Communications

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ORTHODOXY AND THE PUBLIC SQUARE

TO THE EDITOR:

In his contribution to *Tradition*'s symposium "Orthodoxy and the Public Square" (38:1, Spring 2004), Rabbi Chaim Dovid Zwiebel presented what seemed to be a compelling argument for Agudath Israel's unique view. For example, in reference to *Webster v. Reproductive Health Services*, a famous abortion case from 1989, he put forward that Agudath Israel's brief—under the direction of its Moetzes Gedolei HaTorah—presented

> an Orthodox Jewish voice [which] articulates an authentic Jewish perspective on an issue that had elicited numerous representations by non-Orthodox groups that totally distorted the Torah position. . . . As read by the Moetzes Gedolei Hatorah . . . public statements that various Jewish groups were making in their own submissions to the Supreme Court and in the media misleadingly converted the narrow halakhic exception that authorized abortions under certain exceptional circumstances into a general rule endorsing unlimited reproductive choice as an affirmative Jewish value—a classical case of *ziyyuf ha-Torah* and *hillul Hashem* that demanded a clear public refutation.

This does not seem to be an accurate representation of the brief Agudath Israel submitted. The brief makes exactly one reference to Jewish law (less than 100 words), and it certainly does not explore or explain the underlining Jewish law, nor does it note that others are distorting Jewish law. Instead, it argues the exact opposite of the classical pro-life position and contends that American constitutional law ought not be allowed to determine that life begins at conception. Instead, it focuses on federalism issues and religious freedom problems. "Like the court below," it wrote, "Agudath Israel of America believes that the Missouri legislature exceeded its constitutional authority in finding that human life begins at conception" (Agudath Israel Brief, p. 5). Indeed, Agudath Israel explicitly wants the Supreme Court to "prohibit legislative bodies from conferring human status—personhood—upon fetuses" (ibid., p. 6).

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R. Zwiebel and Agudath Israel devoted the whole brief to the proposition that even though abortion is not a form of murder as a matter of American law, American constitutional law ought to allow those states that wish to restrict abortion the right to do so in all cases except "when abortion is necessary to preserve the mother's life, or when it is mandated under the mother's religious beliefs."

Thus, Agudath Israel's Supreme Court brief was neither a faithful recounting of the Jewish law as it governs Jews, nor a faithful recounting of Jewish law as it governs gentiles (who have greater restraints than Jews in issues of abortion).

So too, it was not an argument that refutes those who speak unauthentically in the name of Judaism—indeed, it would grant the latter group heightened protection, as it seeks to protect religiously motivated decisions of all strands of Judaism—and every other faith as well. If the Agudath Israel brief were to be adopted as American law, it would provide exactly the kind of constitutional protection of Reform and Conservative pronouncements in the name of Jewish law in the area of abortion that R. Zwiebel claims the Moetzes told him to challenge since R. Zwiebel fully recognizes that religious freedoms granted to one faith must be granted to all. Consider that if the argument of R. Zwiebel were accepted as American law, the assertion by a liberal rabbi that "it is religiously wrong to have more than two children and abortions in such cases are mandatory" would be protected as a matter of American law even if *Roe v. Wade* were overturned and abortions could be restricted by the different states.

Rather, Agudath Israel's brief was written to protect narrow Orthodox Jewish interests. The question it seeks to answer is, "If Roe is struck down, will religious Jews be able to have abortions when halakha mandates such abortion," and it crafts a solution to that narrow problem without becoming generally pro-choice. It does nothing more and nothing less. Agudath Israel is prepared to accept as legal abortions that Jewish law would label as violations of Jewish law as a price to pay for religious freedom, so long as Jews are granted their freedom.

Of course, it is important and laudable to protect the rights of Orthodox Jews to exercise options allowed by halakha. Nevertheless, it is disingenuous to portray this brief as involvement in the broad public debate when in truth there is no such involvement. R. Zwiebel's characterization of the position of Agudath Israel in his article in *Tradition* in this case (as providing "an Orthodox Jewish voice [which] articulates an authentic Jewish perspective") is just false. Nothing in the brief addresses the issues that he claims it does.

