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The Journal of Halacha and Contemporary Society is published twice a year by the Rabbi Jacob Joseph School, Dr. Marvin Schick, President. The Rabbi Jacob Joseph School, located at 3495 Richmond Road, Staten Island, New York, 10306, welcomes comments on this issue and suggestions for future issues.

It is the purpose of this Journal to study the major questions facing us as Jews in the twentieth century, through the prism of Torah values. We will explore the relevant Biblical and Talmudic passages and survey the halachic literature including the most recent Responsa. The Journal of Halacha and Contemporary Society does not in any way seek to present itself as the halachic authority on any question, but hopes rather to inform the Jewish public of the positions taken by Rabbinic leaders over the generations.

Manuscripts which are submitted for consideration must be typed, double-spaced on one side of the page, and sent in duplicate to the Editor, Rabbi Alfred Cohen, 1265 East 108th Street, Brooklyn, New York, 11236. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles which concern halachic practices of American Jewish Life.

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The Journal of Halacha and Contemporary Society

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Determining Death According to Halacha

In this issue, we are presenting a number of articles dealing with a current situation which is highly problematical. The articles are printed in the order in which they were submitted.

The Editor

Medical Aspects of Brain Death

Marshall J. Keilson, M.D.

As an introduction to the halachic discussions that will follow on the subject of brain death, it is imperative to have a thorough understanding of the subject matter involved. I hope to present the information in an objective, unbiased fashion, explaining the medical knowledge as it exists today. Halacha cannot be judged in a vacuum and thus, *poskim* who will tackle such difficult questions will need a working knowledge of the basic medical facts. In my opinion, some of the earlier ambiguities in halachic opinions may have resulted from a lack of concise, clear, and rigid criteria for brain death in the medical literature. These criteria have now been standarized, refined, and verified, and will be briefly reviewed. The discussion will focus on adults and on children older than five years.

Historically, the definition of death was not an issue until about thirty years ago. Upon cessation of spontaneous respiration or heart beat, death (neurologic or otherwise) would invariably follow shortly thereafter. With the advent of artificial respiratory support, patients were being kept "alive" who had suffered extensive irreversible brain damage associated with permanent loss of respiration. The only detectable sign of life in these patients was continued spontaneous heart beat with associated maintenance of blood pressure (though now even the latter can be maintained to a certain degree with various medications). Thus, the question arose

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as to whether these patients were, in fact, dead or alive.

The famous Harvard criteria were first introduced in 1968. There have been numerous reviews of these criteria as medical science has advanced, but the basic structure remains intact. The Harvard criteria have attained almost universal acceptance by medical societies, state legislatures, ethicists, and most religious groups. Thus, a patient who fulfills these medical criteria is considered by the secular world as medically, morally, ethically, and most important, *legally* dead.

What are the driving forces compelling us (physicians and society at large) to redefine death along neurologic lines? As systemic death will always follow true brain death shortly thereafter, why the hurry to pronounce death a few hours or at most a few days before? Aside from the obvious question of whether death has taken place, there are at least three other important factors.

1. Financial and triage considerations — maintaining a brain dead (i.e. dead) patient in an intensive care unit or even a regular hospital bed is extremely costly — both fiscally and physically. In this era of soaring medical costs and hospital occupancy rates over 90 percent, there is great pressure to reduce expenditures and free up much needed beds. Some contend that valuable staff time (attendants, residents, nurses etc.) would be better spent on more salvageable patients.

2. Social — there is great anguish and suffering involved for relatives and friends of these patients who are maintained with respirators and multiple other unsightly paraphernalia in the twilight zone of brain death. Though I am not certain as to the significance of this as a halachic problem, it is an important consideration in the secular world.

3. Organ transplantation — at present, cardiac and liver donation is possible only from the brain-dead donor. Cessation of spontaneous heartbeat renders these organs unfit for transplant. With over 80 percent five-year survival rates in transplant patients, these transplant procedures are life-saving and almost routine. The pressure on hospital personnel to help locate donors and procure organ donation is very intense. In fact, New York State Public

Health Law requires administrators to request organ donation from family members of appropriate patients who die in the hospital.

Clincial Aspects

The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research published guidelines for the determination of death in 1981. The Uniform Determination of Death Act states:

> An individual who has sustained either 1. irreversible cessation of circulatory and respiratory functions or 2. irreversible cessation of all functions of the entire brain, including the brainstem, is dead. The determination of death must be made in accordance with acceptable medical standards.

In simpler terms, the first definition is the one with which we are all familiar. A patient stops breathing or the heart ceases to beat either unexpectedly or associated with a terminal illness, and the patient is dead. The second newer definition, requires that *both* the "upper" brain (cerebral hemispheres) and the "lower" brain (brainstem) cease to function (Figure 1). The patient may then be declared dead.

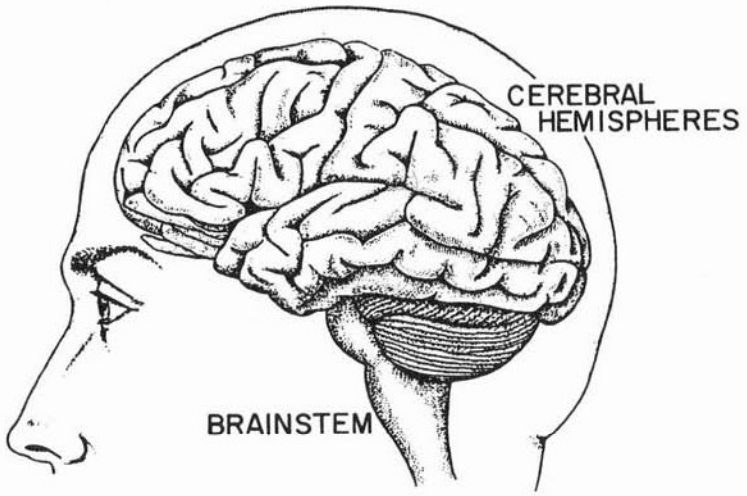

TABLE I

Criteria for Determination of Death (Adapted from the President's Commission)

An individual presenting the findings in either Section A (cardiopulmonary) or Section B (neurological) is dead. In either section, a diagnosis of death requires that *both* cessation of functions and irreversibility be demonstrated.

A. Cardiopulmonary (traditional definition of death)
   1. Cessation recognized by appropriate examination
   2. Irreversibility — persistent cessation of function for an appropriate period of observation and/or trial of therapy

B. Neurologic (modern definition of death)
   1. Cessation — must have a and b.
      a. Cerebral functions are absent
      b. Brain stem functions are absent
   2. Irreversibility — must have a, b, and c.
      a. Cause is established and sufficient to account for brain dysfunction
      b. Possibility of recovery is exluded
      c. Persistent cessation of function for appropriate period of observation and/or trial of therapy

The Commission outlines criteria for this determination as seen in Table 1. Though established as "advisory," these criteria are generally accepted and executed in their present form throughout the country. We will analyze these criteria in a bit more detail and reference will be made to them during the ensuing discussion.

B 1a : Cerebral functions are absent — the cerebral hemsipheres (upper brain regions) are the seat of consciousness, and thus profound unresponsivenes (deep coma) must be present.

This alone, however, is not "brain death," as the brainstem (lower brain regions — see Figure 1) may still be functioning. Numerous medical conditions can render a patient profoundly unresponsive (i.e. comatose) yet not affect lower brain function (e.g. liver or kidney failure, mineral, imbalance in the blood, severe infections alcohol intoxication, drug overdose, etc.). Of greater significance is that many of these conditions are potentially reversible. Thus, in addition to profound unresponsiveness, a second absolute prerequisite for brain death must be met.

B 1b.: Brainstem functions are absent — brainstem dysfunction is determined by clinical examination confirming the absence of the so called "cephalic" reflexes (pupillary, corneal, vestibulo-ocular, and gag) and absolute, irreversible absence of spontaneous respiration. The details of these procedures are not appropriate for the present discussion; however, it is sufficient to state that the examination is standardized and easily performed by experienced physicians (generally neurologists or neurosurgeons). The central focus here is on the ability to breathe. With a relatively simple bedside procedure (apnea testing) it can be demonstrated that the region of the brainstem responsible for control of respiration is permanently and irreversibly dead. There cannot be, now or ever, return of independent breathing. In contrast, the heart, which is an *independent* organ, will continue to beat spontaneously. Thus, the only apparent detectable sign of "life" in the brain-dead individual is continuous, spontaneous heart beat.

The above examination fulfills the requirement for cessation of function of the cerebral hemispheres and the brainstem. Now it remains to be proven that this cessation is irreversible beyond doubt.

B 2 a,b,c : The presence of brain death should not be certified unless the underlying cause is identified (e.g. severe head trauma, or patient postcardiac arrest who was "successfully" resuscitated), and there is no chance of reversibility. As noted previously, several conditions can closely simulate brain death, and these must be excluded. In addition, an appropriate period of time must pass, which varies from 6-24 hours in different centers.

Laboratory Evaluation

1. Electrophysiological testing

a. Electroencephalogram (EEG=brainwave) — this most commonly used test measures electrical activity of the cerebral hemispheres (upper brain regions) only and plays no role in evaluating the brainstem. It is a common *misconception* in both lay and non-neurological medical circles that a "flat" EEG is diagnostic of brain death. Though firm technical requirements have been set up by the American EEG Society for determining a "flat" EEG, pitfalls exist which need to be considered. For example, a "flat" EEG can be seen in patients with severe drug overdose even when brain death is not truly present (so-called false positive). Alternatively, several authors have reported occasional persistent minimal EEG activity in the presence of true brain death (so-called false negative). Thus, with certain limitations, the EEG is a valuable confirmatory measure of brain death in experienced hands in the proper clinical setting.

b. Evoked potentials — without exploring these procedures in detail, it is sufficient to say that these tests are useful in evaluating the functional electrical integrity of the brainstem. These confirmatory tests can be performed at the patient's bedside.

2. Cerebral blood flow studies

The presence and absolute irreversibility of brain/brainstem death can be confirmed by demonstrating the complete absence of blood flow to the brain. The most direct and reliable method is with cerebral angiography (injecting dye directly into the large blood vessels that feed the brain). In most cases, the four vessels which normally bring blood to the brain are abruptly cut off before entering the skull. However, because there is no actual flow of blood, the veins that drain blood from the brain are never seen. This test is the "gold standard" against which all other non-angiographic flow studies are compared. Unfortunately, it is usually impractical (or impossible) to perform angiography routinely as it requires transporting a comatose, respirator-dependent patient to the radiology section of the hospital. Thus, various radioisotope techniques have been used to test cerebral blood flow in a safer,

simpler manner at the bedside. In simple terms, this involves injecting a radioactive substance into a peripheral vein and following its course with a special scanning device as it flows into the brain. A disadvantage of this method is that the *brainstem* circulation is not well visualized and thus absolute absence of flow to this region may not always be diagnosed with certainty. Various other modalities (including Xenon enhanced computed tomagraphy, digital angiography, transcranial Doppler) have been tried for brain death confirmation but are not widely used as yet.

Pathology

The most common finding in patients with brain death is the so called "respirator brain." The pathological features consist of a mixture of swelling and destruction and are related to the duration of time spent on the respirator after cerebral blood flow ceased. It is, in fact, not the respirator that leads to "respirator brain" but lack of blood flow and oxygen. Thus, a brain studied soon after brain death may be almost normal in appearance.

Conclusion

None of the above information necessarily suggests whether neurological/brain death is in fact equivalent to the traditional criteria of death. Brain death can be diagnosed with certainty and it is equally assured that all patients rigidly meeting criteria for brain death will systemically die in a matter of hours or a few days. That is — in the respirator-supported brain- dead individual whose heart continues to beat spontaneously, circulatory collapse will inevitably follow in short order. However, whether the *neshama* (soul) leaves the body at the moment of brain death or later, with cessation of heart beat, is a halachic question, not a medical one.

Definition of Death in Judaism

Dr. Fred Rosner, M. D.
Rabbi Dr. Moshe David Tendler

Introduction

The modern era of human heart transplantation which began late in 1976 initiated intense debate about the moral, religious and legal issues relating to life and death and especially the definition of death. The traditional definition of death as reflected in *Black's Law Dictionary* is the "total stoppage of the circulation of the blood, and the cessation of the animal and vital functions consequent thereon, such as respiration, pulsation..." With the advent of heart transplantation, this definition of death became inadequate and a new definition of death, so-called brain death, evolved. Brain death is now socially acceptable and legislatively sanctioned throughout most of the civilized world.

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In a classic 1968 article on brain death,[1] an Ad Hoc Committee of the Harvard Medical School recommended four criteria: unreceptivity and unresponsivity, no movements, no reflexes, and a flat electroencephalogram. This paper was reprinted as a "Landmark Article" in 1984[2] with an accompanying perspective editorial[3] which states:

> The Harvard Committee report likely spawned more medicolegal discussion and action than any other publication. Almost every legal entity has had to deal with this new concept of death, and most medical standards for death of the brain originated, with some modifications, from the criteria set forth in this article. The prescience of this committee has become even more obvious as hundreds of clinical observations have borne out the diagnostic value of their clearly stated clinical rules.

In 1981, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research published its report that defined death.[4] This definition was approved by the American Bar Association and many other organizations and prominent individuals. The recommended proposal was the following:

> An individual who has sustained either (a) irreversible cessation of circulatory and respiratory functions, or (b) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.

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1. "A Definition of Irreversible Coma." Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death. *J.A.M.A.* 1968; *205:* 337-350.
2. *Ibid. J.A.M.A.* 1984; *252: 677-679.*
3. Joynt RJ, A new look at death. *J.A.M.A.* 1984; *252:* 680-682.
4. President's Commission for the study of Ethical Problems in Medicine and Biomedical and Behavioral Research: *Defining Death: Medical, Legal and Ethical Issues in the Determination of Death.* Washington, D.C., Government Printing Office, 1981.

The duration of time for observation has not been settled. The Harvard Ad Hoc Committee stated "all of the above tests shall be repeated at least 24 hours later with no change." The President's Commission recommended an observation period of six hours if confirmatory tests are available and twelve hours if they are not. For anoxic brain damage, the Commission stated that twenty-four hours of observation is generally desirable for ascertainment of brain death but that this period may be reduced if a test shows cessation of cerebral blood flow or if an electroencephalogram shows electrocerebral silence (i.e., a flat tracing) in an adult patient without drug intoxication, hypothermia or shock.

At present, most statutes and judicial opinions accept the extension of the definition of death first introduced by the Harvard Ad Hoc Committee and recognize that death can be accurately demonstrated either on the traditional grounds of irreversible cessation of heart and lung functions or on the basis of irreversible loss of all functions of the entire brain. This recognition is codified in the Uniform Determination of Death "Standard" which does not specify diagnostic tests or medical procedures required to determine death but leaves the medical profession free to make use of new medical knowledge and diagnostic advances as they become available. The determination of death must thus be made in accordance with accepted medical standards.

In New York State, the Governor in 1984 appointed a Task Force on Life and the Law which published its recommendations on the Determination of Death in July 1986. (However, Rabbi J. David Bleich, a member of the Task Force, issued the lone dissent from the group's decision). The Task Force suggested that the New York State Department of Health promulgate a regulation which establishes that an individual is dead when the individual has suffered either (a) irreversible cessation of respiratory and circulatory function or (b) irreversible cessation of all functions of the entire brain, including the brain stem. On June 18, 1987, the State Hospital Review and Planning Council adopted a regulation recognizing the total and irreversible cessation of brain function as a basis for determining death in New York State. Shortly thereafter, the Department of Health amended its regulations to include this

standard so that either the brain death standard or the circulatory or respiratory standard may be relied on to determine that death has occurred.

The brain death standard applies to hospital and nursing home patients who have lost *all* brain function and whose breathing and circulation are artificially maintained. Under the standard, patients like Karen Ann Quinlan, who had brain stem capacity and the ability to regulate basic functions such as heartbeat and respiration, are considered alive.

It is of paramount importance not to confuse brain death with other forms of ireversible brain damage, particularly the permanent vegetative state, for a patient in such a state is alive according to all legal, moral, medical, and religious definitions. Such a patient is certainly not dead in the medical or legal sense and his organs may not be removed for transplantation until death has been established by either classic irreversible cardiorespiratory criteria or by irreversible brain stem death criteria.

Does Judaism Recognize Brain Death?

There is at present an intense debate among rabbinic authorities as to whether or not Jewish law (halacha) recognizes brain death as a definition of death. It is our thesis that the answer is affirmative. The classic definition of death in Judaism as found in the Talmud and Codes of Jewish Law is the absence of spontaneous respiration in a person who appears dead (i.e., shows no movements and is unresponsive to all stimuli). The absence of hypothermia or drug overdose must be ascertained because these conditions can result in depression of the respiratory center with absence of spontaneous respiration and even heartbeat. If resuscitation is deemed possible, no matter how remote the chance, it must be attempted.

Jewish writings provide considerable evidence for the thesis that the brain and the brain stem control all bodily functions, including respiration and cardiac activity. It, therefore, follows that if there is irreversible total cessation of all brain function including that of the brain stem, the person is dead, even though there may still be some transient spontaneous cardiac activity. Brain function

is divided into higher cerebral activities and the vegetative functions of the vital centers of the brain stem. A criterion of death based on higher cerebral death alone is ethically and morally unacceptable. If a person is decapitated, his heart and lungs may still function for a brief period of time, but that person is obviously dead at the moment the brain and brain stem are severed from the remainder of the body. We contend that if one can medically establish that there is total cessation of all brain function including the brain stem, the patient is as if "physiologically decapitated."

There are a number of objective tests that can evaluate the viability of the brain stem. Brain stem death may be the preferable definition of death in Judaism since it is irreversible. Brain stem death confirms bodily death in a patient with absence of spontaneous respiration who may still have a heartbeat. We will provide support for our position from ancient and recent Jewish sources.

Classic Definition of Death in Jewish Law

The definition of death in Jewish law is first mentioned in the Babylonian Talmud which enumerates circumstances under which one may desecrate the Sabbath.[5]

> ...every danger to human life suspends the [laws of the] Sabbath. If debris [of a collapsing building] falls on someone and it is doubtful whether he is there or whether he is not there, or if it is doubtful whether he is an Israelite or a heathen, one must probe the heap of the debris for his sake [even on the Sabbath]. If one finds him alive, one should remove the debris, but if he is dead, one leaves him there [until after the Sabbath].

The Talmud then comments as follows:[6]

> How far does one search [to ascertain whether he is

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5. *Yoma* 8: 6-7.
6. *Ibid* 85a.

> dead or alive]? Until [one reaches] his nose. Some say: Up to his heart. ...life manifests itself primarily through the nose, as it is written: "In whose nostrils was the breath of the spirit of life."[7]

The renowned biblical and talmudic commentator Rashi explains that if no air emanates from his nostrils, he is certainly dead. Rashi further explains that some people suggest the heart be examined for signs of life, but the respiration test is considered of greatest import.

The rule is codified by Maimonides (Rambam) as follows:[8]

> If, upon examination, no sign of breathing can be detected at the nose, the victim must be left where he is [until after the Sabbath] because he is already dead.

The universally accepted code of Jewish law by Rav Yosef Karo, the *Shulchan Aruch*, states:[9]

> Even if the victim was found so severly injured that he cannot live for more than a short while, one must probe [the debris] until one reaches his nose. If one cannot detect signs of respiration at the nose, then he is certainly dead whether the head was uncovered first or whether the feet were uncovered first.

Neither Rambam nor Rav Karo require examination of the heart. Cessation of respiration seems to be the determining physical sign for the ascertainment of death.

Another pertinent passage found in the *Shulchan Aruch* states:[10]

> If a woman is sitting on the birthstool [i.e., about to give birth] and she dies, one brings a knife on the

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7. Genesis 7:22.
8. *Mishneh Torah* (Code of Maimonides), *Hilchot Shabbat*, (Laws of the Sabbath) 2:19.
9. *Shulchan Aruch* (Code of Jewish Law), *Orach Chayim* 329:4.
10. *Ibid* 330:5.

> Sabbath, even through a public domain, and one incises her womb and removes the fetus, since one might find it alive.

Rabbi Moses Isserles, known as Ramo, adds to this statement:[11]

> However, today we do not conduct ourselves according to this [rule] even during the week [i.e., even *not* on the Sabbath] because we are not competent to recognize precisely the moment of maternal death.

Several commentators explain that Ramo is concerned that perhaps the mother only fainted, and incising her abdomen might kill her. Maimonides, five centuries earlier, had already raised the problem of fainting complicating the recognition of death, when he wrote: "Whosoever closes the eyes of the dying while the soul is about to depart is shedding blood. One should wait a while: perhaps he is only in a swoon."[12]

Both Rambam and Ramo, however, agree that the talmudic description of death, for all practical purposes, is the absence or cessation of respiration.

Recent Rabbinic Writings on the Defintion of Death

The classic Jewish legal definition is that death is established when spontaneous respiration ceases. Rabbi Moses Schreiber *(Chatam Sofer)* asserts that if a person is motionless "like an inanimate stone" and has no palpable pulse either in the neck or at the wrist, and also has no spontaneous respiration, his soul has certainly departed, but one should wait a short while to fulfill the requirment of Maimonides, who was concerned that the patient may only be in a swoon.[13] Rabbi Sholom Mordechai Schwadron states that if any sign of life is observed in limbs other than the

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11. Ramo, Glossary on *Shulchan Aruch, Orach Chayim 330:5.*
12. *Mishneh Torah, Hilchot Avel* (Laws of Mourning) 4:5.
13. Responsa *Chatam Sofer,* Section *Yoreh Deah,* No. 338.

heart and lungs, the apparent absence of spontaneous respiration is not conclusive in establishing death.[14]

On the other hand, Rabbi Isaac Yehuda Unterman, addressing the Eleventh Congress on Jewish Law in Jerusalem in August 1968, stated that one is dead when one has stopped breathing. Thus, many talmudic and post-talmudic sages agree that the absence of spontaneous respiration is the only sign needed to ascertain death. But some would also require cessation of heart action. Thus, a patient who has stopped breathing, says Rav Unterman, and whose heart is not beating is considered dead in Jewish Law.[15] [We should point out that in 1968 the Harvard Criteria were new and unclear, and there was yet great confusion about the definition of brain death itself.]

Rabbi Eliezer Yehuda Waldenberg also defines death as the cessation of both respiration and cardiac activity.[16] One must use all available medical means to ascertain with certainty that respiratory and cardiac functions have indeed ceased. A flat electro-encephalogram in the face of a continued heartbeat is not an acceptable finding by itself to pronounce a patient dead. Even after death has been established one should wait a while before moving the deceased.

Rabbi Immanuel Jakobovits states, in part, that "the classic definition of death as given in the Talmud and Codes is acceptable today and correct. However, this would be set aside in cases where competent medical opinion deems any prospects of resuscitation, however remote, at all feasible".[17]

Rabbi J. David Bleich traces the Jewish legal attitude concerning the definition of death from talmudic through recent rabbinic times.[18] In his opinion, brain death and irreversible coma are not acceptable defintions of death insofar as Jewish law is

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14. Schwadron, SM, Responsa *Maharsham*. Vol. 4, Sect. 6, No. 124.
15. Unterman IY, "Points of Halacha in Heart Transplantation." *Noam* 1970; *13*:19
16. Responsa *Tzitz Eliezer*. Vol. 9, no. 46 and Vol. 10, No. 25:4.
17. Jakobovits I. Personal communication, August 1, 1968.
18. Bleich JD, *Contemporary Halakhic Problems*, New York, Ktav, 1977, pp. 372-393.

concerned, since the sole criterion of death accepted by Jewish law is total cessation of *both* cardiac and respiratory activity long enough to make resuscitation impossible. Rabbi Bleich also discusses the various time-of-death statutes already enacted into law in many states in this country and statutes being contemplated by other states,[19] and expresses the hope that provisions allowing for exemption from legislated definitions of death for reasons of conscience will be written into such statutes in order to preserve civil and religious liberties.

Total Brain Death in Judaism

The position that complete and permanent absence of any brain-related vital bodily function is recognized as death in Jewish law seems to be supported by Rabbi Moshe Feinstein[20] whose responsum on heart transplantation begins with a discussion of decapitation. Rav Moshe Feinstein quotes Maimonides,[21] who states that a person who is decapitated imparts ritual defilement to others because he is considered dead even though one or more limbs of the body may yet move spastically, temporarily. The situation is comparable to the tail severed from a lizard which may still quiver temporarily but is certainly not alive.[22] Rav Feinstein asserts that "someone whose head has been severed — even if the head and the body shake spastically — that person is legally dead." The requirement of Maimonides cited earlier in this essay to wait a while when death is thought to have occurred (i.e., when the patient has no spontaneous respiratory activity), according to Rav Feinstein, is to differentiate between true death and the situation "where the illness is so severe that the patient has no strength to breathe." Since only a few minutes of absent breathing is compatible with life, if the patient is observed for fifteen minutes with no spontaneous respirations, he is legally dead (unless a potentially

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19. Bleich JD, "Time of Death Legislation." *Tradition* 1977; *16;* 130-139
20. Responsa *Iggerot Moshe,* Section *Yoreh Deah,* Part 2, No. 174.
21. *Mishneh Torah, Hilchot Tumat Met* (Laws Concerning Ritual Defilement by the Dead) 1:15.
22. *Oholot* 1:6.

reversible cause of respiratory absence is present, such as hypothermia or drug overdose).

In the same responsum Rav Feinstein prohibits heart transplantation if the donor's heart is removed before total brain death has occurred. The presence of any spontaneous respiratory activity, however, indicates that a person is still alive and no matter what the clinical neurological picture, the patient may not be considered dead for any purpose including organ transplantation.

The above responsum is dated 1968 (5728 in the Hebrew calendar). Another responsum of Rav Feinstein dated two years later[23] amplifies the Jewish legal definition of death. He reiterates the error of physicians who diagnose death when the patient has no cerebral function but is still breathing spontaneously. This responsum also prohibits heart transplantation as murder of the recipient because his life is thereby shortened since (at that time) the success of cardiac transplantation in prolonging life had not been demonstrated.

On May 24, 1976, Rabbi Feinstein sent a letter to the Honorable Herbert J. Miller, who was Chairman of the New York State Assembly's Committee on Health, relevant to Assembly Bill 4140/A concerning the determination of death. In his letter he said:

> The sole criterion of death is the total cessation of spontaneous respiration.
>
> In a patient presenting the clinical picture of death, i.e., no signs of life such as movements or response to stimuli, the total cessation of independent respiration is an absolute proof that death has occurred. This interruption of spontaneous breathing must be for a sufficient length of time for resuscitation to be impossible [approximately 15 min.]
>
> If such a "clinically dead" patient is on a respirator, it is forbidden to interrupt the respirator. However, when the respirator requires servicing, the services may be withheld while the patient is carefully and continuously monitored to detect any signs of

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23. *Iggerot Moshe*, Section *Yoreh Deah*, Part 2, No. 146.

