

KOSHER LIVING



'HOD'

Does Jewish law prohibit, or require, donation of organs upon death?

By CHRIS LEPPEK

IJN Assistant Editor

There was a time, not so very long ago, when death was a pretty simple matter. The definition was straightforward: When the heart stopped beating and breathing ceased, an individual was said to be, and was treated as, dead.

That was before 20th-century science made many new things possible, including the ability to keep vital physical systems of the human body — particularly the cardiac and respiratory — functioning, even while the individual was in a state of irreversible "brain death."

It was also before a surgeon named Christian Barnard demonstrated that the transplantation of human organs was a viable possibility, one with titanic ramifications for saving human lives.

The implications of such developments had obvious implications far beyond the medical realm. In recent decades many of these issues have been extensively argued and ultimately settled.

Brain death — loosely defined as the cessation of blood flow and oxygen to the brain, the absence of all electrical activity in the brain and the demonstrated absence of all neurological functions — is today accepted as a clinical definition of death in virtually all medical, legal and social communities.

(There are subtle but relevant differences in neurological terminology. "Whole brain death" is the death of every neuron in the intracranial cavity, for example, while "brain-stem death" refers to death of the brain as a whole. Neurologists find the physiological differences between them to be minor. Both conditions, and others, such as

"neocortical death" are often referred to by the general term "brain death.")

The fairly simple formula of brain death, however, is rendered considerably more complex by another new dimension of medical ability — the fact that brain dead patients can have their bodies kept in a functional state, at least for a brief time, through various life support technologies.

This, in turn, greatly affects organ transplantation, which has made quantum leaps since Dr. Barnard's first tentative heart transplant in 1967. The viability of many transplant operations depends entirely on the rapidity with which an organ can be transferred from donor to recipient.

In sum: A brain dead patient, classified as medically and legally dead but whose organs may remain vital for days or even weeks after the onset of brain death, is the perfect organ donor for another patient, one whose life depends on that organ.

The ethical axis of this increas-

ingly common scenario is all too obvious. Is it permissible to take a vital organ from a person with brain death in order to save the life of another?

The answer to that question depends on the answer to yet another: Is the brain dead person, to borrow from the Munchkins who asked of the Wicked Witch of the East, "morally, ethically, spiritually, physically, positively, absolutely, undeniably and reliably dead?"

It's very easy to get a yes answer to almost all shades of that question. Virtually all physicians, attorneys, bioethicists, even clergymen, express no doubt of the certain equivalence of brain death to death itself.

In some quarters, however, the spiritual part of the question snags.

While some Orthodox Jews have no problem equating brain death with halachic death (including Robert Berman, below), a sizable portion of the Jewish community which governs all aspects of life and death according to the Torah, isn't so sure.

Torah-observant Jews are not unanimous on the issue of brain death; many remain unwilling to accept brain death as halachic death (as death according to Jewish law).

Simply put, they reject the idea that a person whose heart is beating and lungs are breathing is truly dead, even if these functions are dependent on artificial life support.

Hence, they are equally unwilling to allow organ transplants from the bodies of brain dead individuals, even if the life of the potential recipient is at stake. In their

eyes, the removal of a heart, lungs, liver, kidneys or other vital organ from such a person amounts to an act of murder.

One of Orthodoxy's most visible and articulate opponents of organ transplants from brain dead patients is Rabbi J. David Bleich, professor of law at Cardozo Law School and professor of Talmud and Jewish law at the Rabbi Isaac Elchanan Theological Seminary at Yeshiva University.

Under what might be called "normal" circumstances, that is when halachic death can be confirmed, Rabbi Bleich says, there is no problem with Jews participating in organ donation, either as donors or recipients.