It is a rare author who can be accused of mischaracterizing his own work, but that is what has happened here—R. Zwiebel directly mischaracterized something he himself wrote in a way designed to make it more appealing to the audience for which he was writing, even though on examination his characterization of his own work is absolutely false in substance. I fear this violates the first value in Torah scholarship: truth.

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Chaim Dovid Zwiebel responds:

Rabbi Goldwasser confuses two distinct points: (1) the *reason* Agudath Israel decided to submit an amicus curiae brief in the *Webster* case, and (2) the substantive *content* of the brief itself.

With respect to the former, which was the subject of my essay in *Tradition*, it was the decision of our Moetzes Gedolei HaTorah that we should enter the legal fray at the Supreme Court level precisely for the reason discussed in my essay: to dispel the notion, conveyed by various non-Orthodox and secular Jewish groups, that unfettered reproductive freedom (i.e., abortion on demand) was consonant with Jewish values. Had the broader Jewish community not been such a vocal proponent of *Roe* v. *Wade* (often speaking in the name of Judaism, no less!) we would not have found it necessary to invest the energy and resources to present a contrary view in the Supreme Court (and, through the media attention generated by the legal brief, to American society at large).

With respect to the latter, which was decidedly not the subject of my essay, the brief was what a brief is supposed to be: an attempt to advocate a *particular point of view* within *the specific context of the case under consideration*. The point of view—as per the guidance we received from our Moetzes Gedolei HaTorah—was that abortion on demand should not be deemed a fundamental constitutional right, but that abortion where halakha would require it should retain its protection. (Yes, it's true, Agudath Israel's advocacy on the issue of abortion seeks "to protect narrow Orthodox Jewish interests." Imagine!) The specific context in which that point of view was to be articulated was the Supreme Court's review in *Webster* of a Missouri statute that imposed certain restrictions on the performance of abortions and that further "found" that human life begins at the moment of conception; and in which the

Court had indicated that one of the questions presented for its consideration was whether *Roe* v. *Wade* should be reconsidered.

Without going into the full detail of the argument we presented in the brief (anyone interested in reading it may write me at Agudath Israel of America, 42 Broadway, New York, NY 10004, and I will be glad to send a copy) we advanced three major points: (1) that *Roe* v. *Wade* was wrongly decided and should be overturned; (2) that the right to abortion should nonetheless be preserved in the extraordinary case when the pregnancy threatens the mother's life or where her religious beliefs require that the pregnancy be terminated; and (3) that Missouri's legislative finding that the fetus is a human being from the moment of conception, which could jeopardize the right to abortion in situations where halakha would demand it, should be struck down as an unconstitutional establishment of religion.

R. Goldwasser is right that protection of the right to abortion where pregnancy threatens the mother's life or where her religious beliefs mandate terminating her pregnancy could result in abortions in cases where halakha would not permit them: for non-Jewish women, for whom halakha recognizes no "life of the mother" exception to the prohibition against abortion, or for Jewish women who are guided by the type of "liberal rabbis" fancifully conjured up in R. Goldwasser's letter. However, under the American system of law, as R. Goldwasser correctly notes, "religious freedoms granted to one faith must be granted to all," and sometimes the only way to ensure that our halakhic rights are legally protected is to extend such protection beyond the precise parameters of halakha. That is one of the realities of the imperfect world we inhabit as we await the arrival of *Mashi'ah.*

R. Goldwasser is also right that the Agudath Israel brief does not provide a detailed analysis of halakha as it relates to abortion. That is not what the *Webster* case was about, and that is not what legal briefs are supposed to do. But no one who read the brief would have mistaken Agudath Israel's position for that of the pro-*Roe* v. *Wade* Jewish establishment. They would have read our statement (pp. 2-3) that:

> Reconsideration of a decision [*Roe* v. *Wade*] that has effectively legalized abortion on demand is, in our view, highly appropriate and long overdue. Jewish tradition accords fetal life significant protection; it rejects the notion that termination of pregnancy, even prior to fetal viability, is a matter of free choice within the province of the mother.

