

## CADAVER DONATIONS IN THE JEWISH LEGAL SYSTEM

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### INTRODUCTION

The use of human cadavers for teaching and training purposes is a relatively new phenomenon in medical education. From antiquity through the Middle Ages and beyond, the dissection of the human body was largely considered immoral and was often illegal. That said, select physicians and artists, such as Bandinelli and da Vinci, performed anatomical dissections.

It was not until the twentieth century that the use of cadavers in medical schools became standard practice. Indeed, in 1888, in the United States House of Representatives, New Jersey Congressman William McAdoo referred to anatomy as “the savage, soulless science of the medical schools.”<sup>1</sup> Yet, over time, dissecting the human body became a required rite of passage for nearly all medical students. Entry into the gross anatomy lab is one of the hallmarks of medical education.

The Jewish legal system faces a complex balancing test with regard to anatomical dissection. On the one hand, the belief that

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<sup>1</sup> McAdoo, William. (NJ) Objection to House Bill No. 5040, “for the promotion of anatomical science and to protect the desecration of graves in the District of Columbia.” *Congressional Record* 19:2418 (Mar. 26, 1888).

man is created in the image of God is axiomatic. As such, the dissection of the body was classically viewed as an act of desecration (*nivul ha-meit*); it is similarly prohibited to derive any “benefit” from the corpse. On the other hand, Jewish law considers *pikuach nefesh*, the preservation of human life, to be a compelling interest that can override nearly every other legal regulation in the corpus of Jewish law. Thus, the question of using cadavers for medical education and research is one that pits two critical principles of Jewish law against each other.<sup>2</sup>

## I. CADAVER STUDIES AND AUTOPSIES

### A. *Early Rabbinic Views*

The first recorded responsum on the subject is by Rabbi Jacob Emden of Altona, Germany (1696-1737) in 1737. The questioner asked whether he may perform dissections on the Sabbath. Rabbi Emden expressed admiration for the medical profession, writing that “the study of nature . . . [is a] praiseworthy discipline, necessary if one is to look at the works of God . . . This goes particularly for the subfield of medicine, for upon this rest the lives of all creatures! The Torah testifies to the efficacy and commands that it be practiced . . . therefore, it is fitting to work hard [and learn] it.” Nonetheless, Rabbi Emden states that “anyone who wishes to participate in the field of medicine must learn the techniques of surgery” and rules that it is impermissible to do so from a human body since that would breach the prohibition on deriving benefit from corpses.<sup>3</sup>

The next major rabbinic decision on this topic was written by Rabbi Ezekiel Landau of Prague (1713-1793), who was asked about the permissibility of performing an autopsy on a Jewish patient who died during a failed gallbladder operation. The purpose of the autopsy was to improve future surgical treatments. The question came from Rabbi Leib Fishels of London, who wanted Landau to affirm his own ruling that autopsy was permissible because the procedure was for the purpose of saving lives. Fishels described “random cutting” as a “degradation of the dead” (*bizayon ha-meit*) but “dissecting to save a life” as a form of bringing “honor to the dead” (*k’vod ha-meit*). Fishels argued that since this autopsy would

<sup>2</sup> Rabbi Shlomo Brody, *Ask the Rabbi: Cadaver Conundrum*, JERUSALEM POST (Jan. 31, 2008), <http://www.jpost.com/Jewish-World/Judaism/Ask-the-Rabbi-The-cadaver-conundrum>.

<sup>3</sup> RABBI JACOB EMDEN, SHE’EILAT YABEITZ 1:41; ZEV FARBER, HALAKHIC REALITIES: COLLECTED ESSAYS ON ORGAN DONATION 340, 355, 322-484 (1st ed., 2017).

save others, it was “fulfilling a need of the world.”<sup>4</sup>

Rabbi Landau, who was writing his responsa against the backdrop of the Enlightenment, which led to mass abandonment of Jewish observance and antagonism toward Jewish law, agreed with Rabbi Fishels’s analysis in principle but added a new element in practice: a requirement of *sakanat nefashot lefaneinu*, “people whose lives might be saved right here, before us.” Thus, while an autopsy that might even lead to “possible lifesaving” would unquestionably be permitted—even required—the potential autopsy presented by this case in London could not be allowed. As commentators have noted, “the cumulative effect of autopsies” was not yet understood in 1803 when this responsum was penned.<sup>3</sup>

A key factor in Landau’s responsum is his concern that doctors might consider the remote possibility of saving lives to be a similar factor in other cases, which could lead to unjustifiable dissections of “all corpses” simply to enhance their medical skills.<sup>4</sup> Rabbi Landau assumes that physicians do not have respect for the human body in the postmortem context.

