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BRAIN DEATH AND HALAKHAH: A FOOTNOTE WITH UNCERTAIN IMPLICATIONS

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People who die as the result of errors in halakhic reasoning are no less dead than people who die from medical errors. [1] Paskening life-and-death issues is properly terrifying – what if one errs? and yet, because the stakes are so high, the responsibility to speak if one has something to say is also tremendous.

But over time, at least the textual grounds for decisionmaking are usually clarified. Psak on such issues is usually a choice among the positions of gedolim without presuming to add new evidence.

Formal philosophic reasoning can sometimes add new dimensions to a halakhic argument that has been well-trodden by much greater scholars. I try to make a contribution along those lines to the issue of brain death in my essay "An Alternate Construction of the Debate." [2]

Here, with great trepidation, I want to offer a simple reading of what may be an important text for some definition-of-death purposes. I acknowledge up front that the reading as developed in response to one offered by Rav Nachum Rabinovich of Yeshivat Birkat Mosheh, who is an overwhelmingly greater posek and scholar than am I. Furthermore, Rav Rabinovich has seen my arguments and they have not convinced him. Halakhic readers should weight our positions accordingly.

Nonetheless, I feel obligated to present the truth as I currently see it, and to see whether it finds a place in the discussion. Critiques are of course welcomed and encouraged.

The halakhic argument about brain death is often represented as a dispute between Rav Moshe Tendler and my teacher Rav J. David Bleich. I recently discovered that in a 1968 article ("What is the Halakhah for Organ Transplants". Tradition 9:4), Rav Rabinovich anticipates one of Rabbi Tendler's key arguments. He states that a brain-dead body lacks a central controlling force, and is therefore dead.

Rabbi Bleich denies that the diagnosis of brain-death means that the body has lost all integration. Many have discussed whether he is correct. But reading Rav Rabinovich, it became clear to me that there has been insufficient discussion of whether the definition is

halakhically true in principle.

Rav Rabinovich cites Rambam's Commentary to Mishnah Ohalot 1:6 as his source. As his scholarship is astonishing, and his readings in my experience generally impeccable, I was very bothered that this citation didn't ring true.

Yeshivat Birkat Moshe's website has a [שאל את הרב](#) link, so I emailed to ask whether Rav Rabinovich still maintained this reading. To my delight, Rav Rabinovich responded directly, assured me that he still maintained it and referred me to the discussion in his later *עיונים במשנת הרמב"ם* (p. 160-161). In a further iteration, I failed to convince him to hold otherwise. So it is my privilege and responsibility to now lay both readings before you, and ask for your comments.

Here is Rav Rabinovich's original formulation:

It is also clear from the case mentioned of the woman who was decapitated that the absence of any possibility of revival confirms the status of death even though there may still be muscular spasms. Maimonides (Commentary to Mishnah Ohalot 1:6) explains that the organism is no longer considered to be alive "when the power of locomotion that is spread throughout the limbs does not originate in one centre, but is independently spread throughout the body." It follows that if the restoration of central control is feasible, the commandment to save life applies. Obviously then the definition of death depends upon the availability of more sophisticated techniques of resuscitation. Here again, the applicability of such methods and the consequent decision as to the onset of death is determined according to the judgment of the physicians.

Mishnah Ohalot 1:6 reads as follows:

1. אדם - אינו מטמא עד שתצא נפשו,
 2. ואפי' מגוייד ואפי' גוסס - זוקק ליבום, ופוסר מן היבום, מאכיל בתרומה, ופוסל בתרומה
 3. וכן בהמה וחיה - אינן מטמאין עד שתצא נפשם;
 4. הותזו ראשיהם, אף על פי שמפרכסים - טמאין,
 5. כגון זנב של לטאה שהיא מפרכסת:
- a. Human beings are not metamei until their nefesh departs –
 - b. even if their arteries are severed, or if they are irreversibly and imminently

dying – they (are legally alive for all legal matters, including those that affect the status of others, such as marriage).

- c. *So too, beheimat and chayot are not metamei until their nefesh departs.*
- d. *However, if they are decapitated, even though they are mefarkheis (=twitching?tremoring?) they are metamei,*
- e. *This like the tail of the lizard, which is mefarkheis.*

The problem with the Mishnah's last line is that a lizard with its tail cut off is not dead, and the tail by itself never contained a *nefesh*. In other words, the twitching lizard tail provides no information whatsoever about the presence or absence of a lizard *nefesh*. How, then, can it be a useful analogy for determining whether a decapitated but twitching cow still has a *nefesh*?

