhic issue: the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research continues to debate its position on determining the criteria of death.

If cardiac activity is a sign of life, then taking a heart by definition is murder. If cessation of brain function is defined as death, then even with ventilator machines and a beating heart, taking organs, even retrieving the heart itself, is permitted.

From a medical-history perspective, cardiac death was supplanted by brain death due to technologically advanced respirators. The move from the former to the latter became critical once organ donation had become possible. This change was not purely a philosophically new understanding of death. Rather, due to medical advancements, there developed a previously impossible separation in time between loss of respiration and brain function, and loss of heartbeat.

Some people began to see patients attached to ventilators and asked how long hospital resources could be "wasted" on ventilated corpses, and then began arguing for brain death. However, there exists a slippery slope concern, namely, the fear that the criteria of death could move into the realm of patients in a persistent vegetative state (PVS). In a PVS, a person who appears to be in a coma actually has brainstem function and is breathing on his or her own. Defining a PVS patient as deceased is not a halakhically acceptable option, and certainly, as of now, there has been no attempt to define a PVS patient as dead. Nevertheless, for ethicists the concern is there.

## Section I – The Halakhic Question

*How does halakha define death?*

The Mishna (*Yoma* 8:7) teaches:

מי שנפלה עליו מפולת, ספק הוא שם ספק אינו שם, ספק חי ספק מת, ספק עובד כוכבים ספק ישראל - מפקחין עליו את הגל. מיצאוהו חי - מפקחין עליו, ואם מת - יניחוהו.

When someone is caught under falling debris [on Shabbat or a holiday] and it is unclear whether he is there or is not there, and it is further unclear [assuming he was caught in the collapse] whether he is alive or dead, and it is unclear whether he is Jewish or an idol worshiper, the rubble should be cleared for his sake. If they find him alive, they continue to clear the rubble; dead, they leave him [until after Shabbat or the holiday].

The Talmud (*b. Yoma* 85a) comments:

תנו רבנן: עד היכן הוא בודק? עד חוטמו, ויש אומרים: עד לבו...  
Our rabbis taught: Up to what point must one check? Up to his nose. Some say: Up to his heart...

אמר רב פפא: מחלוקת ממטה למעלה, אבל ממעלה למטה, כיון דבדק ליה עד חוטמו, שוב אינו צריך, דכתיב: "כל אשר נשמת רוח חיים באפיו".  
Rav Pappa said: "The debate concerns [uncovering the person] from bottom to top, but from top to bottom, once one has checked the nose [for signs of breath], one need check no further, as it says: "all in whose nostrils was the breath of life" (Gen. 7:22).

The Talmud describes a situation in which one is directed to violate the work prohibitions (*melakhot*) of Shabbat in order to save a person's life. Once the person has been found to be dead, the prohibitions of Shabbat return and one is forbidden to do the prohibited acts further.

How is it decided when the laws of Shabbat are suspended for saving a life? How is the person determined to be alive or not? The Talmud directs the examiner to look for signs by which once he has reached the individual under the debris, he can determine whether the person is alive. Two options are presented: checking the nostrils and checking the heart. In talmudic times, there was no sophisticated equipment to make this determination as there is today. The examiner simply checked either whether the person was breathing or whether the heart was beating.

How does the examiner determine whether the person is breathing? He or she places an item, such as a mirror or a feather, under the victim's nose in order to determine whether exhalation is occurring. If air moves, the individual is alive; if not, the person is declared dead and Shabbat may not be violated any further.

The other examination mentioned in the Talmud is the search for a heartbeat. However, it is interesting to note that the Jerusalem Talmud mentions not *ad libbo* (until his heart), but *ad tiburro* – “up to his navel.”<sup>21</sup> Presumably then, the necessary criterion of death for the Jerusalem Talmud was respiration alone, since searching the belly region, where the diaphragm expands and contracts, would be a test of breathing function.

### *The Rishonim*

The commentaries of the *Rishonim* seem to emphasize the respiratory function as the test for death. For example, Rashi comments on the above passage:

“עד חוטמו”. ואם אין חיות בחוטמו, שאינו מוציא רוח, ודאי מת, ויניחוהו.	“Up to his nose” – And if there are no signs of life from his nostrils, i.e., he is not breathing, then he certainly is dead and should be left [until after Shabbat].
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21. This is what the majority of the Babylonian Talmud manuscripts and *Rishonim* had as well.

