A Jewish Perspective on Ethical Implications of the Criteria for Clinical Death

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In the contemporary world, we are all called to pronounce ourselves on a variety of bioethical issues, from abortion to stem cell research to euthanasia to organ transplants and beyond.

We are asked to express our opinions and make personal as well as legislative decisions that will affect our lives very profoundly. We are challenged by totally new moral choices based on today’s technological possibilities that give increasing power to individuals and governments to improve the quality of life, to save lives through organ transplants, to do research leading to promising new treatments for formerly untreatable medical conditions, based on stem cell research, to reduce pain and suffering, to bring healthier children into the world and interact in formerly inconceivable ways with what we generally refer to as "mother nature."

Modern technological advances lead us to raise questions and seek answers in our various particular and universal or common ethical systems. The reassuring certainties of the past, adopted as guidelines for centuries no longer hold unless we adapt them to present circumstances. The most dramatic quandary we must all face is the question of choices over life and death, and among these, of organ transplants from persons pronounced by medical authorities as being "clinically dead".
"To save one life is equal to saving the entire universe." This wise saying appears in Jewish as well as Muslim sacred literature. But we are also warned that we cannot save one life at the expense of another.

In Jewish normative or "halachic" tradition a "goses", or person in the process of dying, must be treated as a living person and his death must not be accelerated by anyone, but neither must it be artificially prevented. Before a patient enters the "goses" stage we must do all we can to aid his recovery. On the other hand, an organ transplant must be done before blood circulation through the body ceases. Thus, timing becomes an essential issue.

This poses the enormous medical and moral issue of finding a precise definition of the exact moment in which a dying person can be pronounced as dead - that is, beyond the possibility of recovery and also beyond the capacity of perceiving thoughts, sensations, and pain.

Unless we can be absolutely certain this moment has come, we would be committing murder by removing a vital organ for transplant.

The three monotheistic religions have responded to this dilemma in similar ways.

The legal and medical communities tend to use "brain death" (whose definition is still not unequivocally clear) as a legal definition of death even if life support equipment keeps the body's metabolic processes working. Prior to these technological advances, death was determined in the Jewish tradition by a combination of the cessation of breathing and a halt of the heartbeat.

In both the Jewish and Muslim traditions there has been division over whether to accept brain death criteria or rely basically on traditional criteria while Catholic and Protestant theologians seem to find no objections in the concept of brain death defined by the irreversible cessation of total function of the brain, including the brain stem.

The generally accepted definition today is that death is deemed to occur when there is either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the entire brain including the brain stem. Doctors point out that "brain death" is not synonymous with merely being comatose or unresponsive to stimuli. Even a flat EEG (electro-encephalogram) does not in itself
unequivocally indicate brain stem destruction. There are additional signs.

It was in 1968 that a special committee of the Harvard Medical School formulated criteria for measuring total brain death as an alternative to the older definition of irreversible circulatory-respiratory failure. From that point on, these criteria were recommended and used by judges and legislators in the U.S. and then in many countries of Europe, who accepted total brain death as an alternative way to measure death—and to allow transplants to take place.

As lay persons not trained in the medical arts, we are left with an emotionally charged quandary.

For example, some hospitals, in the U.S. and elsewhere, start organ transplants within 5 minutes after patients who are not connected to machinery that continues to perfuse their organs even after brain death, are pronounced dead by cardio-respiratory criteria. These donors are called NHBD's (non heart-beating donors). This short span is considered optimal for a successful transplant since organs begin deteriorating very quickly. Yet some medical sources hold that a patient could still experience auto-resuscitation after 5 minutes, so that a pronouncement of death in this case is premature. For them, the patient is being killed by the transplant process.

To complicate things further, as responsible persons we must be aware that economic interests on the one hand, and personal interests for the survival of a particularly dear patient, perhaps even a relative, awaiting a transplant, offer the possibilities of moral corruption for those who for medical and legal reasons wield the power of making these decisions.

We are all aware of the international horrors of organ trafficking involving a large demand by economically advantaged patients, and the unscrupulous actions by criminal organizations—or groups, including certain governments, that wield unchecked power—who kidnap children, or use prisoners, or pay economically needy persons in order to remove kidneys and other organs, sometimes vital to their own survival. This practice lends itself to extreme and unspeakable abuse by the powerful over their innocent victims.

