

## Determining Death

*Rabbi Herschel Schachter*

**T**he *Chazon Ish* wrote<sup>1</sup> that it is not an easy task to determine what the halacha is. First, one must be familiar with all the details of halacha, the normative Jewish law; secondly, and often more difficult, one must be able to analyze properly the case at hand in order to know which halacha "on the books" it is most similar to.

Traditionally, halacha is determined by analogy: the *posek* juxtaposes the particulars of his own case and various halachic precedents and principles, and thereby decides into which category his case falls. Then he must apply these precedents and principles to the situation at hand.

However, the situation of a brain-dead individual is unique to our generation. Never has anything comparable existed in earlier generations. Bodily function can now be simulated by machines, and consequently an ill person can linger in a kind of medical-legal limbo for a short period of time. Thus, it has become important to the medical profession to determine at what point a patient may be considered dead (both for terminating treatment and for possible organ transplantation). In turn, the new realities have given rise to the halachic need to determine the moment of death.

The Talmud tells us<sup>2</sup> that if someone is not breathing, he is dead. This conclusion is based on the verse in the Torah<sup>3</sup> "*Kol asher nishmat ruach chaim be-apov*" "Whoever has the breath of

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1. *Kovetz Iggerot*, vol. I, no. 31.

2. *Yoma* 85a.

3. *Bereishit* 7:22

life in his nostrils.” But it is necessary to examine this talmudic dictum — does the Talmud mean to rule that breathing is the *criterion* for life or death, or does it merely relate that lack of breathing is an *indication* that the person is dead? In other words, it may merely mean to tell us that if a person is not breathing, we may safely assume that *death has already occurred*, but actually death itself is determined and defined by some other bodily functions.

The possible ambiguity in the talmudic dictum is the subject of an inquiry by Rabbi Zvi Hirsch Chayes (Maharatz Chayes) to the *Chatam Sofer* early in the nineteenth century.<sup>4</sup> Maharatz Chayes notes that Rambam describes the case of a person who stops breathing for a day or two, but then resumes his normal activities.<sup>5</sup> Doesn't this possibility cast doubt on the advisability of employing the Talmud's criterion for life, if indeed a person may be alive even if not breathing? But *Chatam Sofer* brushes off this suggestion as being a circumstance so remote in possibility or probability that we need give it no consideration. In the context of his response, *Chatam Sofer* seems to indicate his belief that cessation of breathing is not what *determines* death but rather that in 9,999 cases out of 10,000, it signifies that death has already occurred.

This approach is also the one adopted by Rav Moshe Feinstein, viz., that cessation of breathing is an indicator that the person has died.<sup>6</sup>

ולע"ד נראה דישהה מעט שמא נתעלף שכתב הרמב"ם...  
 הוא לא מחמת שאין לחוש לעילוף אלא רק לזמן מועט...  
 אלמא דשייך לחוש לעילוף זמן רב אבל הוא משום דגם מי  
 שנתעלף מוכרח לנשום שא"א לחיות בלא נשימה, אבל זמן  
 מועט מאד דאיזה מינוטין יכול אדם לחיות בלא נשימה...  
 וכשפסק לנשום אפשר שהוא מצד שכבר מת... אבל כיון  
 שאין לו כח לנשום הרי אי אפשר לו לחיות אלא לזמן מועט

4. See biography of Maharatz Chayes by R. Mayer Herhskowitz, pp. 168-175; *Techumin*, vol. 8, p. 441, in essay of R. Nachum Rabinovitz.

5. *Moreh Nevuchim* sec. I chap. 41.

6. *Iggerot Moshe, Yoreh Deah*, vol. 2, no. 174.

דאיזה מינוטין וכששוהין זמן זה הוא ודאי כבר מת... וזה אולי כוונת החתם סופר... לא שיצא מחשש עילוף למפרע אלא דיצא מעתה אחר זמן השהוי מחשש שמא עדיין הוא רק מעולף דהא אי אפשר לחיות יותר בלא נשימה.

And it seems to me that it is necessary to wait [in order to determine death] in case the person only fainted as the Rambam has written... and this is not because people only faint for a short while... but rather we see that it is possible to be concerned that a person has fainted for a long while. However, [it is necessary to wait only a short while to see whether the person is dead or has fainted] because even someone who has fainted still has to breathe, for it is not possible to live without breathing for more than a few minutes... And when a person has stopped breathing it may be because he has already died... or since he doesn't have the strength to breathe. Consequently it is not possible for him to live more than a very short time of a few minutes. And if we wait [and still he does not breathe] then he has certainly already died... And perhaps this is the intention of the *Chatam Sofer*; not that retroactively we no longer have to be concerned that he has only fainted, but rather that now, after the few minutes of waiting, he is removed from the possibility that it might be only a faint, for it is not possible for a person to live longer without breathing. (loose translation).