> independent breathing no matter how feeble. If such breathing motions do not occur, it is a certainty that he is dead. If they do occur the respirator shall be immediately restarted.

A more recent responsum of Rabbi Feinstein, dated 1976,[24] supports the acceptability of "physiologic decapitation" as an absolute definition of death. Rabbi Feinstein again reiterates the classic definition of death as being the total irreversible cessation of respiration but then states that if by injecting a substance into the vein of a patient, physicians can ascertain that there is no circulation to the brain — meaning no connection between the brain and the rest of the body — that patient is legally dead in Judaism because he is equivalent to a decapitated person. Where the test is available, continues Rav Feinstein, it should be used.

We interpret Rabbi Feinstein's written responsa to indicate that Jewish law clearly recognizes that death occurs before all organs cease functioning. This is our interpretation, not necessarily accepted by others. Cellular death follows organismal death. Jewish law defines death as an organismal phenomenon involving dissociation of the correlative or coordinating activities of the body and not as individual organ death.

It is our opinion that the continued beating of the heart is not *halachically* critical. In the case of the Talmud where the patient is buried under debris, the interest focuses on any sign of residual life to warrant desecrating the Sabbath to dig him out. It has no relevance to a patient lying in an intensive care unit whose every function is monitored and whose status is open to full evaluation. In such a case, the issue is truly one of definition, not confirmation.

Based on the position of Rav Moshe Feinstein cited above, Rabbi M. Tendler, one of the authors of the present essay, has introduced the concept of physiologic decapitation as an acceptable definition of death in Judaism even if cardiac function has not ceased.[25]

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24. *Ibid.* Part 3, No. 132.
25. Tendler MD, "Cessation of brain function. Ethical implications in terminal care and organ transplants." *Annals NY Acad. Sci.* 1978; *315*:394-497.

The thesis is[26]

> that absent heartbeat or pulse was not considered a significant factor in ascertaining death in any early religious source. Furthermore, the scientific fact that cellular death does not occur at the same time as the death of the human being is well recognized in the earliest biblical sources. The twitching of a lizard's amputated tail or the death throes of a decapitated man were never considered residual life but simply manifestations of cellular life that continued after death of the entire organism had occurred. In the situation of decapitation state, death can be defined or determined by the decapitated state itself as recognized in the Talmud and the Code of Laws. Complete destruction of the brain, which includes loss of all integrative, regulatory, and other functions of the brain, can be considered physiological decapitation and thus a determinant per se of death of the person.
>
> Loss of the ability to breathe spontaneously is a crucial criterion for determining whether complete destruction of the brain has occurred. Earliest biblical sources recognized the ability to breathe independently as a prime index of life... destruction of the entire brain or brain death, and only that, is consonant with biblical pronouncements on what constitutes an acceptable definition of death, i.e., a patient who has all the appearances of lifelessness and who is no longer breathing spontaneously. Patients with irreversible total destruction of the brain fulfill this definition even if heart action and circulation are artificially maintained.

Thus, if it can be definitely demonstrated that all brain functions including brain stem function have ceased, the patient is legally dead in Jewish law because he is equated with a decapitated individuals whose heart may still be beating. Brain stem function

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26. Veith FJ, Fein JM, Tendler MD, et al, "Brain death. I. A status report of medical and ethical considerations." *J.A.M.A.* 1977; *238*:1651-1655.

can be accurately evaluated by radionuclide cerebral angiography at the patient's bedside.[27-30] This test is a stress-free, simple, safe, highly specific and highly reliable indicator of absence of blood flow to the entire brain, thus confirming total irreversible brain death. "The absence of cerebral blood flow is presently considered the most reliable ancillary test in diagnosing brain death."[31] There are also other tests used to confirm brain death.[32]

Extensive recent medical reviews confirm that cessation of brain flow as measured by radioisotope techniques is invariably accompanied by signs of brain cell lysis. This evidence of cellular decay, although confirmable only at post-mortem examination, is an absolute criterion of death despite the beating heart. The heart is not dependent for its stimulation on brain function. A heart completely removed from the body continues to beat as long as its

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27. Korein J, Braunstein P, George A, et al, "Brain death. I. Angiographic correlation with the radioisotopic bolus technique for evaluation of critical deficit of cerebral blood flow." *Ann. Neurol.* 1977; *2*:195-205.
28. Tsai SH, Cranford RE, Rockswold G., Koehler S,"Cerebral radionuclide angiography." *J.A.M.A.* 1982; *248*:591-592.
29. Schwartz JA, Baxter J, Brill D, "Diagnosis of brain death in children by radionuclide cerebral imaging." *Pediatrics* 1982; *73*:14-18.
30. Goodman JM, Heck LL, Moore BD, "Confirmation of brain death with portable isotope angiography. A review of 204 consecutive cases." *Neurosurgery* 1985; *16*:492-497.
31. Alvarez LA, Lipton RB, Hirschfeld A, et al, "Brain death determination by angiography in the setting of a skull defect." *Arch. Neurol.* 1988; *45*:225-227.
32. Ropper AH, Kennedy SK, Russell L, "Apnea testing in the diagnosis of brain death: clinical and physiological observations." *J. Neurosurg.* 1981; *55*:942-946.

    Rowland TW, Donnelly JH, Jackson AH, "Apnea documentation for determination of brain death in children." *Pediatrics* 1984; *74*:505-508.

    Trojaborg W, Jorgensen EO, "Evoked cortical potentials in patients with "isolectric EEG." *Electroencephalogr. Clin. Neurophysiol.* 1973; *35*:301-309.

    Ropper AH, Kehne SM, Wechsler L, "Transcranial Doppler in brain death." *Neurology* 1987; *37*:1733-1735.

    Darby J, Yonas H, Brenner RP, "Brainstem death with persistent EEG activity. Evaluation by xenon-enhanced tomography." *Critical Care Med.* 1987; *15*:519-521.

    Tan WS, Wilbur AC, Jafar JJ, et al, Brain death. "Use of dynamic CT and intravenous digital subtraction angiography." *Amer. J. Neurorad.* 1987; *8*:123-125.

nutrition is maintained. Rabbi Feinstein is of the opinion that the criterion of death in a patient who gives the clinical impression of death is cessation of spontaneous respiration. "Clinical impression of death" means "if he resembles a dead person, that is to say he does not move any of his limbs."[33] [Yet, Rav Feinstein never specifically excluded the heart as a criterion as well. *editor*]

When a patient is on a respirator and gives all the evidence of having died, i.e., meets the Harvard criteria, he is not "brain dead" — a confusing term — but is dead as evidenced, first and foremost, by cessation of independent respiration. In addition, a careful check must be made that he meets the reservation that he appear clinically dead. This requirement is met in the fullest and most absolute measure by total unreceptivity, unresponsiveness, absence of all movements, absent cephalic reflexes, fixed dilated pupils and persistence of all these findings for at least a twenty-four hour period in the absence of intoxicants or hypothermia. These are the Harvard criteria.

Thus, we maintain that valid definition of death is brain death. The classic "respiratory and circulatory death" is in reality brain death. Irreversible respiratory arrest is indicative of brain death. A brain dead person is like a physiologically decapitated individual. The requirement of Maimonides to "wait awhile" to confirm that the patient is dead is that amount of time it takes after the heart and lung stop until the brain dies, i.e., a few minutes.

Until the brain dies, one must attempt to restart the heart and the respiration of a non-breathing patient. If the heart and lung function are rapidly restored the patient may suffer no neurological deficits. There are a number of objective tests now available that can evaluate the viability of the brain stem. A simple, non-stressful test is the radionuclide blood flow study described above. This test does not violate the prohibition against unnecessarily stressing the patient in any way and has been shown to be "nearly 100%" accurate. The question whether "nearly 100%" is accurate enough

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33. Rashi's commentary on *Yoma* 85a (s.v. *ad hechan*).

when we are dealing with the soul is an open question.

Another strong proof for our thesis that brain death is the Jewish legal definition of death is found in the *Shulchan Aruch.*[34] The author describes individuals "who are considered dead even though they are still alive" to include those whose neck has been broken and those whose bodies "are torn on the back like a fish." These people are considered dead in that they impart ritual defilement and render their wives widows even though they may still have spastic or convulsive movements and even have heartbeats. The reason is that the connection between the brain and the body has been severed by the severance of the spinal cord or by the severance of the blood supply to the brain. It thus seems clear that death of the brain is the legal definition of death in halacha.

The fifteenth century commentator, Rabbi Yehuda Aryeh of Modinah, who was Rabbi in Venice and known by the pen name of *Omar Haboneh,* states:[35]

> ...All [Rabbis] agree that the fundamental source of life is in the brain. Therefore, if one examines the nose first, which is an organ of servitude of the brain, and there is no [spontaneous] respiration, none of them [i.e., the Rabbis] doubt that life has departed from the brain.

Further support for our position can be deduced from the talmudic precedent[36] which is codified in Jewish law,[37] about the woman who dies in labor whose unborn fetus is still alive. As cited earlier, since the woman may only be in coma and not dead "because we are not competent to recognize precisely the moment of maternal death,"[38] we do not perform an immediate cesarean section to try to save the unborn child because the comatose but alive mother might be killed thereby. However, where death is

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34. *Shulchan Aruch, Yoreh Deah* 370.
35. Commentary *Omar Haboneh* in Jacob Habib's *Eyn Yaakov, Yoma* 85a.
36. *Arachin* 7:1.
37. *Shulchan Aruch, Orach Chayim* 330:5.
38. Ramo, *Shulchan Aruch, Orach Chayim* 330:5.

certain, as for example if the mother was accidentally decapitated, an immediate cesarean section is required[39] although individual limbs or organs of the mother may still exhibit muscular spasms.

Rabbi Nachum Rabinowitz[40] quotes Rambam[41] who explains that the organism is no longer considered to be alive "when the power of locomotion that is spread throughout the limbs does not originate in one center, but is independently spread throughout the body." Obviously, continues Rabbi Rabinowitz, "the definition of death depends upon the availability of more sophisticated techniques of resuscitation." Again citing Rambam[42], he concludes that the applicability of such methods and the consequent decision as to the onset of death is determined according to the judgment of the physicians.

We believe that the sophisticated medical techniques described above including radionuclide angiography can definitively establish the absence of any possibility of resuscitation, equating such a physiologically decapitated patient with the hypothetical case of the decapitated woman whose death is confirmed by her decapitated status even though she may still exhibit muscular spasms.

In a later publication,[43] Rabbi Rabinowitz quotes again from Maimonides as follows: "If a person's neck is broken... or if his back is torn like a fish or if he is decapitated or if he is hemisected at the abdomen, he imparts ritual defilement [because he is dead] even if one of his organs is still shaking." From here it can be concluded, he continues, that if the controlling center which unifies all the activities of the organs is nullified (i.e., dead), the movement of a single organ is meaningless and does not indicate that the person (i.e., the organism) is alive.

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39. Responsa *Shevut Yaakov*, Vol 1 No. 13.
40. Rabinowitz N, "What is the *halakhah* for organ transplants?" *Tradition* (New York) 1968; *9*:20-27.
41. Rambam *Mishnah Commentary, Oholot* 1:6.
42. *Mishneh Torah, Hilchot Rotze'ach* (Laws of a Murderer) 2:8.
43. Rabinowitz NE,"Sign of life: a single organism." *Techumin*, Zomet Alon Shevut, Gush Etzion, Israel, Vol 8, 1987 (5747), PP 442-443.

We are aware of opposition to our point of view. Rabbi Aaron Soloveichik considers our position to be a serious misinterpretation of Jewish law.[45] We maintain our position, however, that total and irreversible cessation of all brain function as determined by the Harvard criteria is equivalent to total destruction of the brain and, hence, tantamount to functional or physiological decapitation which in Judaism is equated with death.

Conclusion

Judaism is guided by the concepts of the supreme sanctity of human life, and of the dignity of man created in the image of G-d. The preservation of human life in Judaism is a divine commandment. Jewish law requires the physician to do everything in his power to prolong life, but prohibits the use of measures that prolong the act of dying. To save a life, all Jewish religious laws are automatically suspended, the only exceptions being idolatry, murder, and forbidden sexual relations such as incest. In Jewish law and moral teaching, the value of human life is infinite and beyond measure, so that any part of life — even if only an hour or a second — is of precisely the same worth as seventy years of it.

When life ends is an issue which is presently being actively discussed. All rabbis agree that the classic definition of death in Judaism is the absence of spontaneous respiration in a patient with no bodily motion. A brief waiting period of a few minutes to a half hour after breathing has ceased is also required. If hypothermia or drug overdose which can result in depression of the respiratory center with absence of spontaneous respiration and even heartbeat are present, this classic definition of death is insufficient. Hence, wherever resuscitation is deemed possible, no matter how remote the chance, it must be attempted unless there are ethical and moral considerations for cessation of all therapy. Brain death is a criterion

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44. *Mishneh Torah, Hilchot Tumat Met* 1:15.
45. Soloveichik A, "Jewish law and time of death." *J.A.M.A.* 1978; *240:*109. See Tendler MD, "Jewish law and time of death." *J.A.M.A.* 1978; *240:*109 which offers a response to the objections of Rav Soloveichik.

for confirming death in a patient who already has irreversible absence of spontaneous respiration. The situation of decapitation, where immediate death is assumed even if the heart may still be briefly beating, is certainly equated with organismal death. Whether or not total, irreversible brain stem death, as evidenced by sophisticated medical testing, is the Jewish legal equivalent of decapitation is presently a matter of debate in rabbinic circles. We are of the opinion that it is.

Determining Death

Rabbi Herschel Schachter

The *Chazon Ish* wrote[1] that it is not an easy task to determine what the halacha is. First, one must be familiar with all the details of halacha, the normative Jewish law; secondly, and often more difficult, one must be able to analyze properly the case at hand in order to know which halacha "on the books" it is most similar to.

Traditionally, halacha is determined by analogy: the *posek* juxtaposes the particulars of his own case and various halachic precedents and principles, and thereby decides into which category his case falls. Then he must apply these precedents and principles to the situation at hand.

However, the situation of a brain-dead individual is unique to our generation. Never has anything comparable existed in earlier generations. Bodily funcition can now be simulated by machines, and onsequently an ill person can linger in a kind of medical-legal limbo for a short period of time. Thus, it has become important to the medical profession to determine at what point a patient may be considered dead (both for terminating treatment and for possible organ transplantation). In turn, the new realities have given rise to the halachic need to determine the moment of death.

The Talmud tells us[2] that if someone is not breathing, he is dead. This conclusion is based on the verse in the Torah[3] *"Kol asher nishmat ruach chaim be-apov"* "Whoever has the breath of

1. *Kovetz Iggerot*, vol. I, no. 31.
2. *Yoma* 85a.
3. *Bereishit* 7:22

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life in his nostrils." But it is necessary to examine this talmudic dictum — does the Talmud mean to rule that breathing is the *criterion* for life or death, or does it merely relate that lack of breathing is an *indication* that the person is dead? In other words, it may merely mean to tell us that if a person is not breathing, we may safely assume that *death has already occurred,* but actually death itself is determined and defined by some other bodily functions.

The possible ambiguity in the talmudic dictum is the subject of an inquiry by Rabbi Zvi Hirsch Chayes (Maharatz Chayes) to the *Chatam Sofer* early in the nineteenth century.[4] Maharatz Chayes notes that Rambam describes the case of a person who stops breathing r a day or two, but then resumes his normal activities.[5] Doesn't this possibility cast doubt on the advisability of employing the Talmud's criterion for life, if indeed a person may be alive even if not breathing? But *Chatam Sofer* brushes off this suggestion as being a circumstance so remote in possibility or probability that we need give it no consideration. In the context of his response, *Chatam Sofer* seems to indicate his belief that cessation of breathing is not what *determines* death but rather that in 9,999 cases out of 10,000, it signifies that death has already occurred.

This approach is also the one adopted by Rav Moshe Feinstein, viz., that cessation of breathing is an indicator that the person has died.[6]

> ולע"ד נראה דישהה מעט שמא נתעלף שכתב הרמב"ם... הוא לא מחמת שאין לחוש לעילוף אלא רק לזמן מועט... אלמא דשייך לחוש לעילוף זמן רב אבל הוא משום דגם מי שנתעלף מוכרח לנשום שא"א לחיות בלא נשימה, אבל זמן מועט מאד דאיזה מינוטין יכול אדם לחיות בלא נשימה... וכשפסק לנשום אפשר שהוא מצד שכבר מת... אבל כיון שאין לו כח לנשום הרי אי אפשר לו לחיות אלא לזמן מועט

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4. See biography of Maharatz Chayes by R. Mayer Herhskowitz, pp. 168-175; *Techumin,* vol. 8, p. 441,"in essay of R. Nachum Rabinovitz.
5. *Moreh Nevuchim* sec. I chap. 41.
6. *Iggerot Moshe, Yoreh Deah,* vol. 2, no. 174.

> דאיזה מינוטין וכששוהין זמן זה הוא ודאי כבר מת... וזה אולי כוונת החתם סופר... לא שיצא מחשש עילוף למפרע אלא דיצא מעתה אחר זמן השהוי מחשש שמא עדיין הוא רק מעולף דהא אי אפשר לחיות יותר בלא נשימה.
>
> And it seems to me that it is necessary to wait [in order to determine death] in case the person only fainted as the Rambam has written... and this is not because people only faint for a short while... but rather we see that it is possible to be concerned that a person has fainted for a long while. However, [it is necessary to wait only a short while to see whether the person is dead or has fainted] because even someone who has fainted still has to breathe, for it is not possible to live without breathing for more than a few minutes... And when a person has stopped breathing it may be because he has already died... or since he doesn't have the strength to breathe. Consequently it is not possible for him to live more than a very short time of a few minutes. And if we wait [and still he does not breathe] then he has certainly already died... And perhaps this is the intention of the *Chatam Sofer;* not that retroactively we no longer have to be concerned that he has only fainted, but rather that now, after the few minutes of waiting, he is removed from the possibility that it might be only a faint, for it is not possible for a person to live longer without breathing. (loose translation).

But if cessation of breathing is to be interpreted only as a sign to the observer that the person has died, we have yet to answer the essential question — what is it that makes a person dead? Or perhaps it will be easier to address the other side of the coin — what is it that makes a person be considered alive?

In the Torah, the expression "he has no blood" is used to describe a person who is killed by others but whose murder is not punishable. Thus, in *Shemot* 21, 2, we learn

> אם במחתרת ימצא הגנב... אין לו דמים
>
> If the thief be found breaking in [and be killed], there is no guilt (literally [the thief] — *he has no blood*).

And in *Bamidbar* 35:27, in connection with an avenger who pursues the murderer of his relative,

ומצא אותו גואל הדם... ורצח את הרצח אין לו דמים

> and if he finds him... and kills the murderer, he [the murderer] is as if he had no blood (literally, *he has no blood.*).[7]

Based on this usage, we can see that it is the circulation of blood which is considered the essence of life.

We may also draw this inference from other Biblical teachings. The Torah teaches that "a person who hits his father or mother is to be put to death."[9] The Talmud rules that the death penalty is forthcoming only if the child hits the parent and causes blood to flow (or perhaps even if he caused formation of a black and blue mark, indicating some amount of blood beneath the surface has been shed.)[10] The talmudic conclusion derives from comparing the first part of the verse, which prescribes the penalty for *striking* a parent, and the latter half of the verse, which prescribes the penalty for *killing* an animal. The Torah does not place two unrelated laws in the same verse;[11] consequently, we must infer that in the first half of the verse the Torah is discussing a blow which is in some way equivalent to the killing mentioned in the second half of the verse. Thus, we infer that it refers to "killing" a parent in a milder form — namely, by causing bleeding. Causing partial loss of the flow of blood is a partial act of killing . Hence total cessation of the

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7. See Commentary of Rav Velvel Soloveichik to the Rambam where he points out that the *Tannaim* understood these expressions (he has blood, he has no blood) as a description of the status of the person killed rather than referring to the murderer and being understood as meaning "he is guilty" or "he is not guilty."
8. Rambam *Hilchot Rotzeach*, Chap. 1.
9. *Shemot* 21:15; *Vayikra* 24:18 and 21.
10. *Sanhedrin* 84b. Nitziv,*Commentary to Sheilot*, 60:9
11. When two halachot appear together in one *pasuk*, it is assumed that there is a relationship between them. This is called *hekesh* (a comparison). If the two halachot appear in adjacent *p'sukim*, this is called *semuchim* and is only to be taken as an indication that they are related (his rule applies in *Devarim*.) See *Yevamot* 4a.

flow of blood would define total death of the entire body.

The Palestinian Talmud[12] states that the *melacha* (forbidden act) involved in causing bleeding on Shabbat is *netilat neshama* ("taking the soul"). In their commentary to the Babylonian Talmud, the Tosafot record[13] that Rabbenu Tam considered causing bleeding as a form of killing based on the Biblical verse *"Ki hadam hu hanefesh"*, "for the blood is the soul."[14] Just as one who kills an animal has violated the *melacha* of *schochet* (נטילת נשמה) so too one who causes bleeding has *partially* caused the taking of life. The Talmud distinguishes[15] between blood caused to flow from an ordinary wound as opposed to *"dam Hakoza shehaneshama yotzah bo,"* blood flowing from a wound which caused the soul of the animal to depart. Here again, we find the halacha defining death as arising from cessation of the blood flow.

Thus, from the Torah and the Talmud, we may deduce that our halachic legal system defines a living person as one whose blood is circulating. Apparently, cessation of blood flow is the definition of death.

Let us now consider what these halachic references imply in the situation of a brain-dead individual. Most doctors consider a person "brain-dead" when tests clearly indicate a total and irreversible cessation of blood flowing to the brain. What, indeed, should be the halachic status of the brain at this point; and, more to the point, what is the halachic status of the entire body?

Rav Moshe Feinstein once commented on the concept of a "dead" limb: He was asked whether a person may put *T'fillin* on an arm which is paralyzed.[16] One prominent Rabbi had expressed the opinion that the mitzvah cannot be fulfilled on a paralyzed arm, but Rav Moshe Feinstein opposed this view. In the course of his responsum, he considered the situation not of a paralyzed arm, but

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12. *Shabbat, Perek Klal Gadol,* chap. 7c, halacha 2.
13. *Ketubot* 5b.
14. *Devarim* 12:23.
15. *Keritot* 20b, 21a.
16. *Iggerot Moshe, Orach Chaim,* vol. 1, nos. 8,9.

of a gangrenous arm. When gangrene sets in, blood has ceased flowing to that part of the body. That arm is *dead* and cannot qualify as the proper place for *T'fillin.*

However, otherprominent *poskim* of previous generations[17] did allow *T'fillin* to be placed on a gangrenous arm. They obviously felt that although a limb has gangrene, it is still "alive" as long as the basic circulatory system continues functioning for the rest of the body. If the organism is considered alive, even that limb which happens to be cut off from the flow of blood is also considered "alive". While it is true that the Talmud[18] speaks of individual limbs being considered "dead," that is only when the limb is entirely (or almost entirely) severed from the rest of the body.[19] But where the limb is fully connected to the rest of the body which still maintains a functioning circulatory system, even the gangrenous limb is considered "alive".

But let us pursue the option indicated by Rav Feinstein, who assumes that when blood no longer reaches the brain, it is halachically considered "dead". What does this imply regarding the life status of the entire body? Should we declare that since the thing which makes humans uniquely human is the brain, this person is no longer alive "as a person" but merely alive "as an animal," and regarding animal life there is no prohibition of murder? This suggestion is intriguing, but it has no foundation in the Talmud. In fact, the halacha does not seem to distinguish between the definition of death with respect to humans and definition of death with respect to animals.

We must therefore return to the essential question — what moment do we consider the instant of the soul's departure?

The Talmud posits[20] specific organs which are vital to life. Each one is an *"eiver shehaneshama teluya bah,"*" an organ upon

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17. R. Shlomo Kluger הובא אגרות משה או"ח ס' ט.
    R. Meir Arik חלק ב אמרי משה ס"י"ד.
    R. Yosef Engel גליוני הש"ס קידושין כד.
18. *Avodah Zarah* 5b
19. *Chullin* 127a, 129b.
20. *Erchin* 20, *Temura* 10.

which the soul depends." This is a *halachic* concept.

Rambam[21] in quoting the Talmud names three such vital organs: the heart, brain, and liver.[22] In determining the moment of *"yetziat neshama"*, the departure of the soul, it would appear[23] that one ought to consider the state of these three organs "upon which the soul depends." One could argue that if any *one* of these three vital organs is halachically declared dead, then the entire body is pronounced dead. On the other hand, one could also claim that a person is not dead until *all* the vital organs are dead. Indeed, this second option is invoked by the *Mishkenot Yaakov*,[24]based on a passage from the Palestinian Talmud:[25]

The Mishnah in *Avoda Zara* teaches that it is forbidden to derive any benefit from *"orot levuvim."* This refers to the pelts of animals whose hearts ere cut out, while they were alive, in order to be used for idolatrous sacrifice. Why, asks the Paletinian Talmud, should these pelts be forbidden, when we have a principle that live animals (*baalei chaim*) are never considered as objects of idolatry from which we may not derive benefit. The author of *Mishkenot Yaakov* therefore concludes that the rabbis in the Talmud must have considered these animals as still alive, otherwise their question on the Mishnah is difficult to comprehend. Here we see that the Talmud considered as "alive" animals whose hearts had been plucked out! He adduces this as evidence that the loss of only one vital organ does not render the animal dead according to the definition of Jewish law.

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21. *Commentary to Mishnah, Erchin* 20a; *Hilchot Erchin*, beginning of chap. 2.
22. It is irrelevant whether medical facts in the twentieth century support this conclusion, which is a legal, not a medical statement. Jewish law follows the principles aid down by the Talmud; all halachic categories have been fixed by the Talmud and are the basis for developing all further Torah decisions. Thus, those organs designated by the rabbis of the Mishnah as the "vital organs" retain that *halachic* status. For a further discussion of this fundamental principle of development of Jewish halacha, see the *Chazon Ish* to *Yoreh Deah* (5-3).
23. *Iggerot Moshe, Yoreh Deah, vol. 2, p. 249, s.v. "aval barur upashut."*
24. *Yoreh Deah*, end of No. 20; quoted briefly by *Pitchei Teshuva* to *Yoreh Deah 40.*
25. *Avoda Zara*, chap. 2, halacha 3.

