

Last week Rabbi Dov Linzer published a statement (Appendix A), cosigned by many other rabbis, on the subject of halakhah and braindeath. Agudath Israel of America's office subsequently issued an unsigned statement (Appendix B) that took very sharp issue with Rabbi Linzer's statement. I am party to neither statement, and expect to discuss the substance of the brain death issue at YU sometime next month. But it seems to me that the methodological issues raised by this dispute are worth exploring in their own right.

Two caveats up front:

- 1) I consider Rabbi Linzer a dear friend and greatly respected colleague, and so while I have not signed his statement, I have a personal and kevod haTorah interest in defending his honor.
- 2) The Agudath Israel statement, while complaining of the strong language with which Rabbi Linzer opposes a particular combination of halakhic positions, descends on occasion to snideness and namecalling. I have some hesitancy about treating an anonymous broadside of that type as a serious position statement. On the other hand, the brain death controversy has a long history of generating at least as much heat as light, and coopting competent participants into proper Torah discussion may be a better strategy than ignoring them.

My goal here, therefore, is to the extent possible to frame the issues in a way that makes both sides comprehensible, and perhaps to explain where conflicts of sensibilities create flashpoints that prevent each side from understanding the other.

Rabbi Linzer's statement, as I understand it, is compatible with the following procedural arguments:

A.

- 1) Some highly significant poskim of the recent past, as well as the current Av Beit Din of the RCA, have ruled that one or another standard of neurological death can be recognized by Halakhah. Their authority is sufficient to prevent an outside observer from declaring that someone acting on the basis of such a ruling is acting nonhalakhically.
- 2) Bracketing the question of which position is correct, the non-metaphysical consequences of acting on the proposition that braindeath is halakhically death are superior to the consequences of acting on the opposite assumption.
- 3) Therefore, rabbis who do not see themselves as competent to decide this issue on its formal halakhic merits, when consulted on the issue by laypeople, should either indicate their utilitarian preference for the braindeath position, without framing that as a psak, or else encourage those laypeople to consult poskim who decide the issue in that direction.

B.

- 1) It is possible to make a formal halakhic argument that permits the receiving of organs taken from brain-dead patients even if one formally forbids the removal of such organs.
- 2) In practice, if not in principle, this would mean that the outcome of halakhah would be that halakhic Jews would allow their lives to be saved through the killing of others, but not allow themselves to be killed to save others in the identical circumstances.
- 3) Furthermore, most major organ donations are only possible at present if one accepts the brain death standard. Therefore, if broadly accepted, this argument would lead to the halakhic community receiving many more organs than it donated. This would generate at least the appearance that we considered our lives more valuable than those of others.

- 4) Because of both 2) and 3), regardless of the formal plausibility of this argument, it must be rejected in practice. This rejection can be grounded either in
- a) a claim that when a formally plausible halakhic argument leads to a morally repugnant outcome, one must adopt alternative plausible halakhic arguments if they exist, or
 - b) a claim that while the argument may be correct if evaluated in the abstract and/or in every individual case, following it in practice as a communal policy would be a violation of *chillul Hashem* and/or run the risk of generating violent anti-Semitism (*mishum eivah*). These principles are overriding with regard to this issue.

Agudath Israel's responses, as I understand them – possibly somewhat charitably - can be reframed as follows:

A.

- 1) Rabbis and laypeople alike can only consider practical consequences as a halakhic factor within the framework of halakhah. If one cannot formulate those consequences in formal halakhic terms, they are halakhically irrelevant.
- 2) Therefore – if one is faced with a halakhic question which one is incapable of resolving on the merits, either as a rabbi or as a layperson, one's only legitimate options are to refer the question either to the greatest available poseik, or else to the poseik to whom one usually asks one's sh'eilot. One is not entitled to consider the merits of the question at all when considering where to refer the question.

B.

- 1) Several great poskim have in fact adopted the position that one can receive organs taken from brain-dead patients even though one would not be allowed to agree to the donation of one's own organs in the reverse situation.
- 2) It is unacceptable to assert that following any halakhic position adopted by a great posek, let alone the majority of great poskim, is immoral.

I have the following brief glosses and comments on these issues – again, I hope to address the issue broadly next month.

A.