## Section I – The Halakhic Question

Rashi continues in his next gloss:

הכי גרסינן: "אמר רב פפא:  
מחלוקת מלמטה למעלה"  
- מחלוקת דהנך תנאי, דמר  
אמר: עד לבו, ומר אמר: עד  
חוטמו, מלמטה למעלה,  
שמוצאו דרך מרגלותיו תחלה,  
ובודק והולך כלפי ראשו, דמר  
אמר: בלבו יש להבחין אם יש  
בו חיות, שנשמתו דופקת שם,  
ומר אמר: עד חוטמו, דזימנן  
דאין חיות ניכר בלבו וניכר  
בחוטמו.

This is the proper text: "Rav Pappa said: The debate concerns [uncovering the person] from bottom to top" – this tannaitic [debate], where one said up to the heart and the other said up to the nose, [concerns checking] from bottom to top, when one first finds his legs and keeps checking until reaching his head, for one said to check his heart to look for signs of life, since his breath [literally, "spirit"] pulsates there, and the other said up to his nose, since there are times when life is not detectable in his heart but is detectable in his nostrils.

According to Rashi, one opinion is that the heart indicates whether the person is alive, for his *breath* pulsates there. The other opinion is that one should examine until reaching the person's nose, because sometimes no life can be detected at the heart but signs of life can be detected at the nose.

Similarly, Maimonides (MT Laws of Shabbat 2:19) states:

בדקו עד חטמו ולא מצאו  
בו נשמה - מניחין אותו שם,  
שכבר מת.

If they checked up to his nose and did not find any breath, he is left there [until after Shabbat], because he is already dead.

Rabbi Joseph Karo writes in the *Shulḥan Arukh* (Oḥ 329:4):

אפי' לו] מצאוהו מרוצץ,  
שאינו יכול לחיות אלא  
לפי שעה, מפקחין ובודקים  
עד חוטמו. אם לא הרגישו  
בחוטמו חיות, אז ודאי מת -  
לא שנא פגעו בראשו תחלה,  
לא שנא פגעו בדגליו תחלה.

Even if they found him crushed and he could not live longer than a short while, there is an attempt to save the person and he is checked up to his nostrils. If no sign of life is felt from his nostrils, then he certainly is dead, regardless of whether he was being uncovered head first or feet first.

The question of breath versus heartbeat is discussed at length by the rabbinic community from the time of the sages through the *Rishonim* and the *Aḥaronim*. Most authorities opine that it is the cessation of respiration that determines death. However, an alternative view merging both opinions has been put forth by Rabbi J. David Bleich:<sup>22</sup>

Brain death and irreversible coma are not acceptable definitions of death insofar as halakha is concerned. The sole criterion of death accepted by halakha is total cessation of cardiac and respiratory activity.

Those who maintain that cessation of cardiac activity defines death see the heart as an internal pacemaker separate from brain function. This is certainly true and has been shown in frog experiments where the heart is taken out of a frog and placed in saline and yet the heart continues to beat.<sup>23</sup> If the frog's lungs are extracted, on the other hand, the results will be different. The lungs will not expand, because there is no pacemaker in the lungs: it needs to be activated by the brainstem. In other words, the lungs will not breathe without the brain, but the heart will beat without the brain, as long as it has oxygen and nutrients. However, the relevance of this point is questionable: does the beating heart in a petri dish mean that the frog is still to be considered alive?

Practically speaking, those who believe that the definition of death is cessation of cardiac activity would not allow for retrieval of the heart for transplantation. This is because the heart must be still beating in order for it to be viable for transplantation, but if the heart is beating, the donor is still alive according to this position. However, for those who define death by permanent and irreversible cessation of respiration,

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22. J. David Bleich, "Establishing Criteria of Death," *Tradition* 13, no. 3 (1973): 90–113. While it appears that Bleich approaches this decision based on his understanding of the responsum of Rabbi Moshe Sofer (*Hatam Sofer* YD 338), if one examines the responsum in the context of the passage in b. *Yoma*, it appears that even Rabbi Sofer understands that the moment of death is based on respiration and not the cardiac pulse. See also Avraham Steinberg, *Respiratory-Brain Death*, Science, Halacha and Education Series (Jerusalem: Merhavim, 2012), 76–77.

23. Martyn Paine, *The Institutes of Medicine* (New York: Harper and Brothers, 1870), 304.

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a heart may be donated upon determination that the donor's respiratory function has irreversibly ceased and is being maintained only artificially, via the respirator.

