

Communications

BRAIN DEATH

TO THE EDITOR:

The rabbinic controversy about whether or not total and irreversible brain death is an acceptable definition of death in Jewish law was reviewed by Dr. Yoel Jakobovits in *Tradition*.¹ Since then, there have been some developments showing the growing consensus of the halakhic validity of brain stem death. These include the following letters, some of which are as yet unpublished but copies of which are on file with the Editor.

An additional responsum of Rabbi Feinstein concerning brain death recently came to light. This 1985 responsum is addressed to Dr. S.S. Bondi, grandson of Rabbi Joseph Breuer, and is dated Kislev 5745. In this responsum, Rabbi Feinstein states that "even though the heart can still beat for several days, nevertheless, as long as the patient has no independent respiration, he is considered to be dead, as I explained in my responsum in *Iggrot Moshe, Yoreh Deah, Part 3, #132*." He thus clearly and unequivocally reiterates and clarifies his earlier statement on brain death.

An extensive exchange of correspondence and personal discussions took place between one of us (MDT) and Rabbi Shlomo Zalman Auerbach between 1991 and 1993 (details available on request) culminating in the following statement issued by Rabbi Auerbach which is in press in the next issue of *Assia* (Jerusalem):

In the following situations, It is permissible to remove organs for transplantation from a person who physicians have determined is brain dead:

1. In the Diaspora, whether the organ donor is Jewish or not, a Jew is allowed to be the recipient of organs to save his life.
2. If someone is actually decapitated or if the entire brain is outside [the skull], even if the heart is beating [organ removal from the donor for transplantation is permissible].
3. When brain death is established according to all accepted medical tests so that it is permissible to remove the mechanical respirator—and it is clear that the patient lies like an inanimate stone and does not breathe spontaneously, and one waits until the heartbeat stops completely for *half a minute*—if one can successfully revive the heart, one may use [that patient's] organs for transplantation.
4. If in the future a test is discovered which can definitively and unequivocally determine that all brain cells are dead without any doubt, and if after removal of the respirator it is apparent that the patient does not breathe for thirty seconds—and, in addition, if the test itself does not violate the laws of a *goses*, that is to say that the test does not involve moving the patient or injection of a substance into the body—one might consider whether this situation is equivalent to decapitation and then allow organ transplantation from such a corpse even if the heart still beats.

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Rabbi Ahron Soloveichik, who disagrees with the “physiologic decapitation” concept, nevertheless wrote a letter dated November 11, 1992 which begins as follows:

To whom it may concern:

I am writing this letter in order to dispel the erroneous notion that I tell people that Horav Reb Moshe Tendler’s allegation that his father-in-law Hagoen Reb Moshe Feinstein said that brain death constitutes Halachic death is untrue. This is not true.

Rabbi David Feinstein, in response to a statement attributed to him by Dr. Abraham S. Abraham in his 1992 *Nishmat Abraham (Yoreh Deah #339)*, wrote a letter of clarification on November 26, 1992 (Rosh Hodesh Kislev 5953). Rabbi Feinstein’s brief letter states the following:

I have already written that what my revered father [Rabbi Moshe Feinstein] wrote in his *Iggrot Moshe, Yoreh Deah, Part 3, #132* is a true responsum and one should not question it or think that it may be falsified. Thus, it is accurately his opinion. Some of the details therein I heard directly from him. That which I wrote in a letter on 3 Shemot 5750 [1990], I have not retracted. It should not be necessary to repeat this every time a person claims that this responsum [of my father] or that this letter [of mine] is not true. I ask all those who read this letter to not require me to write another.

To clarify the matter: if the patient is lying motionless like a corpse, even if the heart is beating, since he is not breathing [spontaneously], he is completely dead. This additional [statement] to the above is for better clarification.

Having seen the 1985 responsum of Rabbi Moshe Feinstein and the 1992 letter of his son Rabbi David Feinstein, Rabbi Tzvi Flaum (who previously expressed uncertainty as to Rabbi Feinstein’s opinion on brain stem death) wrote a letter to one of us (MDT) on February 9, 1993. Rabbi Flaum declares that it is “quite clear that Rav Moshe held that death occurs according to halacha when brain death has been diagnosed and the person has lost his capability of autonomous respiration and is inanimate as a stone.” It is obvious, continues Flaum, that “This is the case even if the heart is still beating.” This interpretation “is buttressed by the later unpublished letter of Rav Moshe to Dr. Bondi stating explicitly that he accepts the Harvard criteria as being equal to the Mishnaic dictum of decapitation.” Rabbi Flaum concludes by citing Rabbi David Feinstein’s letter clarifying his father’s ruling.

