

Halakhic Death Means Brain Death

By Rav Moshe David Tendler

(The following article is an edited transcription of oral and written statements on the issue of brain death submitted by Rav Moshe David Tendler to The Jewish Review and ultimately approved and edited by Rav Tendler, himself. Readers are referred to our previous interview with Rabbi J. David Bleich, Halakha, Brain Death and Organ Donation, (The Jewish Review, Vol. 3, No. 2) which expresses a contrary viewpoint.)

(Note: Readers are advised to consult with their own rav in order to obtain guidance on the application of halakha to a particular case.)

The criteria for death under Jewish law is an issue that has been the subject of a heated controversy among halakhic authorities. A consensus is emerging among most rabbanim who are able to comprehend both the physiological facts and the halakhic analysis, that brain death has always been accepted as halakhic death by Torah authorities. A major move in this direction has occurred with the acceptance of brain death criteria by the Chief Rabbinate in Israel, and by the Rabbinical Council of America (RCA).

In December, 1988, recognizing the critical importance of this issue, the Rabbi Isaac Elchanon Theological Seminary sponsored a two day symposium on brain death. The first day of this conference was held at the Albert Einstein College of Medicine where the head of the Department of Neurology, Dr. Purpura lectured to the rabbanim and the *s'nicha* students on the medical facts involved in brain death, and then the following week, a day was spent at the Yeshiva where Rabbi Herschel Schachter and I were the two presenters.

I am convinced that everyone present at those meetings learned two things to their satisfaction:

1. Brain death is the finest criterion of death according to halakha; and
2. that my father-in-law, Rabbi Moshe Feinstein, z.l. said so in absolutely clear terms.

(Note: Tapes of these proceedings are available through the Community Service Division of Yeshiva University.)

It is important to clarify the halakhic debate regarding brain death with respect to four areas of inquiry: first, the medical, biological facts; second, the interpretation of traditional halakhic sources on the subject; third, the crucial opinion of Rabbi Moshe Feinstein z.l.; and fourth, the halakhic ramifications of holding that brain death is or is not consistent with Jewish law. I will consider each of them in turn.

Bio-medical Facts

From the bio-medical point of view, the most important distinction that must be made when considering the entire issue of death is the distinction between "brain death" and "cerebral death." I wrote the first article in 1968 (Tradition, Vol. 9, No. 4), accusing Dr. Christian Barnard of committing "double murder," and the reason I did so was at that time Barnard was not only performing an experimental operation which hastened the death of his recipients, but also because he was dealing with donors who were cerebrally dead as op-

posed to brain dead. Cerebral death is not death according to Jewish law.

A patient who is cerebrally dead has lost all function in the cerebrum, the thinking part of the brain. An example of this was Karen Ann Quinlan. Such individuals are referred to as being in a persistent vegetative state or are described as suffering from the "locked-in" syndrome. Such individuals breath normally and have full autonomic control of temperature regulation, etc. They are an integrated organism with a failure of the brain. All of Rabbi Feinstein's *teshuvah's* (with one exception, which I will mention later), refer to cerebral death, because that's all he or we knew about at the time when he wrote them. Cerebral death, I must repeat, is not death according halakha. The ability to "maintain" the respiration of what we now call a brain dead patient came about in the 1970's as a result of improvements in respirators and other life support machinery. The result was that even in the case of an individual who is totally unintegrated, i.e., dis-integrated, we could maintain organ viability. It was only then, that heart transplants moved from the status of *retzicha* (murder), to that of a potentially life-saving procedure.