The critical commandment of *piku'ach nefesh*, which prioritizes the saving of a human life over

The Halachic Organ Donor Society

Member: Robert Berman
HOD ID#: 101
Blood Type: A+

The HOD Society
www.body.org Phone: 212-213-8888



I, Robert Berman, agree to donate all my organs for transplant only — not for research — after (the option checked below):

✓ Brain-stem death, which establishes irreversible cessation of autonomous breathing, as determined by the latest accepted medical testing and clinical bedside exams, including an apnea test. I understand this option allows full recovery of all organs. [This is the opinion of the Chief Rabbinate of Israel, whose decision was based on the writings of Rabbi Moshe Feinstein.]

Irreversible cessation of heart beat. I understand this option significantly limits the possibility of donation and significantly limits the number of organs that may be recovered.

Transplant may commence only after a neurologist who is unaware that I am a potential organ donor confirms that my medical condition fulfills the criteria indicated above. All medical procedures must be done with utmost care, respect and minimum damage to the cadaver.

1. Family contact: First Last Phone: 555-555-5555
2. Family contact: First Last Phone: 555-555-5555

This is the organ donor identification card carried by members of the Halachic Organ Donor Society. Some authorities in Jewish law maintain that the society oversteps the bounds of Jewish law; the society cites its own authorities as mandating its approach.

virtually all other commandments, not only allows but mandates organ donation, provided the donor can be considered dead in halachic terms.

Under such circumstances, barring other extraordinary conditions, Jews may receive or donate organs halachically, including in most cases with non-Jews.

Although clearly conservative on the issue, Rabbi Bleich is very clear on the balance between *piku'ach nefesh* and another commandment not to desecrate a corpse. While the removal of an organ from a corpse by itself could be considered desecration, such a prohibition is overruled by the obligation to save another's life.

However, the rabbi says, Halachah's guideposts are murkier in instances of brain death. Despite modern medical and legal thinking, brain death, in Rabbi Bleich's view, is not an acceptable definition of death according to Jewish law.

Halachah is straightforward in defining death, he says. Only when the total and irreversible cessation of all circulatory, cardiac and respiratory functions has been confirmed can a person be considered dead. If any of these functions remain — even when artificially stimulated — then the lack of neurological functions may not serve as a true indicator of death.

Rabbi Bleich is aware that this flies fully in the face of modern thinking, especially medical thinking, but says this is part of the Jewish reality.

"Jews have, during the course of

QUESTION

Is it permissible to take a vital organ from a person with brain death in order to save the life of another?

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human history, more often than not found themselves the odd man out. That's life. That's Jewish life. I can't say any more about that."

His view, in short, is that because of the complexity and ever-changing nature of modern medical knowledge, it's unwise for halachic Jews to rush to a decision on such a profound issue as death.

"What I'm talking about is yesterday's medicine, certainly not tomorrow's medicine," he continues. "I'm not sure about today's medicine, because it's constantly changing."

That very uncertainty underlies his stance.

Halachic views of death may change as science itself increases its understanding of death, he acknowledges. For the moment, however, enough doubt resides in the brain death question to encourage him to err on the side of safety.

Importantly, that includes organ donation.

"We recommend that if a person fills out an organ donor's card, that there be added a stipulation that requires the opinion of a competent authority — a rabbinical or halachic authority — before the operation takes place."

Rabbi Bleich does not consider his opinion an isolated or extreme one within the observant Jewish world.

"I don't know of any authority I would cite who would endorse any other criteria," he says, "and I do not consider any disputes in the matter to be significant. I can give you a long list of respected authorities who have rejected the cessation of neurological activity as a definition of death."

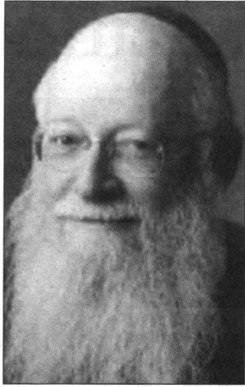
Rabbi Bleich acknowledges that the common definition of brain death involves what is believed to be a "total" cessation of neurological activity, but he feels the term is inaccurate.