In 1984, the Chief Rabbinate of Israel officially ruled that what we call brain death today is accepted by halakha.<sup>24</sup>

Rabbi Moshe Feinstein's ultimate position on brain death has been highly debated.<sup>25</sup> Most of the discussion of Rabbi Feinstein's position surrounds the question of heart transplantation, which requires that a person be declared brain-dead but not dead by cessation of cardiac function. At one point (1968), Rabbi Feinstein wrote that he considered heart transplantation to be double murder (IM YD 5:174):

כי שתילת הלב שהתחילו הרופאים לעשות בזמן האחרון הוא רציחת שתי נפשות ממש, שהורגין בידים את מי שלקחו ממנו הלב, כי עדיין הוא חי... וגם הורגים בידים מחיים ממש של הרבה שנים ולפעמים אף עשרות בשנים את החולה במחלת הלב, כי ידוע שהרבה חולי הלב מאריכין הרבה ימים ושנים, ובה שנוטלין ממנו לבו ומשתילים בו לב של איש אחר – הא כולם מתו בזמן קצר, רובן בזמן של שעות, וקצתם מתו בימים מועטים.

The procedure of heart transplantation that physicians have recently begun performing is quite literally double murder. They are killing the donor with their own hands, since the patient is still alive at the time of retrieval.... They are also killing the individual with heart disease with their own hands – one who may have years, sometimes even decades, left to live, as it is well known that some people can live for years with heart disease. When they take this person's heart and replace it with the heart of a donor – in every case the recipient has died in a short time, most of them within hours and some within a few days.

24. The decision was published in *Tchumin* 7 (5746): 187–92, as well as in *Barkai* 4 (5747): 11–14, and in *Sefer Assia* 6 (5749): 27–38 with additional notes by Halperin. The decision also was published with an accompanying English translation in *Jewish Medical Ethics* 1, no. 2 (1989): 2–10 with editor's notes and two appendices, and is available online: <http://www.hods.org/pdf/Chief%20Rabbinate%20English%20and%20Hebrew%20Side%20oby%20Side.pdf>.

25. See Daniel Reifman's essay in *Halakhic Realities: Collected Essays on Brain Death* (ed. Zev Farber; Jerusalem: Maggid and IRF, 2015) for a detailed discussion. See also Ariel Picard's essay in this volume comparing Rabbi Feinstein's view with that of the Chief Rabbinate and Rabbi Shlomo Zalman Auerbach.



Certainly, this is very strong language. Nevertheless, insofar as murdering the recipient is concerned, an important factor to consider is that Rabbi Feinstein wrote this particular responsum when organ transplantation was still in an experimental stage. At the time, he may not have seen the real potential lifesaving advantages of organ transplantation beyond the experimental phase. Once medical science had developed sufficiently for heart transplantation to be a procedure with a good chance of success, it would no longer be considered murder of the recipient to perform a heart transplant.<sup>26</sup>

In the twenty-first century, heart transplantation has become an extremely successful procedure, giving heart recipients prolonged life for many years post-surgery. For the recipient, the medical community has cyclosporine, an immunosuppressive drug that enormously reduces the risk of organ rejection and facilitates a successful transplant. Though there is still some risk, these concerns of Rabbi Feinstein have been by and large eliminated.

Insofar as the donor is concerned, whether Rabbi Feinstein would still consider the retrieval of a beating heart murder is highly contentious. His son Rabbi Dovid Feinstein<sup>27</sup> has gone on record attesting that his father clearly maintained that irreversible cessation of spontaneous respiration is the criterion of death. That this was the view of Rabbi Moshe Feinstein is supported by a responsum written in the mid-1980s, late in his life (IM YD 4:54):

והנה אף שהלב עדיין יכול  
לדחוף לכמה ימים, מכל מקום  
כל זמן שאין להחולה כח נשימה  
עצמאית נחשב כמת, וכדביארתי  
בתשובתי באגרות משה, יורה  
דעה, חלק ג, סימן קלב.

Now even if the person's heart continues to beat for a number of days, as long as the patient has no ability to breathe spontaneously, he or she is considered to be dead, as I explained in IM YD 3:132.

26. In fact, Rabbi Feinstein even encouraged animal-organ transplant research and immuno-suppressive therapy in the hope that a method would be discovered to make this process safe for a recipient.

27. See his interview on the HODS website, [http://www.hods.org/halachic-issues/videos/video\\_rdfenstein/rabbidovidfeinstein/](http://www.hods.org/halachic-issues/videos/video_rdfenstein/rabbidovidfeinstein/).

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It would appear that according to Rabbi Feinstein, irreversible lack of ability to breathe on one's own is the definition of death. Given modern medical technology, which enables medicine to separate heart function and respiratory function, a clear determination of death is possible. Therefore, it is reasonable to assume that Rabbi Feinstein would have supported modern-day organ transplantation.