Another important biological distinction, one which is related to the distinction between cerebral versus brain death, derives from the fact that biologically, speaking, death actually occurs in three stages: organismic death, organ death, and cellular death. Organismic death refers to the break down of the two systems that are integral to a human being: the neural system and the hormonal or endocrine system. When these systems break down, one part of the body doesn't know what the other parts of the body are doing. In addition, there is no ability to breath autonomically. This is organismic/brain death. I could take such an organismically dead or "brain" dead body, remove the heart and keep it alive for years, or take out the lungs or kidneys and keep them alive in a perfusion system for days, and have each of these organs separated in different rooms in the hospital. This would be no different than a brain dead patient except for the fact that in the latter case the skin would be connecting all of the organs together. Once an individual is brain dead, we have an "organ system," not a living organism. Our language is confusing here because sometimes physicians speak loosely of having a brain dead person on a "life support" system. But this, of course, is a misnomer: the patient is *dead*, and what we have him on is an organ perfusion system. When the body loses its integrative capacity, the patient has died.

Medical science might as well, (in the case of a brain dead patient), remove the brain and the head altogether and put the respirator directly into the trachea. This would illustrate how "dead" such a patient is. The term that I coined for such a condition is "physiological decapitation," and I will explain shortly how this meets the halakhic criteria for death. In this context, I should say that the view, held by some who oppose brain-death criteria, that the concept of death is entirely extraneous to the practice of medicine is a factual and,

particularly, a halakhic error. No less an authority than the Rambam himself stated that all factors concerning death are determined "by what the doctors will tell you." (Rambam, *Hilkhot Retzicha*, 2:8) I believe my discussions of the medical aspects of brain death versus cerebral death, organismic versus organ and cellular death, amply demonstrate that this, indeed, is a medical issue.

Ultimately, Rabbi Feinstein, as I have said, did write a *teshuvah* acknowledging the halakhic status of brain death, but he did not do so until I personally saw 100 brain dead patients. Every Shabbos night, I would go to Kings County Hospital, Jacobi Hospital, and Bellevue Hospital. I would see brain dead patients there and bring the records to Rabbi Feinstein for his examination. On five occasions, I took Rabbi Feinstein to see a brain dead patient. The purpose of all of these visits was to determine for ourselves that we really had a scientifically reproducible medical condition. I asked the physicians (and I have been under attack in the medical literature for introducing this as a small barrier to organ donations), to perform what is known as a blood flow study, or radioisotope bolus study, a study which is innocuous and stress free as far as the

detect changes in brain cells. However, the brain death testing program involves two tests which are 24 hours apart (the "lenient test" allows a twelve hour wait between the two tests). Twelve hours after the cessation of blood flow you have what is known as the "respirator brain syndrome." Anyone can see that what was once a white brain is now deep grey. If you wait another 24 hours, the brain begins to lyse (liquify). If you turn the body upside down, the brain would flow out through a hole in the head. That's what brain dead means.

Halakhic Sources

Now that we have examined the biological facts, we can turn to the halakhic sources. First, we should examine the mishnah in *masechta Oholot* (1:6) where it says that a decapitated animal is considered dead even though the body is trembling like the tail of a lizard, which trembles even after it has been severed from the lizard's own body. It is very important to arrive at a proper understanding of the Rambam's comments on this mishnah. The Rambam, who, as we know, was both a great physician as well as a great halakhicist, explains that the mishnah refers to a lizard (a *sheret*) because a lizard's tail shows a great deal of motion

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patient is concerned, and does not violate the halakhot concerning a *goses*.

As is well known, a patient who is near death is, according to the halakha, in a state of *goses*, and one must stay away from him. The language in the Yerushalmi (Jerusalem Talmud) which the Rambam quotes with regard to such an individual, is very beautiful and poetic: "He is like a flickering candle. If you reach out to fix the wick you will extinguish it." (Rambam, *Hilkhot Avel*, 4:5) Now we don't have a clear definition of *goses* today, because we have respirators and other devices which prevent us from determining precisely when a patient reaches that state. Still, we do have the concept of a patient in *extremus*. It is forbidden to touch him, so how can we do a blood flow study? The answer to this, is that we simply, without even touching the patient, inject a small amount of radioisotope into one of the intravenous tubes which is invariably already in place, and we bring in a portable camera, and, without touching the patient, take a picture. This film shows, in the case of a brain dead patient, what is known as the "hole in head" syndrome. Such an individual has no blood whatsoever flowing into the brain. The photograph shows a "hole in the head" where no radioisotope is detectable. This constitutes what I have called physiological decapitation, and this, as I shall soon show, is death according to Jewish law.

