On Organ Donation

I commend Rabbi Breitowitz's attempt to expound upon the complicated issue of organ donation and *halachah* ("*What Does* Halachah *Say About Organ Donation*," fall 2003). I would, however, like to clarify a number of points.

Rabbi Breitowitz casts doubt on the acceptance by the medical establishment of the criteria of brain-stem death (BSD) by stating that, "the brain-stem death standard itself has recently been questioned by some neurologists." Tens of thousands of neurologists throughout the Western world understand BSD to mean death. Rabbi Breitowitz's comment, and his note that lists one paper written by two physicians, implies dissent large enough to note. It is not.

Concerning Rav Moshe Feinstein's position confirming BSD as halachic death, I refer readers to *Iggerot Moshe* (*YD* 3:132) and Rav Moshe's letter to Dr. E. Bundi, the grandson of Rabbi Yosef Breuer. Rav Moshe's position was also confirmed by Rabbi Dovid Feinstein, Rabbi Shabtai Rappoport, Dr. Ira Greifer and Rabbi Dr. Moshe Tendler.

Furthermore, in 1986 the Chief Rabbinate of Israel appointed a committee of rabbinic scholars and neurologists to investigate the halachic status of BSD. Not only did the scholars unanimously conclude that BSD was halachic death, but they were also of the *unanimous opinion* that Rav Moshe himself accepted BSD as halachic death. The committee included rabbinic luminaries such as Rabbis Zalman Nechemia Goldberg, Mordechai Eliyahu, Avraham Shapiro, Avraham Shlush, Shaul Yisraeli and Yisrael Lau. All the testimonies, letters and documents from these rabbis may be found at the web site of the Halachic Organ Donor Society (HODS) (**www.hods.org**).

Regarding the Rabbinical Council of America (RCA), Rabbi Breitowitz claims that even though the organization has officially accepted BSD as halachic death, "many *rabbanim* who are members of the RCA, however, do not follow this position." HODS recently sponsored a random sampling survey by an independent researcher of the RCA membership. The results show that approximately half of the RCA rabbis claim not to have an informed opinion about BSD, and of those that do have an opinion, the *majority* of them accept BSD as halachic death.

Rabbi Breitowitz, when discussing non-heart beating donation, refers *only* to comatose patients whose hearts stop as a result of being removed from a respirator. He omits other kinds of non-heart beating donation such as those that come from patients who were originally brain-stem dead—whose cessation of breathing is already determined to be irreversible—and who then undergo cardiac arrest. He also omits uncontrolled-donation. This situation arises when CPR is being performed on a patient for a prolonged period of time and the physicians finally declare him dead. Compressions are continued, however, until the family can be contacted to approve or deny organ donation. While this type of donation is rare, it does happen and, therefore, it allows even those Jews who reject the BSD definition of death to become organ donors.

HODS recognizes that there are significant halachic authorities on both sides of the BSD debate, and therefore we offer a unique organ donor card that allows members to indicate their desire to donate organs after BSD or alternatively after cessation of heartbeat.

Rabbi Breitowitz mentions a number of reasons why Jews would halachically be able to donate organs to non-Jews. I would like to suggest three more. In many instances where the Talmud discriminates between the lives of Jews and non-Jews, the non-Jews are specifically idol worshippers. I would like to suggest the possibility that since Muslims are not idol worshipers, and according to some *posekim* neither are Christians, the distinctions made in Talmudic times would not be applicable today.

Second, donating organs only to Jews—to the exclusion of non-Jews—would most likely cause *eivah* (enmity) between Jews and non-Jews. Out of fear of *eivah,* one is allowed to violate Biblical commandments to save the life of a non-Jew, and this applies equally in America (*Iggerot Moshe*, *OC* 4:79).

On a practical level, even if all of one's eight life-saving organs were to be donated to non-Jews, this would directly move eight Jews closer to the top of the list of 80,000 people who need organ transplants, thus increasing their chances of receiving an organ and having their lives saved.

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Rabbi Breitowitz responds

I appreciate Mr. Berman taking the time to read and comment upon my article. He is a forceful, energetic advocate for the encouragement of organ donation within the Orthodox community, and HODS' web site is a treasure-trove of valuable information on both the medical and halachic aspects of this issue. Indeed, I cited this source several times in my article. I realize, as well, that he and his organization are motivated solely out of concern for those persons who desperately need organs to stay alive. Nevertheless, his letter may create the misleading impression that acceptance of BSD is well-nigh universal, both halachically and medically. Neither proposition is true.