### *Determining irreversibility in declaring respiratory failure*

Whatever biological function a diagnostician checks for in determining death, if it is determined to be absent, then this absence must be irreversible. There should be no legitimate diagnosis of clinical death where a physician says, "We said he was dead, but he came back to life." Saying this would be a euphemism for "We made a major mistake." Death is a situation completely irreversible. Thus, we need to check for signs of death to make sure it is irreversible.

The task at hand from the perspective of halakha is not necessarily to show complete brain death, but to demonstrate cessation of respiratory function through lack of blood supply to the brainstem. This is why the term "brainstem death" or "neurorespiratory death" should be preferred to the term "brain death." In order for someone to be designated dead on the basis of cessation of respiration, there has to be clear proof that it is an irreversible event. The difficulty is that the patient is on a ventilator, and one does not want accidentally to kill a patient while checking to see whether he or she is alive.

There are a number of strategies used by clinicians to overcome this obstacle. One way is to test for brainstem function. Since the part of the body that controls breathing is located in the brainstem and not the lungs, if the brain stem is destroyed, this person will never breathe autonomously again, thereby proving that respiration has ceased in an irreversible way. This is why clinicians administer a barrage of reflex tests in order to determine whether the brainstem still is functioning.<sup>28</sup>

Apnea tests are the most useful tests to determine whether spontaneous respiration truly has ceased. These tests involve removing

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28. For further information on these and other tests, see Zelik Frischer's essay in *Halakhic Realities: Collected Essays on Brain Death*.

the patient for a short time from the ventilator and looking for signs of attempted breathing. When administered, such an exam is able to give an accurate measure of whether respiratory function has ceased in the brainstem. Both an apnea test and reflex tests are required for any brain death determination in either Israel or the United States.

In addition to these tests, another way to determine brainstem function is provided by various “confirmatory tests.” For example, in the early stages of brain death determination, the main confirmatory test suggested was the EEG (electroencephalogram).<sup>29</sup> The understanding was that if there were to be a flat line in the EEG, it could be assumed that there was no brain activity. However, the difficulty with an EEG is that it is an assessment of collective cortical function, not specific to brainstem function (a lack of which causes cessation of respiration). As such, the EEG is not a useful test to determine brainstem death. Furthermore, immediately upon a person’s death, the EEG will never completely flat-line: there will always be some cellular activity.<sup>30</sup>

Some halakhic authorities require more direct tests that are not commonly used in hospitals, such as a radioisotope or electrical physiological test, to confirm that there indeed is no brainstem function. The radioisotope test is performed by injecting a radioactive material into a peripheral vein; a device like a Geiger counter is placed over the head to pick up any radioactive signals. In brain death, blood flow to the brain ceases, so there should be no radioactivity detected over the skull. This is not the most sensitive test, but it is preferred by some halakhic authorities, such as Rabbi Shlomo Zalman Auerbach,<sup>31</sup> since it does not require moving the patient at all. As the patient may already be defined as a *goses* (someone in the process of dying) and halakha forbids moving

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29. See discussion in Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics*, “Appendix 1: Tests to Determine the Time of Brain Death,” 706–7.

30. The Chief Rabbinate of Israel had an ongoing battle with the Israeli Ministry of Health regarding having a clause on a license saying that a person is willing to donate organs in accordance with the Chief Rabbinate of Israel. The Ministry of Health wanted the determination of death to be via an EEG, while the Chief Rabbinate wanted the declaration of death (and therefore permission for organ retrieval) to be determined beyond a clinical EEG reading. See Steinberg, *Encyclopedia*, 708–9.

31. Steinberg, *Assia* 53–54 (5754): 13 ff.

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a *goses* lest one inadvertently hasten the dying process, tests that do not require moving a patient are a desideratum.

A more definitive test to determine cessation of blood flow to the brain is carotid angiography. In this test, a contrast dye is injected into the vein and x-rays of the head and neck are taken. The blood flow within the vessels is clearly seen in the x-rays, and in brain death, the blood flow abruptly stops at the base of the brain. Interestingly, Rabbi Auerbach considers even the injection of material into the vein to be a violation of the prohibition of moving a *goses*. Even though the patient is not physically moved during the procedure, he considers the circulation of material throughout the blood vessels equivalent to moving a *goses*.<sup>32</sup>

Although confirmatory tests are not required in the United States, they can be requested by family members. In Israel, the use of some type of confirmatory testing was recently made a legal requirement for retrieving organs.<sup>33</sup>

### *Caveats for followers of the cardiopulmonary criteria*

While the heart, the liver, and other circulation-dependent organs may not be retrieved according to those who define death as cardiac death, other organs may be donated. The kidneys, which survive thirty minutes after the heart stops beating, as well as other organs, such as skin and cornea, should be seen as permissible by all halakhic standards. Certainly, as discussed above, the importance of saving lives or improving quality of life overrides any other consideration. *Piqu'ah nefesh* is a significant mitzva to do while alive; how much more so when one is no longer alive.