It is important to also realize that one minute after oxygen is no longer being supplied to the brain, one minute after the blood flow stops, a good histologist can

after you cut it off, but that the same kind of motion is observable in many kinds of creatures "because the source of motion doesn't come from a common source in one beginning, but instead derives from independent sources of motion." What is clear is that the Rambam here is talking about organismic versus organ death. In the case where an animal, (or man for that matter), is no longer an integrated organism with a central source of motion, any organ which show *pirchus* or trembling is halakhically dead. It is only when motion is caused by a *shoresh*, a root source, that we call the organ or the organism alive.

Those who oppose brain death criteria make a serious error when they claim that all motion is a sign of life and argue from this that heart-beat is a sufficient criterion for saying a man is alive. We learn from this mishnah that motion is not a sign of life unless, as the Rambam explains, it is motion that comes from a central, integrated source. We can parenthetically point out in this regard that, according to this mishnah (and hence, the Rambam), the heart would be the worst test of life because the heart is the only organ in the body that has motion unto itself; motion that is not organismal, but purely organ related. We can take a human heart out of the body and watch it beat for hours in a bucket of salt water. This is not integrated motion.

The same point can be made with respect to the famous case in Tractate Yoma, of a building collapsing on an in-

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dividual and the question of whether the debris should be removed on the Sabbath. In connection with this, Rabbi J. David Bleich (The Jewish Review, Vol. 3, No. 2) accuses the Israeli Rabbinate of relying on respiration as the sole criterion of death, and he argues on this basis that it would be consistent for them to declare a polio victim dead. Such an individual cannot, and will never, Rabbi Bleich points out, breathe on his own. But for that matter, a person who has a pacemaker could be declared dead by cardiac criteria. All this proves is that death is never determined by breathing or heart-beat. The fact that a polio patient cannot breathe, but is yet alive, is based precisely on the fact that he is an organized system. Indeed it is based on the fact that he has a functioning brain. The question isn't whether a person can or cannot breathe, but only why he can't breathe. Why can a fellow who is under debris and not breathing be declared dead? Because the brain died. Otherwise we would have an obligation to try to revive him using C.P.R. And what does C.P.R. do? Bring a person back to life? No! C.P.R. is effective only when the brain has not died; it is only when C.P.R. does not work that the patient is, indeed, dead. In such an instance, the individual suffers from an irreversible respiratory failure which stems from an irreversible cause — the death of the brain. Brain death is the finest criterion of death, according to halakha, precisely because the classic criteria of irreversible respiratory and cardiac arrest are dependant upon the death of the brain.

Rabbi Bleich cites the commentary of tashi on Yoma 85A, that motion is a separate criterion for life, and that any bodily motion, including heart beat, suffices as a criterion of life even in the absence of spontaneous respiration and other vital signs. He says that the whole discussion in Yoma is limited to a situation in which the victim is, in Rashi's words, "comparable to a corpse and does not move his limbs." If he does move his limbs, then he is certainly alive, no questions asked. However, if we look at Rashi's language, we find that it supports precisely the opposite conclusion than that which Rabbi Bleich wishes to draw from it. Rashi says "sheeino mezas averav," "he does not move his limbs." Rashi does not say "limbs that do not move." In Hebrew, that would be "averav eino-mezizim." Rashi knew his grammar. "Mezas" is an active verb — he does not move his limbs. Rashi is talking about voluntary motion, not autonomic motion; he is talking about the kind of motion that is absent when you ring a lunch bell and the man doesn't come running. He is not talking about the kind of motion involved in the beating of a heart. If Rashi wanted to intimate that motion *per se* was a sufficient criterion for life, he wouldn't have used the language of *voluntary* movement, but rather: would have used the language of the mishnah in Oholot in which, as we have seen, it was already declared that such *involuntary* movement, like the movement of a tail of a lizard, or one might add, the movement of one's heart, is no criterion for life whatsoever. It is untenable to use this Rashi to argue that any motion, including heart-beat, is evidence of life in the presence of a dead brain.