This argument is not irrefutable. Earlier in this century, the Ridvaz in his commentary to the Palestinian Talumud[26] offered a different interpretetion of the above passage. He suggests that removal of the animal's heart was not part of the sacrificial ceremony. Cutting the pelts was the idolatrous act alluded to by the Mishnah. If this be the case, we can understand fully well the question posed by the Palestinian Talmud. How can these pelts be declared as *"Avoda Zara"* and thereby become forbidden for benefit, if even after cutting into the skin the animal is clearly still alive, and live animals cannot become *"Avoda Zara?"* If we accept this alternate interpretation of the Talmudic passage, we will be left with no indicaton at all regarding the status of an animal whose heart has been excised.[27]

If we accept the view that if any one of the vital organs is dead, the person is dead, it might result in some rather startling conclusion: If a person's liver is removed or, according to Rav Moshe Feinstein's understanding even if it is gangrenous, even though the person can still walk, talk, and think, he would be considered halachically dead!

The second option, namely, that a person is not considered dead until all the vital organs are "dead", might be a help to defining with precision a related halachic concept, that of a *gosses*. The Rambam[28] defines *gosses* as one in whom the process of death has already begun. Rav Moshe Feinstein accepts this theoretical definition[29] but does not give specific criteria to determine, in practice, what this corresponds to.[30] Nevertheless, if we follow the

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26. Rambam in medical writings, *Iggerot HaRambam*, Kapach's edition, Jerusalem 1987, p. p. 165, quotes in the name of Galen, the famous Hellenistic physician (a contemporary of the rabbis of the Mishnah): the idol worshippers' practice was to cut out the heart of a live animal and offer it as a sacrifice to their god. The animal would still be alive and jump around after its heart had been removed. (The Rambam writes that he cannot believe such a phenomenon is possible.) This corresponds precisely with the interpretation given by the *Mishkenot Yaakov* to the statement of the Palestinian Talmud.
27. p. 13a.
28. Commentary to *Ohalot* (1-6).
29. *Iggerot Moshe, Choshen Mishpat*, vol. 1, no. 61.
30. *Ibid.*, vol. 2, p. 305.

reasoning discussed above, it would follow by definition that when any one of the vital organs is dead, the process of death has clearly begun already, but will not be completed until all of the vital organs have irrevocably ceased functioning.

The question of whether a brain-dead person is halachically dead is relevant not only to the question of using his organs for transplantation, but also to the issue of *chalitzah*. The Torah states[31] that if a man dies without children, his wife may not remarry until she has the ritual of *chalitzah*. Let us posit the case of a married man whose only child is brain dead. If the father then dies, does his wife require *chalitzah*? Is their brain-dead child indeed "dead", in which case the father died without any living offspring? Or is he still considered alive, in which case the father died while his child was still alive, and the widow does not need *chalitzah*?

The innovations and inventions of the twentieth century have made possible medical techniques which could not even be imagined a century ago. The medical profession, eager to perform "miracles" through organ transplantation, anxious to reduce suffering for the patient and family, has advocated guidelines which to some people appear radical. In their zeal to prevent doctors from "pulling the plug" on brain-dead patients, some rabbis have declared that such individuals are definitely considered "alive" beyond any shadow of a doubt. Based on our analysis, I see no room for such certainty.

On the other hand, if one accepts the position of Rav Moshe Feinstein that a gangrenous limb (or one to which no blood circulates) is "dead" and combines that assumption with the second premise that loss of even one of the vital organs renders a person "dead", it might be possible to argue that a brain-dead individual is truly dead. However, since each of these two premises is by no means certain as we have documented, it would appear that a person in such unfortunate circumstaces should be considered *safek chai safek met* — questionably alive, questionably dead. In such a situation of *safek*, of doubt, the proper course to follow seems to be *Chumra*, to follow the stricter possibility, both regarding removal of organs as well as on the issue of *chalitzah*.

31. *Devarim* 25:5-10

Death According to the Halacha

Rabbi Ahron Soloveichik

The following was written by Rav Soloveichik in response to Mr. Chaim Dovid Zweibel, counsel to Agudath Yisrael.

QUESTION: I. What constitutes death according to the halacha?

ANSWER: Years ago I delivered a lecture at Yeshiva University before the Rafael Society in New York. I delivered the same lecture at Kinus Torah SheBa'al Peh in the Fifth Avenue Synagogue four years ago. In this lecture I established the thesis that according to the halacha, total death is determined by the termination of the three basic functions in life; namely respiration, cardiac activity, and brain activity.

That termination of respiration is a necessary prerequisite to the determination of death is explicity mentioned in the Gemara *Yoma* 85a; and the termination of respiration being indispensable to the determination of death is based upon the verse in the Torah of "...all that had the breath of life in his nostrils." That termination of cardiac activity is indispensable toward the determination of death is mentioned by the Rambam in *Moreh Nevuchim* Book I, chapter 39, and by the *Kuzari* and by the *Chacham Tzvi* and the *Chatam Sofer;* it is also mentioned by Rabbenu Bechaye in his commentary on the Torah on the verse "and you shall love the Lord your G-d with all your heart..." That termination of brain activity

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is indispensable towards the determination of death is mentioned by the Rambam in his *Commentary to the Mishnah, Oholot.* This legal ruling is also implicit in the Rambam, *Hilchot Avel,* no. 5.

In that lecture I pointed out that while all the *Rishonim* agree that death occurs only upon total termination of all three basic and vital functions of life — respiration, cardiac activity and brain activity — there are still two separate bodies of opinion as to the significance of the three vital functions as life factors.

According to Rashi in *Yoma* 85a, the *din* (law) mentioned in the Gemara that if a person is found beneath a pile of stones and found to be devoid of respiration, he is presumed dead and we are not allowed to desecrate the Sabbath for him, is only applicable in a case where in addition to being devoid of respiration, he was also found to be lying motionless like a stone; whereupon the *Chatam Sofer* makes the comment that Rashi herein is pointing out that cessation of respiration is not in itself a criterion for death, but rather that cessation of respiration coupled with being motionless like a stone creates a presumption that the person is completely dead and that all other vital functions have ceased. The *Chatam Sofer* points out that this obviously implies that if a person is devoid of respiration but manifests cardiac activity, he is considered alive. If someone kills him, he is a murderer (רוצח). And I pointed out in that lecture that it follows from Rashi that even if the person is found to be devoid of respiration and cardiac activity but he produces waves on the machine, he is also considered alive. In other words, according to Rashi, death is constituted by the termination of the three vital functions in life — respiration, cardiac activity, and brain activity. This is the position of Rashi.

However, according to the Rambam, as I pointed out in that lecture, death is a process rather than a state which occurs in a split second. The process of death begins with cessation of respiration and it ends with the total termination of all the three vital functions in life — respiration, cardiac activity, and brain activity. The language of the verse (גזירת הכתוב) "all that the breath of life in his nostrils" implies that when a person becomes devoid of respiration, the process of death has begun and the person is not considered fully alive. However, he is not considered fully dead either,

inasmuch as there is cardiac activity in him or brain activity. A person who becomes devoid of respiration but who still has cardiac activity is considered semi-alive and semi-dead. Consequently, if somone will kill him, he will be considered a murderer. Hence, it is absolutely forbidden (יהרג ואל יעבור) to cut out the heart of that person even though the removal of the heart of the donor is indispensable to the preservation of the life of the donee.

This is the gist of the lecture I delivered before the Rafael Society and at the Kinus Torah SheBa'al Peh.

As I have indicated, the principle that a person who still possesses cardiac activity is considered alive is mentioned by the Rambam in *Moreh Nevuchim*, by Rabbenu Bechaye, and by the *Kuzari* among others. Rashbatz in his *Sefer Yavin Shemuah* writes:

> וכוחות הלב הם כח החיים כי לפעמים יתקיים האדם בלא מזון ויתקיים בלא חוש ותנועה, אבל אם יתבטלו מתנועותיו ויתקרר הב״ח ימות לבו בקרבו ויהי לאבן וכן כתיב מכל משמר נצור לבבך כי ממנו תוצאות חיים.

Rabbi Yosef Shaul Nathanson in his *Divrei Shaul* (to *Yoreh Deah* 394) says, among other things,

> כי ברור כשמש דקביעת החיות הוא הדופק על הלב והנשמת אף

> And it is as clear as the sun that the determination of life is the beating of the heart and the breath of the nostrils.

And the *Chacham Tzvi* in Responsum 77 confirms the view of the Rambam in *Moreh Nevuchim* to the effect that the primary factor in life is the functioning of the heart. He writes:

> גם הרב האלקי כמוהר״ר ר׳ יצחק לוריא זצוק״ל אשר רוח אלקים דבר בו הסכים למה שהוא מפרסם לכל אנשי העולם שהלב הוא משכן לנפש החיונית והוא המת לאחרונה אחרי מיתת כל האיברים הרחוקים והקרובים אליו.

> Also that heavenly rabbi, Rabbi Yitzchak Luria, may the memory of the pious and the holy be a blessing, in

> whom the spirit of G-d spoke, agreed to what is publicized to all people of the world, that the heart is a sanctuary for the soul of life, and it [the heart] is the last to die, after the death of all the limbs which are far or near to it.

It is obvious that the so-called "Harvard criteria" do not conform to halacha. It is contrary to what the Rambam said in *Moreh Nevuchim*, to what Rabbenu Bachaye said, to what the *Chacham Tzvi* said, to what the *Chatam Sofer* said, to what the *Tumim* said, and to what R.Yosef Shaul Nathanson said. And last but not least (אחרון אחרון חביב), the Harvard criteria are contrary to what Rav Moshe Feinstein said in his *Iggerot Moshe*, to wit, that a heart transplant operation involves a double murder, a murder as against the donor and a murder as against the donee.

Any analogy between גיסטרא and brain death has no basis. גיסטרא involves an organic physical decapitation whereas what is called brain death at most could involve only a functional non-activity of the brain. Furthermore, how can the doctors be sure that if a person's brain does not produce waves on the encephalograph machine that this demonstrates conclusively that there is total non-activity of the brain? There may be faint brain activity which is too minute to be picked up by the encephalograph machine.

QUESTION II: Assuming that brain death is death according to the halacha — is it proper to impose this view upon those who follow the contrary view?

ANSWER: In order to answer this question I have to have recourse to my imagination. Without recourse to imagination it is impossible for me to assume even for a moment for argument's sake that the Harvard criteria conform to the halacha, in view of the fact that all *Rishonim* and *Acharonim* say that as long as a person has cardiac aactivity he is not considered dead. But as I said, I am resorting to my imagination for a moment and I am assuming that the Harvard criteria conform to the halacha. Even so, it would be repugnant to the halacha to impose one's halacha-true opinion upon someone who follows a contrary view.

The Rambam in *Sefer HaMitzvot* says that even when the Supreme *Bet Din* (High Court) renders a decision that a certain type

of fat (חלב) is permissible, but a certain scholar is convinced that the Bet Din made a mistake, then that scholar is not allowed to act contrary to his own halachic opinion and be lenient; rather he must act according to his own opinion. However, if the scholar came before the Supreme *Bet Din* and presented his arguments before them, and the High Court rejected his arguments and told him exactly why they rejected his view, then that scholar is obligated to cancel his view and to submit to the opinion of the High Court. How much more obvious it is (ק"ו בן קל וחומר) that no *posek* today, can impose his opinion upon any person who follows a (legitimate) contrary opinion.

QUESTION III: Assuming brain death is halachic death — are Jews permitted, not only to receive organs, but also to make their organs available for transplantation into others?

ANSWER: Assuming that brain death is halachic death (and again in order to assume such a preposterous supposition, I am forced to resort to my imagination) then it follows that in a case where the donor — while he was in sound mind and in a state of being able to make a rational decision — bequeathed an organ for transplantion, and in addition the family of the donor without being pressured by the doctors has given its approval for transplantation, then it is permissible according to all *poskim* (not only the *Nodah Biyehuda* who is generally lenient in this area but even according to the *Binyan Zion* who is generally strict in this area) for doctors to use the organ in transplantation.

QUESTION IV: If brain death is not halachic death, is one allowed to benefit from organs donated by others? You quoted a certain Rabbi as saying: "You cannot declare removal of a liver or heart from a brain dead patient as murder, and then allow one of the members of your congregation to benefit from such murder... It would mean that young men of the Orthodox Jewish Faith, now waiting for liver transplants from Dr. Stazell of the University of Pittsburgh, must be told to go home. They cannot participate as accessories before or after the fact in an act of murder."

ANSWER: The statement made by the aformentioned distinguished Rabbi, to wit that one is not allowed even for the purpose of preserving his life to participate as accessory before or

after the fact in an act of murder, is halachically inaccurate inasmuch as it runs counter to the Gemara in *Nedarim* 229 (to which I will return momentarily).

The law that murder is absolutely forbidden (יהרג ואל יעבר) only implies that in a case where an act of murder is committed, even if it is for the purpose of saving a human life, one is not allowed to participate in this act either directly or as a causative factor. However, in the case of a heart transplant or a liver transplant the donee does not in any way participate either directly or as a causative factor (גורם) in the act of removing the heart or the liver from the brain-dead patient. Unfortunately, under the permissive, utilitarian climate prevailing in modern society, doctors are determined to remove the heart or the liver from the brain-dead patient regardless of the identity of the donee. They don't know and they don't want to know who the donee will be. Whether a certain potential donee puts his name on the list or not, the heart or the liver is removed from the brain dead patient anyway. It is the surgeon who commits the act of murder directly. It is the doctors and the nurses who help the surgeon to remove the heart or liver who are effective causes, or abettors, in the act of murder (רציחה). However, the potential doctor of the potential donee who puts his name on the list as a potential donee or the donee is not a participant in the act of murder in any way.

Let me quote the Gemara in *Nedarim* 229:

> When Ulla went up to Eretz Yisrael, he was joined by two inhabitants of Chozai [the modern Khuzistan] one of whom arose and slew the other. The murderer asked of Ulla: "Did I do well?" "Yes," he replied, "moreover, cut his throat clean across." When he came before Rabbi Yochanan, he asked him: "Maybe, G-d forbid, I have strengthened the hands of transgressors?" He replied: "You have saved your life."

From this we see clearly that it would be permitted even to strengthen the hands of murderers in order to save one's life. Certainly it is permitted for a person to put his name on a list as a potential heart or liver donee, which cannot even be considered

"strengthening the hands of murderers," in order to save his own life.

Furthermore, even if the remark by the aforementioned distinguished Rabbi had been halachically sound, it would be irrelevant to the question of whether brain death is halachic death. Assuming that the halacha is that a Jew is obligated to give up his life and not be a beneficiary from an act of murder — would that force us to the conlusion of justifying brain death legislation? This would be adopting a utilitarian approach in halacha. G-d forbid to use such an argument. It is incredible that the aforementioned distinguished Rabbi made such a statement. In all probability it was a slip of the tongue on his part.

In conclusion I would like to mention a poignant remark that was made by Reb Yacov Tzvi Meklenberg in his work *Haktav veHakabala* in connection with the verse

> ואך את דמכם לנפשותיכם אדרש מכל חי אדרשנו ומיד האדם מיד איש אחיו אדרש את נפש האדם (בראשית ט־ה).
>
> However, your own blood of your souls will I require; at the hand of every living creature I require it and at the hand of man; at the hand of man's brother will I require the soul of man.

The question arises as to why this redundancy — "at the hand of man... at the hand of man's brother." *Haktav Vehakabala* says that herein the Torah describes two kinds of רציחה or murder. The expression "at the hand of man" is descriptive of a murder that is done with malice, or with pecuniary or lustful greed. The expression "at the hand of man's brother" is descriptive of a murder that is grounded in a motive of brotherhood or mercy. The Al-mighty will mete out retribution against both kinds of murder. The murder involved in the removal of a heart or liver from a brain-dead patient for the purpose of saving the life of a donee is a murder implicit in the expression of "ומיד איש אחיו — at the hand of man's brother."

It is incumbent upon all those who have ethical sensitivity to protest against those who are trying to implement the Harvard criteria through a heart or liver transplant because of brotherhood

and mercy. I have the greatest respect and reverence for the few distinguished and revered Rabbis here and in Israel who expressed themselves in favor of the Harvard criteria. However, as the *Ba'al HaMaor* in his introduction says וכבר אמר הפילוזוף אהוב אפלטון ואת האמת אהוב מכולם or as the proverb is expressed in Latin, "Amicus Plato sed amigas amica veritas." "I love Plato but the truth I love above everything else." I hope that this brief note will answer your queries.

Accommodating Religious Objections To Brain Death: Legal Considerations

Chaim Dovid Zwiebel, Esq.

Introduction

As the pages of this journal will attest, few issues in Jewish life have generated as much halachic controversy in recent years as that of "brain death." At the same time, few issues in American law have generated as much secular unanimity. By legislation or judicial decision, virtually every one of the 50 states has by now adopted the brain death standard[1] — recognizing that, as a matter of secular law, a person who has sustained irreversible cessation of the entire brain function, including the brain stem, is dead.

For those Jews who follow the view that brain death is not halachic death, the secular law poses a serious problem. According to that view, one whose heart still beats still lives, despite the irreversible cessation of brain function; and it would be an act of murder to disconnect such an individual from a respirator or other life sustaining mechanism, as would routinely be done under the secular standard. Moreover, the secular methodology for *measuring* irreversible cessation of entire brain function may be halachically unacceptable even to those who accept the *concept* of brain death as halachic death.[2] Hence the potential conflict between religious and

1. N.Y.S. Take Force on Life and the Law, *The Determination of Death* (1986) (hereinafter the "Task Force Report"), at 4.
2. See notes 24-25 and accompanying text, *infra.*

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secular law, and the concomitant dilemma: In a secular society that accepts brain death and prescribes the methods of ascertaining its presence, how are the religious beliefs of those who reject the concept or the methodology to be protected?

Anecdotal evidence suggests that the dilemma is frequently resolved on an informal basis. Most doctors, it appears, will generally honor the requests of families that seek to have their brain dead relatives maintained on life-support for religious reasons. Yet there are indications that such informal accommodation is by no means universal; and there is reason to believe that in the years ahead it may be even less readily forthcoming. As the concept of brain death gains increasing acceptance among the general society, as medical technology advances to the point where it is possible to maintain brain dead individuals on life-support for lengthy periods of time, as the costs of such life-support maintenance spiral ever upward, and as the need for organs for purposes of transplantation becomes felt more acutely — health care providers may well increasingly insist upon adherence to the general brain death standard, even over the objections of family members and others close to the brain dead individual.

To address this problem, Rabbi Moshe Feinstein *zt"l* suggested that any governmental effort to make uniform the criteria by which death is determined should include a specific provision exempting patients whose religious definition of death does not coincide with the government's.[3] Advocacy for such exemption has occupied a prominent place on the public policy agendas of several major Orthodox Jewish groups and spokesmen. This approach has encountered stiff resistance, however, primarily from the medical establishment but even from one prominent Orthodox rabbi who supports brain death and opposes legal accommodation of other halachic viewpoints.[4] As a result, success in gaining a formal

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3. Written statement dated 8 Sh'vat 5737 (copy available upon request). Rabbi Feinstein's own halachic views on the subject of brain death have themselves generated considerable debate and are beyond the scope of this discussion.
4. *see, e.g.,* the transcript of the public testimony of Rabbi Moshe D. Tendler

"religious exemption" from uniform brain death standards has not come easily.

This article is divided into two main parts. Part I analyzes and traces the development of a recently promulgated New York State regulation which, as of this writing, is the only formal legal protection of the rights of persons who dissent on religious grounds from a state mandated brain death standard.[5] Part II reviews some of the key constitutional considerations that arguably protect those rights even absent specific legislation or regulation.

I. The New York State Regulation

In late 1987, the New York State Department of Health promulgated a new regulation setting standards for the "determination of death," and requiring health care facilities to develop procedures for the "reasonable accommodation" of religiously based objections to brain death. (The full text of the regulation is set forth in the footnote below.)[6] New York thus

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before the New York State Task Force on Life and the Law, at 7-16 (March 20, 1986).

5. New Jersey is the only state outside New York that has proven at least somewhat receptive to the concept of religious accommodation. In 1984, Governor Kean vetoed a brain death bill because of its failure to accommodate religious objectors. [Letter from W. Carey Edwards, Chief Counsel to the Governor, to Rabbi Yakov M. Dombroff, director of Agudath Israel of New Jersey, Jan. 19, 1984 (copy available upon request).]

6. "*Determination of Death.* (a) An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.

(b) A determination of death must be made in accordance with accepted medical standards.

(c) Death, as determined in accordance with subdivision (a) (2), shall be deemed to have occurred as of the time of the completion of the determination of death.

(d) Prior to the completion of a determination of death of an individual in accordance with subdivision (a) (2), the hospital shall make reasonable efforts to notify the individual's next of kin or other person closest to the individual that such determination will soon be completed.

(e) Each hospital shall establish and implement a written policy regarding

became the first jurisdiction in the United States — and, to the date of this writing (February 1989), still the only jurisdiction — explicitly to recognize as a matter of law the religious rights of persons who object to brain death.

It is instructive to review the background events that culminated in the adoption of the New York State regulation; and then to analyze some of the key provisions of the regulation.

Background

Dating back to the mid-1970's, the New York State legislature on numerous occasions attempted but failed to pass legislation that would officially recognize neurological criteria for death.[7] However, in 1984, New York's highest court, the Court of Appeals, accomplished what the legislature had not. The court held that "[w]hen . . . respiratory and circulatory functions are maintained by mechanical means . . . , death may nevertheless be deemed to occur when, according to accepted medical practice, it is determined that the entire brain's function has irreversibly ceased."[8]

Two years later, the New York State Task Force on Life and the Law, responding to a specific mandate contained in Governor Cuomo's 1984 Executive Order creating the Task Force, issued its

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determinations of death in accordance with subdivision (a) (2). Such policy shall include:

(1) a description of the tests to be employed in making the determination;

(2) a procedure for the notification of the individual's next of kin or other person closest to the individual in accordance with subdivision (d); and

(3) a procedure for the reasonable accommodation of the individual's religious or moral objection to the determination as expressed by the individual, or by the next kin or other person closest to the individual." [10 N.Y.C.R.R. sec. 400-16 (1987).]

7. *See People* v. *Bonilla*, 95 A.D. 2d 396, 402 (2d Dept. 1983).
8. *People* v. *Eulo*, 63 N.Y. 2d 341, 355-56 (1984). The *Eulo* case involved the appeals of two defendants convicted of manslaughter, who argued that it was not their bullets that had caused the death of their victims, but rather the hospitals that had removed their victims' vital organs upon a determination of irreversible cessation of brain function. The Court of Appeals took note of the legislature's failure to enact brain death legislation, but held nonetheless that the defendants' victims were already dead when the hospitals removed their vital organs.

report on "The Determination of Death." The Task Force, like the Court of Appeals, concluded that irreversible cessation of brain function was an appropriate measure of death.[9] Despite the absence of brain death legislation in New York, the Task Force found no need for any such statute in light of the Court of Appeals' 1984[10] ruling. Nonetheless, because it felt that hospitals required further guidance in implementing the court's decision, the Task Force recommended that the Department of Health promulgate a specific regulation embodying the brain death standard, and publish an advisory memorandum setting forth the current clinical tests and procedures for determining brain death.[11]

With respect to individuals who objected on religious grounds to brain death, the Task Force waffled. It considered but specifically rejected creation of an express statutory or regulatory obligation requiring hospitals to accommodate the religious beliefs of such individuals.[12] Nonetheless, the Task Force recommended that "hospitals develop procedures to respond to moral and religious objections to the brain death standard expressed by patients prior to the loss of decision making capacity or by family members on a patient's behalf."[13]

In the spring of 1987, the New York State Department of Health published a proposed regulation that embodied precisely the Task Force's recommendation: It defined as "dead" any person who has sustained "irreversible cessation of all functions of the entire brain, including the brain stem"; and it included no mandate that religious objections to that definition be accommodated.[14] This failed to satisfy proponents of religious accommodation, who

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9. Task Force Report at 6.
10. *Id.* at 13.
11. *Id.* at 9, 14.
12. *Id.* at 11. In an araticulate minority report, Task Force member Rabbi J. David Bleich took issue with the other members of the Task Force on this point, urgin as "a matter of civil liberty" the enactment of a statue expressly accommodating religious objections to brain death. *Id.* at 29, 40-43.
13. *Id.* at 12-13.
14. N.Y. State Register, I.D. No. HLT-19-87-00040-P (May 13, 1987).

continued to urge that respect for the rights of religious dissenters be made obligatory by law rather than merely encouraged by non-binding recommendations. Their efforts finally met with some success in July 1987, when the New York State legislature passed for the first time a religious accommodation bill.[15]

The essence of this bill, whose key sponsors were Assemblyman Sheldon Silver, Assemblyman Sam Colman and Senator Eugene Levy, was that "no decision or decisions with respect to an individual to commence or terminate life support treatment . . . shall employ a definition of death that would be contrary to the religious beliefs or practices or moral convictions of such individual . . ." The Silver-Colman-Levy bill further imposed upon an individual's health care provider the affirmative duty "to use reasonable efforts to determine, from such individual's family member or friend," whether any contemplated action in this context would violate the individual's beliefs.

Passage of the Silver-Colman-Levy bill, coupled with vigorous lobbying efforts directed at New York State's Commissioner of Health, finally resulted in the Department of Health's promulgating a revised regulation which, as noted above, mandated for the first time that health care providers develop procedures for the reasonable accommodation of individuals' religiously based objections to brain death.[16] This revised regulation in place, New York's Governor Cuomo allowed the proposed Silver-Colman-Levy legislation to die.

Noteworthy Aspects of the Regulation

Turning to the substance of the regulation, it is apparent that its purpose, like that of the Silver-Colman-Levy bill which Governor Cuomo ultimately did not sign into law, is to ensure protection of the religious rights of persons who do not accept neurological criteria for measuring death. Nonetheless, the

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15. A. 4882 (introduced March 3, 1987); S. 6415 (introduced June 30, 1987).
16. N.Y. State Register, I.D. No. HLT-31-87-00034-P (Aug. 5, 1987). The text of the regulation appears at note 6 *supra*.

regulation does differ from the lapsed legislative approach in several respects. Those differences, as well as certain other noteworthy aspects of the regulation, deserve close attention.

1. *"Reasonable Accommodation."* The regulation does not mandate absolute accommodation of a patient's or family's religious objection to brain death, but only such accommodation as is "reasonable."[17] Although the body of the regulation offers no guidance as to when accommodation might not be "reasonable," the "Regulatory Impact Statement" issued simultaneously with the initial proposal of the regulation suggests that the line of reasonableness may be crossed in situations of triage, "instances when maintenance of a brain dead person would result in harm to another patient for whom meaningful life could be saved." The Silver-Colman-Levy bill, in contrast, speaks in terms of absolute accommodation, and at least arguably would have required hospitals to continue treating religious objectors notwithstanding triage.