Furthermore, it is critical to mention that if one follows the halakhic opinion that the criterion for death is cardiac function, then one should receive organs only from those who have expired based on these same criteria. Otherwise one is saving one's own life by taking that of

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32. But see the suggestion of Professor Steinberg, referenced in Picard's contribution to this volume, that the BAER and TCD should be considered sufficiently non-intrusive that even Rabbi Auerbach would permit their use for determining brain death.

33. As per the 2008 Brain-Respiratory Death Law, put forward by Knesset Member Otniel Schneller. For more information on the law in Israel and its interplay with halakha, see Daniel Sinclair and Yoel Bin Nun's essays in *Halakhic Realities: Collected Essays on Brain Death* and Picard's essay in this volume.

another, something forbidden by halakha. It is both halakhically and morally wrong to accept a heart transplant if one defines death by the cardiopulmonary criteria.

## **CONCLUSION**

It is of paramount importance that every Jew take the idea of organ donation seriously. How exactly to go about it is a difficult question and depends on one's view of brain death and halakha, and which halakhic authorities one follows. There are outstanding organizations with resources that can help guide a person through this process.

The Halachic Organ Donor Society (HODS, [www.hods.org](http://www.hods.org)), founded in 2001, is a not-for-profit organization that provides a great deal of information, in essay and video form, about the medical protocol for organ donation, halakhic issues, and rabbinic opinion. The hope is that making information available will help clear up misconceptions that deter individuals from signing on as organ donors or even supporting organ donation.

The Adi organization (Aguddat Adi) is the National Transplant Center in Israel. Adopted by the Ministry of Health in 1994, it manages the allocation and distribution of organs for transplant in Israel. People who desire to become organ donors and wish to receive an organ donor card register through Adi. Halakhic matter, material about one's rights as an organ donor, and information about allocation of resources, among much else, can be accessed using its website at [www.itc.gov.il/eng/merkaz.html](http://www.itc.gov.il/eng/merkaz.html). The organization has online correspondents available in Hebrew, English, and Russian.<sup>34</sup>

As all end-of-life decisions, including organ donation, must be made in accordance with the patient's wishes, everyone should think through these issues, including organ donation, and make his or her desires known to loved ones, legal counsel, and any relevant halakhic authority. To ensure that the patient's desires are honored, it is prudent

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34. The work of both organizations has been critical to ensuring that the process of organ donation is done in a halakhic, legal, and ethical manner, with all parties considered. For more details on the HODS and Adi cards and the differences between the two, see Picard's essay in this volume.

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for individuals to sign a health care proxy such as the one from the RCA,<sup>35</sup> which has places for the signatures of a competent halakhic authority and a relative or a person close to the patient (or a lawyer) who will oversee and enforce the individual's wishes.

The most significant point in revisiting the issues relating to organ donation is not to convince everyone to donate his or her organs. Rather, it is important to discuss the halakhic issues regarding organ donation, unravel misconceptions in this area, and be tolerant and supportive of those who make the choice to undergo transplant surgery, donate organs, or sign donor cards, so that each community can take important steps toward improving the situation of scarcity of organs for donation. As the Mishna (*Sanhedrin* 4:5 according to MS Kaufmann) teaches:

וכל המקיים נפש אחת - מעלין  
עליו כילו קיים עולם מלא.      And whoever preserves a single life – it  
is as if he has preserved the entire world.

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35. The RCA's healthcare proxy is available on their website, <http://www.rabbis.org/pdfs/hcp.pdf>.

## Chapter 2

# The Obligation to Donate Organs

Yuval Cherlow

### I. THE SIGNIFICANCE OF HUMAN LIFE

The significance of life and the concomitant obligation to save lives constitute a fundamental principle of Torah. We find it both in the realm of Jewish philosophy as well as in the realm of halakha. The idea finds clear and precise expression in the Mishna (m. *Sanhedrin* 4:5 according to MS Kaufmann):

לפיכך נברא אדם יחידי בעולם,  
ללמד שכל המאבד נפש אחת -  
מעלין עליו כילו אבד עולם מלא,  
וכל המקיים נפש אחת - מעלין  
עליו כילו קיים עולם מלא.

The reason humanity was created as a single individual in the world was to teach that anyone who kills one person is considered as someone who destroys the entire world. Similarly, anyone who preserves the life of any person is considered as someone who preserves the entire world.

There are many other statements of the sages along these lines that make extraordinary claims about the importance of saving lives.