With regard to my concept of physiological decapitation (on which my acceptance of brain death criteria is, in part,

based), one can point out that the mishnah in Oholot speaks of a literal, anatomical decapitation being tantamount to death. It is legitimate to ask whether or not for some religious/halakhic reason, the fact that the head is still attached to the body prevents us from saying that a person is dead even when there is no blood flow to the brain. If we study the Talmud and Codes, we find that there is simply no such restriction. In Gemorrah Hullin (21A), we find it said that "if a person fell, broke his neck and most of the flesh is torn away, he defiles a tent," which means he is dead. Here we already have a case of a person who is declared dead on "decapitation" criteria even though he is not anatomically decapitated. However, if we look further, we find the Gemorrah discusses the situation recorded in the Book of Samuel where it is said of Eli ha'Kohen that when he heard that the Ark of the Covenant had been captured, he fell from his chair and he broke his neck and died *without any visible signs of damage at all*. The Gemorrah states that he died in this way because he was an old man: An old man does not need to suffer a large, massive wound in order to be killed. It's enough that he broke his neck, even though there is no visible wound. As soon as his neck broke, he was called dead. They didn't wait for the heart to stop. Right here in Hullin we have a case of death by decapitation. What kind of decapitation? Physiological, not anatomical.

Are we prepared to have the Christian world level a similar charge against us and refuse us their organs?


Further, if we examine the Shulchan Arukh (Yoreh Deah, 62, Hilchos Ever Min HaChai), we find a discussion with respect to the Noahide law prohibiting one from eating flesh which has been torn from a living animal. There, it states that "Testicles which have been ripped, but which are still in the scrotum are permitted to be eaten" (once the animal has been slaughtered). This is because they still have life in them and they do not fall under the category of flesh torn from a living animal. The Shulchan Arukh explains that if these testicles had no life in them, the evidence of this would be that they would begin to decay and smell. In such a case, the testicles are dead and are indeed considered torn from a live animal, and one is not permitted to eat them once the animal has been slaughtered. What we have in this latter case is a body part which is halakhically detached, i.e., dead, even though it remains anatomically connected. By analogy, the cerebral blood flow studies demonstrate the very same thing with respect to the brain: that the brain is halakhically detached even though it is anatomically connected, and this is what is meant by "physiological decapitation." Those who oppose the use of brain death criteria argue that brain death constitutes the mere dysfunction of an organ and is, therefore, not equivalent to its destruction. But right here in the Shulchan Arukh we find a situation in which (1) the blood flow is broken

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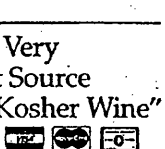
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HALAKHIC DEATH ...

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(as is evidenced by the fact that gangrene sets in); (2) the organ remains attached to the body; and (3) the organ is not merely dysfunctional, but is, rather, halakhically detached and, therefore, halakhically dead.

The main point which can be derived from the Gemorrah Hullin and from the discussion in the Shulchan Arukh that I have quoted is that anatomical detachment is not a factor at all in declaring either an organ or a whole person dead. The key is, as is the case when we have brain death, physiological detachment.

In Shulchan Arukh *Yoreh Deah* 370, we find a section which is entitled "Who Is Considered To Be Dead Even Though He Is Alive." Irrational? On the contrary. What the Shulchan Arukh is saying is that "signs of life" are not the criteria for life. The Shulchan Arukh proceeds to list such individuals: a person with a broken neck or one who has a massive wound along his back like that which results when one splits open a fish. Such individuals defile tents and are regarded as dead even though they are "alive" (have signs of life). However, a *goses*, a man who is near death, or who had his throat cut, or who has many multiple wounds "doesn't die until he dies." Why would the cases first mentioned be regarded unequivocally as instantaneous deaths and the others not be so regarded? The answer is that such individuals experience a condition in which their blood pressure drops instantly due a massive wound. Blood flow to the brain is interrupted, and they die because the brain dies within seconds or minutes of that interruption. The Shulchan Arukh rules that in such cases we are not required to check the man's heart or breathing. Such a person may even have involuntary motion, but according to the Shulchan Arukh he is dead. It's simply not true that Jewish law regards any sign of motion as proof of life.