"The notion of brain death is a medical myth," he says. "There is no such thing as a total cessation of brain activity. What there can be is a radical diminishment of brain activity, but not total cessation."

Although most such neurological indicators may have ceased all apparent function, it is only when there is a total shutdown of the hypothalamus — a region of the brain responsible for many automatic activities — that true death can be declared, the rabbi says.

And the hypothalamus never shuts down, he adds, without the heart also shutting down. Until that takes place, Rabbi Bleich says, "We are not defining death; we are defining irreversible coma," which, at least in halachic terms, is something else entirely.

The rabbi doesn't dispute the hard medical evidence. There are no known cases where a brain dead



Rabbi J. David Bleich, professor of law at Cardozo Law School and of Talmud at Yeshiva University, says "brain death" and "halachic death" are not the same thing.

patient has regained consciousness, and brain death is a virtual guarantor of full clinical death, almost always within a few days.

"Barring a miracle, that patient will not survive," he acknowledges of people with brain death. However, he points out, odd exceptions can occur.

Rabbi Bleich cites the case of a woman who was diagnosed as brain dead, yet whose cardiac and respiratory functions continued for 157 days. The woman was still able to deliver a viable fetus before she died.

"It struck me as odd," the rabbi says, "that a cadaver could deliver a child."

In other words, at least in that one case, brain death did not equate with death.

In any case, the odds of a brain dead person's survival are beside the point, the rabbi says. Halachah mandates that death may not be hastened in any way, even if it is to save another life. Equivocation on the issue results in ethically impossible dilemmas, he says.

"How do you treat a patient in this state?" he asks. "Do you pull the plug and call the mortician or do you adopt a different attitude? Do you adopt the attitude of Judaism, which teaches that only G-d can give life or take life?"

There are, in fact, many people whose lives could be saved, provided society was prepared to accept the idea of removing vital organs from people who lie in a coma or vegetative state, for example.

"But no one in good conscience could do that," Rabbi Bleich says. "There is an imperative not to commit homicide."

Another illustration: Halachically, the life of a 95-year-old man could not be exchanged for that of a one-year-old baby, despite the promise of a long life an organ transplant would give the infant, even if the old man is brain dead and has almost certainly no chance of ever regaining consciousness.

"That simply is not how you make the equation," Rabbi Bleich says. "Those are questions that we are not required to answer. The decisions are emotionally difficult but intellectually quite easy. Judaism regards life per se as an intrinsic value."

Ironically, very similar language might be used by a determined activist on the opposite side of the question.

Robert Berman, a former reporter with the *Jerusalem Post*, left his career in journalism in late 2001 to help found and direct the New York-based Halachic Organ Donor (HOD) Society. The society received seed money from Stephen Flatow, a man

whose daughter was murdered in a terrorist attack in Israel in 1995.

Berman, a Yeshiva University graduate who describes himself as modern Orthodox, explains that the HOD Society exists mainly to encourage Jews to sign up as organ donors.

His goal is to significantly increase the number of Jewish donors, both in Israel and the Diaspora, whose rates of participation in organ donor programs are among the lowest in the world, he says.

In many Western countries, organ donor memberships are as high of

30% of the population, he says. In Israel, the sign-up rate is a low 3%. Although he has no hard figures for American Jewry, he claims the membership rate, including that for secular, Reform and Conserva-

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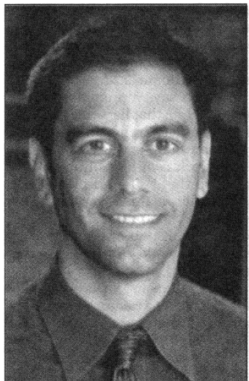
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Robert Berman, director of the Halachic Organ Donor Society, wants more Jews to consider organ donation, including situations when brain death is present.

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Organ donation

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tive Jews, is well below that of the American average.