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Another expression of the supreme importance of life can be found in the well-known halakhic principle that saving a life overrides the vast majority of Torah laws. For example, Maimonides writes (MT Laws of the Foundations of the Torah 5:1):

בשעה שיעמוד גוי ויאנוס את ישראל לעבור על אחת מכל מצות האמורות בתורה או יהרגנו - יעבור ואל יהרג, שנאמר במצות: "אשר יעשה אותם האדם וחי בהם" - ולא שימות בהם. ואם מת ולא עבר - הרי זה מתחייב בנפשו.

At a time when a gentile forces an Israelite to violate one of the commandments of the Torah on pain of death, the person should violate [the commandment] and not be killed, for it is written with regard to the commandments, "that a person should do and live by" (Lev. 18:5) – not die by. If he dies rather than violate [the commandment], his life is forfeit.

Jewish law incorporates the principle of the importance of life in many areas, and it finds expression in a number of venues. For example, the obligation to save the life of one's fellow is the basis for the law of the pursuer, which forbids a person to sit quietly on the sidelines when others are pursuing another person in order to kill him. On the contrary, the bystander is obligated actively to involve himself or herself in order to save his or her fellow from being killed.

Another example is the expansive treatment given by the sages to the Torah commandment "Do not stand idly by the blood of your fellow" (Lev. 19:16). A simple interpretation of this commandment would be that it obligates a person to save someone from drowning, for instance, or from a wild beast. Halakhic authorities extended this obligation even to a case of entrapment where people working on behalf of a hostile government are attempting to trick a person into incriminating himself. According to these authorities, if one does not warn the potential victim that his or her words are being monitored, one has violated the prohibition of standing idly by.



Jewish law further codifies the inverse of this law as a positive commandment. Based on a midrashic understanding of the verse requiring a person to return a lost object, the Talmud (b. *Bava Qamma* 81b) argues that a person must even return another's "lost self." This becomes one of the textual bases for the halakhic requirement for doctors to treat their ill patients. This obligation is recorded by Maimonides in his commentary to the Mishna (*Nedarim* 4:4):

כלומר שחייב הרופא מן הדין  
לרפאות חולי ישראל, והרי הוא  
בכלל אמרם בפירוש הכתוב:  
"והשבתו לו" - לרבות את גופו,  
שאם ראהו אוכד ויכול להצילו  
- הרי זה מצילו בגופו או בממונו  
או בידיעתו.

Meaning to say that a physician is legally required to treat sick Jews, and this is part and parcel of how [the rabbis] understand the words "you shall return it [literally, 'him'] to him" – this includes his own body: if one sees a person losing [his life] and can save this person, he should save him, whether this be by using his body, his money, or his knowledge.

These assertions need to be the point of departure for any halakhic discussion in the realm of organ donation. The supreme importance of saving lives, combined with many other important Torah values, such as kindness and charity, forms the basis of the halakhic requirement to donate organs in order to save others or even just in order to improve their quality of life in a substantial manner.

Obviously, that this is the point of departure does not ipso facto make this the definitive halakha, since there are opposing factors as well. The obligation to save lives, however, must be given pride of place if at all possible. Furthermore, it is essential to keep in mind that what is under discussion is not whether it is permissible to donate organs, but whether the obligation to save a person's life is operative in these cases. Donating organs can literally rescue a person from the jaws of death and must be seen as nothing less than a fulfillment of the obligation of saving a life in one of the most important and fundamental iterations of this halakha that exist.



אמר רבי חנינה: מתניתא אמרה  
כך שאין מתרפין משפיכות דמים,  
דתנינן תמן: "אין דוחין נפש  
מפני נפש".

Rabbi Ḥanina said: The Mishna taught us the principle that one may not heal a person through murder [of another], for it teaches us: "One may not cast off one life to save another."

This principle applies even if the first person's life actually is a threat, but only an unintentional one, to the life of the second person. Certainly it applies to the killing of a person who has only a short time to live in order to save someone else with prospects for a longer future. The deliberations regarding organ donation must emphasize this point throughout, namely, that halakha in no way can countenance actively cutting short one person's life, even by a moment, in order to save someone else. Organ donation can be considered an option only when the donor from whom the organs will be retrieved is already considered dead according to halakha.

#### **Aside: Danger to the Patient**

Traditionally, there was a second issue regarding organ donation and the possible killing of a patient, viz., the question of danger to the organ recipient. Rabbi Moshe Feinstein was the most vocal in pointing to this problem, writing (IM YD 2:174):

שתילת הלב שהתחילו הרופאים  
לעשות בזמן האחרון הוא  
רציחת שתי נפשות ממש.

The procedure of heart transplantation that physicians have recently begun performing is quite literally double murder.