Although the imposition of a "reasonableness" standard upon a hospital's duty of religious accommodation may create halachic difficulties in individual cases, it may at the same time enhance the constitutionality of the regulation by insulating it against attack as an "establishment of religion" in violation of the First Amendment to the United States Constitution. This conclusion emerges from *Estate of Thornton* v. *Caldor,*[19] in which the U.S. Supreme Court struck down a Connecticut statute that prohibited an employer

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17. 10 N.Y.C.R.R. sec. 400.16 (e) (3).
18. *See, e.g.,* Rabbi M. Feinstein, *Iggerot Moshe,* II *Choshen Mishpat* 73 (b), at 304 (5742), where Rabbi Feinstein rules that an individual who has already been placed in an emergency room is entitled to remain there even if only to preserve temporary life *(chayei sha'ah),* despite the fact that as a result there is no room to treat another individual for whom there might be hope of full recovery. Accordingly, if one assumes that a brain dead individual is still alive for purposes of halacha, it would seem to follow that his right to remain on life support would take halachic precedence over the right of a new patient to the same support, even in cases where that would prelude the new patient from receiving treatment that could save his life.
19. 472 U.S. 703 (1985).

from requiring an employee to work on the day designated by the employee as his Sabbath, or from dismissing any employee who refuses to work on his Sabbath. In so doing, the Court made repeated reference to the fact that the religious accommodation mandated nder the statute allowed for no exceptions.[20] The clear implication is that religious accommodation laws do not unconstitutionally establish religion *per se*, unless they create a hierarchy f values in which religion *always* takes precedence over any other concern.[21]

By analogy, any attempt to require a health care provider to accommodate a patient's religious objection to brain death would be constitutionally ulnerable were its mandate stated in absoute terms. In contrast, the New York State regulation, couched as it is in the limited terms of reasonable accommodation, would likely survive any constitutional attack.

2. *Timing of Notification to Next of Kin.* Section (d) of the regulation requires a hospital to make reasonable efforts to notify the patient's next of kin or other close person — and thereby afford an opportunity for the assertion of a religious objection — *prior* to the completion of a determination of brain death. Read in conjunction with section (c) of the regulation, which states that death shall be deemed to have occurred only "as of the time of the completion of a determination of death," the implication of this pre-completion notification requirement is that any patient whose religious beliefs will be accommodated pursuant to the regulation will never have been confirmed as brain dead. That patient would thus be fully alive for purposes of the law.

The Regulatory Impact Statement published simultaneously

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20. *Id.* at 709-10.

21. Justice O'Connor, in her concurring opinion, spelled this out even more clearly. She observed that *Thornton* did not call into question the constitutionality of Title VII of the federal Civil Rights Act, which mandates *reasonable* accommodation of an employee's religious needs. A critical distinction between Title VII and the Connecticut law, in Justice O'Connor's view, was the absence of any requirement of *absolute* religious accommodation under the federal statue. *Id.* at 711-12.

with the regulation suggests that the pre-death notification requirement was designed to promote the value of uniformity. Under this theory, once irreversible cessation of all brain activity has conclusively been confirmed, mandating reasonable religious accommodation would undermine the state's interest in maintaining uniform standards of death determination.

Whatever the merits of the uniformity line of reasoning,[22] one possible ancillary benefit of pre-death notification, from the perspective of the family that has interposed a religious objection on behalf of a near brain-dead relative, is that the costs of continued maintenance on life support following such an objection are likely to be covered by the patient's insurance. The patient is, after all, still alive and presumably still entitled to the benefits of health care coverage. In contrast, were the regulation to allow a hospital to conclude a determination of brain death before notifying the family (as would have been the case under the Silver-Colman-Levy bill), the costs of any subsequent maintenance upon life support might well be resisted by third-party insurers on the theory that they are not obligated to finance the treatment of confirmed brain dead individuals.

3. *The Hospital's Obligation to Notify.* Under the Silver-Colman-Levy bill, a hospital would not have been permitted to remove a brain dead individual from life-support mechanisms without first making "reasonable efforts to determine, from such individual's family member or friend, that such action will not violate such individual's religious beliefs or practices or moral convictions." To satisfy this requirement, the hospital presumably would have had to query the family member or friend as to the patient's beliefs.

The regulation adopts a different approach. Section (d) requires a hospital merely to *notify* the patient's next of kin or other close person of the patient's condition. Upon meeting that requirement, the hospital need not say another word; it must

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22. See discussion at text accompanying notes 40-46 *infra.*

reasonably accommodate any religious objection interposed on behalf of the patient, but it has no affirmative duty to solicit any such objection.

Although advocates of a religious exemption from brain death standards did press for a provision requiring the hospital affirmatively to ask whether the patient would have religious objection to brain death, such a requirement would have represented a departure from religious accommodation laws in other contexts. Such laws typically do no more than afford an individual the opportunity to ask for different treatment based on his religious beliefs — or, where the individual's condition precludes him from making such a request on his own, allow someone close to the individual the opportunity to make the request on the individual's behalf.[23] An argument can be advanced, however, that the gravity of what is at stake in the brain death context — literally the life or death of the patient — justifies the imposition of a more severe burden on the health care provider than is ordinarily imposed on a party required to accommodate. In promulgating its final regulation, the New York State Health Department rejected this argument, and it remains to be seen whether any future legislation or regulation in this field will accept it.

4. *Criteria for Measuring Brain Death.* Death, according to section (b) of the regulation, is to be determined "in accordance with accepted medical standards." Innocuous though this provision

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23. A good illustration of this approach is the statutory protection available in New York State against routine post-mortem dissection or autopsy procedures. Sections 4209-a and 4214 of New York's Public Health Law enable an individual to protect himself against such procedures by carrying a card stating his objection to routine dissection or autopsies. Where a decedent is found with no such card on his person, he is nonetheless afforded a measure or protection under section 4210-c of the Public Health Law, which allows a surviving relative or friend to assert on the decedent's behalf a religious objection to the performance of routine post-mortem procedures. However, nothing in the law requires the medical examiner to take affirmative steps to contact a relative or friend to determine whether the decedent would have had religious objection to such a procedure.

24. The "accepted medical standards" formulation, which is a common feature in

may seem, it demonstrates the potential importance of the section (e) religious accommodation requirement even for those in the halachic community who accept brain death as halachic death. For even if halacha would regard as dead an individual who has sustained irreversible cessation of the entire brain function including the brain stem, the "accepted medical standards" for *measuring* such cessation may not necessarily be acceptable halachic standards of measurement. The degree of certainty that physicians may accept in determining brain death may be (or may become) less than the degree of certainty upon which halacha would insist.[25]

Thus, one need not dispute the underlying concept of brain death in order to require protection against an "accepted medical standards" measurement of brain death. The reasonable religious accommodation mandate provides the necessary protection.

II. Constitutional Considerations

As noted above, New York is the only state that hks codified, at least in some measure, the requirement that a patient's religious beliefs be reasonably accommodated in the context of determining his death. The absence of specific legislation or regulation, however, does not necessarily mean that religious objectors outside of New York have no legal protection against uniform application of brain

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many of the state brain death laws, was developed in 1980 when the National Conference of Commissioners on Uniform State Laws proposed the Uniform Determination of Death Act. The Commissioners explained that measurement criteria for establishing brain death would inevitably clash with advances in "biomedical knowledge, diagnostic tests, and equipment," and that it was therefore preferable that the law refrain from mandating specific measurement procedures. Prefatory Note, *Uniform Determination of Death Act*, 2 U.L.A. 293 (1980).

25. This is no idle or abstract concern. One prominent halachic supporter of brain death, Rabbi Moshe Tendler, has argued for the standardized usage of radioisotope blood flow studies as the most reliable means of ascertaining brain death. Such studies, however, are neither a part of the well-knwon "Harvard criteria" for determining brain death, nor are they routinely performed. *See, e.g.*, N.Y.S. Dept. of Health Memorandum, *Guidelines for a Determination of Death Using Brain Based Criteria*, Series 87-71, Health Facilities Series H-45 (Aug. 21, 1987).

death laws. Uniform determination of death laws that recognize no explicit exception for religious objectors are nonetheless subject to certain overriding constitutional values that may mandate reasonable religious accommodation in appropriate cases. Specifically, as outlined below, an individual's rights to (1) free religious exercise and (2) privacy, both of which are constitutionally protected, provide ample basis for requiring reasonable religious accommodation even where there is no express statutory or regulatory authority.

The Constitutional Rights

1. *Free Exercise of Religion.* Under the "free exercise clause" of the First Amendment ("Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof . . .*"), government may not burden religious practice unless it can demonstrate that "an inroad on religious liberty . . . is the least restrictive means of achieving some compelling state interest."[26]

The lack of universal opposition to brain death among halachic authorities in no way undercuts the constitutional standing of individuals who follow the view that brain death is not halachic death. As the U.S. Supreme Court has held, the First Amendment's free exercise protections are triggered not by unanimity of religious conviction, but by sincerity of religious conviction. Thus, in commenting upon an apparent conflict between two members of a certain faith group as to whether working on the production of military weapons violated that faith's religious principles, the Supreme Court stated as follows:

> Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One

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26. *Thomas* v. *Review Board of Indiana Employment Security Division,* 450 U.S. 707, 718 (1981).

> can, of course, imagine an asserted claim so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation. [27]

There can be little doubt, therefore, that laws which purport to establish uniform death criteria, and which make no exceptions for individuals whose religious views on life and death do not coincide with the state's, burden free exercise rights and implicate First Amendment considerations.

2. *The Right of Privacy.* Although the United States Constitution nowhere mentions any right of privacy, the Supreme Court has held that such a right does exist and is of constitutional dimension. The essence of this right is that there are certain decisions so personal and so fundamental, that it is "implicit in the concept of ordered liberty" that such decisions be left to each individual rather than to government.[28] This amorphous yet powerful consitutional right has been invoked in a wide variety of circumstances (though there is some indication that the Supreme Court has now begun to retrench from its expansive interpretation of the privacy right[29]). Most relevant for our purposes are the judicial rulings in cases involving abortion (relating to the *beginning* of life) and cases involving the "right to die" (relating to the *end* of life).

(i) *Abortion.* The leading abortion case is *Roe* v. *Wade,*[30] which

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27. *Id.* at 715-16.
28. *Roe* v. *Wade,* 410 U.S. 113, 152 (1973).
29. *See Bowers* v. *Hardwick,* 478 U.S. 186 (1986), where a 5-4 majority of the Supreme Court refused to extend the right of privacy to cover consensual homosexual activity.
30. 410 U.S. 113 (1973).

ranks as one of the most controversial decisions in the history of the Supreme Court. At issue in *Roe* was a Texas statute that made it a crime to procure or attempt an abortion other than as necessary to save the mother's life. The Court identified two main interests at tension with one another: the state's interest in protecting human life or potential human life; and the woman's constitutional right to privacy. The privacy right, reasoned the Court, was in the category of "fundamental rights," and accordingly could be overcome only by a "compelling state interest" embodied in a law "narrowly drawn to express only the legitimate state interests at stake."[31] The Court reasoned that the state's interest in preserving the fetus' potential human life[32] becomes "compelling" only when the fetus has developed to the point of viability, beyond which a state generally has the right to proscribe abortions. Prior to viability, however, the state's interest in protecting the fetus is not "compelling" and must thus yield to the mother's privacy rights.[33]

So long as *Roe* v. *Wade* remains the law of the land,[34] a case can be made by analogy for the proposition that the right of privacy encompasses the right to reasonable accommodation of a patient's religious objection to brain death. Under this theory, if government is restricted from defining the onset of human life in a manner that encumbers a pregnant woman's right of privacy, it ought similarly be restricted from defining the conclusion of human

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31. *Id.* at 155.
32. The Supreme Court considered but specificially rejected the contention that a fetus was a "person" for purposes of the Fourteenth Amendment ("[N] or shall any State deprive any person of life, liberty, or property, without due process of law") or for other purposes of law. 410 U.S. at 156-62. The Court did acknowledge, however, the state's "important and legitimate interest in protecting the potentiality of human life." *Id.* at 162.
33. *Id.* at 163-165.
34. In January 1989, the U.S. Supreme Court agreed to review *Webster* v. *Reproductive Health Services*, 851 F. 2d 1071 (8th Cir. 1988), wherein a federal appellate court struck down as unconstitutional a Missouri anti-abortion statue. In its order grating review, the Supreme Court asked counsel to address the issue of whether "*Roe* v. *Wade* . . . [should] be reconsidered and discarded . . ." 57 U.S.L.W. 3442 (Jan. 10, 1989).

life in a manner that encumbers a patient's right of privacy.

(ii) *The "Right to Die".* The common law has long recognized the concept of personal autonomy in medical decision-making.[35] In the celebrated Karen Anne Quinlan case, New Jersey's Supreme Court invested that common law right with constitutional stature. Citing *Roe* v. *Wade*, the court in *Quinlan* observed: "Presumably this right [of privacy] is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions."[36] Although not all jurisdictions have conferred constitutional status upon an individual's decision to refuse medical treatment, the trend of the states has been to follow New Jersey's lead in cloaking the common law right of personal autonomy in constitutional privacy garb.[37]

By analogy, where a patient's religious beliefs impel him to seek continued life-support beyond brain death, such decision should be encompassed within the privacy/personal autonomy rubric articulated in the "right to die" cases. Choosing to receive treatment is no less an expression of personal autonomy than choosing to forego treatment; it deserves no less constitutional protection.

The Countervailing Governmental Interest

Constitutionally grounded though they may be, neither the

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35. In the oft-quoted words of the renowned jurist Benjamin N. Cardozo, then the Chief Judge of New York's Court of Appeals: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff* v. *Society of New York Hospitals*, 211 N.Y. 125, 129-30 (1914).
36. *Matter of Quinlan*, 355 A.2d 647, 663 (N.J. 1976).
37. *Compare In re Storar*, 52 N.Y. 2d 363, 376-77 (1981), where the New York Court of Appeals reaffirmed the common law right of personal autonomy in medical decisions but declined to extend the constitutional right of privacy to "right to die" decisions, *with* such decisions as *Supt. of Belchertown State School* v. *Saikewicz*, 370 N.E. 2d 417, 424 (Mass. 1977), *Leach* v. *Akron General*

right freely to exercise one's religion nor the right of privacy is absolute. As noted above, government may abridge free religious exercise where it employs "the least restrictive means of achieving some compelling state interest."[38] Similarly, the right of privacy must yield to a "compelling state interest" embodied in a law "narrowly drawn to express only the legitimate state interests at stake."[39]

In this context, the governmental interest most frequently asserted in support of generally applicable brain death laws is that of uniformity. To make exceptions for religious objectors, the argument goes, would undermine society's interest in having one uniform definition of life and death. Typical of this line of reasoning is The Hastings Center's argument against any formal "religious exemption" from brain death standards:

> Religious freedom and pluralism are important values in our society. However, in many areas society is forced to have consistent standards. We believe that the societal need for consistency and clarity in determining death mandates as much uniformity as possible in the criteria for declaring death. Accordingly, when a patient meets the neurological criteria, the Guidelines do not leave a declaration of death to the discretion of the health care professional, surrogate, family, or others.[40]

Similarly, when the New York State Task Force on Life and Law issued its report on "The Determination of Death," it expressly rejected the suggestion that the brain death regulation

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Medical Center, 426 N.E. 2d 809, 814 (Ohio 1980), and *Matter of Conservatorship of Torres*, 357 N.W. 2d 332, 339 (Minn. 1984), where the highest courts of Massachusetts, Ohio and Minnesota (respectively) concluded that personal autonomy in medical decision-making was an aspect of the constitutional right of privacy.

38. See text accompanying note 26 *supra*.
39. See text accompanying note 31 *supra*.
40. The Hastings Center, *Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying*, at 87 (1987).

mandate reasonable accommodation of religious objections because of its view that "the State's interest in uniformity with respect to so basic a determination is too great to permit variation dependent upon religious beliefs."[41]

Contrary to these viewpoints, however, neither logic nor legal precedent compel the conclusion that government's interest in uniformity precludes the mandating of reasonable religious accommodation. For one thing, uniformity is not necessarily incompatible with free exercise and privacy rights. Uniform determination of death laws can be crafted in such a manner as to require reasonable accommodation without undermining uniformity. The recently promulgated New York State Health Department regulation, as discussed above, was designed specifically to avoid this conflict, by requiring notification of the patient's family or friend *prior* to a final determination of brain death. This ensured that accommodation of the patient's beliefs could be accomplished while he was still alive pursuant to uniformly applicable standards.

Moreover, even if the values of uniformity and accommodation would be mutually and irrevocably incompatible, the constitutional guarantees of free religious exercise and privacy are not so easily pushed aside. In determining whether an asserted governmental interest is sufficiently "compelling" as to justify some restriction of religious freedom, "only those interests *of the highest order* . . . can overbalance legitimate claims to the free exercise of religion." It is highly questionable whether insistence upon one uniform standard of death qualifies as such an interest of the highest order. The key governmental interest here is not so much uniformity as it is clarity. So long as government prescribes clear guidelines upon which a health care provider can safely rely without being concerned about running afoul of the law, it has achieved the main purpose of creating uniform laws.

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41. Task Force Report at 11.
42. 10 N.Y.C.R.R. section 400.16 (d). See dicussion at text accompanying note 22 *supra.*
43. *Wisconsin* v. *Yoder,* 406 U.S. 205, 215 (1972).

There are instances, perhaps, where the state's interest in applying brain death criteria to religious objectors may be sufficiently compelling to subordinate the patient's religious or privacy rights. An example might be a situation of triage, where maintaining a religious objector on life support beyond brain death would make it impossible for a hospital to provide life support to a new patient whose life might be saved. The constitutional rights of free religious exercise and privacy require no such accommodation in the face of the state's compelling interest in protecting innocent third parties.[44] As noted above, the recently promulgated New York State regulation mandates only such accommodation as is "reasonable," precisely in order to allow hospitals to allocate scarce medical resources to other patients in triage situations. As a general rule, though, the state's interest in uniformity is not so compelling as to justify dispensing with the patient's constitutional rights.

Even assuming that uniformity does embody a compelling governmental interest of the highest order, it does not necessarily follow that applying a uniform determination of death standard across the board without making allowance for minority religious viewpoints constitutes the "least restrictive means" of achieving that interest. In the first edition of his landmark treatise on constitutional law, Professor Lawrence H. Tribe described the relevant considerations in determining whether the "least restrictive" test has been satisfied:

> Failure to accommodate religion when the government could substantially achieve its legitimate goals

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44. Thus, in the context of abortion, the state's interest in preserving the life of a viable fetus is deemed sufficiently compelling to override the mother's right of privacy *(Roe* v. *Wade,* 410 U.S. 113, 163-65 (1973)). Similarly, in the context of refusing necessary medical treatment where that would endanger the well-being of minor or even unborn children, the state's interest in protecting innocent third parties has been deemed sufficiently compelling to override the patient's rights of privacy *(e.g., Matter of Farrell,* 529 A.2d 404, 411-12 (N.J. 1987)) and free religious exercise *(e.g., Application of President and Directors of Georgetown College,* 331 F. 2d 1000, 1008 (D.C. Cir. 1964)).

45. See text accompanying votes 17-21 *supra.*

> while granting religious exemptions has been disapproved as hostility toward religion rather than hailed as the essence of neutrality.
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> In applying the least restrictive alternative compelling interest requirement, it is crucial to avoid the error of equating the State's interest in denying a religious exemption with the State's usually much greater interest in maintaining the underlying rule or program for unexceptional cases. Only the first interest — that in denying an exemption — is constitutionally relevant when an exemption is sought.[46]

Since the Orthodox Jewish community appears to be the only significant segment of the general populace that has religious objection to brain death — indeed, even among the Orthodox there are different halachic views — adopting a policy that accommodates the religious needs of those relatively few individuals will in large measure leave intact the state's interest in uniformity. Thus, this is not a situation where government has no alternative but to burden free exercise or privacy rights. It can accomplish its main objective of uniformity without insisting that individuals choose between their religion and the secular law.

Conclusion

There are differences of view within the halachic community regarding the criteria by which death is to be measured. Individual families faced with the agonizing question of whether their brain dead relative is halachically dead will no doubt consult with, and act pursuant to the direction of, their own halachic authorities. Sometimes, at least, this process will cause them to seek to maintain their brain dead relative on life support, notwithstanding the secular law's insistence that he is dead.

The principle of religious accommodation is one that has stood the American Orthodox Jewish community in good stead in a wide

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46. Tribe, *American Constitutional Law*, at 852, 855 (1st Ed. 1978).

variety of secular legal contexts. Its application to the determination of death deserves the support of all segments of the community — even those who perceive no conflict between the secular law and the halacha. For what is really at issue here is not whether brain death is or is not halachic death; but whether it is in the interest of the Torah-observant community to combat secular laws that preclude individuals from following the guidance of their individual halachic decisors. On that issue, it is fair to hope that both supporters and opponents of brain death can find common ground.

Does Martyrdom Require A Blessing?

Moshe A. Bleich

Rabbinic literature of the post-Holocaust period assumes as a matter of course that those who perished in the Holocaust due to the fact that they were Jews are to be deemed as having died as martyrs in sanctification of the Divine Name (*al kiddush ha-Shem*).[1] This assessment of the status of Holocaust victims gives rise to an intriguing question of Jewish law: Since death *al kiddush ha-Shem* constitutes fulfillment of a commandment, does the fulfillment of that commandment require pronouncement of a blessing *(birkat ha-mitzvah)* as is the case with regard to fulfillment of other commandments? If the answer is in the affirmative, a secondary issue which presents itself is establishing the correct text to be employed in pronouncing the blessing.

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1. See, for example, Irving J. Rosenbaum, *The Holocaust and Halakhah* (New York, 1976), p. 61; Yitzchak Rafael, *Torah She-be-al Peh* (5732), XIV, 7-8; Simon Efratti, *Mi-Gei ha-Hareigah* (Jerusalem, 1961), pp. 38-39; Simon Huberband, *Kiddush ha-Shem* (Tel Aviv, 1976), pp. 131-134; and an unpublished letter authored by R. Eliezer Schach in the possession of this writer. Cf., *She'elot u-Teshuvot Chatam Sofer, Yoreh De'ah,* no. 333. The primary source upon which this position is predicated appears to be Rambam, *Iggeret ha-Shmad;* see *Iggerot ha-Rambam* (Jerusalem, 1979), p. 61. However, further examination of the texts of both *Teshuvot Chatam Sofer* and *Iggerot ha-Rambam* indicates that those texts do not support this position. For that reason the source for this thesis is somewhat obscure and requires further elucidation. See also the comments of R. Israel Schepansky, *Or ha-Mizrach,* Nisan-Tammuz 5748, pp. 312-13..

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The earliest referecne to these issues is found in the writings of a 14th-century authority, R. Menachem Recanati, *Piskei Halachot*, no. 70. *Piskei Halachot* declares that a blessing is required in such circumstances:

> המקדשים את השם חייבים לברך על קידוש השם הנכבד והנורא כיון דהיא מצות עשה מדאורייתא דכתיב ונקדשתי בתוך בני ישראל.

Thus R. Menachem Recanati unequivocally rules that sanctification of the Name, in common with all other mitzvot, requires a blessing, a *birkat hamitzvah*.

A similar position is adopted by R. Isaiah Horowitz, *Shelah, Sha'ar ha-Otiyot, Ot* 1, who declares that one who is put to death in sanctification of the Name in the presence of at least ten Jews is obligated to pronounce a blessing. *Shelah* indicates that the text of the blessings to be pronounced is as follows:

> ברוך אתה ה' אלקינו מלך העולם אשר קדשנו במצותיו וצונו לקדש שמו ברבים.[2]

> Blessed art Thou ... who has sanctified us with his commandments and commanded us to sanctify his Name publicly.

Shelah also takes note of some possible objections to the position that a blessing is required upon fulfillment of the mitzvah of sanctification of the Name, but dismisses those considerations out-of-hand.[3] In support of his position *Shelah* cites the inclusion of this blessing in the liturgy of the Ashkenazic rite (in the prayer אתה הוא עד שלא נברא העולם) which is incorporated in the preliminary section of the morning prayers and culminates with the blessing ברוך אתה ה' מקדש את שמך ברבים "Blessed art Thou, O

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2. Surprisingly, R. Reuben Margulies, *Mekor ha-Berachah*, chap. 9, sec. 18, cites the text of the blessing recorded by *Shelah* inaccurately as "לקדש את השם."
3. For a further discussion of the comments of *Shelah*, see *Mekor ha-Berachah*, chap. 6.

Lord, who publicly sanctifies Thy Name." This prayer was incorporated in the morning service during, or immediately after, the "*doro shel shmad*"[4] (generation of apostasy) and memorializes the historical events involving martyrdom in sanctification of the Name which occurred during that epoch. *Shelah* argues that, *a fortiori*, actual fulfillment of sanctification of the Name should necessitate a blessing. Absence of this blessing in the Sephardic rite as well as in Rambam's text of the prayer service, argues *Shelah*, does not contradict the view that a blessing was indeed ordained by the Sages for actual sanctification of the Name. That position, he asserts, is not subject to dispute; the sole disagreement, he maintains, is with regard to subsequent institution of the blessing as a commemorative blessing memorializing a historical event.

However, in sharp contradiction to this position, a contemporary scholar, Rabbi Mordecai Fogelman,[5] advances the thesis that this blessing was indeed ordained in the aftermath of the *doro shel shmad* but that it was never pronounced by the *mekadshei ha-Shem* themselves before they were put to death. Rather, he claims, the blessing in the form in which it is recited in the morning prayer, אתה הוא עד שלא נברא העולם וכו' ברוך אתה ה' מקדש את שמך ברבים, was introduced after the oppression of the *doro shel shmad* ceased and is not designed to memorialize the martyrdom of that generation but to commemorate an entirely different aspect of *kiddush ha-Shem*. During the *doro shel shmad* Jews were prevented from performing many mitzvot upon pain of death. Among the mitzvot forbidden to them was recitation of the *Shema*. According

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4. This historical period has been identified as the reign of the Persian ruler Yezdigird II in the mid-sixth century C.E. An adherent of Zoroastrian dualism, Yezdigird attempted to eradicate monotheism. Public worship was curtailed on the Sabbath and guards were posted in the synagogues to assure that the *Shema* not be recited. The custom of incorporating the *Shema* in the *kedushah* of *mussaf* also originated at the time of that persecution. Since the guards remained at their posts only until the third or fourth hour when they knew that the time for recitation of the *Shema* had elapsed, the *Shema* could then be recited at a later hour. See Rashi, *Sefer ha-Pardes*, chapter 4 and *Shibbolei ha-Leket*, ed. S. Buber (Vilna, 1886), pp.

5. *Torah She-be-al Peh*, XIV (5732), 97.

to Rabbi Fogelman's analysis, this blessing was introduced upon abrogation of those decrees as an expression of joy and thanksgiving. Accordingly, the blessing follows the recitation of the verse *"Shema Yisra'el"* in commemoration of the fact that during this early period of Jewish history it was forbidden to recite the *Shema.*

However, it appears that this thesis is explicitly contradicted by R. Solomon Luria, *Teshuvot Maharshal,* no. 64. Maharshal unequivocally declares that this blessing was originally ordained "in conjunction with sanctification of the Divine Name" i.e., for recitation by those who themselves sanctified the Divine Name.[6] Maharshal clearly states that this blessing was originally and primarily a *birkat ha-mitzvah,* and only later was it incorporated in the liturgy of the morning prayers.