Rav Moshe's Opinion

With regard to my father-in-law, Rabbi Moshe Feinstein, z.l., we must remember the important fact that all of Rabbi Feinstein's early *teshuvahs* in this area were on cerebral death. He had only one *teshuvah* on brain death. Rabbi Feinstein, contrary to what some would have you believe, never changed his mind on the subject, he simply made a separate *teshuvah* with respect to a new set of medical facts. I should parenthetically relate that 2-1/2 weeks prior to Rabbi Feinstein's death, he turned to me and said "I know I am close to death, but I want you to know that I'm proud, even boastful, that I have never ever had to withdraw a responsum that I wrote. I never had to change my mind." Rabbi Feinstein's son is quoted to the effect that the elder Rabbi Feinstein never changed his mind on the criteria for death, this is accurate. He never changed his mind that *cerebral death* is forbidden as a criterion, and indeed when he later published responsa forbidding heart transplants, he again was referring to cerebral death. However, when he learned of tests for brain death which tested for death of the brain stem as well as death of the cerebrum, such death being incompatible with spontaneous respiration, and after I reported to him that I had personally observed that these tests were accurate in 100 cases, he accepted the concept of brain

death as being equivalent to death by decapitation. The relevant portions of his responsum, a responsum which was in fact addressed to me, is well worth repeating:

There is now a test in which a liquid is injected into the body through the veins in order to see whether the connection has been broken between the brain and the rest of the body and destruction of the brain has set in; this is the same as death by decapitation.

If he can be made to breath by a respirator even though he has died, this does not declare him alive.

In his previous responsa, he specifies (*Yoreh Deah*, 2:146), "what the doctors say, that if the brain does not function he is to be declared dead *even though he still breaths*, etc." clearly refers to *cerebral death*, not brain death. It is hard to imagine how anyone with an awareness of the medical and halakhic issues involved could misunderstand my father-in-law on this point.

I can recall from my notes and my son's (*Rav Mordechai Tendler*) notes 17 cases in which Rabbi Feinstein ruled that people who were declared brain dead should be removed from their respirator. It is not only a question then of what he said, but of *Masseh Rav*? What did he actually do? Rabbi Feinstein held that the respirator should be removed knowing full well, based on blood flow studies, that the person was brain dead and the respirator would never be reattached.

Rabbi Feinstein, contrary to what some would have you believe, never changed his mind on the subject, he simply made a separate teshuvah with respect to a new set of medical facts.

Halakhic Ramifications

There are many implications which derive from the mistaken, but so called "strict" halakhic view on death criteria that may not at first be so readily apparent. If a person is dead, the halakha demands that we bury him in the timeliest of fashions. We can't, so to speak, "play it safe" and keep him on a respirator for another five or six days, because in doing so we violate the halakha that a dead person must be buried as soon as possible.

Second, if such a dead body is kept on a respirator, a Kohen cannot come into the hospital during this time. We cannot accept a "Chumra" in this area. We have to make up our minds: "Is the person dead or isn't he dead?"

There is a third ramification, and this has to do with violating the Sabbath. It would be forbidden for all our *frum* doctors to do anything for such a person on the Sabbath. Finally I should note that there is a critical lack of intensive care beds in most hospitals, and we may be risking the life of a living individual because we have a dead brain occupying an intensive care bed which would otherwise be afforded to a critically ill individual whose survival (*b'derech hateva*) depends on obtaining intensive care.