However, Rabbi Feinstein was writing during the early stages of organ transplantation, when the survival rates for recipients were abysmal. Nowadays, after the invention of cyclosporine and advanced anti-rejection treatments, this is not a live concern. There can no longer be any serious argument that transplantation should be forbidden on the grounds that it is dangerous for the patient.

### **III. DETERMINING THE MOMENT OF DEATH**

Due to the tension between the obligation to save lives, on one hand, and the prohibition to kill one person to save another, on the other,

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there is a strong need in halakha to define death as precisely as possible. First, it is important to note that death is not a moment in time, but a process. Essentially death occurs as a series of system collapses. As this process can take time, it is critical for halakha to be able to pinpoint at what stage in this process a person can be declared dead.

This is critical because only when this point is determined will it be possible for the person's family to fulfill the important obligation to save the lives of others by donating the organs of their loved one, as the Torah commands. Complicating matters, at the present level of technology, most organs (there has been some progress with kidneys) remain viable for transplantation only if the person's heart is still beating and his or her blood is still flowing, something that is possible to do mechanically through artificial respiration. This, however, makes the determination of death somewhat more complicated.

There is no debate that traditionally, death was determined in halakha by the cessation of respiration and for all practical purposes, the cessation of heartbeat. This was also standard medical practice until recently. Nevertheless, modern medical practice has begun declaring death based on neurological criteria, by testing the patient for brainstem function. Brainstem death is irreversible, and short of human error, can be definitively demonstrated. The question that stands before contemporary halakhic authorities is whether halakha recognizes the death of the brainstem as a legitimate indication of death or will remain with the position that the only way to determine death is to check for breathing and heartbeat. It goes without saying that taking the latter route would virtually eliminate any possibility of donating organs.

In my estimation there are two good reasons for halakha to adopt brainstem death as a legitimate definition of death. The first reason is that halakha generally leaves it up to medicine to determine death. Halakhic authorities are not insensitive to the reality that science and medicine advance, and it seems impossible to argue seriously that life continues after the death of the brainstem, considering the fact that brainstem-dead patients exhibit no independent signs of life. Therefore, there appears to be no good reason to concoct far-fetched arguments for life after brain death. Rather, it seems best simply to accept the medical community's

decision to treat brain death as death, a decision that is intuitively obvious to anyone who looks into the matter.

Second, even if one argues that we are required to stick with the traditional definitions and to determine death based on the cessation of respiration and heartbeat, the death of the brainstem should be considered clear and unequivocal evidence of the fact that the person can no longer breathe spontaneously or maintain his or her heartbeat. That which we see on the EKG (heartbeat monitor) is a result of the artificial pumping of the deceased patient's lungs. The person's lungs failed as a result of the death of the respiratory center in the brainstem, and the heart would have failed as well if it were not for the fact that electronic machinery is keeping the lungs pumping and oxygenating the blood. This fact is so clear and incontrovertible that it even brings up the possibility that one should forbid this type of treatment, since it may be a violation of the prohibition to desecrate a corpse.

Therefore, since brainstem death means that a person's heart and lungs can no longer function independently, it matters little whether one says that the person is dead because his or her brainstem is dead, or that the person is dead because his or her lungs and heart can no longer function independently. Either way, the brainstem-dead patient is a ventilated corpse. The body is being kept running by machinery; the person is no longer alive, but dead.

For this reason, many important rabbis, among them former chief rabbis of Israel Rabbi Mordechai Eliyahu and Rabbi Avraham Shapira, decided in no uncertain terms that brainstem death should be accepted as a legitimate definition of death in halakha, a decision that essentially opened the door to organ donation as a viable halakhic option.

#### **IV. HALAKHIC IMPEDIMENTS TO DONATING ORGANS**

Defining brainstem death as death does not make organ donation a simple process insofar as halakha is concerned. A number of difficulties still need to be addressed. Essentially there are two main problems.

The first problem is the rule that one may not even touch a dying person, let alone do anything more invasive, for fear that doing so will hasten his or her death. This problem comes up against the requirement to perform a confirmatory test. Such tests are mandated

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by the Chief Rabbinate of Israel, and compliance with this mandate is required by Israeli law. Even outside of Israel, although not required by law in most countries, such a test is required by halakha according to many authorities.

Many confirmatory tests are quite invasive, however. Consequently tests such as radionuclide angiography – a test that checks for blood flow to the brain by injecting something into the bloodstream – are forbidden. Therefore, halakha requires a confirmatory test that is non-invasive and involves no manipulation of the body if the family are to allow the doctors to evaluate their loved one for brainstem death. Luckily, there are a number of ways physicians can do this, the most prevalent nowadays being the TCD.