Rabbi Fogelman further maintains that no blessing need be recited upon fulfillment of the mitzvah of *kiddush ha-Shem.* He argues that the statements of *Piskei Halachot* and *Shelah* are not to be accepted as definitive rulings but are to be viewed merely as the opinions of individual scholars. Rabbi Fogelman points out that in the overwhelming majority of his rulings *Piskei Halachot* quotes the source of his ruling, thereby indicating that it is predicated upon a statement found in the Babylonian Talmud, the Palestinian Talmud, or Rambam, etc.; however, in this instance, *Piskei Halahot* cites no source because no earlier authority had, in fact, required a blessing upon fulfillment of the mitzvah of *kiddush ha-Shem.* Rather, concludes Rabbi Fogelman, *Piskei Halachot* based this ruling upon his own personal opinion *(mida'ata de-nafsheh).* Accordingly, Rabbi Fogelman forcefully argues that, since there is no source indicating that the Sages did indeed ordain a blessing upon fulfillment of this mitzvah, we lack the requisite authority to institute such a blessing of our own accord.

Evidence indicating that the Sages failed to ordain a blessing for the mitzvah of *kiddush ha-Shem* may perhaps be found in the oft-

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6 *Maharshal's* statement reads: "ועוד אני אומר דברנה של אחריה מקדש את שמך ברבים שהוא מן הירושלמי והיא נתקנה על קדושת השם שיין שפיר אמריה."

quoted passage found in the Gemara, *Berachot* 61b, which relates that Rabbi Akiva died in sanctificaiton of the Name with the words of the *Shema* on his lips. In this narrative, the Gemara relates that the *last* words of the sainted martyr were the words of the *Shema* and makes no mention whatsoever of Rabbi Akiva having recited a blessing immediately prior to his execution. This would seem to indicate that a blessing upon fulfillment of the mitzvah of *kiddush ha-Shem* is not required.

Nevertheless, as noted previously, the earlier-cited statement of Maharshal is in agreement with the position of *Shelah* who regards a *birkat ha-mitzvah* as mandatory. Moreover, *Darkei Teshuvah, Yoreh De'ah* 157:22, quotes *Teshuvot Bet David* as stating that Me'iri is also of the opinion that one should recite a blessing upon fulfillment of the mitzvah of *kiddush ha-Shem*. Although a contemporary scholar, Professor Shraga Abramson,[7] reports that he could locate neither the statement attributed to Me'iri nor the statment of *Teshuvot Bet David* as quoted by *Darkei Teshuvah* and that, consequently, those particular sources cannot be relied upon as establishing an obligation to pronounce a blessing, it is nevertheless clear that *Darkei Teshuvah* did indeed view the normative halachic ruling as being in accordance with the position of *Shelah*. *Pitchei Teshuva, Yoreh De'ah* 157:6, also appears to accept the view of *Shelah* as normative. Moreover, R. Ephraim Oshri, *Teshuvot mi-Ma'amakim*, II, no. 4, reports that R. Elchanan Wasserman and Rabbi Levinson, a grandson of R. Israel Meir ha-Kohen, the *Chafetz Chayyim*, both testified that *Chafetz Chayyim* ruled that a blessing must be pronounced upon fulfillment of the mitzvah of *kiddush ha-Shem*. Another source, *Yosef Ometz*, no. 483, also rules that it is necessary to recite a blessing prior to fulfillment of the mitzvah of *kiddush ha-Shem*.[8]

Nevertheless, at least one latter-day authority reaches a conclusion identical to that of Rabbi Fogelman, namely, that a

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7. *Torah She-be-al Peh*, XIV (5732), 160.
8. However, the text of the blessing suggested by *Yosef Ometz* differs from the text recorded by *Shelah*, as will be indicated later.

blessing upon fulfillment of the mitzvah of *kiddush ha-Shem* is not required. R. Moshe Schick, *Maharam Schick al Taryag Mitzvot*, mitzvah 297, rules that a blessing should not be recited upon fulfillment of the mitzvah of *kiddush ha-Shem*. He bases his ruling upon the well-known statement of the Gemara, *Sanhedrin 39b*, "מעשה ידי טובעין בים ואתם אומרים שירה לפני" – "The work of My hands drown in the sea and you recite 'song' before Me!" Maharam Shick argues that, since the mitzvah of sanctification of the Name is occasioned by a tragic event, one should not recite a blessing in conjunction with fulfillment of that mitzvah.

It would appear that the earlier-cited authorities who adopt an opposing view do not address themselves to this objection because they regard the comment of the Sages as limited to the concept of *shirah* or "song."[9] An event that causes a human being to perish is indeed not a proper occasion for song and rejoicing. However, mitzvot must be performed as mandated whether or not the occasion is a time for rejoicing and regardless of the consequences; the tragic effect in no sense diminishes the status of the mitzvah and hence should not preclude the recitation of a blessing. Thus, since *kiddush ha-Shem* constitutes a mitzvah, a *birkat ha-mitzvah* would seem to be obligatory in any event. However, according to those authorities who maintain that a *"she-hechiyanu"* blessing is recited only on occasions of joy,[10] this consideration does serve to explain why a *she-hechiyanu* is not recited in conjunction with the mitzvah of *kiddush ha-Shem*. Quite obviously, loss of life cannot be deemed to be an occasion of joy.

In develping his thesis that the Sages did not ordain a blessing upon fulfillment of the mitzvah of *kiddush ha-Shem*, Rabbi Fogelman addresses the underlying question of why they failed to do so. In endeavoring to elucidate this fundamental point he notes that Avudraham states that, as a general rule, the Sages ordained

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9. See the discussion in *Maharsha* on *Sanhedrin* 39b and *Teshuvot Chavot Ya'ir*, no. 225, with regard to whether *shirah*, or "song", is limited to *hallel ha-gadol* or is broader in nature.
10. See for example, *Tosafot, Sukkah* 46a, *s.v ha-oseh sukkah.*

blessings in association with a mitzvah only when the mitzvah requires an overt physical act for its fulfillment. Avudraham states that the reason that, in our day, we do not recite a blessing upon *kevi'at ha-chodesh* is that determination of the New Moon in the present historical epoch requires only calculation *(cheshbon)* and not an overt action *(ma'aseh).* Accordingly, Rabbi Fogelman argues that since *kiddush ha-Shem* is performed passively, i.e. by allowing oneself to be put to death, rather than in an active manner, it does not entail an overt act and hence it can readily be understood that the Sages did not ordain a blessing for the mitzvah of *kiddush ha-Shem.*

It is of interest to note that, in his remarks, Avudraham includes a parenthetical comment of R. Gershom b. Shlomo who voices an objection to the thesis propounded by Avudraham. R. Gerson b. Shlomo takes issue with Avudraham on the grounds that if a mitzvah that does not involve an overt act does not occasion a blessing, why then do we recite a blessing upon *sefirat haomer* (counting the *omer*)? The mitzvah of counting the *omer* is a passive one involving only "calculation" *(cheshbon).* Accordingly, argues R. Gershon b. Shlomo, Avudraham's thesis that mitzvot which are passive in nature do not entail *birkat ha-mitzvot* is not a cogent one. The published texts of Avudraham include this comment but do not present a rebuttal. Although Rabbi Fogelman fails to mention this objection, it may have been for this very reason[11] that *Shelah* and other authorities rejected the principle in question as formulated by Avudraham.[12]

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11. It appears that *Shelah* may have concluded that Avudraham himself accepted the objection of R. Gershom b. Shlomo, since *Shelah* maintains that none of the categories formulated by Avudraham regarding mitzvot which do not require recitation of a blessing applies to *kiddush ha-Shem.*

12. However, it should be noted that *Bi'ur ha-Gra, Orach Chayyim* 8:1, also maintains that one does not recite a blessing upon performing a mitzvah that is passive in nature. Yet it should be noted that, in his comments establishing that one does not pronounce a blessing upon fulfilling passive mitzvot, *Bi'ur ha-Gra* cites *hashmatat kesafim* as a prime example. If so, it may be cogently argued that a blessing upon *sefirat ha-omer* is understandably required. Since the counting of the *omer* is performed verbally and entails at least a minimal physical act the

Birkat Hoda'ah or Birkat ha-Mitzvah

It has been assumed in the foregoing discussion, that if a blessing was indeed ordained in conjunction with sanctification of the Divine Name, the blessing constitutes a *birkat ha-mitzvah.* However, it would appear to be quite possible that such a blessing might be ordained, not in the nature of a *birkat ha-mitzvah,* but in the nature of a *birkat hoda'ah,* a blessing of praise or thanksgiving to be pronounced on the occasion of being accorded the opportunity to perform this unusual but most sacred mitzvah. A source which tends to support this thesis is the previously mentioned statement of *Teshuvot Maharshal,* no. 60, indicating that the blessing *"mekadesh shimcha ba-rabbim"* was originally formulated as a blessing to be pronounced on the occasion of *kiddush ha-Shem.* Maharshal records the formula of the blessing as ברוך אתה ה' מקדש את שמך ברבים,"Who publicly sanctifies Thy Name" rather than, as might have been anticipated, אשר קדשנו במצותיו וצונו ..."Who has commanded us to sanctify His Name publicly." This would seem to indicate that Maharshal did not regard this blessing as being a *birkat ha-mitzvah* and thus omitted the phrase אשר קדשנו במצותיו וצונו "...Who has sanctified us with his commandments and commanded us..." If the blessing is not a *birkat ha-mitzvah* it must then be in the nature of *birkat hoda'ah.*

It should be noted that even if the correct liturgical formula of this blessing is אשר קדשנו במצותיו וצונו, the blessing may nevertheless constitute a *birkat hoda'ah.* A number of authorities

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mitzvah may not be considered passive in nature. *Hashmatat kesafim,* on the other hand, is entirely automatic in nature and requires no act whatsoever on the part of the creditor. According to this line of reasoning, it may be argued that the mitzvah of *kiddush ha-Shem* is entirely passive in nature and, according to *Bi'ur ha-Gra,* does not require a blessing. For a further discussion of the opinion of *Bi'ur ha-Gra* see R. Reuben Margulies, *Mekor ha-Berachah,* no. 1.

For further sources discussing this principle, see the comments of Rabbi Moshe Betzalel, *Maaseh Betzalel,* a commentary on *Piskei Halachot,* no. 70. See also the comments of *Sefer Otzar Birkat ha-Mitzvot,* Part II, *Kelalei ha-Berachot,* (Jerusalem, 1986) *Be'er Ha-Berachah,* pp. 24-26, and *Emek ha-Berachah, ibid.,* p. 24.

state explicitly that, on occasion, even a blessing couched in those words constitutes, not a *birkat ha-mitzvah,* but rather a *birkat hoda'ah. Taz, Yoreh De'ah* 1:17, maintains that the blessings associated with *shechitah* and *eirusin* are *birkot hoda'ah* despite the fact that the text of those blessings incorporates the phrase אשר קדשנו במצותיו וצונו. A further source supporting such a thesis is the comment of *Aruch ha-Shulchan, Orach Chayyim* 25:13, to the effect that the blessing pronounced upon donning *tefillin shel rosh* אשר קדשנו במצותיו וצונו על מצות תפילין is not a *birkat ha-mitzvah* but rather a *birkat hoda'ah,* a blessing of thanksgiving.

If the nature of the blessing מקדש שמך ברבים is understood in this manner, the comments of Maharam Schick may be explained in a new and quite cogent vein. If Maharam Schick assumed that the blessing ordained in association with an act of *kiddush ha-Shem* is not a *birkat ha-mitzvah* but rather a *birkat hoda'ah,* his argument מעשה ידי טובעין בים ואתם אומרים שירה is readily understandable. His contention is quite simply that a blessing of praise and thanksgiving is akin to *shirah* and is inappropriate at a time of tragedy.

Nevertheless, even assuming this analysis of the nature of the blessing to be correct, it may well be argued that, when an individual suffers death in sanctification of the Name, the event cannot be categorized as being in the nature of מעשה ידי טובעין בים. *Shelah,* cited above, eloquently describes how profound was the desire of Rabbi Akiva to fulfill the mitzvah of dying *al kiddush ha-Shem* and how great is the merit associated with performance of this mitzvah. Although punishment of the Egyptians certainly resulted in a sanctification of the Divine Name, the Egyptians themselves cannot be regarded as having intended that result and hence they did not become edified or spiritually elevated thereby. Accordingly, when the Jews and the angels rejoiced upon the destruction of their enemies, the Almighty proclaimed, "How can you rejoice when My handiwork is being destroyed?" מעשה ידי טובעין בים ואתם אומרים שירה. In sharp contrast, a Jew who willingly accepts martyrdom *Al kiddush ha-Shem* manifests the highest possible expression of love of G-d as commanded by the verse "And you shall love the L-rd your G-d with all your heart

and all your soul." In accepting martyrdom for his faith the Jew fulfills his duty as servant of G-d in the fullest sense of the term. Such devotion to G-d endows his act with ultimate meaning. Since his death does not represent wanton destruction of a creature of the Almighty it is not possible to decry such a loss as מעשה ידי טובעין בים

Moreover, further investigation raises some doubt with regard to whether this analysis of the nature of the blessing serves as an adequate basis upon which to predicate an explanation of Maharam Schick's position. Elsewhere, *Teshuvot Maharam Schick, Orach Chaim,* no. 336, Maharam Schick himself asserts that the reason that one does not pronounce a blessing upon fulfillment of the mitzvah of remembering Amalek's transgression against the Jewish people is because one does not pronounce a blessing in conjunction with an unfortunate occurrence *(ein mevorchim al ha-kalkalah).* This comment is understood by at least one authority, Rabbi Joseph ha-Kohen Schwartz, author of *Teshuvot Ginzei Yosef,* in comments that appear in his *Yalkut Yosef,* an addendum to Rabbi Reuben Margulies' classic work, *Mekor ha-Berachah,* as reflecting the view that G-d does not rejoice in the destruction of the wicked as expressed in the comment of the Sages מעשה ידי טובעין בים ואתם אומרים שירה. The blessing in conjunction with remembering the deeds of Amalek is assuredly a *birkat ha-mitzvah* and not a *birkat hoda'ah.* Hence *Maharam Schick* apparently maintained that the import of the dictum מעשה ידי טובעין בים is not limited to a *birkat hoda'ah* but is broader in scope and encompasses *birkot ha-mitzvot* as well.

Text of the Blessing

With regard to the precise text of the blessing pronounced upon fulfillment of the mitzvah of *kiddush ha-Shem, Shelah* states that, despite the fact that *Piskei Halachot* declares חייבים לברך על קידוש השם (we are obligated to make a blessing upon sanctification of the Name) this comment should be understood as a statement regarding the obligation to recite a blessing on the mitzvah of *kiddush ha-Shem* but not as reflecting the text of the blessing itself. Two distinct forms of blessings are found in talmudic texts. One

employs the preposition *"al"*; the other employs the prefix *"le"*. Citing the opinion of Riva, cited by Rosh, *Pesachim*, chap. 1, no. 10, who states that with regard to a mitzvah that can be performed through an agent the formula *"al"* is employed but that with regard to a mitzvah that cannot be fulfilled through an agent the prefix *"le"* is employed, *Shelah* argues that, since the mitzvah of *kiddush ha-Shem* cannot be fulfilled through an agent, the proper formula for the blessing is *"le-kadesh Shemo"* and not *al kiddush ha-Shem*. *Shelah* concludes that since both Ran and Rosh[13] concur with Riva, the normative halachic ruling is in accordance with Riva. Thus he concludes that the text of the blessing is

ברוך אתה ה' אלקינו מלך העולם אשר קדשנו במצותיו וצונו לקדש שמו ברבים.

However, although *Shelah* assumes that the halacha is in accordance with Riva, nevertheless, Rabbenu Tam disagrees and formulates a different rule for the distinction between *"al"* and *"le."* Rabbenu Tam as quoted by Rosh, *Pesachim* 1:10, maintains that the word *"al"* is employed only when the fulfillment of the mitzvah is completed immediately, e.g., the mitzvah of reading the *megillah*. However, blessings pronounced upon mitzvot that are ongoing in nature, e.g., *sukkah, tzitzit* and *tefillin*, employ the preposition *"le."* In the case of *tefillin* and *tzitzit*, fulfillment of the mitzvah continues as long as the *tefillin* or *tzitzit* are worn; in the case of *sukkah*, the mitzvah continues as long as one remains in the *sukkah*. In light of this analysis, it would follow that, according to Rabbenu Tam, since fulfillment of the mitzvah of *kiddush ha-Shem* is of limited duration and is not ongoing in nature, one should pronounce the blessing in the form *al kiddush ha-Shem."*[14]

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13. However, *Korban Netanel*, in his commentary on Rosh, *Pesachim*, chap. 1, no. 10, sec. 20, disputes *Shelah's* contention that Rosh maintains the same position as Riva. *Korban Netanel* contends that Rosh espouses the position of Rabbenu Tam.
14. It should be noted that Rabbenu Tam himself, *Sefer ha-Yosher*, no. 340, explains his principle in a manner somewhat different from that ascribed to him by Rosh.

Korban Netanel, in his commentary upon the above-cited statement of Rosh, quotes the *Shelah* as maintaining that the normative ruling is in accordance with Riva. However, *Korban Netanel* maintains that most rabbinic decisors, including the *Shulchan Aruch,* maintain that normative halacha is in accordance with the view of Rabbenu Tam and not in accordance with *Shelah.* Hence, *Korban Netanel* maintains that the correct text of this blessing is *al kiddush ha-Shem."*[15]

Teshuvot Maharshal, no. 60, apparently maintains that the blessing employs neither of these formula but instead is couched in the words *mekadesh shimcha be-rabbim* rather than the usual form *asher kiddishanu bemitzvotav ve-tzivanu.* Maharshal, however, may have been of the opinion that this blessing is a *birkat hoda'ah* rather than a *birkat ha-mitzvah.*

Yosef Ometz records a fourth, and lengthier, text for this blessing:

A careful comparison of the comments of Rabbenu Tam in *Sefer ha-Yosher* and the Rosh will yield significant halachic differences. However, those ramifications would not affect Rabbenu Tam's position with regard to the blessing upon the mitzvah of *kiddush ha-Shem* which, even according to *Sefer ha-Yosher,* would require the formula *al kiddush ha-Shem.*

15. *Korban Netanel's* major argument demonstrating that the normative ruling is in accordance with Rabbenu Tam is the fact that the accepted practice is to pronounce the blessings over *matzah* and *maror* using the formula *al achilat matzah* and *al achilat maror.* The mitzvot of *matzah* and *maror* cannot be performed through an agent. Hence according to Riva one should pronounce the blessings using the formula *le-echol matzah.* Since, however, accepted practice is to employ the word *"al"* it is evident that we follow the opinion of Rabbenu Tam rather than that of Riva.

Mekor ha-Berachah, chapter 10, also raises the objection that, according to Riva, one should pronounce the blessing *le-echol matzah* and *le-echol maror* and *ha-She'elah, Parshat Tzav, She'ilta* 76, no. 6, and the *Sefer Chok Ya'akov, Orach Chayyim* 432:2, for clarification of Riva's position.

Netziv's comments are designed to explain Rambam's position as formulated in *Hilchot Berachot,* chap. 10. However, the sources cited by Netziv do not seem to clarify the position of Riva. *Chok Ya'akov* 432:2 explains that since the biblical verse employs the phrase על מצות ומרורים יאכלוהו the Sages established the formula of the blessing in a manner patterned upon the words of the verse and accordingly ordained that the formula of the blessing be *"al."* See also the

ברוך אתה ה' אלקינו מלך העולם אשר קדשנו במצותיו וצונו לאהוב את השם הנכבד והנורא ההיה וההוה ועתיד להיות בכל לבבנו ובכל נפשנו ולקדש שמו ברבים. ברוך אתה ה' מקדש שמך ברבים. שמע ישראל ה' אלקינו ה' אחד.[16]

Blessed art Thou O Lord our G-d, King of the Universe, who has sanctified us with his commandments and commanded us to love the revered and awesome Name, which was and is and will be, with our whole hearts and with all our spirits and to sanctify his Name publicly. Blessed art Thou, O Lord, who sanctifies thy Name publicly. Hear O Israel, the Lord our G-d the Lord is one.

Yosef Ometz is the only authority known to this writer who indicates that following the blessing upon *kiddush ha-Shem* one should recite the *Shema.* It would appear that, for *Yosef Ometz,* the words of the *Shema* are incorporated as an integral part of the blessing. If *Yosef Ometz* is correct, it is somewhat less troubling that the Sages relate that Rabbi Akiva died while reciting the *Shema* but make no mention of the blessing concerning *kiddush ha-Shem* since, according to *Yosef Ometz,* the *Shema* constitutes the conclusion of the blessing of *kiddush ha-Shem.* Thus, it may be assumed that Rabbi Akiva recited the blessing in its entirety, including the *Shema.*[17]

The words of the Talmud, *Berachot* 61b, stating that when Rabbi

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comments of *Avnei Nezer, Orach Chayyim* 381, secs. 1-3 and *Orach Chayyim* 535.

16. Rabbi Yekusiel Yehudah Greenwald in his *Kol Bo* on *Hilkot Aveilut,* chap. 1, no. 1, sec. 18, seems to accept *Yosef Ometz'* text of this blessing as being authoritative. It should be noted that Rabbi Oshry, *Teshuvot mi-Ma'amakim,* II, no. 4, fails to quote the word *"et"* when citing *Yosef Ometz.* Presumably, this is a mere typographical error. However, Rabbi Grunwald in his *Kol Bo* on *Hilkhot Aveilut,* also quotes *Yosef Ometz* with the omission of the word *et.*

17. Alternatively, it may be argued that recitation of the *Shema* while being executed is itself an intergral part of the fulfillment of the mitzvah of *kiddush ha-Shem.* If so, it is not remarkable that the Sages omit any mention of the blessing which would appropriately have preceded recitation of the *Shema.*

Akiva went to his death "*z'man kri'at Shema hayah* — it was the time for recitation of the *Shema;* while they scraped his flesh with iron combs he was accepting upon himself the yoke of the kingship of Heaven" suggest an alternative resolution to the question of why R. Akiva did not pronounce a blessing upon accepting martyrdom. Since we are pointedly informed that R. Akiva was executed at an hour when *kri'at Shema* should have been recited, it may be inferred that Rabbi Akiva had not as yet fulfilled his obligation with regard to recitation of the *Shema.* Accordingly, when led to his death as a martyr, he seized the opportunity to recite *kri'at Shema.* While engaged in fulfilling that mitzvah he was exempt from pronouncing a blessing upon the mitzvah of *kiddush ha-Shem* on the basis of the principle that when one is engaged in performing one mitzvah one is exempt from performing other mitzvot.[18]

As stated earlier, *Pitchei Teshuvah, Darkei Teshuvah, Chafetz Chayyim* and *She'elot u-Teshuvot mi-Ma'amakim* all accept both the opinion of *Shelah* and his text of the blessing as normative. Thus, for purposes of halacha, it would appear that the text of the blessing to be recited in conjunction with the *mitzvah* of *kiddush ha-Shem* is ברוך אתה ה' אלקינו מלך העולם אשר קדשנו במצותיו וצונו לקדש שמו ברבים.

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18. See Rabbi Zevi Hirsch Meizels, *She'elot u-Teshuvot Mekadeshei ha-Shem,* I, *Kuntres Sha'ar Machamadim,* no. 9, for a further explanation of the narrative recorded in *Berachot* 61b.

The Good Samaritan: Monetary Aspects

Rabbi Aaron Kirschenbaum

In the 1960's, American society was deeply shocked to read about the tragic death of Kitty Genovese, a young woman who was murdered by a mugger on the streets of Queens, despite 38 witnesses who saw what was happening or who heard her cries for help and did not so much as lift a finger to call the police for assistance. In the wake of that horrifying callousness, many conferences were held, much soul-searching took place, to probe the causes and the frequency of this type of behavior.

The position of Jewish law in such a case is well known, being based on the biblical imperative *"lo ta'amod al dam re'echa"* (*Leviticus* 19:16) — a person must not stand idly by while he sees his fellow Jew in danger of life or limb.

Not only his life, but even his possession must also be saved if possible. This law has been discussed previously in this Journal, in Volume IX, "The Sotheby's Case — A Halachic Perspective" by Rabbi Simcha Kraus.

In the present essay, I will focus on the monetary features of this halacha, which requires the bystander to make efforts to rescue, whether it be life, limb, or property. In this regard, three aspects of the halacha will be considered:

(1) The expenditures required of the rescuer.

(2) The compensation due to the rescuer.

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(3) The damages caused by the rescuer.

The monetary rights and obligations arising out of a rescue situation are governed by three halachot: (1) The mitzvah nature of the act. The Torah commands, *lo ta'amod al dam re'echa, Thou shalt not stand idly by the blood of thy neighbor* (*Leviticus* 19:16), which the Rabbis interpreted to mean that "if one person is able to save another and does not save him, he transgresses the commandment."[1] (2) The construction of the duty to save life and limb as an extension of the well-known duty to restore lost articles (*hashavat avedah*). Thus, the Talmud explains: "Whence do we know [that one must save his neighbor from] the loss of himself? From the verse, *and thou shalt restore it to him*[2] (*Deuteronomy* 22:2).[3] (3) An implied employer-employee relationship, where the rescued is construed as the employer of the rescuer. The definition of the nature and rules of this relationship has been transmitted to us as part of the Oral Tradition (*yored she-lo birshut*).

The Mitzvah

Had the duty of the bystander to come to the rescue of his fellow man in peril been derived exclusively as an extension of the law regarding the restoration of lost property, it would have been limited to the personal ability of the rescuer. *Thou shall not stand idly by...*, as a verse independent of the halacha of *hashavat avedah*, implies an all-encompassing duty — including one's financial resources as well. It broadens the duty from the person of the rescuer to his purse, i.e., it obligates him to go to extraordinary lengths to save the victim — even to the extent of actually hiring help.[4]

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1. Maimonides, *Torts*, "Murder and the Preservation of Life" 1:14, summarizing the talmudic discussion in *B. Sanhedrin* 73a.
2. Because they viewed the suffix *it* as superfluous, the *Tannain* interpreted it as meaning *him* and therefore understood the verse as commanding, *And thou shalt restore him* [a person who is losing his life] to *himself* (R. Meir Halevi Abulafia, *Yad Ramah-Sanhedrin* 73a).
3. *B. Sanhedrin* 73a: *B. Bava Kamma* 81b; *Sifrei Ki Tezei* 22:2 (para. 223) (ed. Finkelstein, p. 256).
4. *B. Sanhedrin* 73a.