Here is Rambam's commentary, in the Hebrew translation by R. Yosef Kapach [3] (the differences in the Ibn Tibbon translation are minor and don't affect our discussion):

והתנועה שמתנועעין האברים אחר המות קוראים אותה פרכוס.
ולטאה - הוא "אלסאם אבוץ", לפי שבעל חי זה מתנועע זנבו זמן מה
אחר שנכרת.
ויארע זה למקצת מיני בעלי החיים אם לא היה הכח המניע מתפשט בכל
האברים מיסוד ומוצא אחד אלא יהיה מפולג בכל הגוף.

The movement which the limbs move after death is called pirkus.

The (=Arabic translation of /lizard/) because this animal – its tail moves for some time after it is severed.

This happens to some species of animal if the motive force was not spread to all the limbs from one foundation and source, but rather is divided throughout the body.

Rambam explains why the lizard's tail moves after being severed. It is because the lizard, even when fully alive (=possessed of its *nefesh*), has a motive force that is distributed throughout its limbs rather than centralized. (For our purposes, it does not matter whether Rambam's explanation is scientifically correct.) This is true of the lizard before its tail is severed, and after.

How can we learn anything from the lizard about species that have a central motive force? Rambam explains that the severed tail of a lizard does not contain a *nefesh*, and yet it moves! Therefore movement does not **prove** the **presence** of a *nefesh*.

Rambam is careful **not** to say that the absence of a central motive force equals death or proves the absence of a *nefesh*. Lizards are alive, with tails and without.

Now it is possible that other animals are considered dead when they become like living lizards, i.e. when they lack a central motive force. This argument can be made on the basis of pure reason, or on the ground that it is the best reason for saying that decapitation equals death. (Although one must think about which part of the animal

would be alive if decapitation does not equal death.) But I contend, with all humility against R. Rabinovich, that nothing in Rambam's Commentary strengthens this explanation of the Mishnah.

On p. 104-5 of his Defining the Moment, Rabbi Dr. David Shabtai makes a subtly different point. (He accurately notes that R. Herschel Schachter makes a "similar rebuttal of this argument" in B'Ikvei ha'Tzon 36:12 p. 250). He suggests that "while Rambam certainly claimed that integrated motion is indicative of a living being, he never claimed that it was the very **definition** of what it means to be alive". I do not agree that Rambam claims that integrated motion is proof of life – all he says is that motion per se is not proof of life.

If I am correct, there may be no textual evidence at all for the "dis-integrated organism" definition of death, especially as applied to the nervous system exclusively.

This may matter to very few people; I suspect that the appeal of the definition is fundamentally intuitive. I think Rabbi Tendler generally presents it as a given, rather than as something that requires demonstration. I don't know that Rabbi Bleich ever fully rejects it. It gains enormous practical support if we acknowledge that many cells in the body remain functional long after death is declared by any definition.

But I wonder now whether it wasn't Rav Rabinovich's argument that enabled this definition to gain an initial foothold, and if so, whether it bears rethinking, regardless of one's overall position on the question of whether braindeath equals halakhic death.

Notes:

[1] I borrowed this formulation from one regarding moral reasoning found on the back cover of Janet Radcliffe Richards, The Ethic of Transplants: Why Careless Thought Costs Lives (Oxford). The copy I read had been distributed by the Halakhic Organ Donation Society. My HODS card is [here](#).

[2] forthcoming in Halakhic Realities: Collected Essays on Organ Donation, Vol.2, to be published by Maggid and IRF, edited by Rabbi Dr. Zev Farber. *See also* http://torahleadership.org/categories/vayigashbraindeath_1.pdf, http://torahleadership.org/categories/linzerbraindeath_2.pdf, http://torahleadership.org/categories/brain_death_halakhah_and_ethics0.mp3,

<http://torahleadership.org/categories/brandeisbraindeath.mp3>.

[3] The Ibn Tibbon translation reads:

והתנועה אשר ינועו האיברים אחר המות יקרא פרכוס
ולטאה – הוא שם השרץ וזה בעל חי יתנועע זנבו מאד מאד אחר חתוכו
ואמנם יקרה זה לקצת מיני בעלי חיים כאשר לא יהיה הכח המתנועע מתפשט בכלל
האיברים משרש והתחלה אחת אבל תהיה מתפרדת בכל הגוף.

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