I. *Rav Moshe's position*: Rav Moshe addressed issues of brain death in several *teshuvot*: *YD* 2:174 (5728); *YD* 3:132 (5736); *Choshen Mishpat* 2:72 (5738). While a number of statements seem to indicate support for a BSD definition, Rav Shlomo Zalman Auerbach *z"l*, Rav Ahron Soloveichik *z"l* and, *yibadel lechaim*, Rav Yosef Sholom Elyashiv interpreted Rav Moshe as permitting the utilization of the brain-death criteria only after cessation of heartbeat. It must be emphasized that these *gedolim* were not purporting to disagree with Rav Moshe; rather, in their view, Rav Moshe himself did not necessarily endorse BSD as a stand-alone criterion. It should be noted that in *YD* 3:132—the very *teshuvah* that Mr. Berman cites as support—Rav Moshe quotes with approval the ruling of *Chatam Sofer*, *YD* 338, who explicitly enumerates lack of pulse (heartbeat) and lack of respiration as necessary prerequisites for the determination of death. In *CM* 2:72, a *teshuvah* written two years later, Rav Moshe reiterated a point he made some years earlier that removal of a heart constitutes murder of the donor. Since under American law hearts are not removed until the donor has been diagnosed as brain dead, this too suggests that BSD is not equivalent to halachic death.

Mr. Berman is correct that a number of eminent *posekim,* including Rav Moshe's son-in-law, Rabbi Dr. Moshe Tendler, as well as a committee of the Israeli Chief Rabbinate, do interpret Rav Moshe's *pesakim* as supporting BSD, but certainly none of us can dismiss out of hand the contrary interpretation of Rav Auerbach, Rav Elyashiv and Rav Soloveichik. For further elucidation, I refer the reader to my earlier article, "The Brain Death Controversy in Jewish Law," *Jewish Action* (spring 1992): 61 (available at the HODS web site) and especially the addendum in the summer 1992 issue (p. 78). See also the voluminous discussions in Dr. Abraham's *Nishmat Avraham YD* 339:1 (2), pp. 241-244 and in J. David Bleich's "Of Cerebral, Respiratory and Cardiac Death," *Contemporary Halakhic Problems* IV (New Jersey, 1995), 343-350. Again, I am well aware of the controversy surrounding Rav Moshe's position. I take no sides in this matter other than to note that it is indeed a controversy.

II. *The RCA position*: The RCA has endorsed BSD as halachically sufficient following the *pesakim* of Rabbi Tendler and the Israeli Chief Rabbinate. As chairman of the RCA's Biomedical Ethics Committee, Rabbi Tendler spearheaded the preparation of a health-care proxy form that would authorize the removal of vital organs from a respirator-dependent, brain-dead patient for transplantation purposes. Although the form was approved by the RCA's central administration, its provisions on brain death were opposed by a majority of the RCA's own Va'ad Halachah (Rabbis Rivkin, Schachter, Wagner and Willig). It is obvious that at least some eminent *posekim* within the RCA do not agree with the organization's position. In light of this disagreement at the highest level of the RCA's *posekim*, the positions of the rank and file frankly assume less importance. The *talmidim* of X tend to follow the rulings and opinions of X, the *talmidim* of Y will follow Y. With all due respect, in the absence of a Sanhedrin, grave halachic matters cannot be decided by a head count, even a rabbinic one. (In any case, the approving votes are less than fifty percent of the total membership since approximately half of the membership claims to have no informed opinion on the matter.)

III. *Views of other* posekim: Brain-death criteria have been rejected by a whole spate of *posekim* including Rav Auerbach, Rav Elyashiv, Rav Waldenberg, Rav Yitzchok Weiss, Rav Nissan Karelitz, Rav Yitzchok Kolitz, Rav Shmuel Wozner, Rav Ahron Soloveichik, Rav Hershel Schachter and Rabbi J. David Bleich. Some of these *posekim* reject BSD in principle; others are concerned with the accuracy of the diagnostic test; still others acknowledge that while BSD may be death, it is at best a *safek* (doubtful situation), and as such, one would be prohibited to remove organs as it is *possibly* murder. Again, I refer the reader to the following: *Nishmat Avraham YD* 339:2, pp. 241-244; *Nishmat Avraham* V, pp. 92-98 and J. David Bleich, *Time of Death in Jewish Law* (New York, 1991), 144-145. It is true that Rav Auerbach's final pronouncement comes much closer to a standard that would legitimate organ removal but, as noted, it would require that the BSD donor be off of the respirator for five to six minutes before the heart could be removed.

IV. *Medical Definitions*: Mr. Berman is absolutely correct that a large majority of the medical profession regards brain death as equivalent to death for all purposes—whether it be termination of life-support or removal of organs. It is also true that for almost two decades it has been the dominant American legal definition of death as well. However, two points need to be considered: First, it is beyond the purview of science to determine when a person is dead. Medicine can describe with greater or lesser accuracy the level of functionality an organism may possess, but whether that level is equivalent to death or life is a moral and religious question, not a medical one. Thus, while the findings of neurologists concerning level of activity are highly instructive, their labeling of a certain level as death is not.

Second, the brain-death concept originated in a 1968 report authored by a special committee of Harvard

Medical School. The report explicitly noted that it was not actually defining death rather irreversible coma, the point after which further medical treatment should be deemed futile. The eventual adoption of the Harvard criteria as a basis for a determination of death, as was done in laws like the Uniform Determination of Death Act, was a later development and was, to some degree, motivated by a practical desire to facilitate organ transplantation. Few would support removal of vital organs from the dying; most would support such removal from the dead. By a magical process of redefinition, persons who were formerly classified as dying are now defined as dead, thereby eliminating moral quandaries. Needless to say, such a result-oriented, ethical slight-of-hand is entitled to little deference in any objective halachic determination.