His work is all about saving lives, says Berman. He emphasizes that he has no specialized training in Jewish law as it pertains to the definition of death and related questions.

"The primary thrust is that people are dying. Period. People are dying in America, people are dying in Israel, people are dying all over the world. And they're dying needlessly, and that word needlessly should be in bright lights. The organs are available, but families refuse to donate them because they believe it's against their religion."

There are a wide range of objections to organ transplants across the world, Berman says.

"I'm doing it for the Jewish community and wherever the Jewish community may be," says Berman, who has recently traveled to London and Israel, and has planned future trips to Jewish communities in Ireland, South Africa, Australia and across the US.

Although the HOD Society itself takes no position on halachic views of death — and, in fact, issues organ donor cards of two types, one for heart cessation and one for brain death — Berman's personal opinion is that halachic death and brain death are not mutually exclusive.

"I'm trying to lecture to Jews, to show them how their Jewish law, how their Halachah, how their Torah, supports organ donation, to explain to them what the medical and Jewish law issues are and hopefully to increase the pool of organ donors in the world."

Berman's position on brain death — he prefers the more specific term 'brain-stem death' — puts him in opposition to Rabbi Bleich and other opponents of brain death organ donations, and he claims not to be alone in the halachic world. Despite Rabbi Bleich's insistence that no "significant" debates are going on in the Orthodox world, Berman says that the writings of such prominent halachic authorities as Rabbi Moshe Feinstein, Rabbi Moshe Tendler and the Chief Rabbinate of Israel support his own position.

(For the record, Rabbi Bleich says that there remains a lot of disagreement over the rulings of Rabbi Feinstein and the Chief Rabbinate. Detailed analyses of those decisions can be found in a variety of halachic sources.)

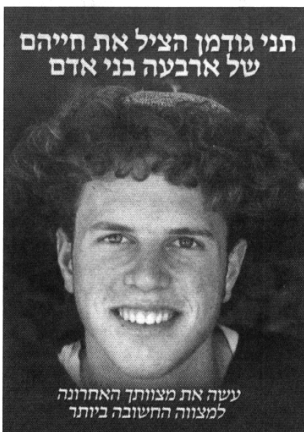
Berman, who estimates that more than half of the authoritative Orthodox authorities still side with Rabbi Bleich, describes the organ transplant debate as a relatively recent one.

When Stephen Flatow, whose daughter Alisa was killed by terrorists in a bus bombing, wanted to donate his daughter's organs while she was in a state of brain death, he first consulted rabbinical authorities, Berman says.

"That was the first blip on the radar of at least Orthodox Jewish consciousness, that maybe the Torah supports organ donation and doesn't prohibit it," he says. "But as quickly as that blip went up, it went off the screen just as quickly. People today are still confused — do Jews do that or don't they do that?"

Berman got involved because he became aware of the dire need for donated organs while he was working as a journalist in Israel. He estimates that 100 Israelis die each year because of a paucity of organ donors.

On the central issue of whether



TOP LINE: 'Tani Goodman saved the lives of four people.' BOTTOM LINE: 'Make your last mitzvah your most important one.'

brain death equals absolute death, Berman is without doubt.

"Nobody has woken up from brain-stem death," he insists. "There is no such thing. The person is dead. There needs to be an understanding of the difference between an organism and an organ. The organism as a human being can be dead, but the organ can be kept alive."

A kidney, for example, can be kept alive out of the body for about 48

hours. Yom Kippur, the holiest day of the year when we fast, we could be commanded to eat pork, if that can save another person's life."

He acknowledges, however, that of the three commandments that take precedent over *piku'ach nefesh*, one is murder. In other words, one cannot kill a person to save another person's life, which obviously colors the debate, if one considers a brain dead person actually to be alive.

While Berman concedes that the majority of the Orthodox world continues to oppose organ transplants in brain death situations, he senses a changing tide.