To what extent does the duty to rescue include one's financial resources as well?

> *Thou shall not stand idly by* means that thou shall not hinder thyself. Rather *go to any extent necessary* in order to save the life of thy fellow.[5]

These words would seem to indicate one's financial resources must be utilized *without apparent limit.*

Jewish law normally requires the maximum expenditure of twenty percent of one's resources, if necessary, for the fulfillment of a positive commandment; but it demands the sacrifice of *all* of one's resources, if necessary for the avoidance of the overt violation of a negative commandment.[6] Since the violation of *Thou shall not stand idly by* is not an overt act, this demand that one sacrifice all one's resources to save one in peril is due to the supreme sanctity of human life.[7] The *actual limit* is the sum total of the rescuer's financial resources. In other words, he need not go into debt in order to save his fellow.[8]

Now, the ransoming of captives is a mitzvah one of whose sources is the verse, *Thou shall not stand idly by.*[9] The maximum one must spend on the ransoming of captives is twenty percent of one's assets.[10] This apparently contradicts Rashi.

It would seem to me that perhaps where the bystander is called upon as an individual to save someone in immediate peril, his obligation has no monetary limit. Where the citizen is called upon

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5. Rashi, *Sanhedrin* 73a. The italics have been provided for the translation of *hazor al kal ha-zedadim.*
6. *Shulchan Aruch, Orach Chaim* 656 gloss.
7. See further R. Hanoch H. Agus, *Marcheshet* (offset; New York, n.d.), I. 43:7-10. Rabbi Agus himself adopts the view of *Rivash* (*Response* 387) that *all* negative commandments—even those whose violation does not entail an overt act—demand that one sacrifice all of one's resources to avoid violation. Hence, according to his view, there is nothing exceptional in Rashi's demand.
8. R. Elijah b. Samuel of Lublin, *Responsa Yad Eliahu* (Amsterdam, 1712), 43.
9. Maimonides *Seeds,* "Gifts to the Poor" 8:10, *Tur* and *Shulchan Aruch Y.D.* 252:1-3.
10. *Marcheshet,* I, 43, 7-10, on the basis of *Gittin* 45a and *Ketubot* 50a.

as the member of the community[11] to participate in the ransoming of captives, he cannot be taxed for more than twenty percent of his wealth.[12]

There is an opinion, however, that just as in all cases of the demand for positive performance, *Thou shall not stand idly by*, too, does not require more than twenty percent.[13]

But the financial obligation, whether it be without limit or limited to twenty percent of one's assets, does not represent a lien on the property of the bystander; the duty remains a personal one, and, as we have seen, the bystander need not go into debt in order to rescue.

The rescuer does have the right to sue the rescued party[14] in order to recover the money he expended.[15] This holds true even if the victim protests, wishes not be rescued, and later refuses to compensate the rescuer.[16] Nay more, there is a lien on his property, and even his heirs may be sued for compensation.[17]

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11. *Cf. B. Gittin* 45a.
12. See further: R. Moshe Shternbuch, *"Be'inyan Oness Belo Ta'aseh Ufidion Shevuyin"*, *Yad Shaul* (Tel Aviv, 1953), pp. 373-375 [reprinted in: R. Yehiel Yaakov Weinberg, *Seridei Esh*, I (Jerusalem: Mossad Harav Kook, 1967), pp. 304-306] Rabbi Agus himself interprets the law, that the duty to ransom captives is limited to twenty percent, as referring only to a situation where the captivity poses no immediate threat to life. Should life be threatened, the duty would require ransom without limit. The wording of Maimonides, *ibid.*, however, renders such distinctions as Rabbi Agus and I have proposed as being forced.
13. See sources and interpretation in: R. Shalom Mordecai Schwadron of Brezan, *Responsa Maharsham*, vol. V (Satmar, 1926), resp. 54.
14. To be elaborated upon below.
15. R. Meir Halevi Abulafia, *Yad Ramah — Sanhedrin* 73a; R. Menahem Hameiri, *Bet Hebechirah — Sanhedrin, ibid.* (ed. A. Sofer,) p. 273.
16. R. Meir B. Baruch, *Responsa Maharam Rothenberg*, IV Prague Collection (M.A. Bloch, ed.; Budapest: J. Steinberg, 1895; Reprint: Tel Aviv, 1969), resp. 39, referring specifically to a captive who is redeemed and then obligated to compensate his rescuers for their expenditures on the ransom. The principle was then extended to all who must be rescued under the "Thou shall not stand idly by" law, including a patient who refuses treatment; the physician is obligated to treat him and may subsequently receive his fee (determined by the courts or by the current rates) despite protestations of the patient; R. Joseph Engel, *Gilyonei Hashass* (New York, 1949,) *Sanhedrin* 73a.
17 *Responsa Rosh* 85:2 R. Joseph b. David Philosoph, *Responsa Bet David* (cited in

The rescued party is exempted from compensation if the rescuer, while saving himself, incurred no additional losses in saving the former — the principle being,[18] "Though one has derived benefit, if the other has thereby sustained no loss, there is no liability [on the part of the former] to pay."[19]

In any event, the personal nature of the obligation to fulfill *Thou shall not stand idly by* also works to the advantage of the rescued party. Even if he is destitute and may subsequently plead bankruptcy,[20]the duty of the rescuer remains unchanged.[21]

The special mitzvah nature of the obligation to save someone in peril impelled the Rabbis to make an enactment providing for the exemption of the rescuer from any tort committed in the course of the rescue operation.

The basic law of torts in the halacha is clear:

Man is always [in the category of one who has been]

Warhaftig, *op. cit*, p. 228) limits this lien on the property to cases where the person in jeopardy (in captivity or in serious illness) does not register protests, but if he protests the rescue, his heirs may not be sued. This opinion appears to be in conflict with the reasoning of *Responsa Maharam* cited in the previous note. Indeed, R. Samuel de Medina (*Responsa Maharashdam*, Y.D., 204) speculates whether it might not be possible to limit the law as stated in *Responsa Maharam* to collection before the ransoming; but had the captive protested, he could not be subsequently compelled to compensate his redeemers after having been redeemed. It seems to me that this speculation on the part of the *Maharashdam* is due to his dependence on the *Mordechai* (*Bava Kamma* 58) for the responsum of *Maharam*. We, who are fortunate in having the original *Responsa Maharam* before us, know that the *Maharam* ruled that even after redemption, a protesting captive may be compelled to compensate his ransomers.

18. *B. Bava Kamma* 2b.
19. R. Chaim Benveniste, *Knesset Hagedolah*, Y.D. 421: (*Tur*) 3.
20. *Rosh* (R. Asher b. Yehiel), *Sanhedrin* 8:2.
21. R. Hameiri, *ibid.* (although the reading is unclear) and *Rosh, ibid.* See further R. Eliezer Waldenberg, *Responsa Ziz Eliezer*, V "Ramat Rachel" (Jerusalem, 1957), sect. 24, and R. Yitzhak Ze'ev Kahana, *Pekuach Nefesh Bahalachah*, *Sinai* 46 (1960), pp. 129-130, who apply these principles to the medical practitioner: A doctor must treat an indigent patient. According to Rabbi Waldenberg, if, however, there are a number of physicians in a specific locality, there must either be a system of rotation for the free treatment of the impoverished or the institution of state-supported medicine.

> "forewarned" [and hence is liable for damages] whether [he acts] inadvertently or willfully, under coercion or voluntarily, whether awake or asleep.[22]

This law is *de'oraita*, of scriptural derivation. Exceptionally, however, a rescuer is immune from suit for the damages he committed.

Thus,

> If one chases after the pursuer in order to rescue the pursued, and he breaks objects belonging to the pursuer or to anyone else, he is exempt. This rule is not [a matter of] strict [*i.e.*, biblical] law [of torts], but is an enactment [*takkanah*] made in order that one should not refrain from rescuing another or lose time through being too careful when chasing a pursuer.[23]

The fourth century talmudic source of this provision clearly reecognized that the biblically ordained strict principle of near-absolute tort liability[24] was being violated here. Thus, Rabba in the Talmud[25] justifies this "violation" as being in the public interest. For if you were not to rule thus [but rather make the rescuer liable], no one would put himself out to rescue a fellowman from the hands of a pursuer.

The *takkanah*, of course, is eminently sensible; and really much ado should not be made of it. I should like, however, to contrast this premedieval dictum with the Anglo-American law of today. In an article entitled, "The Good Samaritan and the Bad", Professor Gregory of the University of Virginia Law School, puts it bluntly:

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22. Based upon *M. Kamma* 2:6; *B. Sanhedrin* 72a; Maimonides *Torts*, "Assaults and Damages" 1:12; 6:1.
23. Maimonides, *Torts* "Wounding and Damaging" 8:12.
24. For if one may not save himself by destroying or by appropriating another's property, it follows *a fortiori* that one may not save others by such measures. See further, R. Margoliot, *Margoliot Hayam*, p. 82.
25. *B. Bava Kamma* 117b.

> Our law says [he declares] that you do not have to volunteer to relieve others from dangers not due to your own fault; but if you do volunteer — if you engage in some activity that is followed by harm to such another — then a court may let a jury scrutinize what you did and call it actionable negligence — *no matter how hard you tried* [Italics provided]. Many people aware of this think it much wiser to do nothing at all. If you are under a duty to "fease", the non-feasance can never be held actionable. But if you do engage in feasance toward anybody, then under most circumstances you must "fease" carefully. Moral: Don't ever "fease" unless you have to!

Professor Gregory is not very proud of his legal system. In a footnote, he writes, "Of course, I do not want to be understood as advising people never to help others who are in danger or distress." He does not; but the law implicitly does. This serious lacuna may be attributed to the general Anglo-American reluctance to countenance nonfeasance as the basis of any liability.[27] I might add that technically speaking, the Good Samaritan is liable to tort action instituted by the very person he saved![28] Compare this with the talmudic statement of the fourth century just cited: our talmudic Good Samaritan, duty-bound to come to the rescue of his fellow, is exempt from liability for the objects he broke whether they belonged to the pursued or to any other person.

Additional Halachot

The rescuer's right to compensation for expenditures and

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26. Ratcliffe, *The Good Samaritan and the Law*, p. 28. Israeli law is not much better; *cf.* U. Yadin, "The Bad and the Good Samaritan" (Hebrew), *Mishpatim* 2 (1970), 260-262; Daniel Friedmann, *Dine Assiat Osher Velo Bemishpat* (Tel Aviv: Avukah, 1970), pp. 27-30; and M. Ben Porat, "The Good Samaritan" (Hebrew), *Tel Aviv University Law Review* 7 (1979-1980), 269-281.
27. See Prosser and Keeton, *The Law of Torts* (5th ed., St. Paul, Minn.: West, 1984), pp. 375-378.
28. See J.R. Spencer, "The Rescuer as Defendant", *Cambridge Law Journal* 28 (19700), 30-33.

losses incurred are alluded to rather briefly and superficially in the sources. It could be that rabbinic authors found it unnecessary to go into detail because it is part of the mitzvah of restoring lost objects to their owners, which is spelled out in great detail in the Talmud, commentaries and codes. The same principles could be applied, where necessary and appropriate, to cases involving the saving of life — with proper provision being made occasionally for the special significance of the latter.[29]

In formulating the rules of compensation we notice the occasional construction of the finder as an implied employee of the owner of the article — for the "labor" expended in finding, maintaining and restoring the article to its owner.

An examination of these rules yields the following conclusions:

(1) The actual act of rescue, being the fulfillment of a religious duty (mitzvah), warrants no monetary compensation.[30]

(2) If the act of rescue takes place during working hours and therefore requires the sacrifice of the rescuer's pursuit of a livelihood, he is entitled to a minimal wage.[31] If this amount is not enough, he must receive court permission for full compensation for the loss involved in leaving work. If the court is not in session, the law of lost objects declares that his own economic interests take priority over the economic interests of his fellow.[32] This declaration is obviously inappriopriate in the case of the peril of one in distress; it seems clear that in the latter case full compensation for the labor of the rescuer would be the rule.[33]

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29. The supposition on my part is substantiated by the style of thinking and the stray references to the law of the lost objects which we find, for example, in: R. Samuel de Medina, *Responsa Maharashdam* (Reprint; 2 vols.; New York: M.P. Press, 1959), *Y.D.*, resp. 204.
30. *Tosafot, s.v. im, Bava Mezia* 31b; also *Responsa Maharashdam, ibid.*
31. *Kefoel batel,* "as an unemployed laborer", the definition of which is the subject of extended discussion; for a digest of the opinions involved in this definition, see *Talmudic Encyclopedia,* XI, *"Hashavat Avedah"*, pp. 82-84.
32. *M. Bava Mezia* 2:9.
33. Full compensation for losses sustained by the rescuer in the absence of court permission or in the absence of explicit warranty by the rescued party when

(3) Expenditures made legitimately by the rescuer would also be recoverable in full.[34]

(4) The cost of damages and disabilities incurred by the rescuer in the course of the rescue operation, however, could not be recovered by the rescuer. The Jewish law of tort obligates the tortfeasor, and the tortfeasor only, for damages incurred; no one else — not even the one as interested as the rescued party himself — is so obligated.[35]

Although the above is but a broad outline, it suffices to give us a general view of how Jewish law copes with the problem of the losses incurred by the Good Samaritan.

Religion and Law

The personal, religious nature of the duty that one has to rescue has led at least one later medieval authority to limit the rescuer's right to recover the losses he incurred in the course of his rescue operation in a number of ways.

(1) The rescued party must, it is true, compensate his rescuer for his losses. But if the former is bankrupt, he need not make said compensation, even if he subsequently comes into a fortune.[36]

(2) The rescuer's right to be compensated for his losses exists

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circumstances of speed and anxiety preclude the possibility of making such warranty is also evident from Rosh, *Bava Mezia* 2:28, cited also in *Tur, Ch. M.* 264, *Bet Yosef*, H.M. 265, and *Aruch Hashulchan, Ch.M.* 264:3.

34. Maimonides *Torts*, "Robbery and Lost Objects" 13:19; *Tur* and *Shulchan Aruch Ch.M.* 267:26; with special provision being made to facilitate collection. See sources cited above, note 15.

35. The *obligation* of the rescued party to reimburse his rescuer for his labor and expenditures, as that of an owner of a lost object to reimburse the one who found and returned it to him, is, in all probability, that of an implied contract of labor. (See further *B. Bava Mezia* 101a and Maimonides *Torts*, "Robbery and Lost Objects" 10:4 for the rabbinic analogue to *negotiorum gestio.*) Such contracts in Jewish law do not cover disabilities of the laborer incurred in the course in his employment.

36. This ruling is based upon *M. Peah* 5:4 (majority opinion) and *Tur Yoreh De'ah* 253(4). Maimonides, however, in his *Commentary to the Mishnah (ibid.)* does charge the former bankrupt, who at present can afford to do so, with the moral duty to compensate his rescuer; cd. *Tosefot Rabbi Akiva Eger* and *Tif'eret Yisrael* Boaz, *ad. loc.*

only if the rescue operation is successful. If he failed in his attempt, his right for compensation is, at most, that of a minimum wage for labor expended.[37]

(3) The obligation to compensate the rescuer for his losses devolves upon the rescued party himself and upon no one else, not even his close relatives.[38]

It is relevant to note that these three limiting rulings were not regarded as discouraging bystanders to do their duty. On the contrary, the very reasoning behind them is: "for the reason [that the bystander] is going to such lengths, even to the extent of incurring monetary losses, is not that he is doing so in behalf of his fellow [who is in peril] exclusively, but rather he is also doing so in his own behalf, to save himself [*i.e.*] to discharge the obligation placed upon him by [the Holy One], may He be blessed. Moreover, his [heavenly] reward is a very great one indeed."[39]

A final thought. The halacha makes no special provision for the bystander who is disabled as a result of his rescue attempt or for his dependents if he dies in that attempt. Traditional Jewish society had its established ways of caring for the crippled, for widows and for orphans. The welfare state has its ways. Would it not be proper for halachic leaders to press for special provisions whereby the community would regard these dependents as entitled to specific benefits?[40] (Special provisions under the National Insurance Administration, *Hamossad Levituah Leumi*, in Israel, for example, could be one possibility.)[41]

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37. This ruling is derived *a fortiori* from the case of an unsuccessful attempt to salvage someone's property; see *B. Bava Kamma* 116a (bot.)
38. This ruling is based upon a narrow, literal interpretation of Rosh, *Sanhedrin* 8:2.
39. All the foregoing: *Responsa Maharashdam*, Y.D. resp. 204.
40. See further Wallace M. Rudolph, "The Duty to Act: A Proposed Rule", *The Good Samaritan and the Law*, pp. 243-278; and Warren P. Miller and Michael A. Zimmerman, "The Good Samaritan Act of 1966: A Proposal", *ibid.*, pp. 229-300.
41. For an example of the utilization of a national (quasi-governmental) institution for the implementation of the halachic requirements in a similar though not identical, way, see R. Waldenberg, Jerusalem 5717 *"Ramat Rachel"*, sect. 24:6-7.

Brit Milah and the Specter of AIDS

Rabbi Alfred S. Cohen

One of the more frightening aspects of modern life is the specter of the AIDS epidemic, which has swept across continents like a whirlwind, bringing death and hysteria in its wake. At first considered an affliction which threatened only the fringes of society, AIDS has now come into its own as a threat to even the most clean-living and innocent persons. Retroactively, hospital patients who thought their lives had been saved by an emergency blood transfusion, or hemophiliacs who received blood treatments, or even nurses, doctors, and dentists have found out to their horror that not only have they become victims of the disease, but in addition, as carriers, they have unknowingly infected other innocent persons, family members, or friends.

No one, we are cautioned, can feel smugly secure that he or she is not at risk, that AIDS is of no concern. Consequently, we must re-examine some of our most common practices and consider whether modifications ought to be made, either as a precaution to stem the spread of AIDS or even as a measure of self-protection.[1] This is a particularly cogent question with reference to the

1. In recent years, it has become common practice in most mikvahs to place chlorine pellets in the water, to remove the danger of contracting AIDS or other communicable diseases.

Rabbi, Young Israel of Canarsie;
Rebbi, Yeshiva University High School

performance of the *Brit Milah*, which is an almost universal practice among Jews. As we shall see, some of the halachic procedures attendant upon the *Brit* may harbor tremendous dangers not only for the baby or the *Mohel* at any particular *Brit*, but even for the entire Jewish community.

This study will examine the possible dangers and the halachic questions which need to be addressed in order to find resolution for what may prove to be a dilemma of epic proportions.

Although we are all familiar with the requirement of the Torah that all Jewish males receive a *Brit*, we should not confuse this with the procedure loosely termed a "circumcision", or removal of the foreskin. Actually, "*Brit*", according to the halacha, is a more extensive procedure. The Mishnah in *Shabbat* 133a rules עושין כל צרכי מילה בשבת מוהלין פורעין ומוצצין... "On the Sabbath, we (must) perform all the requirements of *Milah*: circumcision, *Priah*, and *Metzitza*." Thus, Jewish law apparently recognizes three parts to the *Brit Milah* — removal of the foreskin; *Priah* which is tearing of the mucous membrane which lies under the foreskin, and *metzitza*, or "sucking out" the blood from the wound, for the purpose of cleansing the area and removing germs which might harm the infant.[2]

The traditional method of *Metzitza* was — and is — accomplished by "*metzitza be'peh*" whereby the *mohel* places his mouth over the wound and sucks out some blood. In light of the medical reality that one of the primary methods for transmitting the AIDS virus is by "exchange of body fluids," particularly blood, there is great concern whether this *metzitza be'peh* is advisable or even permissible in our day and age.[3] Simply put, a *Mohel* performs

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2. The Gemara considers the infants to be in mortal danger unless the blood is drawn out. For a more precise definition of this danger, see תפארת ישראל and שרי חמד מערכה קונטרס המציצה, and ספר זכרון ברית לראשונים.
3. AIDS is still a disease about which not enough is known. In an article in *The New York Times* on Friday, May 6, 1988, it was reported that preliminary research indicates that "Human saliva contains substances which prevent" the AIDS virus from infecting white blood cells. Whether further tests will demonstrate that saliva is an effective barrier remains to be shown.

dozens, maybe hundereds of *milahs* a year, often upon children whose families he does not know at all. What if the father or mother of the baby had the AIDS infection, even for the most innocent of reasons, and the child was born harboring the virus? Potentially there may be great danger that the *Mohel* may get infected. Is the *Mohel* required to place himself in mortal danger? How integral a part of *milah* is *metzitza*, particularly *metzitza be'peh*? Or let us approach the matter from the other direction — what if the *Mohel* is or, unbeknownst to himself, becomes a carrier of the virus? He could become another "Typhoid Mary", spreading the disease to hundreds of victims, unaware of what is happening. Are the parents obligated under Jewish law to place their son in such danger?

In order to answer these questions, we shall have to analyze a number of issues:

1) What is the role which *metzita* plays in the *brit milah*? Is it a therapeutic measure, essential for assuring proper healing? Or is it an integral part of the *milah* itself?
2) How essential is *metzita* specifically by mouth to satisfy the halachic fulfillment of the mitzvah of *brit milah*?
3) Can or should the element of *pikuach nefesh* (mortal danger) obviate the requirement for *metzitza be'peh*?
4) To what extent does medical opinion influence halachic decisions?
5) *Metzitza be'peh* has been performed at all *brit milahs* for thousands of years. Is it permissible to relinquish a *minhag*? What is the power of a *minhag*?

In addressing these very serious questions, we are fortunate that we do not have to start *de novo*, for it is a topic which was at the center of a great deal of conflict and controversy during the nineteenth century, and there is an extensive body of halachic

literature devoted to analysis of the question.[4] A major assault was undertaken by various Reform spokesmen in Germany during the course of the last century, attacking circumcision altogether as a vestigial barbaric ritual, an unworthy and unhealthy practice for people who considered themselves enlightened and rational. There were Reform "rabbis" and laymen who challenged the right of the Jewish *Gemeinde* (community organization) to force its members to circumcise their sons as a pre-condition for registering them as Jews. Even among those who did not seek to abolish circumcision entirely, there was nevertheless a widespread sentiment that *metzitza* — and certainly *be'peh*!! — was a disgusting, unsanitary, and totally unacceptable practice.

Consequently, many halachic authorities responded to the attacks on *brit milah*, in an effort to clarify and protect the traditional practices. But underlying all their careful analysis and explication is the awareness that, fundamentally, the "reformers" were mounting an attack on millenia of Jewish tradition in an attempt to break down the authority of Torah and tradition and replace it with their own concepts of a universal religion of "enlightened humanism." To their credit, the rabbis did not descend to the level of polemic and invective which was leveled at them, but chose to respond to the calumnies voiced against *milah* with reasoned arguments and careful explanation of the basis for the traditional practice.

The Maharam Schick took an active part in the controversy, for by the time he was writing he saw that the assault on *brit milah* was more than just an endeavor to improve the welfare of Jewish infants. He clearly understood that the true impetus for all the polemics was a challenge to the authority of the rabbis and, even more, a challenge to the supremacy of halacha, to the belief of *Torah miShamayim* (the Torah as being a Divine instrument). In his rulings he forbade a *mohel* from participating in a *brit milah*

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4. 236-281 שדי חמד, חלק ח, דף 182-632. For a brief review of all the opinions, see ספר הברית דף קפ"ה.

which did not include *metzitza be'peh.*[5] Moreover, he goes so far as to argue that possibly *metzitza be'peh* is on the level of "*halacha leMoshe miSinai*" — i.e., an express oral tradition dating back to Moshe Rabbenu — in which case, even if it could be argued that "Nature has changed", no change in the tradition could be countenanced.[6]

Furthermore, precisely because the challenge to traditional *brit milah* was perceived as an attack on the very heart of Judaism, he forbade even the slightest deviation from age-old practice.[7] "Because today היום אמורים לו עשה כך ולמחר כך וחייב למסור נפשו they tell him to do this, and tomorrow they will tell him to do that — and therefore he is obligated to give his life [to uphold the principle that the laws of the Torah are inviolate]." In *Sanhedrin* 74 the Gemara teaches that when there is a general attack on Judaism, one must choose death rather than accept even so minor a change as modification of the traditional type of laces Jews used in their shoes. Maharam Schick considered the contemporary situation comparable in severity, and insisted that it is forbidden to budge an iota from previous tradition.

It is perhaps difficult to rely upon this aspect of the Maharam Schick's written response as a precedent in our own situation, for surely the current suggestion that some modification be introduced in *metzitza* is not coming at all from the camp of the irreligious or the anti-religious. Indeed, few but the most meticulous Jews are familiar with the practice of *metzitza be'peh.* Rather, rabbinic scholars and Orthodox medical professionals are raising the suggestion, and their sincere concern for the physical welfare of the Jewish community is not being seriously impugned. Fortunately,

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5. שו"ת מה"רם שיק יו"ד רמ"ד.
6. He does not define how one determines what is a הלכה למשה מסני.
7. שו"ת מהר"ם שיק או"ח קנ"ב. As a student of the *Chatam Sofer*, Maharam Schick felt compelled to respond to a letter of the *Chatam Sofer* which had been published, declaring that *metzitza* is not an essential part of the *Brit* and, if necessary, could be omitted. Maharam Schick writes that the letter was only discussing a case of הוראת שעה, and was a case of the lesser of two evils, from which no precedent could be drawn.

most of the rabbis who defended *brit* practices a century ago chose to buttress their opinion with careful and erudite halachic analyses of the purpose, importance, and rationale of *metzitza be'peh*. Their opinions are highly relevant to the present discussion.

The first point which needs to be clarified is the proper characterization of *metzitza*: what is its function? Usually, *metzitza* is seen as a measure instituted to assure the health and safety of the infant. Such is the view of R. Yaakov Ettlinger[8] relying on the Rambam.[9]

> ואח"כ מוצץ את המילה עד שיצא הדם ממקומות הרחוקים כדי שלא יבא לידי סכנה
>
> And afterwards, he [the *mohel*] sucks the *milah* until blood comes out [even] from the distant parts, so that [the child] will not be in any danger...

Following this reasoning, Rav Ettlinger refuses to sanction elimination of *metzitza be'peh*, which he concludes is the best way to draw blood even from the distant vessels.[10] His defense of *metzitza be'peh* was actually a counterattack on those who wanted to do away with the practice, which he maintained was an important saftey measure.

Many rabbis contend that *metzitza* is a procedure mandated by the Gemara as a critical step in insuring the cleanliness and promoting the healing of the incision. For that reason, the Gemara insisted that it be performed even on Shabbat (as *pikuach nefesh*), and instructed that any *mohel* who neglected this step was to be removed from his position.[11]

> אמר רב פפי האי אומנא דלא מייץ סכנה הוא ועברינן ליה פשיטא מדקא מחלל עליה שבתא סכנה היא מהו דתימא...