- 1) A key issue here is the locus and structure of authority. In one model, the ideal mode of halakhah is that all decisions are made by the best decisionmaker = greatest poseik. For practical reasons, that poseik may choose to delegate or leave residual authority in the hands of lessers. However, such authority is immediately withdrawn once that decisionmaker has addressed an issue.

Accordingly, the first task of lesser or nonposkim when facing halakhic decisions is to determine whether a greater poseik has addressed the issue. If multiple greater poskim have addressed the issue, and disagreed with one another, the remaining issue is purely procedural – which greater poseik has jurisdiction. No lesser has any right to address the substance of any issue which has been addressed by one or more greater.

In a second model, the ideal mode of halakhah is that all decisions are made by autonomous individuals. This ideal is constrained in practice by the need for some issues to be addressed collectively, and by the halakhic incompetence of many individuals.

However, when the formal halakhic issues have been addressed by competent scholars, and the results can plausibly be seen as intellectually inconclusive, and there is either no

need or no possibility for collective action, decisionmaking reverts to the autonomous individual.

I note that the first model loses much of its attractiveness if one does not presume that great Torah scholarship and formal halakhic decisionmaking skill are directly correlated with excellent moral intuition and pragmatic judgment. On the other hand (thanks to Dov Weinstein for making this point well), the second model significantly devalues halakhic scholarship as a religious goal for individuals, and is likely to produce a largely ignorant community with a small and cloistered Torah elite, whose products are generally seen as irrelevant.

It is likely worth correlating these models with Yitro's suggestion, and Mosheh Rabbeinu's somewhat altered implementation, of a tiered judicial system.

2)

An underlying issue here is why, if one believes that the formal halakhic conversation on this issue is indeterminate, one should not simply apply the formal category of safeik (legal uncertainty) and follow the procedural rules generated by that category. I cannot treat this issue in depth here, but an analogy may be useful. The rule "halakhah kedivrei hameikil b'eirubin" (the law always follows the lenient side of controversies with regard to certain legal constructions) cannot be applied in advance, or else the lenient side wins all controversies simply by existing.

B.

1) Note that one could resolve the dispute between the two statements by asserting that the relevant gedolei haposkim only allowed the reception of organs taken from brain-dead patients in isolated individual cases. Those poskim might agree with Rabbi Linzer's practical conclusion were the question made one of communal policy, and particularly were it to become a question of publicly known communal policy.

2) It is worth considering whether the morality or immorality of a given halakhic decision rests exclusively on its outcomes, on its reasoning, or on a combination of the two. For example – one might reach the take-but-don't-donate position on the ground that most organs will be taken from non-Jews by non-Jews, and

a) Jews have no obligation to sacrifice a chance at survival so as to avoid entanglement in intra-Gentile violence, or rather

b) Gentiles have the autonomous halakhic right to define death as they please, regardless of how halakhah defines it for Jews, and therefore Jews have no right to impose the halakhic definition on Gentile transplant surgeons removing organs from Gentiles.

Should our moral judgment of the same practical decisions change, depending on whether the actor offers the first or second rationale?

3) I think it is clear that throughout history, great poskim have disagreed with each other in strong terms, and framed their disagreements in moral as well as intellectual terms. In that sense I strongly reject the claim that all pesakim of great poskim lead to outcomes that are objectively morally acceptable. Accordingly, I think that an individual who acts immorally on the basis of such a pesak may be immoral b'shogeg (accidentally), or even b'ones (as the result of force majeure), but their action remains immoral regardless.

4) It is regrettably the case in our time that almost every week brings further examples of great talmidei chakhamim and poskim with tremendous moral blind spots, with those

blind spots affecting not just their personal behavior but the content of their Torah. One can deny this tautologically – since they are great scholars, it follows that their actions cannot be immoral, and thus our evaluations must be correct, or else since our evaluations of their actions are correct, they must in fact not be great scholars – but at least for me, this would lack all integrity, and betray the core responsibilities of being tzelem Elokim and ben berit.

Shabbat shalom!
Aryeh Klapper

APPENDIX A

We, the undersigned Orthodox rabbis and rashei yeshiva affirm the following principles with regard to organ donation and brain stem death:

First and foremost, the halakhic definition of death is a long-standing debate amongst gedolei haposkim, and it should not be forgotten that, among others in the U.S. and Israel, the former Chief Rabbis of Israel, R. Avraham Shapira and R. Mordechai Eliyahu, zikhronam li'vracha, and, yibadel li'chayim, Rav Gedalia Dov Schwartz, the av beis din of the Beit Din of America, are proponents of the position that brain stem death constitutes the halakhic definition of death.