But if cessation of breathing is to be interpreted only as a sign to the observer that the person has died, we have yet to answer the essential question — what is it that makes a person dead? Or perhaps it will be easier to address the other side of the coin — what is it that makes a person be considered alive?

In the Torah, the expression "he has no blood" is used to describe a person who is killed by others but whose murder is not punishable. Thus, in *Shemot* 21, 2, we learn

אם במחותרת ימצא הגנב... אין לו דמים

If the thief be found breaking in [and be killed], there is no guilt (literally [the thief] — *he has no blood*).

And in *Bamidbar* 35:27, in connection with an avenger who pursues the murderer of his relative,

וּמְצָא אוֹתוֹ גּוֹאֵל הַדָּם... וְרָצַח אֶת הַרָצוּחַ אִין לוֹ דָּמִים

and if he finds him... and kills the murderer, he [the murderer] is as if he had no blood (literally, *he has no blood*).<sup>7</sup>

Based on this usage, we can see that it is the circulation of blood which is considered the essence of life.

We may also draw this inference from other Biblical teachings. The Torah teaches that "a person who hits his father or mother is to be put to death."<sup>9</sup> The Talmud rules that the death penalty is forthcoming only if the child hits the parent and causes blood to flow (or perhaps even if he caused formation of a black and blue mark, indicating some amount of blood beneath the surface has been shed.)<sup>10</sup> The talmudic conclusion derives from comparing the first part of the verse, which prescribes the penalty for *striking* a parent, and the latter half of the verse, which prescribes the penalty for *killing* an animal. The Torah does not place two unrelated laws in the same verse;<sup>11</sup> consequently, we must infer that in the first half of the verse the Torah is discussing a blow which is in some way equivalent to the killing mentioned in the second half of the verse. Thus, we infer that it refers to "killing" a parent in a milder form — namely, by causing bleeding. Causing partial loss of the flow of blood is a partial act of killing. Hence total cessation of the

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7. See Commentary of Rav Velvel Soloveichik to the Rambam where he points out that the *Tannaim* understood these expressions (he has blood, he has no blood) as a description of the status of the person killed rather than referring to the murderer and being understood as meaning "he is guilty" or "he is not guilty."

8. Rambam *Hilchot Rotzeach*, Chap. 1.

9. *Shemot* 21:15; *Vayikra* 24:18 and 21.

10. *Sanhedrin* 84b. Nitziv, *Commentary to Sheilot*, 60:9

11. When two halachot appear together in one *pasuk*, it is assumed that there is a relationship between them. This is called *hekesh* (a comparison). If the two halachot appear in adjacent *p'sukim*, this is called *semuchim* and is only to be taken as an indication that they are related (his rule applies in *Devarim*.) See *Yevamot* 4a.

flow of blood would define total death of the entire body.

The Palestinian Talmud<sup>12</sup> states that the *melacha* (forbidden act) involved in causing bleeding on Shabbat is *netilat neshama* ("taking the soul"). In their commentary to the Babylonian Talmud, the Tosafot record<sup>13</sup> that Rabbenu Tam considered causing bleeding as a form of killing based on the Biblical verse "*Ki hadam hu hanefesh*", "for the blood is the soul."<sup>14</sup> Just as one who kills an animal has violated the *melacha* of *schochet* (נטילת נשמה) so too one who causes bleeding has *partially* caused the taking of life. The Talmud distinguishes<sup>15</sup> between blood caused to flow from an ordinary wound as opposed to "*dam Hakoza shehaneshama yotzah bo*," blood flowing from a wound which caused the soul of the animal to depart. Here again, we find the halacha defining death as arising from cessation of the blood flow.

Thus, from the Torah and the Talmud, we may deduce that our halachic legal system defines a living person as one whose blood is circulating. Apparently, cessation of blood flow is the definition of death.

Let us now consider what these halachic references imply in the situation of a brain-dead individual. Most doctors consider a person "brain-dead" when tests clearly indicate a total and irreversible cessation of blood flowing to the brain. What, indeed, should be the halachic status of the brain at this point; and, more to the point, what is the halachic status of the entire body?