While on the one hand, we subscribe to the high ideals of ethically controlled organ transplants from human beings whose spirit has left the earth in order to save other lives or improve their quality and end
suffering, on the other hand we must be aware that economic, social, and/or other personal reasons can make it difficult to find effective measures to prevent the illicit and immoral removal of organs from prospective donors who might still be able to recuperate their lives.

Personal fantasies and nightmares regarding this subject abound, making it problematic, for some of us, to sign permissions for organ transplants in case of accidental death.

Take the example of an unidentified victim of a car accident who arrives by ambulance in an emergency room. Say the physician in charge has been waiting for months or perhaps even a couple of years, for an organ to transplant into a wealthy patient with life-threatening kidney disease. Will this physician do all he can to save the life of the accident victim, or will he be passively or actively negligent by delaying life supporting interventions?

Given the daily headlines regarding the immoral and criminal activities related internationally to organ transplants, these are not superfluous questions.

The crucial issue is that once cardiac arrest stops circulation, rapid tissue degeneration makes the organ unsuitable for transplant. Given the increasing success of these operations and the enormous expense of sustaining patients on respirators, there is a natural temptation to redefine death so that organs become available.

The Jewish point of view on all this is not monolithic. However, there are a few guidelines that can be said to be emblematic of the Jewish tradition.

One is the sacredness of life and our duty to protect and nurture life from its tender beginnings to its natural end. Therefore we must do all we can to save every life and may not under any circumstances knowingly sacrifice one life to save another.

Another guideline is the Jewish tradition of avoiding the issuing of dogma, and the Jewish practice of treating each case on an individual basis. Cases brought before rabbinic courts, for example, must get opinions from three rabbis. Applied to medical decisions therefore, the Jewish tradition would, accordingly, require a
committee of more than one doctor in consultation with family members to reach the decision of pronouncing that death has occurred and granting permission for beginning an organ transplant. This is meant to serve as a safeguard for malpractice.

Today all branches of Judaism, including the orthodox, do permit organ transplants, on the Talmudic basis of considering duties for preserving life as more highly binding than rituals regarding death. Jewish law uses situational examples, not unflexible rules, to illustrate specific legal ideas.

Rabbi Jakobovits, the former Chief Rabbi of England, stated "The value of human life is infinite and beyond measure, so that a hundred years and a single second are equally precious." This could be said to be the counterpart of the saying that "to save one life is equal to saving the entire universe."

End of life patient care decisions, from the Jewish viewpoint, always favor the continuation of life no matter what the quality, as seen from outside. One cannot use low quality of life as an excuse for withholding treatment or even hastening death. This view is often in contrast with those who would apply euthanasia to what observers might consider an unacceptable quality of life. But here too, each individual case would be considered unique even if decisions would be based on traditional principles.

Interpersonal behavior in Judaism is traditionally conceived as the execution of duties within the context of relationships. Judaism urges one to perform mitzvot (good deeds) that is, to act in accordance one's duties, and this applies in the health care setting no less than anywhere else. The clinic thereby provides a relatively new arena in which mutual obligations between patients, physicians and families can be explored in accordance with the interpretation of tradition and applied to specific cases.

The main sources of Jewish tradition are the Jewish Bible (the Torah, the Prophets and additional writing; the Talmud which is rabbinical commentary; and finally, the Responsa literature in which prominent
Jewish scholars through the centuries have given opinions on contemporary matters as interpreted through the Bible and Talmud.

The Jewish usage of rethinking traditional religious wisdom in terms of new challenges throughout the evolution of history, leads to positions that can accommodate new solutions while still based on deep rooted moral convictions and precepts.

Even within Orthodox Judaism there exist multiple interpretations of most texts with a resultant variability of rulings. Jews of the Reform movement are often more open to ethical analysis that seeks answers outside the traditional Halachic literature, where Halachic analyses become just one of the many that are possible and are not necessarily considered binding. The Jewish tradition is one of continued and ongoing questioning rather than one of absolute theological law passed down from above.

However a contemporary Jewish controversy over brain death does exist. Quite recently, on March 25, the Jerusalem Post published an article on this subject. The title states that a member of the Knesset announced that “hundreds of organ transplants may lose funding.” It stated that “Rav Elyashiv has ... ruled in the past that brain death does not constitute clinical death according to halacha. In a letter signed by Elyashiv and Rabbi Shlomo Xalman Ohrbach that appeared in the haredi daily Yated Ne’eman in 1992, removing organs after brain death but before cardiovascular failure should be considered close to murder” says the article.