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8. שו"ת בנין ציון א: כג, כד.
9. הלכות מילה פרק ב הלכה ב.
10. But see ספר הברית דף רי"ז, which cites the opinion of the Radvaz, who had a different understanding of this passage in the Rambam.
11. שבת קל"ג.

However, reluctance to countenance any changes in the *metzitza* by mouth may arise from a different conception of that procedure: while it is true that it surely has a therapeutic purpose, there are some scholars who claim that *metzitza* is an integral part of the *brit milah* itself, not only an aid to healing. They interpret *metzitza* as fulfilling the obligation of *"hatafat dam brit"*, "letting the blood" for the purpose of establishing the covenant between G-d and the Jew.[12] This second interpretation arises from the somewhat ambiguous text of the Mishnah.[13]

> עושין כל צרכי מילה בשבת, מוהלין פורעין ומוצצין ונותנין עליה איספלנית וכמון.
>
> On Shabbat, we do all that is necessary for the *Milah* — we circumcise, we do *per'iah*, we suck out the blood, and we bandage the wound.

The question is where *metzitza* belongs in this list — is it part of the first group — the *milah* and *periah*, which are certainly the essence of the mitzvah, or does it go with the bandages, which are clearly only necessary aids to maintain the infant's health?

Already in the days of the *Rishonim*, this question was taken up. The Ran[14] conjectures that were the *metzitza* only for medicinal purposes, the Mishnah would have termed it *"refuah"* (healing), rather than *"tzorchai milah"*, i.e. one of the necessities of the *milah*. ואפילו במציצה עד מה יש לעיין דכל דפרע הכי סיים צרכי המילה ודילמה המציצה יקריא רפואה ולא צורך מילה וצ"ע. Obviously, resolution of this question is a major factor in determining whether modifications can be made in the *metzitza* process. If it is part of the *milah*, we have to follow exactly the criteria for correct *milah*; but if it was instituted to promote healing, and there are better or less dangerous methods available to promote healing, serious consideration ought

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12. שו"ת מהר"ם שיק שם.
13. משנה, שבת קל"ג.
14. חידושי הר"ן שבת קל"ב. Also cited in משנה ברורה של"א. עיין מועדים וזמנים חלק ב ס' ק"מ בהג"ה אות ב.

to be given to these alternatives. Rav Asad, in his commentary on *Shulchan Aruch*,[15] points out a number of practical halachic differences which would arise from the latter reading of the Mishnah.

Nishtanah Hateva?

The nineteenth-century rabbinic defenders of *milah* also approached the subject from a different vantage: Let us assume that *metzitza* is not actually part of the *brit* itself but was instituted by the Gemara as an essential life-saving procedure. In that case, if one could demonstrate that lack of *metzitza* does not pose a mortal threat to the infant, it might be possible to make some change. That is not to say that the Gemara was mistaken when it declared *metzitza* vital. However, we do occasionally find our Sages concluding that *"nishtanah hateva"* "Nature [of things or of people] has changed." When our own experiences directly negate an observed phenomenon in the Gemara, we are forced to conclude that the realities which they confronted were not the same as those we experience. Thus, we may posit that evidently things are not the same as they used to be.

Perhaps it would be possible to argue that albeit in talmudic times there was a danger to the child if *metzitza* were not performed by mouth, nowadays the medical reality is such that absence of *metzitza be'peh* does not pose a threat to the child's wellbeing. Such an argument need not be rejected on religious or procedural grounds, for eminent halachic authorities have employed a similar rationale for explaining other changes in Jewish law.

For example, the Gemara is of the opinion that a baby born in the eighth month is not a viable child;[16] technically, one does not violate the Sabbath to save such a child's life, since he cannot live anyway. But, as the Ramo[17] noted some four centuries ago,

> Many wonder at this [teaching of the Talmud that an eighth-month baby cannot live], for experience denies

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15. יו"ד רנ"ח.
16. שבת קל"ה.
17. רמא, אבן העזר קנ"ו.

> [the validity for their teaching]; therefore, we must say that nowadays *there has been a change in this matter*, and so in a number of situations. (italics added)
>
> ואע״ג דאמרינן יולדת ל״ט אינה יולדת, כבר תמהו על זה רבים שהחוש מכחיש זה אלא שאנו צריכים לאמר שעכשו נשתנה הענין וכן הוא בכמה דברים.[18]

This was also the reasoning of Rav Yosef Karo, author of the *Shulchan Aruch*, in discussing another of the procedures of *brit milah*. It used to be the practice to wash the baby with warm water, both before and after the *brit*.[19] So vital was this measure considered for the baby's health that, if for some reason no warm water was available on Shabbat, it was even permissible to heat up water for this purpose.[10] Yet Rav Karo notes that nowadays this is not necessary — we see that babies are not washed with warm water, and nothing happens to them. Therefore, he concludes, it must be that "*nishtanah hateva*," Nature has changed, and it is no longer an element of danger.[21]

We may not cavalierly declare, however, that any regulation which no longer appears necessary or rational should be abolished on the grounds that "Nature has changed." It is an argument that halachic experts are loath to employ, and one would hardly dare make such a declaration without ample precedent.

The *Tifereth Yisrael* undertakes to weigh the halachic validity of medical opinion; we cannot out of hand reject a medical statement which contradicts the Gemara, for, as we have seen, it is possible that matters have undergone a change since the time the Talmud was written. If it is necessary to conclude that "*nishtanah hatevah*", perhaps we will have to reach that conclusion. But

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18. See also מגן אברהם קעג־א, קעט־ח; תוספות ע״ז כ״ד: ד״ה פרה; תוספות מועד קטן י״א, ד״ה כוורא; צל״ח ברכות ט: תשובות חתם סופר קיא; חזון איש אבן העזר י״ב אות ז.
19. משנה שבת פרק יט משנה ג.
20. שם.
21. However, the Ramo notes his disagreement with him on this point, arguing that there has been no change.

ultimately, *Tifereth Yisrael* concludes that we cannot justify an argument of *nishtanah hateva* in this case. It has never been shown that sucking out the blood is *not* an important factor in the remarkable track record of *brit milah,* halachically performed, as a spectacularly safe procedure for thousands of years. Doctors readily admit that indeed there is some value to *metzitza,* and that it reduces swelling. Therefore, the nature of things has not really changed so much that we can reject the Talmud's evaluation. Consequently, he writes that *metzitza* must continue.[22]

Minhag

A further very strong consideration for continuing with *metzitza be'peh,* in the eyes of many rabbinic authorities, is the force of Jewish custom, a sacred *minhag* which has been observed for thousands of years. Not only is religious authority apt to be somewhat conservative when it comes to innovation, but the halacha itself grants tremendous significance to a custom; it is not to be taken lightly. This brings us to the next major question which we have to consider: how much weight does a *minhag* carry, under what circumstances may an alteration be made in age-old custom, and is such a change warranted by the present circumstances?

There is no question that in Jewish law, a custom attains great sanctity over time, sometimes even greater than that of a halacha. In *Yevamot* 115, the Gemara declares that even if Eliahu the Prophet himself were to appear and instruct us that we are mistaken in the way we perform a certain mitzvah, "we do not listen to him, since the people have already become accustomed [to do it a certain way...]." It is startling to discover that even when scholars realized that the community was following an incorrect custom, they were reluctant to effect alterations.[23] In *Taanit* 28b, we find Rav, the

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22. תפארת ישראל, פרק י"א דמילה משנה ב אות ט"ו. This position was approved also by R. Eliezer Horowitz, שו"ת יד אליעזר סי' נ"ה. In משנה ברורה, ביאור הלכה, דיותר טוב ממציצה בפה ואפילו בשבת יש להתיר the *Chafetz Chaim* writes שלא א' בספוג. I have also heard that in pre-war Vilna no *mohel* ever made *metziza* by mouth.

23. There are many other such instances recorded: באר שבע נ"ג considered the

greatest rabbinic authority in all of Babylon, unwilling to stop the common custom of reciting *Hallel* on *Rosh Chodesh*, although, since the prayer was not warranted, they were reciting a *bracha* in vain, which according to many *poskim* is a biblical transgression![24]

So strong is this sentiment that an accepted custom ought not be tampered with, even if it seems misguided, that Rambam penned the classical ruling, as follows:

> והנהיג מנהג ופשט בכל ישראל ועמד בית דין אחר ורצה לבטל אינו יכול לבטל עד שיהא גדול ממנו בחכמה ובמנין.
>
> And if this custom was accepted and spread among all the Jews, and a later *Bet Din* wants to abolish [the custom], it may not do so unless it is greater [than the previous *Bet Din* which instituted the custom] in both wisdom and number.[25]

In light of the foregoing, it is understandable why the rabbis are so reluctant to countenance any tampering with the customary manner of performing *metzitza*. One could argue, however, that the Gemara never mentions *metzitza by mouth*. Although it is adamant about the importance of *metzitza*, it does not specify that it must be by mouth.

Perhaps based on this consideration, the community of Frankfurt-am-Main in 1885 published a pamphlet outlining the position of the Orthodox *Gemeinde* on this thorny question. Under the direction of Rabbi Samson Rafael Hirsch, the tiny embattled minority of Orthodox Jews had become a significant entity within

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custom of *kapparot* on Erev Yom Kippur as wrong, similar to the forbidden דרכי אמורי. However, he would not change it. Similarly, the *Bet Yosef* cites the opinion of the Ran, who considered that it was technically permissible to chant the Megilla in translation, so that it could be understood by all, but would not allow it because it would be a change in the custom. בית יוסף תר"ץ.

24. The text does add, however, that he would have stopped them were it not for the fact that they omitted certain parts of the *Hallel*.
25. However, there is a distinction between the case cited by the Rambam and the one we are dealing with: the Rambam discusses a regulation established by an official *Bet Din*, while it is difficult to know who instituted the custom of *metzitza be'peh*.

the very bastion of Reform in Germany. While adhering strictly to the dictates of halacha, the committed Jews in Frankfurt nevertheless eelt that they had to confront the reality of strong scientific objections to the traditional methods and respond to the denunciation of ancient *milah* practices as barbaric and atavistic.[26]

In the pamphlet, it was announced that hereafter all *milahs* performed in the *kehillah* would include *metzitza*; however, rather than exposing the open wound to direct contact with germs which might be present during oral suction, the *mohel* was to use a sort of glass tube, with an opening at the top, so that his mouth would not come into direct contact with the cut, nor would blood enter his mouth. The new directive sought to comply with the talmudic requirement of *metzitza* and even continue the ancient custom of *metzitza be'peh*, albeit with a slight modification which could nevertheless still be termed *metzitza be'peh*. Included in the pamphlet was a letter from R. Yitzchak Elchanan Spector, Rav of Kovno, expressing his approval of the new procedures. (In later years, acceptance was also to be forthcoming from Rabbi Chaim Berlin, Rabbi Chaim Soloveitchik, and Rabbi Aharon Kotler.[27])

Nevertheless, there were and are *poskim* who reject the proposal as an unacceptable innovation, contrary to the established *minhag* which the Jewish people has observed for thousands of years. They insist that the halacha does require direct oral contact, pointing to the express statement of the Ramo and Maharil that the *mohel* must spit out the blood and that he has to rinse out his mouth before reciting the blessing.[28]

For those who follow the many *poskim* who approved the glass tube, it would seem to be an ideal solution for the AIDS problem, since according to many it satisfies the criterion of *metzitza* (and perhaps even *metzitza be'peh*), it does no violence to *minhag Yisrael*, and yet it conforms to the primary objective of our

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26. As reported in ספר הברית ר"ב.
27. שו"ת הר צבי ריי"ד; פני הדור חלק ד קצ"ט; מהריץ חיות שכ"ב; ספר הברית דף רכ"ב.
28. רמ"א יורה דעה רס"ה: א: מהריל הלכות מילה. ארי ליקוט תורה לך לך; זהר כי תשא עמוד ק"ץ; שרי חמד דף 264.

sages to promote greater opportunities for sanitary healing of the circumcision.

There is, furthermore, a very strong argument to be made to the effect that our sages were not reluctant to modify a custom if they perceived the innovation as an improvement. Interestingly, a classic example of this readiness to innovate occurs in connection with another part of the *milah* process — *periah*.

According to all halachic opinion, *periah* is part of *milah* as mandated by the Torah. Rambam[29] describes *periah* as ואחר כך פורעין את הקרים הרך שלמטה מן העור בצפורן ומחזירין לכאן ולכאן. There is absolutely no ambiguity in his instructions: after the initial cut, the *mohel* should use his fingernail to tear the soft mucuous membrane under the foreskin and roll it back on either side. The *Shulchan Aruch* likewise specifies this.[30] Yet R. Yaakov Emden, living in the eighteenth century, indicates that by his time it had long been the practice to perform *milah* and *periah* in one step instead of two. Furthermore, he cites sources to indicate that this change had been instituted at a much earlier date, perhaps even by the time of R. Hai Gaon, who died in the eleventh century! Nowhere is any objection recorded despite the fact that *periah* is unquestionably part of the *milah* itself, and if the procedure must be performed exactly as mandated since earliest times, this "innovation", one would think, should have evoked a storm of bitter criticism. There could have been ample grounds for objecting to a change in the *milah-periah*. The Midrash, extolling the wisdom and beauty of the human body which is uniquely constructed for the performance of mitzvot, notes that G-d gave people nails on their fingers so that they could perform the rituals of *melika* (a form of *shechita* of birds in the *Mikdash*) and *periah*. Nevertheless, when *mohelim* developed a more efficient method of performing *milah* and *periah* in one step, no objection was raised.

Perhaps we have to conclude, then, that the violent opposition to any modification of *metzitza* procedure in the nineteenth century

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29. הלכות מילה פרק ב הלכה ב.
30. יורה דעה רס"ד, ג.

arose not from the particulars of the suggested changes but rather from an awareness that the entire controversy was fundamentally a ruse by the enemies of Judaism to destroy the foundation of Torah observance. Thus, they were resisted absolutely, on ideological rather than on technical grounds. But absent ideological bias, there may be times when modifications may be warranted or advisable.

Medical Opinion

The *brit milah* controversy in the last century highlighted a vexing problem in Jewish legal thinking, one which recurs in many areas of life, not just this one. How much validity should be given to scientific opinion when it comes to the formulation of normative Jewish practices? More specifically, how does the halacha react when scientific opinion seems to contradict talmudic principles?

Before we explore this topic, we must insert an *obiter dictum:* we discount altogether the scientific or medical opinions of people who do not believe in the Torah or who are advocates of a lifestyle contrary to Jewish thinking. As the *Tifereth Yisrael* wrote, in rejecting their contentions,

> ואני מוסיף דאנו רואים היום דרופאי ישראל שהרוב שלהם ובזדון ליבם מיעצים להדיח בענין אכילת איסורים. ...

> ... for we see that the majority of Jewish doctors ... out of the waywardness of their hearts advocate that [we] should eat forbidden [non-kosher] foods.[31]

However, in the present situation, the cautions voiced by immunologists about transmitting the AIDS virus are not directed specifically toward any Jewish practice; moreover, it is conscientious Orthodox medical professionals who are bringing to the fore their genuine concern that the traditional *milah* practice might inadvertently spread the disease.

Already in the days of the Gemara, we find that the rabbis did seek medical advice; however, it is difficult to gauge what credence

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31. תפארת ישראל יומא פרק ח משנה ה.

they gave to medical opinion. In *Nidah*[32] we find the following account: R. Eliezer told about a woman who approached his father, R. Zadok, to find out what to do, for she was discharging "some sort of red pieces" (*k'min kelipot adumot*). R. Zadok asked the other Sages, and they asked the doctors, who responded that this woman must have some internal wound which is sloughing off these red pieces. They said "Let her put the discharged pieces into water; if they dissolve, she is *Tameh* (ritually impure)."

The Rosh[33] (in the early 14th century) pointed out the major difficulty with this passage — what is it coming to teach us? If the rabbis believed the doctors, why did they say to test the discharge? And if they were not prepared to believe the doctors, why ask their opinion? How then do we decide whether the Gemara felt that medical opinion has validity?

The Maharik,[34] also a *Rishon*, felt that the rabbis were indicating that they were prepared to follow the doctors' ruling.[35]

R. Yosef Karo, the great sage who wrote the digests which

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32. נידה כב:.

33. שו"ת ראש כלל ב סימן ח.

34. מהרי"ק שורש קנ"ט. This is in keeping with the halachic premise that any "craftsman" can be trusted when speaking about a matter in his profession, since he would not want to jeopardize his reputation by lying.

However, the Maharam Schick (או"ח קנ"ב) writes that anyone who claims *metzitza be'peh* is dangerous is just a "liar," for he himself had been a *mohel* for forty years and had never seen any child have a bad experience. See also חת"ם ספור רע"ז who feels that we cannot rely on a phenomenon observed in the non-Jewish community to draw conclusions about the Jewish one.

For a complete study of the subject see

באר היטב יו"ד קפז' י"ז, חתם ספור אבן העזר ב'ס"א, פתחי תשובה שם ס"ק ל', תשובות פני יהושע לב'ד, משפט עוזיאל י"ד א'כ"ו, דעת כהן ק"מ, חכם צבי מ"ז, מנחת אלעזר חלק א'ג'ד'ה, הר צבי יו"ד קמט, שדי חמד מערכה יום כיפור ג'ה.

35. When Rosh studied the passage, he apparently attributed the last sentence to the rabbis — i.e., they told the woman to make the test, in order to verify the medical diagnosis. But one could also attribute that last sentence to the doctors, who advised the rabbis to tell her to test their diagnosis. In other words, the doctors themselves might have wanted to confirm their diagnosis by means of a test. (תשובות עבודת הגרשוני כב). See also חתם ספור יו"ד קע"ה about the advice of a non-Jewish doctor, and באור הלכה תרי"ח who leaves the question of the reliability of a non-Jewish doctor's advice to the discretion of the rabbi.

form the veritable foundation of Jewish law, seems to be prepared to rely on the medical profession. In *Bet Yosef*, he explains that since the doctors knew that such a discharge (as was described in the *Nidah* passage) cannot come from the uterus and of necessity has to be from the kidneys, we can rely on them.[36] Also, as we noted earlier, he was prepared to go along with the current medical thinking of his time which held that there was no need to wash a newborn baby with warm water before and after the *milah*, and therefore would not allow water to be heated up for this purpose on the Sabbath.[37]

But both rulings are challenged by the Ramo,[38] the Ashkenazi rabbi whose gloss on the *Shulchan Aruch* and *Bet Yosef* set the standard for Ashkenazi Jews. Commenting on the first case above, he writes

> And I am surprised at him, for it says in the Gemara that we do not rely on the doctors *alone*...

Apparently, he interprets the talmudic passage as indicating that the rabbis were interested to know the medical opinion but were not prepared to follow it slavishly; therefore, they advised the woman to perform a test to see whether the diagnosis was accurate.

Chatam Sofer, in the nineteenth century, is not prepared to give very much weight to medical opinion. However, he concedes that at the very least, the doctor's pronouncement should be enough to create a doubt in our mind. Thus, on Shabbat or Yom Tov, if the doctor declares that a patient's life is in danger, we follow his directions and transgress Shabbat or Yom Tov, not necessarily because we accept his word implicitly, but rather because his expert opinion is enough to engender a doubt, a *safek*. And in a situation of *safek pikuach nefesh*, the rule is that we take no chances and do whatever is recommended to save the patient's life.[39]

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36. יורה דעה קצ״א ד״ה כתב.
37. או״ח שלא.
38. יורה דעה קצא אות ד, או״ח שלא אות ב. Just how the Ramo differs in practical terms is not easy to understand. See his הגהות to the טור.
39. אגרות משה יו״ד ב־ס״ט. See also פ״ב: שו״ת חת״ם סופר אבן העזר ב.

In a further explanation of his position, the *Chatam Sofer*[40] seeks to show that medical opinion is accepted by the halacha in a general sense only. But since it is not an exact science when it comes to issuing a ruling in any specific case, the rabbis should not rely on this general medical advice as binding. If they consider that the person for whom they have to make the ruling fits into the general category (*rov*), they may choose to rely on the doctors.[41] But, for example, in the case of an infant who has to undergo *brit milah*, the Gemara has a specific evaluation of the status of the child — the Gemara holds that there is a *chazaka* (prevailing condition) that all boys who are being circumcised are in mortal danger unless *metzitza* is performed. In such a case, the general medical opinion that germs are present and may cause infection cannot override the rabbinic certainty that if *metzitza* does not take place, the child is in danger of his life.

However, when the medical opinion (*rov*) does not contradict the prevailing reality (*chazaka*) as seen by our Sages, it seems prudent to take it into account. Thus, the glass tube or other methods of extracting blood from the wound would satisfy the dictates of halacha in a number of ways:

> (a) *Metzitza* is performed, assuring that blood is drawn from the wound, thus satisfying the criterion of the Gemara.
> (b) It is sanitary, thus avoiding the danger of contamination about which the medical profession warns.

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40. שדי חמד מערכה יום כפור ג אות כז. See further שו״ת חת״ם סופר יו״ד קע״ה, שו״ת חת״ם סופר יו״ד קע״ה.

41. The Gemara, שבת קכח rules that for the first three days after a woman gives birth, she is not permitted to fast on Yom Kippur, and we violate the Sabbath for her. Rambam, in recording this law, adds "whether she says she needs it or even if she says she doesn't need it." (הלכות שבת פרק ב הלכה יג). The מגיד משנה records there a controversy among the rabbis, whether the Gemara posited the rule regardless of what the medical profession advises, or only if there is no medical opinion on the matter. He notes that Rambam was of the opinion that if the woman says she feels able to fast and the doctors also says that it is not necessary for her to transgress, then it should not not be done. משנה ברורה ש״ל אות יא־יב rules similarly. See also באור הלכה יו״ד שכ״ח ד״ה ורופא.

To this writer, therefore, it appears that the solution offered by the Frankfurt community in the nineteenth century, and accepted by many leading *poskim*, would be an ideal solution to the problem posed by the AIDS epidemic. It insures the child's safety by performing *metzitza*, which is a vital method of cleansing the wound, and it also guards against possible infection of either the child or the *mohel*. In short, it accords both with halachic requirements and medical guidelines.

Gloves

In a public statement criticizing the suggestion that *metzitza be'peh* be modified in order to avoid the spread of AIDS, Rabbi Menashe Klein[42] remarks that a far greater danger of spreading the disease exists in the *milah* itself, for it is not unusual for the *mohel* to nick himself accidentally during the procedure. Although Rabbi Klein does not consider the advisability of the *mohel's* using surgical gloves, that alternative seems obvious.

Dentists, nurses, lab technicians, and doctors now routinely wear gloves in the performance of mundane office procedures, for fear of inadvertently cutting themselves and coming into contact with the patient's blood or saliva. Is there any halachic reason why a *mohel*, too, should not protect himself by wearing gloves as he performs the *milah*?

In *Pesachim* 57a the Gemara criticizes a kohen who covered his hands with silk gloves while performing the Temple service. However, the disparagement arose because of his motivation — he wanted to keep his hands from getting soiled, an unworthy attitude towards the holy work in the *Bet Hamikdash*. Based on this

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42. In a public letter, dated 1988, Rabbi Menashe Klein of Brooklyn writes extensively refuting any arguments for elimination of *metzitza be'peh*, which he insists is a mitzvah, and anyone who does it will be protected. In the course of his argument, he notes that even if there is danger of transmission of disease, there is a far greater probability of its happening during the actual *brit*, for it often happens that the *mohel* nicks himself, and there could be an exchange of blood. If we accept the medical argument agains *metzitza be'peh*, we would then have to be even more afraid to do *milah* altogether, and the mitzvah would have to be abandoned!

talmudic text, the *Pitchei Teshuva*[43] rules that a *sofer* (scribe) may not write a *Sefer Torah* while he is wearing gloves.

However, if the motivation for wearing gloves were not personal fastidiousness but rather for protection or for sanitary reasons, it may be assumed that no objection would arise.[44]

Parental Choice

We are thankfully not yet at the point where AIDS imminently threatens the Jewish community, but were such dire eventuality to develop, (G-d forbid), a case might be made for declaring that a father who nevertheless asks the *mohel* to perform direct *metziza be'peh* would be placing his child in a potentially life-threatening situation. Does a father have the right to take that chance? May he declare himself willing to rely on thousands of years of precedent, trusting in the protection of G-d to save from harm those who are sincerely concerned to perform a mitzvah in the best possible way? Or would we say that he is forbidden to endanger his child for a standard of religious observance which is not required and which may even be contra-indicated?

Actually, the father might have a precedent to draw upon. In the Gemara, Rav Poppa observes that although the rabbis had declared that on a very cloudy or windy day, no *brit milah* should take place (because the bad weather might be dangerous for the baby), nevertheless people do it all the time and nothing untoward occurs. He concludes that "since so many people do it, G-d watches out for the simple folk," and saves them from danger.[45]

The contention that when many people do something, even if it be dangerous, they will be saved from danger because "G-d watches over the simple" is indeed a rationale occasionally employed by halachists. For example, Rav Moshe Feinstein refused to declare smoking a forbidden habit although he conceded that much evidence pointed to its deleterious effect on health; he

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43. פתחי תשובה יו"ד רע"א אות י"ט.
44. ספר הברית דף קע"ט ע"ז.
45. יבמות עב.

explained his refusal as based on the principle "since so many people do it, G-d watches out for the simple."[46]

It is only proper to question whether in the present circumstance, with AIDS being a very clear and present danger, anyone could legitimately argue that "many have done this" and "G-d has watched over them" because in truth, many people have engaged in behavior which is considered high-risk for contracting AIDS, and indeed, they have contracted it in ever-increasing numbers. G-d does not seem to be watching out for them at all. Even the most innocent victim of a blood transfusion has not been spared from the consequences of the AIDS virus. Under what pretext, then, could we venture the bravado to declare that "G-d will watch over the simple" in this instance?

Nevertheless, this rationale has been employed by a host of halachic decisors over the centuries, in a wide variety of situations, and some rabbis may choose to apply it here as well.

There is a further argument which could perhaps be offered to defend the position of those who want to proceed with the traditional *metzitza be'peh*, even if it is known to be dangerous and even if the ruling were rendered that it is not necessary. There is an impressive list of rabbis who, although in the minority, maintain that if an individual wants to be stricter than the law requires, he is permitted to do so, *even if it will result in his death!*[47] The Rambam is categorically opposed to this option, terming it a sinful act of

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46. אגרות משה יו"ד ב' מ"ט
See further on this topic in the Ritva, as cited by בית יוסף יו"ד רס"ב ד"ה גרסינן. The subject is also explored further in ריטבא, יבמות יב; תרומת הדשן רי"א; יבמות ס"ד: אבן העזר סי"ט; חיים שאל חלק א' נ"ט.