In any event, even within the medical profession the consensus is not absolute. Mr. Berman notes correctly that my note lists only "one paper written by two physicians [which] implies dissent large enough to note [which] it is not." Lack of space necessitated omission of other sources. A partial list includes Capron, "Brain Death: Well Settled Yet Still Unresolved," *New England Journal of Medicine* 344 (2001): 1244; Wijdicks, "The Diagnosis of Brain Death," *New England Journal of Medicine* 344 (2001): 1715; Greenberg, "As Good As Dead: Is There Really Such a Thing as Brain Death?" *The New Yorker* (13 August 2002): 360. An earlier critique appears in Halevy and Brody, "Brain Death: Reconsidering Definitions, Criteria and Tests," *Annals of Internal Medicine* 119 (15 September 1993): 520 and in Shewmon, "Brainstem Death, Brain Death and Death: A Critical Reevaluation of the Purported Equivalence," *Issues in Law and Medicine* 14 (fall 1998): 125. This last article is especially interesting because Dr. Shewmon is a neurologist in a major transplant center who was a strong proponent of the brain-death standard but eventually came to reject it. Dr. Shewmon's article also cites many other studies that dissent from the conventional wisdom. It should also be noted that what is widely accepted in the United States is not necessarily regarded as valid in other countries.

Finally, there are a number of facts concerning patients with a clinical diagnosis of brain death that need to be noted: Such patients 1. Have brought babies to term; 2. Have occasionally regained consciousness; 3. Are warm to the touch, and maintain body temperature; 4. Have been able to occasionally survive in at least a comatose state without suffering cardiac arrest for weeks, months and, in some cases, even years.

Let me reiterate that I am not at all arguing against a brain-death standard, but simply trying to show that the issue is less clear-cut than Mr. Berman paints it.

V. *Donating organs to non-Jews*: In note 24 of my article, I provided four possible bases to permit blanket donation of cadaveric organs even though it is probable that the recipient will be a non-Jew. Mr. Berman cites three reasons. First, he suggests that since Muslims and, according to some, even Christians, are not idol worshippers, the distinction between Jews and non-Jews would not apply. I believe this assertion is incorrect. When the Torah states rules pertaining to "idolaters," these rules may often not apply to monotheistic Gentiles. See, for example, Rambam, *Hilchot Avodat Kochavim* 10:6 (residence in the Land of Israel). But with respect to violating prohibitions in order to save a life, the Torah limits the dispensation to the saving of *Jewish* lives. See *Yoma* 83a. Even if Muslims or Christians are not characterized as pagans, they certainly are not Jewish and hence, not covered by the *vechai bahem* rule.

Mr. Berman's second rationale—*eivah*—was mentioned in note 24 of my article, though I did not employ the term. The citation of *Iggerot Moshe*, *OC* 4: 79 is directly on point and appeared as a supporting reference in an earlier draft of my piece, but was dropped in the editorial process to conserve space. The *eivah* argument is not totally compelling. There is indeed some evidence that Jews have been excluded from recipient lists in parts of Europe as a result of their unwillingness to be donors. As such, *eivah* may, in fact, be a possible justification. It is questionable, however, whether the concept of *eivah* is limited to the specific contexts in which *Chazal* applied it or whether it is a general rule that can be applied across the board. *Chazal* used *eivah* as a dispensation for some forms of *chillul Shabbat*—see *Avodah Zarah* 26a and commentaries—but there is no explicit reference to its being employed as a *heter* for *nivul hamet*.

Mr. Berman's third argument is that the donation of organs to non-Jews indirectly helps Jews in need of organs by moving them higher up on the recipient list. This is an intriguing argument that deserves careful consideration from *posekim*. I wonder, however, if such indirect assistance satisfies the *Noda B'Yehudah*'s ruling that *nivul hamet* is permitted only if a *choleh Yisrael* will directly benefit. Does moving up on a list qualify as a direct life-saving benefit? I believe it may, but the matter needs further study.

VI. *Non-heart beating donors (NHBD)*: Finally, Mr. Berman notes that the halachic problems I identified in NHBDs do not apply to all NHBDs. I certainly agree. As long as the heart was not stopped through improper and deliberate cessation of life-support, and the lack of heartbeat is irreversible, the donor is a cadaver, and removal of the organ would certainly not constitute *retzichah* (murder). These cases, however, are likely to be rare; any lapse of time that will be long enough to result in *irreversible* cessation of heartbeat will also be long enough to render the organ unsuitable for transplantation.

My remarks were directed to a specific protocol that was developed at the University of Pittsburgh Medical Center.

All of us owe HODS a debt of gratitude for raising public awareness of these important and complex issues, but such awareness can in no way dispense with the need to consult with a qualified and knowledgeable *posek* (as the HODS web site itself notes.) JA