Rabbi Eliezer Yehuda Waldenberg’s previous opposition to accepting brain stem death as halachically valid,² has now been reversed with his recent ruling that ordered Hadassah Medical Center in Jerusalem to perform a cesarian section on a pregnant woman in the ninth month of gestation in order to save the fetus because the mother was brain stem dead.³ Rabbi Shlomo Zalman Auerbach concurred in this ruling.⁴

Finally, early in 1994, Rabbi Auerbach was joined by Rabbi David Feinstein and Rabbi Tuvia Goldstein in calling on the Orthodox Jewish community to help locate a donor for a young woman in need of a lung transplant.⁵ The intent of this plea was for family members to authorize such organ donation from a relative declared brain stem dead in order to save the life of the patient.

All rabbinic authorities agree that the classic definition of death in Judaism is the absence of spontaneous respiration in a patient with no other signs of life. A brief waiting period of a few minutes to a half hour after breathing has ceased is also required. Brain death is a criterion 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, classic Jewish sources, as well as the responsa of Rabbi Moshe Feinstein, z"l. This view is now supported by more and more rabbis including Rabbi Shlomo Zalman Auerbach, the Israeli Chief Rabbinate, Rabbi Feinstein's sons, David and Reuven, and seemingly, Rabbi Eliezer Y. Waldenberg.

(RABBI) MOSHE D. TENDLER, PH.D.
FRED ROSNER, M.D.

New York

NOTES

1. Y. Jakobovits, "(Brain Death and) Heart Transplants: The (Israeli) Chief Rabbinate's Directives," *Tradition*, 24:4, Summer 1989, pp. 1-14.
2. E.Y. Waldenberg, {"*Be'Issur Hashtalat Lev Vekaved MeiAdam LeAdam* (In regard to the prohibition of transplanting a heart or liver from person to person)."} *Assia*, No. 47-48, Kislev 5750 (Dec 1989), pp. 115-128.
3. Y. Shafran, "*Hatzalat Uber Hamatzui Begufah Shel Nifteret—Hibatim Hilchatiyim* (Saving a fetus extant in the body of a dead woman—halachic considerations)," *Assia*, No 49-50, (Tammuz 5750), July 1990, pp. 95-118 (See p. 105).
4. Personal communication from Rabbi S.Z. Auerbach to Dr. Abraham Steinberg and Rabbi Yigal Shafran.
5. B. Jolkovsky "Teen's plight fuels battle over organ transplants. Halacha faces new questions in hi-tech era." *The Forward* (New York), Jan. 9, 1994, pp. 1 and 5.

RABBINIC AUTHORITY

TO THE EDITOR:

In the special issue of *Tradition* dedicated to Rabbinic Authority (Summer, 1993, 27:4), the late Rabbi Simhah Friedman discusses the binding nature of the opinion of Torah authorities (*da'at Torah*) in secular affairs. He presents the purported view of the distinguished Rav E. E. Dessler that the opinion of such authorities is to be followed because their rulings are reached under the influence of *ruah hakodesh* (the Divine Spirit). He then spends much of his 23-page article proving that human intelligence—and not prophetic dreams, heavenly visitations or metaphysical inspiration—is the determinant of Halakha; hence, says Rabbi Friedman, *da'at Torah* is not binding.

Other than followers of certain Hassidic *rebbeim*, I have never heard of anyone who understands *da'at Torah* to refer to the likes of metaphysical inspiration. On a personal level, I have had the privilege to being present when recognized *gedolim* of our times—whose opinions are considered *da'at Torah* by a large portion of Jewry—have dealt with major decisions. Never did any one of them imply that their decisions were taken with anything but their human decision making faculties. On the contrary, they were all repelled by anyone who claimed to have arrived at any conclusion through metaphysical inspiration.

Nor does R. Dessler have a different view. An examination of the full text of the citation quoted by Rabbi Friedman (*Michtav Me'elياهو* I, p. 75), clearly indicates a position that *da'at Torah* is a product of human intelligence. It reads as follows:

. . . I have merited knowing many of these Torah greats personally, such as the Chafetz Chaim, Reb Chaim Brisker, Reb Chaim Ozer and have seen them at conferences concerning Jewry at large. I can honestly say that even for those of such puny intelligence such as ours, their brilliance (*pikchutam*) was astounding; their analytic insights would literally descend to the depths [of the problems]. . . . When they considered, and totally involved themselves, in the problems of Jewry—purely for the sake of Heaven—it was awe-inspiring to witness on their faces the degree and the depth of their sense of responsibility. Indeed, whoever did not see this can never know what a true sense of responsibility is. Whoever merited standing before them at these moments, felt sure that he experienced the *shechinah* dwelling in their activities and the Divine spirit resting in their company. One might literally recite the blessing “He who separates between the holy and the profane” over the difference between their conferences and other conferences to which we are accustomed. . . .