The second problem revolves around the question of trust. Halakhic decisors must have complete trust in physicians. They must believe that these physicians will not cut short the life of the “donor,” even by a moment, and that they will abide by all of the criteria required for a proper determination of brainstem death. In Israel, any possible fears have been obviated by the implementation of set criteria, clear and unequivocally stated, that are designed to ensure that the death determination will be performed in line with the requirements of halakha. Of course, halakhic authorities in other countries need to examine the criteria used by their local hospitals and whether there are procedures in place to ensure that these criteria are followed.

Nevertheless, it is critical to keep in mind the other side of this issue: every restriction that we enforce with regard to these concerns and questions of trust literally equals condemning wait-listed patients to death. This is what I tried to emphasize in the first section of this essay: the obligation incumbent upon us is to try to save as many lives as possible within the confines of halakha. It is of course forbidden to do so in a way that violates Jewish law and ethics. However, it would be equally wrong for us to accumulate extra concerns and apprehensions making the donation of organs virtually impossible. Doing so would be a classic example of a *ḥumra de-atei li-yedei qula*, a stricture that ends up as a leniency: one that would culminate in bringing about the death of many sick patients waiting for available organs. We need to follow the halakha exactly and not veer to the right or the left.

## V. OTHER CONCERNS

There also are additional considerations that have been brought to bear on this issue. For example, some have referenced the prohibition of deriving any benefit from a dead body, an extension of the prohibition against desecrating a body. Others have brought up the requirement to bury the dead as soon as possible.

As much as these issues are important in their own right, they have no place in the halakhic discourse over organ donation. Saving the life of a person who is in danger of dying and can be saved by the donation of an organ from a dead body overrides any other consideration, halakhic or otherwise, as I tried to make clear in the introduction.

Certain non-halakhic considerations also have been brought forward. In particular, the argument has been made that the burial of a person in the absence of some organs can have an adverse effect on the person's future resurrection. This is an exceedingly peculiar claim. Not only is this kind of argument outside the boundaries of normative halakhic discourse, but it also lacks any real logic. Is it really possible that the Holy One cannot resurrect people whose hearts have been transplanted into the bodies of others? It is difficult to accept the soundness of such claims.

In fact, I would venture to argue the opposite. It is a great merit to the deceased if his or her organs are used to save the lives of others, bringing kindness and redemption to those in peril. There is nothing more valuable in the eyes of God than doing kindness, as the prophet Hosea (6:6) says:

כִּי חֶסֶד חָפְצָתִי וְלֹא זֶבַח  
וְדַעַת אֱלֹהִים מֵעֹלוֹת.  
For it is kindness that I desire and not  
sacrifices, and the knowledge of God  
more than burnt offerings.

We must follow the ways of Torah and halakha, and not worry about senseless anxieties that have no place in this discussion.

## VI. TAKING BUT NOT GIVING

The most difficult position to come to terms with in the debate over organ donation is the idea suggested by some that it is permissible to receive retrieved organs but not to donate them. Ethically speaking, this position is so warped as to make it difficult to imagine a worse

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desecration of God's name than advocating for it. Quite literally, the name of God is desecrated when His believers maintain unethical positions. Such an argument brings to mind the famous words of Elijah the Prophet to Ahab (1 Kings 21:19):

הֲרִצְחָתָּ וְגַם יִרְשָׁתָּ?! Have you murdered and then inherited  
[your victim's estate]?

Those who oppose organ donation argue that doing so involves killing the donor. As they do not believe that brainstem death can be defined as death, removing a brainstem-dead patient's heart or other vital organs is tantamount to murder in their view. But if one believes this to be true, how can one then possibly defend being willing to receive organs from this murdered patient?

Of course, I am aware of the *pilpul*-like casuistic arguments that have been brought to bear to defend this practice. The argument has been made that once the organ has been removed from the person's body – and it is not we who have removed it, but the physicians – we should at least use it to save someone's life, so why not the life of a Jew? However, this sophistry does not really succeed in removing the ethical stain of hypocrisy from this position. It would be best to erase this position as a halakhic option.

### CONCLUSION

It is my fervent wish that everyone be granted a long and healthy life and that no one ever, God forbid, need to face the painful question of whether to donate a loved one's organs. Nevertheless, if the situation ever arises, I hope that each of us will participate in the meritorious act of saving lives by agreeing to the donation of organs, an act that is a merit to the donor and a gift of life to the recipient. Doing so is not only a mitzva, but an outright halakhic obligation.<sup>1</sup>

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1. This essay was translated by Zev Farber from a Hebrew draft.