They would have further read (at various points on pp. 3-4) that

"*Roe* v. *Wade* was decided incorrectly and should be overruled"; that "in most cases, the right to abortion should not be accorded the status of a 'fundamental' right"; and that only in "those exceptional cases" where "abortion is necessary to preserve the mother's life or when it is mandated under the mother's religious beliefs," should abortion be deemed a "fundamental" right.

To say, as R. Goldwasser does, that this formulation does not constitute "involvement in the broad public debate" over abortion, or that it "argues the exact opposite of the classical pro-life position," or that it provides "exactly the kind of constitutional protection of Reform and Conservative pronouncements in the name of Jewish law in the area of abortion," is to distort the plain meaning of our presentation. And the proof of the pudding is in the fact that when we submitted our brief, it was noted widely that Agudath Israel's position on abortion differed dramatically from that of the "mainstream" Jewish community. The members of our Moetzes Gedolei HaTorah were pleased.

BRAIN DEATH

To The Editor:

In his response to my article on brain death (*Tradition* 38:4, Winter 2004), Dr. Reichman rightly noted that I focused on decapitation. This is the only way that I am able to understand Rabbi Moshe Feinstein's various opinions on brain death. To argue, as Dr. Reichman and others have, that R. Feinstein holds that the absence of breathing alone determines death is a position that directly contradicts his responsum (*Yoreh De'ah* II:146) where he unequivocally holds that so long as the heart beats the person is alive, and breathing is merely the most readily apparent sign of heart function. R. Feinstein states there, "When a man's heart is beating, the halakha is that he is alive." In his subsequent responsum (*Yoreh De'ah* III:132), R. Feinstein speaks of a circumstance that "is really like decapitation." With this crucial and unique element he agrees death can be determined even though the heart may still be beating. The key issue then becomes the confirmation that brain death is equivalent to decapitation as R. Feinstein himself outlines.

The argument that nobody requires confirmation of "complete destruction of the cardiac muscle tissue" in cardiac death, as Dr. Reichman writes, is not an apt analogy. Lack of cardiac function is today

easily demonstrated in modern hospitals. However, the halakhic requirement to show physiologic decapitation is not so easily demonstrated. The whole issue with physiologic decapitation is the mandate to prove there is complete disconnection of the brain to the body. This can only be confirmed either by demonstrating complete destruction of the brain or complete disconnection of the brain from the body. And this is exactly what R. Feinstein required as he states, "[when] it is clear that the brain no longer has any connection to the body. Also the brain has already completely rotted. This is like decapitation" (*Yoreh De'ah* III:132). It is this point that the medical literature fails to prove. In the clinical syndrome called brain death, there is abundant evidence of ongoing function of the brain.

Dr. Reichman questions my puzzlement on the position of Wijdicks who does not include testing of autonomic brain function as a criterion for the diagnosis of brain death. He states that such function "is of no clinical (or halakhic) relevance," and therefore Wijdicks does not require it to diagnose brain death. I was actually noting a contradiction in the writings of Wijdicks himself who in one paper states that hormonal and cardiovascular "collapse distinguishes brain death from other comatose states… One should doubt the clinical diagnosis of brain death in a patient whose condition remains stable," (E.F.M. Wijdicks, L.D. Atkinson and H. Okazaki, "Isolated medulla oblongata function after severe traumatic brain injury," *Journal of Neurology, Neurosurgery and Psychiatry* 70 [2001], 127-129) and then fails to list cardiovascular instability as a criterion for brain death (E.F.M. Eelco, "The diagnosis of brain death," *The New England Journal of Medicine* 344:16 [2001], 1215-1221). If brain death is determined only by lack of higher neurologic function of the brain (as the Harvard Criteria do) and ignores autonomic/hormonal function of the brain, then it has created a definition with no biological basis (the brain is still functioning) but rather a value judgment which declares that higher neurological function is important while autonomic/hormonal function is not. By arguing, as Dr. Reichman has, that this residual brain function is halakhically and clinically irrelevant—even though it is probably crucial to the ongoing life of those patients who continue to live despite the diagnosis of brain death (as Shewmon has documented in his "Chronic brain death: meta-analysis and conceptual consequences," *Neurology* 51 [1998], 1538-1545)—this is only true if, as Dr. Reichman asserts, "the sole purpose of the protocol is to confirm irreversible cessation of breathing." However, the position that irreversible cessation of breathing is alone