Nowhere in this letter does R. Dessler imply that these *gedolim* arrived at their decisions by any means other than their human faculties. On the contrary, he emphasizes their outstanding *human* qualities: their intellectual depth, their selfless involvement, their extreme dedication to the welfare of the Jewish people, while contrasting their meetings to “other conferences to which we are accustomed.” (The passages which indicate these points are all omitted in Rabbi Friedman’s citation.) It is obvious that R. Dessler’s brief for reliance on their decisions is not based on supernatural inspiration.

As for R. Dessler’s reference to the “*shekhina* dwelling in their activities and the Divine spirit resting in their company” and a later reference (cited below) to their “*siyata dishmaya*” (Divine assistance), this does not imply, as Rabbi Friedman would have it, that some sort of prophetic inspiration is behind their decision making—for, as we have seen, the entire citation indicates otherwise. These references are not different from that of the Mishna (Avot 2:2) which states, “Two who sit and occupy themselves with Torah—the *shekhina* dwells between them,” and that of the Talmud (Megilla 6b) which states that success in business depends upon *{siyata dishmaya}*.” Obviously, these statements refer, respectively, to the sanctity attendant upon students of Torah and to the blessing of God which brings financial success. However, neither are a contradiction to the fact that the scholars’ studies and the businessmen’s success are products of the personal endeavors of each—nor did R. Dessler mean otherwise.

Rabbi Friedman compounds his misreading of R. Dessler’s opinion by a misunderstanding of the reason for the halakhic authority of post-Talmudic sages. He spends nearly all of the rest of his article citing opinions that we may dispute the non-halakhic portions of the Talmudic writings where our own intelligence tells us they are mistaken. From this he deduces that we may dispute any non-halakhic opinion of Torah authorities, such as *da'at Torah*.

What Rabbi Friedman fails to understand is that only the halakhic authority of the Sanhedrin and the Talmudic Sages is obligatory. (The sources for this are docu-

mented in Dr. Eli Turkel's article in the same issue.) The authority of the halakhic opinions of, say, Rambam, Vilna Gaon or Hazon Ish stems simply from a universal recognition that their greatness and vast command of every aspect of Torah law compared to our own nullifies our opinion—not from any mitzva and not from any belief that they enjoyed metaphysical inspiration. Thus, we are not sinners if we dispute their viewpoints—merely arrogant fools.

To use an analogy, when faced with a medical decision we are not *obligated* to obey a specialist's opinion where we feel that our own intelligence dictates another mode of procedure. But if we decide to follow our own opinion based on our own flimsy medical knowledge we are certainly fools.

Thus, the distinction which Rabbi Friedman makes between halakha and non-halakhic matters is irrelevant to post-Talmudic opinions. We may decide to agree or disagree with them in either case. However, if we do decide to accept the halakhic decisions of the *poskei hadorot* (which I assume Rabbi Friedman and most readers of *Tradition* would do), then, by the same token, we should grant them the same authority in any area where their greatness in Torah enables them to make better decisions than we can make—areas where *da'at Torah* is generally consulted.

In other words, we may agree or disagree with the non-halakhic decisions of Hafetz Haim, R. Haim Brisker, R. Haim Ozer just as we may agree or disagree with their halakhic decisions. There is no difference between one and the other. However, one should recognize that, by the same token, there is no difference in the two instances between the degree of one's foolishness.

In line with this idea, R. Dessler concludes the above citation (quoted by Rabbi Friedman with, again, selected omissions) by saying:

R. Elchanan [Wasserman—whose opinion was being disputed by R. Dessler's correspondent] was a true *godol*, and one should not make light of his opinions, certainly not belittle them, even because of that which pygmies such as we consider to seem to be facts. The Sages have already said that [we must obey the court] even when they say that "left" is "right." And [once should] not say, perish the thought, that they have certainly erred because "I, the puny, see openly that they have erred." Rather, my perception must be nullified before the brilliance of their intelligence and their *siyata dishmaya*. The Sages have said, "One Sanhedrin cannot nullify [a ruling of] another [earlier] Sanhedrin unless it is greater than it in wisdom and number." Besides, it is probably that what we perceive to be "fact" is nothing but fantasy. This is the Torah view on *emunat Chachamim*.