“In contrast, Rabbi Moshe Feinstein, the leading halachic authority in America”, continues the JPost, “who died in 1986, ruled that brain death could be considered clinical death.

In a subsequent letter to the Jerusalem Post, Alan Friedlander stated that Rabbi Feinstein’s position had been misrepresented. “According to Rabbi Rappaport”, he stated, Rabbi Feinstein “only wanted dying people to not have aid in prolonging their death if there is great pain. He does not hold that organs may be harvested from a ‘brain dead’ patient.”
Friedlander goes on to refer to 5 great orthodox American rabbis who were asked in the late 1980’s, for a definitive position on when halachic death occurs, for the purpose of determining whether organ harvesting was permitted. The rabbis were: Aharon Soloveichik, Menachem Mendel Schneersohn (the Lubavitcher Rebbe), Mordechai Gifter of Telshhe Yeshiva, Dovid Feinstein and Moshe Tendler.

Apart from Rabbi Tendler, the other four “all held at that time that brain death does NOT constitute halachic death” says Friedlander. Yet the leading halachic authority for Sephardi Jews, Rabbi Ovadia Yosef, agreed has agreed that brain death is equivalent to clinical death.

“As a result” states the “Jerusalem Post”, the vast majority of Sephardi Jews, both traditional and haredi, are expected to follow Yosef’s ruling and volunteer to donate organs.

“However, with both Elyashiv and Orbach opposed to harvesting organs until the heart stops beating, most Ashkenazi haredim are expected to forgo volunteering to donate their organs.”

We all know that every once in a while we read of cases where persons declared dead suddenly “come to life” again. It would perhaps be important to investigate under what circumstances, by what criteria and by whom and by how many doctors, they were declared dead.

In the world of Orthodox Jewry, the controversy continues. No agreement has as yet been found to defining the exact moment of death and consequently, the exact moment when organ harvesting may take place to save another life.

Here is another authoritative opinion. Rabbi Yitzchok Breitowitz stated in an article entitled, “The Brain Death Controversy in Jewish Law” that “To the extent the patient is halachically alive, removal of an organ... would amount to murder. The principle... that one life may not be set aside to ensure another life – applies with full force even where the life to be terminated is of short duration and seems to lack meaning or purpose and even where the potential recipient has
excellent chances for full recovery and long life. If, on the other hand, the donor is dead, the harvesting of organs to save another life becomes a mitzvah of the highest order. In light of the overwhelming opposition to the ‘brain death’ concept, caution and a stance of ‘shev v’al taaseh’ (passivity) appears to be the most prudent course."

Since “brain death” is the legal definition of death in the vast majority of the United States, permitting doctors to unilaterally disconnect a patient from life support mechanisms, Rabbi Breitowitz calls for hospitals to allow for “religious accommodations” nationwide for those, especially orthodox Jews, who do not accept the criteria of “brain death”.

This, in short, is the controversy within the files of Orthodox Judaism.

However, as we mentioned at the beginning of these considerations, while we wrestle with religious and ethical definitions and guidelines, we must constantly face situations that seem to slip completely from our control. We spoke of the cynical, criminal manipulation of life and death for personal gain and for use by those who possess great power over others – but in our daily lives we must also contend with those who use their small individual power to make decisions over life and death.

Two weeks ago, I visited my rabbi in New York, Rabbi Robert Widom, the Chief Rabbi of Temple Emanuel in Great Neck. He is a man who has devoted his entire life to serving the human needs of his community, and was in the midst of giving emotional support and legal advice to a family whose daughter had just died because a doctor on night duty in the hospital had decided, at 2 am when no one else was around, and without family permission, to simply remove the tubes supplying life sustaining liquids to the patient. The family had kept watch day and night over their daughter, taking turns, and this was the first time she had been left alone.

With the great progress of bioethics in our times, the possibilities for saving lives, for doing good, are enormous. And the possibilities for
misuse, for doing terrible harm to our fellow human beings, are also enormous.

As always, whatever our beliefs or backgrounds, we must all contend with the realities that surround us, and turn to our traditions for the moral courage and support we will always need, if we wish to stand up for good and against evil, in our daily lives.