sufficient to declare death is not supported in the responsa literature (see most importantly the authoritative responsa of Hakham Tsevi [chap. 77] which R. Feinstein cites and agrees with; see also *Responsa of Hatam Sofer*, *Yoreh De'ah* 338) and is directly rejected by R. Feinstein himself (*Yoreh De'ah* II:146).

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EDWARD REICHMAN RESPONDS:

At issue in Dr. Kunin's letter is the interpretation of Rav Moshe *zt"l*'s responsa on the topic of brain death. Dr. Kunin interprets R. Moshe to have required both complete absence of all measurable physiological connection between the brain and the body and complete decomposition of the brain tissue. If this were true, the medical literature cited would indeed necessitate a re-evaluation of the original *pesak*. However, while this is one theoretical interpretation, it is not directly supported from the responsa. Nowhere does R. Moshe state unequivocally that either absence of *all* physiologically measurable activity or *complete* brain decomposition is required for the halakhic determination of death. The only very clear, absolute, and irrefutable requirement according to R. Moshe is cessation of independent respiration. This interpretation of the position of R. Moshe is confirmed by R. Dovid Feinstein (video interview at www.hods.org):

> My father's position was very simply that the stopping of breathing is the point of death. It doesn't matter if the heart functions or doesn't function. That is the way he explained the Gemara in *Yoma*. . . . If the breathing has stopped, then he is considered dead. . . . Anything else is not a criterion.

R. Shabtai Rappoport has likewise confirmed this position: "Once we know that a person's spontaneous breath stopped, this is considered to be death. This I heard from R. Moshe himself" (video interview at www.hods.org).

The sole criterion of irreversible cessation of respiration is unquestionably met in the current brain death criteria. As such, the recent medical literature would in no way affect the original *pesak*.

The issue of brain death and halakha continues to evoke intense responses and remains an issue upon which *poskim* disagree. I did not in either my original response, nor presently, wish to revisit the lengthy

debate on the subject. (R. Shaul Yisraeli presents the Israeli Chief Rabbinate's position, including a halakhic defense of it, in his "On the Permissibility of Heart Transplants Today" [in Hebrew], *Barkai* 4 [Spring 1987], 32-41. A lengthy full text bibliography can be found at www.hods.org.) My objective was and remains simply to clarify that those who initially accepted brain death as halakhic death—primarily R. Moshe Feinstein and the Israeli Chief Rabbinate—could still maintain their respective positions in light of the most current scientific literature.

Regarding the cardiac analogy, I believe it to be directly relevant. Cardiac death is a functional determination, not a physiological one. When cardiac death is pronounced, there is still residual physiological activity of cardiac muscle, and there is no complete decomposition of cardiac tissue. The heart simply ceases to become a functional organ. One should apply the same standard to brain death. Once the brain has no functional control of the body—as determined by brain death criteria—and no longer generates spontaneous breathing—a fact readily and reliably testable—brain death can be declared. To be consistent, one should be able to declare brain death despite the presence of residual physiological activity and the absence of complete tissue decomposition as long as the clinical function of the brain has ceased.