With regard to the question of organ

transplants I should point out that in one of his *teshuvahs*, Rabbi Feinstein held that there are no *issurim* (restrictions) regarding organ transplants from the body of one who has died, if such transplants are done so that another person might live. He tells us (and this, by the way, is so revealing of Rabbi Feinstein's own personality and character) that if the family should feel anguished by permitting such a transplant, then its members are not required to give their permission for it. But he said that it is a mitzvah *not to be anguished* in such a case. The mitzvah is that you should feel joy in saving a life. (*Igrot Moshe*, Y.D. 2:174) This responsum spoke to the issue of organ transplants before we learned about brain death, but the same now applies equally to a brain dead patient. It is a mitzvah to utilize his organs to save the life of another.

There is, however, a serious problem because Agudas Yisrael has made it next to impossible for some individuals to obtain a liver transplant in Israel. Such individuals most often go out of the country to obtain organs and in so doing they compete for potential donors with, for example, Americans. I have heard it said that it is unfair for Israelis to come to America expecting to receive liver transplants when they, themselves, won't donate livers. I wrote to Agudas Yisrael and told them that their position was hurting the Orthodox Jewish patient. I said if the word got out that we will not allow a Jew who is brain dead to be a donor, why would the Goyim let their organs go to us? At one point I was asked by a leading Agudas Yisrael rabbi to contribute funds for a liver transplant for a person coming to the United States from Eretz Yisrael. My response (which I wrote

the hospital. If you believe that the brain dead person is alive, then the person who is to receive his organ is killing him a week, a day or even a minute earlier by coming in and being the first match for his organ. In so doing, he is, in Jewish law, an accomplice to a murder. According to Jewish law, it is murder if you speed the death of the donor by even a minute! The idea that the doctors will take the organs out anyway, and that they then hunt around for a recipient, and that a *frum* Jew can, therefore, also get the organ is based on a massive self-deception. If Agudas Yisrael and others were consistent with their own position, they would rule that it is totally *assur* (forbidden) for any Jew to receive a liver or heart. If they do receive such an organ they would be committing *retzicha*, murder. One, of course, need not be plagued by such a problem if he understands that the only criterion for death, according to Jewish law, is death of the brain.

Just the other week, the heart of a brain dead soldier in the Israel Defense Forces was transplanted into an Arab citizen of Jerusalem. The Eida Hacharedit in Jerusalem protested, not because the brain dead criterion was unacceptable, but because Arabs refuse to donate their organs to Jews! Are we prepared to have the Christian world level a similar charge against us and refuse us their organs?

To paraphrase the Rambam in his commentary on the tenth chapter in *Sanhedrin* where he berates those who misunderstand the abstruse midrashic comments in the Talmud and interpret them literally: "If only they would admit that they do not understand."

The author is a noted authority on medical ethics and the relationship of medicine and science to Jewish law. He serves in a dual capacity as professor of biology at Yeshiva College and as a rosh yeshiva (professor of Talmud) at the University-affiliated Rabbi Isaac Elchanan Theological Seminary (RIETS). Dr. Tendler holds the Rabbi Isaac and Bella Tendler Chair in Jewish Medical Ethics at Yeshiva University. He also serves as Rav of the Community Synagogue of Monsey.



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in a letter to Rabbi Moshe Sherer) was that if this rabbi was asking me for money, he must then agree that a brain dead patient is indeed dead and can halakhically serve as an organ donor, otherwise he would be asking me to be an accessory to murder. I later learned that this Agudas rabbi's response to such a question was that he did not involve himself in such complicated *shielahs* (questions) as the halakhic status of a brain dead patient.

But there are those at Agudas Yisrael who do involve themselves in these questions, and they must acknowledge the consequences of their own position. Those who do not accept the brain death standard should not fool themselves into believing that once an organ has been removed from a brain-dead donor, a Jew would be permitted to make use of it. A liver transplant is not like a cornea transplant where the doctors remove the organ, put it in a freezer, and wait for a potential recipient. In the case of a lung, heart or liver transplant, the doctors must look for a recipient whose blood and physical type matches up to the potential brain dead donor. It is only then that the surgery to remove the lung, heart or liver is performed. The organ is removed for a specific individual, but even more importantly, the organ is frequently not removed for that individual until he decides to enter