Rav Moshe Feinstein once commented on the concept of a "dead" limb: He was asked whether a person may put *T'fillin* on an arm which is paralyzed.<sup>16</sup> One prominent Rabbi had expressed the opinion that the mitzvah cannot be fulfilled on a paralyzed arm, but Rav Moshe Feinstein opposed this view. In the course of his responsum, he considered the situation not of a paralyzed arm, but

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12. *Shabbat, Perek Klal Gadol*, chap. 7c, halacha 2.

13. *Ketubot* 5b.

14. *Devarim* 12:23.

15. *Keritot* 20b, 21a.

16. *Iggerot Moshe, Orach Chaim*, vol. 1, nos. 8,9.

of a gangrenous arm. When gangrene sets in, blood has ceased flowing to that part of the body. That arm is *dead* and cannot qualify as the proper place for *T'fillin*.

However, other prominent *poskim* of previous generations<sup>17</sup> did allow *T'fillin* to be placed on a gangrenous arm. They obviously felt that although a limb has gangrene, it is still "alive" as long as the basic circulatory system continues functioning for the rest of the body. If the organism is considered alive, even that limb which happens to be cut off from the flow of blood is also considered "alive". While it is true that the Talmud<sup>18</sup> speaks of individual limbs being considered "dead," that is only when the limb is entirely (or almost entirely) severed from the rest of the body.<sup>19</sup> But where the limb is fully connected to the rest of the body which still maintains a functioning circulatory system, even the gangrenous limb is considered "alive".

But let us pursue the option indicated by Rav Feinstein, who assumes that when blood no longer reaches the brain, it is halachically considered "dead". What does this imply regarding the life status of the entire body? Should we declare that since the thing which makes humans uniquely human is the brain, this person is no longer alive "as a person" but merely alive "as an animal," and regarding animal life there is no prohibition of murder? This suggestion is intriguing, but it has no foundation in the Talmud. In fact, the halacha does not seem to distinguish between the definition of death with respect to humans and definition of death with respect to animals.

We must therefore return to the essential question — what moment do we consider the instant of the soul's departure?

The Talmud posits<sup>20</sup> specific organs which are vital to life. Each one is an "*eiver shehaneshama teluya bah*," an organ upon

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17. R. Shlomo Kluger טובא אגרות משה או"ח סי' ט.

R. Meir Arik חלק ב אמרי משה סי' י"ד.

R. Yosef Engel גליוני הש"ס קידושין כד.

18. *Avodah Zarah* 5b.

19. *Chullin* 127a, 129b.

20. *Erchin* 20, *Temura* 10.

which the soul depends." This is a *halachic* concept.

Rambam<sup>21</sup> in quoting the Talmud names three such vital organs: the heart, brain, and liver.<sup>22</sup> In determining the moment of "*yetziat neshama*", the departure of the soul, it would appear<sup>23</sup> that one ought to consider the state of these three organs "upon which the soul depends." One could argue that if any *one* of these three vital organs is halachically declared dead, then the entire body is pronounced dead. On the other hand, one could also claim that a person is not dead until *all* the vital organs are dead. Indeed, this second option is invoked by the *Mishkenot Yaakov*,<sup>24</sup> based on a passage from the Palestinian Talmud:<sup>25</sup>

The Mishnah in *Avoda Zara* teaches that it is forbidden to derive any benefit from "*orot levuvim*." This refers to the pelts of animals whose hearts were cut out, while they were alive, in order to be used for idolatrous sacrifice. Why, asks the Palestinian Talmud, should these pelts be forbidden, when we have a principle that live animals (*baalei chaim*) are never considered as objects of idolatry from which we may not derive benefit. The author of *Mishkenot Yaakov* therefore concludes that the rabbis in the Talmud must have considered these animals as still alive, otherwise their question on the Mishnah is difficult to comprehend. Here we see that the Talmud considered as "alive" animals whose hearts had been plucked out! He adduces this as evidence that the loss of only one vital organ does not render the animal dead according to the definition of Jewish law.

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21. *Commentary to Mishnah, Erchin 20a; Hilchot Erchin*, beginning of chap. 2.

22. It is irrelevant whether medical facts in the twentieth century support this conclusion, which is a legal, not a medical statement. Jewish law follows the principles laid down by the Talmud; all halachic categories have been fixed by the Talmud and are the basis for developing all further Torah decisions. Thus, those organs designated by the rabbis of the Mishnah as the "vital organs" retain that *halachic* status. For a further discussion of this fundamental principle of development of Jewish halacha, see the *Chazon Ish* to *Yoreh Deah* (5-3).