"There's a growing recognition and a movement of rabbis that accept brain-stem death as halachic death," he says.

His primary obstacle in encouraging change on the issue, Berman says, is the structural nature of much of the halachic world.

"My struggle is really not about organ donation," he says. "My struggle is about *da'as Torah*, which means a hierarchy of Torah authority. In the more black hat world, they believe that in every generation there is one supreme religious leader who has the ultimate say of what is correct and what isn't correct."

"That's what I'm up against. I'm fighting the battle on two fronts. I'm trying to show that there's a multitude of different opinions on this issue. It's not black and white. But if you speak to people in the black hat world, they will tell you, 'no.'"

He is facing other forms of resistance as well.

One of them is superstition. Many Jews, especially in Israel, believe in the physical resurrection of the body at the time of the Messiah, which causes a reluctance to part with a loved one's organs.

Other Jews still ascribe supernatural powers to the "evil eye," and believe that those who permit their loved one's organs to be donated will endure misfortune.

"It's nonsense, it's delusional," Berman says of such beliefs, even while acknowledging their influence as "major."

Among some Orthodox authorities, Berman says, there is also a fear of a "slippery slope" situation, that is, once views on brain death and organ donation are reevaluated, other changes may be forced in, including some which are less easy to accommodate.

Berman says a prominent rabbi once told him that he wouldn't allow him to lecture in his shul because "the last thing he wants is an educated flock coming to him with a question that will force him take a position on a controversial issue which will then cause him to fall out of favor with half of the Orthodox world. He would rather ignore the issue."

Secular Israelis, he says, tend to share that Orthodox perception which maintains that organ donation is against Jewish law. This might be an excuse for simple discomfort with the issue, he suggests. He refers to a phenomenon in which many secular Jews, despite their anti-religious views, sometimes revert to Orthodox interpretations.

Organ donation

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He suspects the same thing is influencing American Jewry.

There are many other issues complicating the organ donation debate, such as whether it's permitted to donate a dead person's eyes, since this does not actually save lives, or whether there must be advance knowledge of a specific recipient — "a sick person before us" — before a transplant can be approved.

These issues, too, have been exhaustively debated, and can be examined through a variety of halachic sources.

"I've really thrown myself into the maelstrom of controversy," Berman admits, but expresses satisfaction that the HOD Society is making significant progress.

It began with no rabbis willing

to go public in support of its position and no holders of its donor cards. Today, two years after its founding, some two dozen "prominent" rabbis have signed donor cards (which can be checked either for brain death or heart cessation). About 1,000 Orthodox Jews have signed cards.

When Berman speaks, he usually manages to sign up 10% of his audience for cards, which is over twice what most organ donor appeals ordinarily achieve, he says.

He speaks whenever possible, estimating that he has already reached some 8,000 people, and encourages those who oppose his position to show up to argue the many fine points.

"I think open and honest debate will reach the truth," he says confidently, "and that anyone who has ears in his head will hear the truth."

OPINION

'The notion of brain death is a medical myth. There is no such thing as a total cessation of brain activity'

hours. "Nobody would say that the person is alive," Berman says, "but the organ is alive."

Even physicians sometimes make the "critical mistake" of assuming that they are keeping brain dead patients "alive" with life support, while Berman's take is that the body is already dead. The physicians at that stage are merely keeping the organs alive.

"Until recently, it's been relatively easy," Berman says, "because without modern medicine a person's heart would stop beating and they would stop breathing. The two systems, cardio and pulmonary, were very much intertwined. But now with the advent of modern medicine you can actually separate the two. A person could not breathe, he wouldn't be getting any oxygen, but if you stick a tube down his throat to artificially breathe for him, his heart will continue to pump. That's a new gray area, where the medical profession has been able to, let's say, drag out this process of systemic failure."

According to Berman, that does not change the irrevocable nature of brain death, nor the supreme importance attached to *piku'ach nefesh*.

"That might mean that on

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