47. In the mid-nineteenth century, there was a cholera epidemic, and many doctors warned that if people did not eat on Yom Kippur, they would be in great danger. *S'dei Chemed* reports that nevertheless, many rabbis did not permit people to eat, but no one died because he fasted. See שדי חמד, מערכה מילה ב', אות ח', ד"ה ובקונטרוס; שדי חמד מערכה יום כפור ג', אות ד'. He implies that the *Chatam Sofer* חלק ו כ"ג agreed with those rabbis who allowed the people to fast and he seeks to infer from this that even if doctors declare it dangerous to make *metzitza be'peh*, nothing will happen to those who do it. However, a close reading of the *Chatam Sofer's* actual

suicide, and the majority of rabbinic decisors concur.[48] Nevertheless, there are some authorities who contend that an individual may exercise the option to be more strict (although he may not rule for the public that they must do so).[49]

Rabbi Dovid Cohen, in a lecture on the topic,[50] raised a further question: The *Avnei Nezer* maintains that an extra precaution is placed upon the rabbis lest a rabbinic ruling have the effect of obviating a mitzvah entirely. Should rabbinic authorities, therefore, have to take into consideration the eventuality that their ruling — that *metzitza be'peh* should not be performed as long as the threat of AIDS remains imminent — might result in the mitzvah being abandoned altogether? Or might they rely on those who, regardless of any rabbinic ruling, would adamantly continue to perform *metzitza be'peh*, reasoning that thereby the mitzvah will not be obliterated?

Suggested Remedies

What are the results of our investigation? Let us recapitulate the issues and problems we have discussed:

1) The Gemara considered *metzitza* a vital step to insure the healthy recovery of the baby from the *milah*.

2) Challenges to Jewish practice based upon supposed scientific

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responsum indicates that he opined that a person definitely should eat under those circumstances.

For a complete discussion of whether a person should observe a mitzvah when there is danger to life, see בית יוסף יו"ד קנ"א.

See also my article "Potential Pikuach Nefesh: High-Rish Mitzvot," in *Intercom*, a publication of the Association of Orthodox Jewish Scientists, April 1987, pp. 3-8.

48. רמב"ם פרק ה' מיסודי התורה ד'.
See R. Ovadiah Yosef, יחוה דעת ח"א ס"א.

49. האלף לך שלמה שנ"ד.
רדב"ז, חלק ג' תמ"ד.
בית יוסף יורה דעה קמ"ז.

50. Annual Lupin Memorial Lecture, presented at Congregation Gvul Yaavetz, Brooklyn, New York, on November 13, 1988.

verities cannot be the determining factor in our religious lives. However, we are obligated by Jewish law to take into consideration the directives of the medical profession and take appropriate precautions.

3) Jewish thinking does not advocate closing our eyes and minds to medical or scientific realities, trusting that all will be well if we are sincere in our observance of mitzvot. The halacha will find ways to protect our welfare while adhering to the strict dictates of Jewish law.

A number of options lie before us, as individuals or as members of a community. First of all, of course, there is the option to do nothing, and to change nothing, trusting that *milah* will continue to prove beneficial for us and our children as it has for so many years. When the Romans threatened to kill any Jew who circumcised his son (in the Hadrianic persecutions of the second century), Jews nevertheless braved death to fulfill the mitzvah. Jews prevailed, while the Roman Empire has crumbled. The present danger, too, will pass.

Another remedy is suggested by Rabbi Menashe Klein in a public letter, wherein he adamantly defends *metzitza be'peh*. He proposes that the baby's blood can easily be tested for the presence of AIDS cells or antibodies prior to *milah*, and *mohelim* could be certified by their rabbis as having been tested free of AIDS contamination. These steps, he feels, would prevent the spread of the disease through *brit milah*. Although this is a very intelligent proposal, it might be exceedingly difficult to implement. Families might fear being labeled as AIDS carriers if their baby tested positive; there would be a great deal of pressure to suppress such findings, perhaps even to lie about them. In addition, it might be very difficult to get *mohelim* to agree to certification, and to assure that only "certified" *mohelim* be used. Moreover, the truth is that scientists just do not know enough about AIDS to be able to say with accuracy that a person is not incubating the virus. Our tests simply show whether the person already has the virus or antibodies in his blood, but are not able to determine whether they are yet to develop. Our knowledge is too scanty and our tests are not that

reliable. Thus, this proposal may not actually offer an effective solution.

In the city of Baltimore, the rabbis and *mohelim* of the community have agreed on a plan which is admirably moderate, fair, and tolerant, while offering options which should win the approval of the most fearful parents or the most G-d-trusting ones.

The features of the Baltimore plan are as follows:[51]

a) The plan does not go into effect unless all *mohelim* in the city agree to abide by its terms (which they have now all done).

b) There will be no *metzitza be'peh* directly.

c) *Metzitza* will be performed with a glass tube.

d) If the father personally wants to perform *metzitza be'peh* for his own son, the *mohel* will instruct him how to do it.

e) There is no objection to parents calling in a *mohel* from outside the city to perform the *milah.*

Other choices remain, and perhaps new ones will be suggested as we begin to know more about AIDS and how it is spread or can be prevented. In the meantime, the Frankfurt method, devised a century ago, still remains as an attractive alternative to the traditional *metzitza be'peh.* In the eyes of many leading *poskim,* it fully satisfies the requirements of halacha and retains our respect for Jewish traditions. At the same time, it seems to offer important safeguards both for the *mohel* and the baby; moreover, it may prove to be an important factor in preventing the spread of the disease within the Jewish community.

Until such time as there are more definitive pronouncements from our *poskim* on this topic, it seems to this author that discretion is the better part of valor. As it says in *Mishlei,* "The wise man has his eyes in his head."

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51. Rabbi Heineman addressed the Association of Orthodox Jewish Scientists at their convention in June 1988 and outlined this plan.

From Our Readers

To the Editor:

In your Succot 5749 issue, you published an article on the "Land-for-Peace" question, written by Rabbi Herschel Schachter. Allow me to take issue with both the general and specific assumptions made in that article, for the question at hand can have dire consequences both for the *k'lal* (group) and the *p'rat* (individual).

On page 74, a *psak* is brought in the name of Rav Kaminetsky to the effect that Israel is in a state of war; certain halachic decisions are drawn from that assumption. With all due respect, I think that all the laws that pertain to what is considered a state of war, according to the halacha, are made quite clear by the Rambam in *Hilchot Melachim*. We know that even the titles which the Rambam chose for his laws carry special significance. Thus it is important to know that the official title of these laws is *Hilchot Melachim U-milchemoteihem* — Laws of Kings and Their Wars. It is quite clear that the laws governing wars, as discussed by Rambam, are binding only during the reign of a halachically-appointed king. Wars are within the domain of kings and are part of their obligations. Since Rambam includes even a war of self-defense among these wars called *milchemet mitzvah* (see *Hilchot Melachim* 5:1), it follows that even this type of war is under the auspices of a duly-ordained king.

If there is no king, it follows therefore that all other situations of hostilities are considered by the halacha as similar to any other form of tragedy which threatens or befalls a Jewish community — such as flood, plague, etc., as stated in the Rambam, *Hilchot Ta'anit* 2:1 וצרות שונאי ישראל לישראל, על החרב, וכו'. It seems to me that the way to cope with these problems is similar to the way we cope with the danger to a sick or threatened person: namely, that the specialists in each field, such as doctors or professional soldiers, would be asked to offer their advice as to dealing with the given situation, so as to be able to save the maximum number of lives.

Consequently, we are not entitled to apply the dicta of the rabbis concerning wartime, to the wars in Israel today. Thus there is no

relevance to the present day situation in the satement of the *Minchat Chinuch* that the laws of *pikuach nefesh* do not apply in wartime, since it is the nature of war that people are killed. His statement refers only to those wars governed by the rules of "kings and their wars," which do not apply to the present situation.

We must conclude, therefore, that any group of Jews threatened by hostile action, whether they are in Israel or elsewhere, should take into consideration the principle of *pikuach nefesh* when confronted by danger; they should also be aware of the talmudic teaching הבא להרגך השכם והרגו — if someone comes to kill you, go first and kill him. The group must take into consideration each and every Jewish life which is at stake, but this has nothing to do with the fact that the danger happens to be in Eretz Yisrael, for the same approach would be mandated wherever they happen to be.

On page 76, the author introduces a novel concept about a winning battle vs. a losing one, which he offers as an introduction to his discussion as to who is to make such a decision. He draws an analogy to a sick person who is at times called on to make decisions concerning his therapy, whereupon he concludes that since there is no Sanhedrin or other single accepted authority nowadays to make this decision for the *k'lal* (group), we must resort to the opinion of the majority of Jews living in Israel. The author offers no halachic references for his premise. Nor do I see a valid reason why a majority would have the right to decide the fate of others, especially in matters concerning life and death. I am taken aback that he compares the lives of many individuals to the mere limb of a sick person, and that he assumes by whim that just as a person may sacrifice a given limb in order to save his life, so too may the group sacrifice a minority in order to save the group. (Besides which, it is contrary to the halacha. See Rambam, *Yesodei HaTorah* 5:5).

The halacha is clear that the Sanhedrin is empowered to decide certain matters for the community, including when to go to war. (See Rambam in *Hilchot Melachim, Hilchot Sanhedrin, Hilchot Mamrim).* But there is no halachic basis whatsoever for the assumption that when there is no Sanhedrin, it is the popular vote of the masses — whether learned or not — which determines. I suspect this assumption is influenced by contemporary secular

society and its mores.

Then I question the statement on page 80, listing the criteria for "qualified membership" of those who may vote on these crucial matters. Some of these qualifications include that he be a believer, that he circumcise his son, etc. Do these criteria apply also in the case of the individual who might decide to amputate his limb? Must he also meet these requirements? And where did the author find all this? If there is a basis for his premise, why not share it with the readers?

On page 83, the assumption is made that a "governing body" may be considered comparable to the Judges who ruled the Jews before the period of kings. But it seems from the Rambam *(Hilchot Melachim* 1:3) that the Judges too had certain similarities to the kings. The Judges were designated either by a prophet or by the Sanhedrin — not by majority vote of the masses. Although the Gemara in *Berachot* 55a does say that a leader should not be appointed over the group without their consent, it does not seem that this dictum is binding, for it is nowhere brought in the halacha.

The author also relies on a statement from the *Yerushalmi* that the third Bet Mikdash will be built prior to the renewal of the Davidic monarchy; he adduces that it is merely necessary that a Jewish government exist at the time that the Temple rebuilding is undertaken. I fail to see how one may simply rely on a talmudic statement to prove a halachic point, when that statement is not brought or accepted by *Rishonim* and *poskim* (such as the Rambam who says specifically that the Messiah will rebuild the Bet Mikdash). It is possible to interpret the *Yerushalmi* as Rashi and the Tosafot explain (*Succah* 41a) that the third Bet Mikdash will come down from heaven fullly rebuilt, and this may occur before the coming of the *Mashiach.*

I do not wish to burden you with further particulars; however, let me express my surprise that a publication which is called a Journal of Halacha would print an article based on assumptions rather than on halachic precedents and sources. I also find it odd that a halachic composition should be built on sources which could definitely be categorized as *"drush"* or aggada.

I had always understood that Torah learning and the halacha are

not merely a scientific exercise in the establishment of facts and formulations, but rather that a major component of this process must include logic and understanding (למה לי קרא סברא הוא). I therefore cannot logically accept the premise presented in the conclusion of the article, that we are to view the establishment of the modern State of Israel as comparable to the rebuilding — of sorts — of the Bet Mikdash or the equivalent of kingship in Israel. Certainly, in view of some of the unsavoury actions of the "founding fathers" when it came to the possibility of saving lives during the Holocaust and their complicity in the spiritual annihilation of *olim* in the early years of the State (which have been documented), this premise needs a great deal more proof than the author has offered. Perhaps a more appropriate way of defining the present historical era is, in the words of the Mishnah (*Sotah* 49), as "*Ikvata de-Mashicha*" which Rashi explains as "at the end of the Galut before the coming of the Messiah."

In conclusion, I think that much of the "halachic" definitions made in the article, such as what or when we have "*atchalta de-geula*" (the onset of the Redemption), notwithstanding various "sources" adduced, may not be made without a true *Navi* (prophet); until that time, we certainly are not entitled to make changes nor to act in any other fashion than the way accepted over many generation.

Avrohom Gurewitz
Jerusalem
(The writer is Rosh Yeshiva, Yeshivat Ner Moshe, Jerusalem).

Rabbi Schachter responds:

Let me respond to the objections raised by this correspondent:

1. Concerning the Status of War Nowadays.

The *Chazon Ish (Orach Chaim* 114:1) points out that in order to have the status of either *milchemet reshut* (permissible war) or

milchemet mitzvah (mandatory), a war must have the backing of the Jewish government. For this goal, he writes, we require either a *melech* (King) or *shofet* (Judge). Although the leaders of the government of the State of Israel have never really been too observant, many feel nonetheless that the present government is still to be considered as a *"malchut Yisrael"*, (government of Jews) as opposed to a *"malchut umot haolam."* (See page 89 in the essay.)

The point brought out based on the title of the section of the Rambam, *"Hilchot Melachim U'milchemoteihem"*, that there is a clear relationship between a king and a war, is well taken. The *Avnei Nezer* in his essay *"Shesh Maalot Lakiseh" (Yoreh Deah* part II, no. 312) has firmly established from many sources that *"lilchom milchamot Hashem"* "fighting the wars of G-d" is one of the primary functions of the king. This does not; however, imply that laws of war cannot apply without a king. In this context the requirement of *"melech* or *shofet"* of the *Chazon Ish* merely means a Jewish government.

Some of the special laws of kings apply only to the individual who has been duly appointed as *"melech"*; for example, the mitzvah of writing a second *sefer Torah* and the prohibitions against having too many wives. But other halachot pertaining to a king are not limited to that individual, but apply rather to the kingdom and to the government. For example, several *Rishonim* are of the opinion that the right of the king to levy taxes is derived from a text in the book of Samuel. Nevertheless, it is generally assumed that present-day governments also have the right to levy taxes, even though they do not have any kings heading them.

For this reason, Dayan Ehrenberg in his volume of responsa *Dvar Yehoshua* (referred to in note 3 on page 74) felt that the idea of the *Minchat Chinuch does* apply to the present situation. (His essay is *specifically* on the issue of giving away Judea and Samaria for the sake of peace.) Apparently, Rav Yaakov Kaminetzky also felt that to declare a situation as one of "wartime", we need not insist on having a "king."

2. Regarding the distinction between the one who has *"kedushat Yisrael"* and one who is part of *"Klal Yisrael"*, note 15 on page 81 of my article refers the readers to an essay entitled בגדרי היוחסין

באומה הישראלית, which appeared in the journal אור המזרח ניסן תשמ"ז. In that essay the author cites the talmudic passages which establish the criteria of *emunah,* practicing circumcision, not being intermarried, etc. These criteria were not selected by me at random; they are based on talmudic principles.

3. But of course these criteria have no application in the situation where an individual has to decide whether he should have his limb amputated. There it is clear that it is *his life* that is in danger, so *he* is the one to determine whether any specific act should be undertaken for saving his life or otherwise. Only when we are dealing with a situation of danger *(sakana)* to *klal Yisrael* do we have to determine exactly *who* belongs to that body, in order to see what *klal Yisrael* has to say on the matter.

When the life of one individual is at stake, it is only that *one person alone* who must decide what to do. When it is *Klal Yisrael* which is threatened, obviously we must determine what is the feeling of *Klal Yisroel* by majority opinion. It's not that "the majority is determining the fate of the others," but rather that *Klal Yisrael,* as one unit, feels this way. When a Bet Din issues a ruling based on the majority opinion the halacha considers it as the ruling of the entire court of the Bet Din, based on the principle *"rubo kekulo".* Before an individual decides to get married, or to sell his house, various opposing considerations pass through his mind. When he finally arrives at a conclusion we assume that based on the majority of his considerations, *this is* the expression of his will.

"A person may sacrifice a given limb in order to save his life." This statement is imprecise. The *Magen Avraham* states that this is not a matter of choice. (See sources referred to in note 11 on page 79.) The doctors must amputate the limb and extend the patient's life — even against his wishes. Of course, a group may not sacrifice a minority in order to save the lives of the group. This halacha is stated clearly by the Rambam in *Yesodei Hatorah.* But there, the *Poskim* point out that we are not dealing with the body of *Klal Yisrael.* (See *Pitchei Tshuvah* to *Even Haezer* Chap. 6, end of סי"ק י"א). However when *Klal Yisrael* is in danger, all members of that body are likened to individual limbs of a body, and the group has not only the *right,* but rather the *obligation* to sacrifice the

"individual limbs" in order to save the life of the *Klal.* This, to my understanding, is the idea behind the *Minchat Chinuch.*

4. The passages from the Rambam referred to, requiring authorization of the Sanhedrin to go to war, all deal with *milchemet hareshut.* Today, as we have no Sanhedrin, we can have no *milchemet hareshut.* However, to be obligated to wage a *milchemet mitzvah,* a Sanhedrin is not required. We must only know in advance that we are likely to win, for obviously there is never a mitzvah to wage a losing battle.

To follow up on the previous metaphor, determining the nature of the war — whether *Klal Yisrael* is winning or losing — is up to *Klal Yisrael* the *"choleh",* the sick one." If there were a Sanhedrin today, we would not have to poll public opinion, for the Sanhedrin serves a double capacity — they are the Supreme Court deciding halachic matters, and they also represent the *"daat hatzibbur* — opinion of the group" (as pointed out by Rav Soloveichik; see note 13 on page 80). But when no Sanhedrin exists, obviously there is no other way to determine *"daat hatzibbur"* except to poll that *tzibbur.* Why should one feel that I was "influenced by contemporary society and its mores" in reaching this *most obvious* conclusion? The *chiddush* here is that when there is a Sanhedrin, we would disregard the public polls and have the Sanhedrin determine *"daat hatzibbur."* But to say that when there is no Sanhedrin, we follow the view of the majority of the *tzibbur* is no *chiddush!*

5. The Rambam refered to in *Melachim*(1:3) speaks of Yehoshua, Shaul and David, all of whom had the status of *melech* and had to be appointed by the Sanhedrin as well as by a *navi* (prophet). I have not come across a similar requirement for a *shofet* (Judge). The *Chazon Ish's* requirement that either a *melech* or a *shofet* is needed in order to render the situation one of *milchama* according to the halachic definition of war, simply refers to a recognized Jewish government in Eretz Yisrael. The passage in *Brachot* 55a, requiring that no leader be appointed without the consent of the group, is certainly binding and is certainly quoted by the *Poskim.* (See *Magen Avraham* to *Orach Chaim* 53 nos. 20 and 21; *Teshuvot Chavetzelet Hasharon, Choshen Mishpat* no. 4; *Imrei Yosher,* Vol.

I, no. 132; and others).

The application of the principle of *hefker bet din hefker* to the seven community leaders *(Choshen Mishpat* Chap. 2), is obviously based on the assumption that (a) they constitute a "governing body" over the community; and that *dina demalchuta dina* applies to any bona fide "governing body." (See first essay in *Tshuvot Dvar Avraham.)*

6. The comment of the Palestinian Talmud regarding the building of the third Temple before the coming of the *Mashiach* was obviously not quoted by the *Rishonim* or the *Poskim* because it is *not relevant* in halacha. It has, however, been quoted and discussed by such prominent *Acharonim* as the *Tosefot Yom Tov,* the *Gevurot Ari* and the Rashash. It is not an obscure passage "discovered" by this author. We cannot reject passages from the Gemara just because the Rambam "says specifically" otherwise. As the *Dvar Avraham* wrote in one of his letters (vol. 2, no. 24), we declare passages in the Rambam's *Yad Hachazaka* as "difficult" when they are in contradiction to passages in the Talmud, but we don't declare passages in the Talmud as "difficult" just because they are contradicted by the Rambam. It is interesting to note that the *Merkevet Hamishna,* in his commentary to the Rambam's *Hilchot Biat Mikdash* (chap. 1, see, 7) points out that apparently even the Rambam considered the possibility of having the Temple built by the people before the coming of the *Mashiach.*

Furthermore, the passage cited from the commentary of the Ramban to the Torah stands independently of any interpretation of the Palestinian Talmud.

7. The *Chatam Sofer* and the *Minchat Elazar* decided serious halachic issues based on their assessment of their situations as *atchalta d'geula,* without feeling the need for a true prophet. Similarly, the *Netivot* in his commentary to the Book of Esther wrote that the Rabbis in the generation of Esther *paskened* a halachic issue based on their feeling that they were experiencing an *atchalta d'Geula.* (These sources are referred to in the essay on pages 81 and 94.) I feel that the burden of proof is upon any one who wishes to disagree with these three *poskim.*

Nowhere in my essay did I express the notion that we are to view

the establishment of the modern State of Israel as comparable to the rebuilding of the Bet Mikdash. What I did explain is that establishment of the Jewish government in Eretz Yisrael seems to be a necessary and irreversible step leading towards the building of the third Bet Mikdash; this is what is meant by the *halachic* term *"atchalta d'geula."*

The fact that many of the founders of the State were anti-religious does not necessarily indicate anything about the nature of the historical events. If the *Chatam Sofer* and the *Minchat Elazar* felt that the wars of the early nineteenth century and World War II were to be treated halachically as *"atchalta de'geula,"* why should it be so *"illogical"* to consider the wars in Eretz Yisrael during the past forty years as *atchalta d'geula?*

Another example of modern-day application of the concept of *"atchalta d'geula:* In *Yevamot* 64a we find the concept that the Divine Presence will dwell among the Jewish people only if their population is at least 22,000 persons (based on the verse, *"Shuva Hashem rivavot alphei Yisrael").* Hagaon Reb Yehoshua of Kutna, in his approval to the *Sefer Shalom Yerushalayim,* writes that when the new Aliya in the nineteenth century brought the population of Jews in Israel to 22,000, it was a historic milestone which represented a "start of the Redemption" — *atchalta d'geula* — a necessary step leading to the building of the third Bet Mikdash. Why should it be so *illogical,* then, to assume that establishing a new government in Eretz Yisrael, which was clearly Jewish in character even if not wholly Torah-observant, was also another step in the Redemption process?

The Vilna Gaon is quoted by one of his students (in *Kol Hator)* as saying that just as Joseph's brothers did not recognize him, so too when the *Masiach ben Yoseph* will come, the religious Jews will not realize that the events of that period are truly *atchalta d'geula.* Joseph told his brothers, "Even though you may have intended to do evil, G-d intended it for good, to sustain a large multitude." Albeit their motovation in selling him into slavery was evil, yet *Hashem* runs all of history from behind the scenes, and He saw to it that something very good came out of that particular incident. Even if the motivations and the actions of many of the founders of

the modern State of Israel were perhaps evil, yet there is nothing illogical at all in assuming that *Hashem* alone is the true *"poel gevurot, oseh chadashot, ba'al milchamot,"* the only one controlling all history, to see to it that events will lead towards His ultimate goal of *Geula,* Redemption for the Jewish people.

In conclusion, let me repeat that in my article, I based my assumptions purely on halachic sources as I understand them. I do not consider the issue of building the Bet Mikdash to be a matter of *drush* or aggada.

Dear Editor,

In the Fall 1988 issue of this journal there appeared an article by Rabbi Alfred Cohen on the question of drafting women for the army. Unfortunately this piece did not live up to the high standard Rabbi Cohen has set in previous articles. Without going into specifics let me just note that, contrary to the implication of the article, there have been *poskim* who have permitted women to serve in the army.

Rabbis Isaac Herzog and Isaac Nissim gave permission for women to serve in religious units of the Nahal brigade. Rabbis Shlomo Goren and Isser Unterman were among those who even granted permission for women to serve in regular units if they considered themselves to be able to withstand the secular influences (for details see Yehezkel Cohen's booklet *Giyus Banot ve-Sherut Leumi).*

In fact, an entire book was published seeking to demonstrate that women are *obligated* to join the IDF (Rabbi Shemariah Menashe Adler, *Mar'eh Cohen: Be-Inyan Giyus Nashim* [London, 1954]). His most fundamental point is as follows: If the wars in Israel are to be considered as *milhemet reshut* then there is no difference between men and women; both are forbidden to join the army. On the other hand, if the wars are in the category of *milhemet mizvah, all* are obligated to fight. This is a commandment which cannot be annulled simply because of the fear of immodest

behavior. The Torah simply did not grant such a permission with regard to *obligatory* wars.

If I may, I would just like to make one more comment with regard to an item in the Spring 1987 issue. As a memorial to the late Rabbi Moshe Feinstein, a translation of a complicated and important responsum was printed. Considering that R. Feinstein expressed his opposition to such translations *(Iggerot Moshe, Yoreh Deah* III:91) I find it hard to believe that anyone could consider this is a fitting memorial.

Sincerely,

Marc Shapiro

Rabbi Cohen replies:

Thank you for your interest in my article about drafting women for the army. In view of your disappointment as to the content, I will endeavor to set the record straight.

Omission of the views of the Chief Rabbis in Israel was intentional. First of all, in their discussion of the halachic question, they do not essentially introduce any new material, but rather discuss the same halachic sources as are taken up by the other *poskim* whom I mentioned. Furthermore, since they held a quasi-political office, I did not want to include their opinions, which might be construed as reflecting a political ideology. I do not presume to state that their opinions on this topic were in fact tainted by politics; however, since such a suspicion could be raised in the minds of the readers, I felt it was best to try and discuss the matter entirely from an academic, objective point of view.

Nevertheless, since you have raised the point of the halachic opinions of the Chief Rabbis, I feel that it is necessary for me to comment, since your statements are misleading, and I do not want

our readers to be misled. You mention that Rabbi Nissim gave permission for women to serve in "religious units of the Nahal Brigade," but you fail to mention that at the time that was written, the Nahal was very different from what it is today. When Rabbi Nissim referred to Nahal, he was speaking of units that were composed entirely of Torah-observant personnel (usually from Bnei Akiva), from commanders to privates. In these self-contained units, there was no danger of non-religious or anti-religious influence. I am informed, however, that today the situation has changed radically, and Nahal is quite the opposite of what it was.

You quote Rav Unterman as permitting women to serve if they wished, but you omit the following remark he appended:

> I have also heard from religious girls who were drafted into the army that they suffered greatly from the military discipline; they recounted with distress the trials and difficulties which they underwent during their period of service.

Under the circumstances, perhaps you will understand a little better why I chose not to include these halachic opinions, primarily because I do not find them wholly relevant or valid in the present context.

In addition, Rav Unterman was also addressing the option of girls' performing "national service", which would mean that they would serve in hospitals and other support organizations, allowing them to serve their nation while remaining steadfast in their beliefs.

As for your objection to the printing of a responsum by Rav Moshe Feinstein, please be assured that prior to considering publication, I was in touch with members of his family who sanctioned printing of the translation.

Thank you once again for your interest in the *Journal*.

Sincerely yours,

Rabbi Alfred Cohen
Editor