Both positions, that brain stem death constitutes death, and that only cardiac death can define death, are halakhically viable. This remains so even in light of the findings of the President's Council on Bioethics in 2008.

With regard to this long-standing debate, and its critical implications for organ donation, we affirm our position that:

1. Brain stem death is a halakhically operational definition of death. As such, organs may be removed for transplantation under strict halakhic supervision and guidance.
2. In light of the serious moral issues and profound lifesaving potential presented by the possibility of organ donation, we strongly recommend that rabbis who are rendering decisions for their laity on this matter demonstrate a strong predisposition to accept the halakhic view of the gedolei haposkim who define the moment of halakhic death to be that of brain stem death, or that they refer their laity to rabbis who do so.
3. Even as we adopt the brain stem definition of death, we emphasize that the greatest of care is needed in applying this definition in practice, and that safeguards are necessary to insure the organ removal is done in accordance with halakhic principles. Each person should consult with his or her rabbi and appropriate medical professionals to understand how this determination of death is made, and how to ensure that the appropriate procedures will be in place.
4. Rabbis and laity who follow the position that brain stem death is not considered to be halakhic death should be aware that it is medically possible to donate certain body parts after cardiac death and that it is a mitzvah to do so. Thus,
 - a. It is both halakhically permissible and desirable and ethically mandated for every Jew to be an organ donor consistent with his or her definition of halakhic death.
 - b. Rabbis and community leaders must do all in their power to communicate this responsibility to the community, and to encourage all Jews to sign organ donor cards, in line with their halakhic definition of death.
5. To adopt a restrictive position regarding donating organs and a permissive position regarding receiving organs is morally untenable. Such an approach is also highly damaging to the State of Israel, both internally and in regards to its relationship with the larger world, and to the Jewish People as a whole. This approach must thus be unequivocally rejected by Jews at the individual and the communal level.

Appendix B

This statement appeared in today's *HaModia*:

12 Shevat, 5771
January 17, 2011

Statement from Agudath Israel of America

The recent "Rabbinic Statement Regarding Organ Donation and Brain Death" signed by several score "Orthodox rabbis and *rashai yeshiva*" is decidedly unorthodox in its approach to the halachic process. In fact, it makes a mockery of that process, by asking other rabbis to accept one particular *halachic* view regarding a complex issue pertaining to matters of life and death on the grounds that the times, in the signatories' estimation, require a certain result.

The statement, signed by congregational and campus rabbis and chaplains, duly acknowledges the *halachic* controversy over "brainstem death" – the diagnosis that a patient's brainstem has irreversibly ceased functioning. But it goes on to note that forbidding the removal of vital organs from "brain dead" patients – the considered opinion of major *halachic* authorities of past years and the present – would have "critical implications for organ donation." And so, the statement's signers "strongly recommend that rabbis who are rendering decisions for their laity on this matter demonstrate a strong predisposition to accept" the alternative view. Or, if their consciences do not allow them to do so, that they at least "refer their laity to rabbis" who have no such reservations.

For anyone, rabbi or layman, to decide that a perceived outcome should determine what *halachic* approach to take is something usually associated with Jewish movements outside of Orthodoxy.

Organ donation can and does save lives. Halachic authorities have ruled that, under certain circumstances and with proper safeguards, it is permissible and indeed laudable to be a live donor, and to bequeath organs after death. But defining death is a crucial *halachic* matter, not one to be "decided" on the basis of what some consider a societal need.

Compounding the statement's offensive embrace of a *halachic* position based on an extra-*halachic* rationale is its derision of those who take "a restrictive position regarding donating organs and a permissive position regarding receiving organs." That *halachic* position, held by a majority of major *poskim* today, is derided by the statement as "morally untenable," and "must thus be unequivocally rejected by Jews at the individual and the communal level."

No. What must be unequivocally rejected by Jews, at least those who care for the honor of Torah, are attempts to manufacture "*halacha*" to personal specifications and the disparagement of true *halachic* authorities.