23. *Iggerot Moshe, Yoreh Deah*, vol. 2, p. 249, s.v. "*aval barur upashut*."

24. *Yoreh Deah*, end of No. 20; quoted briefly by *Pitchei Teshuva* to *Yoreh Deah* 40.

25. *Avoda Zara*, chap. 2, halacha 3.

This argument is not irrefutable. Earlier in this century, the Ridvaz in his commentary to the Palestinian Talmud<sup>26</sup> offered a different interpretation of the above passage. He suggests that removal of the animal's heart was not part of the sacrificial ceremony. Cutting the pelts was the idolatrous act alluded to by the Mishnah. If this be the case, we can understand fully well the question posed by the Palestinian Talmud. How can these pelts be declared as "*Avoda Zara*" and thereby become forbidden for benefit, if even after cutting into the skin the animal is clearly still alive, and live animals cannot become "*Avoda Zara*?" If we accept this alternate interpretation of the Talmudic passage, we will be left with no indication at all regarding the status of an animal whose heart has been excised.<sup>27</sup>

If we accept the view that if any one of the vital organs is dead, the person is dead, it might result in some rather startling conclusion: If a person's liver is removed or, according to Rav Moshe Feinstein's understanding even if it is gangrenous, even though the person can still walk, talk, and think, he would be considered halachically dead!

The second option, namely, that a person is not considered dead until all the vital organs are "dead", might be a help to defining with precision a related halachic concept, that of a *gosses*. The Rambam<sup>28</sup> defines *gosses* as one in whom the process of death has already begun. Rav Moshe Feinstein accepts this theoretical definition<sup>29</sup> but does not give specific criteria to determine, in practice, what this corresponds to.<sup>30</sup> Nevertheless, if we follow the

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26. Rambam in medical writings, *Iggerot HaRambam*, Kapach's edition, Jerusalem 1987, p. p. 165, quotes in the name of Galen, the famous Hellenistic physician (a contemporary of the rabbis of the Mishnah): the idol worshippers' practice was to cut out the heart of a live animal and offer it as a sacrifice to their god. The animal would still be alive and jump around after its heart had been removed. (The Rambam writes that he cannot believe such a phenomenon is possible.) This corresponds precisely with the interpretation given by the *Mishkenot Yaakov* to the statement of the Palestinian Talmud.

27. p. 13a.

28. Commentary to *Ohalot* (1-6).

29. *Iggerot Moshe, Choshen Mishpat*, vol. 1, no. 61.

30. *Ibid.*, vol. 2, p. 305.

reasoning discussed above, it would follow by definition that when any one of the vital organs is dead, the process of death has clearly begun already, but will not be completed until all of the vital organs have irrevocably ceased functioning.

The question of whether a brain-dead person is halachically dead is relevant not only to the question of using his organs for transplantation, but also to the issue of *chalitzah*. The Torah states<sup>31</sup> that if a man dies without children, his wife may not remarry until she has the ritual of *chalitzah*. Let us posit the case of a married man whose only child is brain dead. If the father then dies, does his wife require *chalitzah*? Is their brain-dead child indeed "dead", in which case the father died without any living offspring? Or is he still considered alive, in which case the father died while his child was still alive, and the widow does not need *chalitzah*?

The innovations and inventions of the twentieth century have made possible medical techniques which could not even be imagined a century ago. The medical profession, eager to perform "miracles" through organ transplantation, anxious to reduce suffering for the patient and family, has advocated guidelines which to some people appear radical. In their zeal to prevent doctors from "pulling the plug" on brain-dead patients, some rabbis have declared that such individuals are definitely considered "alive" beyond any shadow of a doubt. Based on our analysis, I see no room for such certainty.

On the other hand, if one accepts the position of Rav Moshe Feinstein that a gangrenous limb (or one to which no blood circulates) is "dead" and combines that assumption with the second premise that loss of even one of the vital organs renders a person "dead", it might be possible to argue that a brain-dead individual is truly dead. However, since each of these two premises is by no means certain as we have documented, it would appear that a person in such unfortunate circumstances should be considered *safek chai safek met* — questionably alive, questionably dead. In such a situation of *safek*, of doubt, the proper course to follow seems to be *Chumra*, to follow the stricter possibility, both regarding removal of organs as well as on the issue of *chalitzah*.

31. *Devarim* 25:5-10