R. Dessler here, again, admonishes his student to accept R. Elchanan's view, and to conclude that the student's own conflicting view is very likely mistaken, because of R. Elchanan's greatness and prodigious intellect—not, as Rabbi Friedman would have it, due to any Divine visitation. (His references to obeying the court "when they say that left is right" and to "one Sanhedrin cannot nullify another" are obviously metaphorical since these maxims, as noted above, apply only to courts of the Sanhedrin.)

In brief, R. Dessler's view is that *da'at Torah* should be relied upon because leaders who are brilliant, are informed by Torah, who possess profound integrity, and are devoted to their nation, are the "eyes" of the Jewish people and they can guide us most accurately on our national "paths." If we shall not follow such leadership then whom shall we follow? Party leaders and politicians whose agenda is based on power, prestige and monetary gain?

Remarkably, Rabbi Friedman's concluding paragraph, after he has disposed of *da'at Torah* as non-binding, adds,

It is, nevertheless, desirable . . . [to] seriously consider the views of rabbis in worldly matters, when these views are the product of deep reflection upon public issues and conflicts. In my opinion, this may serve as a barrier against the danger of being guided by material self-interests . . .

Far from an afterthought, this idea is central for the authority of *da'at Torah*, one which makes it not only "desirable" but vital when momentous national decisions have to be taken.

RABBI AHARON FELDMAN

Jerusalem

TO THE EDITOR

Rabbi Simchah Friedman takes Rabbi Elyahu Dessler to task for using a verse referring to the evil Achitofel's advice as a metaphor for the advice of *gedolim*. He seems to have overlooked that the Midrash (Midrash Tehillim 3) to this verse comments: {Achitofel's advice was [like] that of a *mal'akh* (angel) and not that of a human"—which makes it quite an appropriate metaphor.

ADINA SHAPIRA

Rechasim, Israel

TO THE EDITOR

The special issue of *Tradition* devoted to rabbinic authority considers when, and under what circumstances, Jews ought to obey the rabbis. But few of the writers consider the related issue: When, in practice, do Jews obey the rabbis?

When a Jew chooses to ask a rabbi questions of Jewish law, he or she invests that rabbi with legal authority. Each Jew chooses to ask this rabbi, rather than some other. The questioner judges whether the rabbi is pious and scholarly, but also if the rabbi understands the questioner's social conditions. Further, the questioner evaluates the rabbi's attitude towards mystical sources and secular learning, his stance towards political realities, his tendency towards leniency or stringency, his preference to decide in accordance with early or late authorities, his balance between technical and policy concerns in determining halakha, his ability to explain and justify the halakha. The questioner also faces practical considerations, in seeking a rabbi who is available, and willing to decide.

When the rabbi himself wishes to consult a colleague or teacher in answering a question in Jewish law, the same set of factors influence his choice of consultant. The process of rabbinic authority thus flows upstream, from ordinary Jew to ordinary rabbi to exceptional *talmid hakham*. Who decides questions of Jewish law is thus determined by the people who ask.

Some scholars may, in developing a theoretical model of halakha, attack the legitimacy of personal charisma as part of rabbinic authority. But as long as at least some of us do sometimes ask our rabbi for a decision without insisting on learning

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all the details of the decision-making process, the authority of the rabbi's personality will remain relevant.

Some scholars like to think that halakha ought to be a completely mechanical, technical process; others consider it legitimate for rabbinic decisors to consider policy. Sensitivity to policy, whether it goes by the name of the search for overarching principles in Jewish law, or, more humbly, individual conscience, or, more grandly, seeking the will of the Almighty, whether we find it licit or not, is itself a matter on which communities and individuals base their decisions when they decide whom to follow. Though we may idealize an objective axiology of decision making, some Jews will insist on following the rabbis who explain their decisions in other terms.

In sum, a theory of halakha which focuses on the decisor looks at only half of the system. There can be no halakhic authority without the ordinary observant Jew who seeks to guide his or her life by halakhah and who therefore chooses to consult with a decisor. Practical halakhic authority is expressed in the medium of responsa, *teshuvot*; but without *sh'eilot*, questions, there are no true *teshuvot*. The Torah is a tree of life, not a model or statue; it gets its shape, in part, from those who hold on to it.

(RABBI) ELIEZER FINKELMAN

Berkeley, CA