This concern was not unjustified. As Mary Roach writes in *STIFF: THE CURIOUS LIVES OF HUMAN CADAVERS*, “anatomists (of the early 1800s) were men who had clearly been successful in objectifying . . . the dead human body . . . they saw no reason to treat the unearthed dead as entities worthy of respect.”<sup>5</sup> There was a “street-theater-cum-abattoir air” to the dissections. Depictions of dissecting rooms “show cadavers’ intestines hanging like parade streamers off the sides of tables . . . [and] organs strewn on the floor being eaten by dogs. In the background, men gawk and leer.”<sup>6</sup> And it wasn’t just artwork that depicted such scenes; the composer Hector Berlioz, in his *Memoirs*, writes about his experience in a dissecting room, where he saw “swarms of sparrows wrangling over scraps of lungs . . . [and] rats in the corner gnawing the bleeding vertebrae.”<sup>7</sup> Such descriptions of the physician’s lab may well have had a negative effect on the religious leadership’s faith in the goodwill of the medical establishment and the likelihood that they

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<sup>4</sup> RABBI EZEKIEL LANDAU, RESPONSA NODA B’YEHUDA, *Yoreh De’ah*, vol. 2, 210; FARBER, *supra* note 3, at 324-28.

<sup>3</sup> LANDAU, *supra* note 4; FARBER, *supra* note 3, at 328.

<sup>4</sup> *Id.*

<sup>5</sup> HECTOR BERLIOZ, MEMOIRS 21 (D. Cairns trans., A.A. Knopf, 2002) (1822); MARY ROACH, *STIFF: THE CURIOUS LIVES OF HUMAN CADAVERS* 46 (2003).

<sup>6</sup> *Id.* at 47.

<sup>7</sup> *Id.*

would care for the dignity of the deceased's bodies.

In 1836, the highly influential Rabbi Moses Sofer (Schreiber) of Pressburg (1762-1839) affirmed Landau's position. Sofer was strongly opposed to doctrinal innovation in Jewish law. In response to "a question about a person who wished to sell his body to science," Sofer writes that "if before us (*lefaneinu*) there were a sick person who had the same illness and" the autopsy would facilitate the sick person's recovery, "it almost certainly would be permitted." However, to sell one's body so that "physicians can dissect him . . . to gain general medical expertise . . . [is not] lifesaving at all . . . [and therefore would] violate both the prohibition of deriving benefit from and desecrating [a corpse]." <sup>8</sup>

### *B. Stricter Approaches*

There were also proponents of even stricter approaches. In 1851, Rabbi Jacob Ettlinger of Germany (1798-1871) was asked if a person who died from a "strange illness" could be autopsied if there was another patient afflicted with the same illness. Doing so, the questioner hoped, might lead the doctors to find a treatment for the live patient. Ettlinger responded that "it is forbidden to save [one's life] by the degradation of one's fellow . . . this is all the truer since the degradation and desecration are certain, whereas the lifesaving through [autopsy study] is only a possibility."<sup>9</sup> Rabbi Ettlinger also expressed concern that "the deceased would not condone his own degradation." This concern, however, opened a doorway for advance permission to be granted by a potential cadaver donor.<sup>10</sup>

Rabbi Sofer's prize student Rabbi Moses Shik (1807-1879) sharply refuted Ettlinger's position. According to Shik, "if there is a sick person before us with the same illness, it is clear . . . that it is permitted to save the other person's life [via autopsy]." Shik directly cites the responsa by Landau and Sofer and writes that "honor is due to the living because the body once had a soul. And if so, how much more [honor is due] when there is a [living] soul [at stake]!"<sup>11</sup> However, before reaching this conclusion, he discusses Ettlinger's implication that cadaver dissection would be permitted if the

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<sup>8</sup> RABBI MOSES SCHREIBER, RESPONSA HATAM SOFER, *Yoreh De'ah* 2:336; FARBER, *supra* note 3, at 328-29.

<sup>9</sup> RABBI JACOB ETTLINGER, RESPONSA BINYAN TZIYON 170-71; FARBER, *supra* note 3, at 330-31.

<sup>10</sup> *Id.* at 330.

<sup>11</sup> RABBI MOSES SHIK, RESPONSA OF MAHARAM SHIK, *Yoreh De'ah* 347-48; FARBER, *supra* note 3, at 332-33.

deceased “condoned” the dissection and cites Talmudic proofs that “there is no way to allow” for this if “there is no sick person before us.”<sup>12</sup> Thus, his position—permitting doctors to perform autopsies for the purpose of saving a life while forbidding individuals from prospectively bequeathing their bodies for dissection—is “the exact inverse” of Rabbi Ettlinger’s.<sup>13</sup>

### C. *Twentieth Century Approaches*

Over the next seventy-five years, rabbis would debate this issue, some ruling more leniently and some more stringently. An important backdrop to this debate was trust or distrust of the medical establishment. In 1924, for example, Rabbi Yehuda Meir Shapira of Lublin (1887-1933), answered a question he received in Petrakov from the rabbis of Krakow. He writes that:

With regard to our question, it seems clear that even according to those who make the argument to permit [autopsy] as overriding the prohibition of desecrating a corpse, in our case there is no room at all for permission, for I have looked into the matter very carefully and I know for a fact that due to the work performed in the prosecutorium [i.e., dissecting room], many of the deceased’s body parts are never buried. Some of them are thrown away, and some of them are stored in jars and marked with numbers. Heaven forbid! Does the point even need to be argued when we consider that thus treating [body parts] flouts the commandment of burial and violates the prohibition of leaving a body unburied for an extended period?<sup>14</sup>

Other rabbis, however, had more trust in the medical establishment. This often led to more permissive approaches. Rabbi Yosef Messas of Morocco (1892-1974) wrote in 1951 that “degradation does not happen to the deceased . . . [but to] the living who see a deceased person like themselves desecrated.” He continues to say that since autopsies are performed by physicians in “a private room and the doctors do not – God forbid – intend any

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<sup>12</sup> *Id.* at 332.

<sup>13</sup> FARBER, *supra* note 3, at 332.

<sup>14</sup> RABBI YEHUDA MEIR SHAPIRA, RESPONSA OR HA-MEIR 74; FARBER, *supra* note 3, at 340-41.

vengeance or degradation, but are simply doing their work faithfully, as a kindness to the living, and the kindness inevitably extends even to the dead, who are having a mitzva[h] done with their bodies,”<sup>15</sup> autopsies may be permitted. He then goes on to forcefully argue with the opinions of both Rabbis Landau and Sofer (a bold move that was so taboo it was virtually unheard of at this point in time), opining that we should “try to prepare a treatment” for illnesses “in advance.”<sup>16</sup> In particular, Rabbi Messas argues with Rabbi Sofer’s position that selling one’s body is forbidden:

[T]his poor and needy person . . . took a little or even a lot of money during his lifetime to sustain his life and the life of his family or to leave something for his poor and needy children while at the same time doing a service to the rest of humanity by contributing toward the saving of thousands of lives by helping to spread the knowledge of medical science. With the greater diffusion of this knowledge, the honor of God, may He be praised, becomes better known.<sup>17</sup>

Messas further surmises that Sofer’s ire is reserved for the anatomy lab (e.g., an Introduction to Anatomy course), in which “all stand crowding around each other as the corpse is dissected into hundreds of pieces, and each and every piece is examined and displayed to each student.”<sup>18</sup> Messas distinguishes this from a situation in which “only two or three doctors examine a body in order to learn the nature of a certain disease” and argues that even Sofer would rule permissively in such a case.<sup>19</sup>

## II. EXAMINING THE QUESTIONS IN THE CONTEMPORARY ISRAELI SOCIETAL CONTEXT

Thus far, the primary conflicts in this debate have been the tension between the preservation of human life and the interpretation of human dignity, as well as the related conflicts about whether the deceased may, in effect, “waive” his dignity as argued in the otherwise strict approach of Rabbi Ettliger. There was also the general question of how much trust could be placed in

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<sup>15</sup> RABBI YOSEF MESSAS, RESPONSA MAYIM HAIM, *Yoreh De’ah*, vol. 2, 109; FARBER, *supra* note 3, at 342-43. *Mitzvah* may be translated as “a good and holy deed”.

<sup>16</sup> *Id.* at 343

<sup>17</sup> *Id.* at 346.

<sup>18</sup> *Id.* at 347.

<sup>19</sup> *Id.*

the medical establishment and how much one was bound by precedent. These questions took on new dimensions in contemporary times, particularly in Israel, where the question was one of national importance.

Most authorities felt bound by Landau's and Sofer's decisions (and certainly more bound by them than Rabbi Messas did). As medical advances continued to be made, the debate became more acute. In the early twentieth century,<sup>20</sup> the Land of Israel saw expanding Jewish settlement and a need to train Jewish doctors. Some authorities sought to distinguish between gentile cadavers and Jewish cadavers by appealing to a sort-of postmodern approach: that since gentile theology did not require care for the body in the way that Jewish theology did, it would be permissible to dissect gentile cadavers with their permission. Rabbi Abraham Isaac Kook, the Ashkenazi Chief Rabbi of Palestine (1865-1935), argued in 1931 that "desecrating the dead is one of the prohibitions unique to Jews, . . . gentiles . . . have no reason to be particularly careful about avoiding the desecration of a corpse if there is a natural purpose for doing so, such as medical reasons."<sup>21</sup>

The Sephardi Chief Rabbi, Ben-Zion Meir Ḥai Uzziel (1880-1953), took a distinctly different approach when asked about the permissibility of Israeli physicians dissecting bodies for medical study. Rabbi Uzziel states unequivocally that desecrating a body is a law that applies to all humans, Jews and gentiles alike.<sup>22</sup> He concluded that "desecration" only occurs when the body is treated disrespectfully, but that respectful autopsies conducted to increase medical knowledge would not fall in this category. He has a remarkably positive attitude toward the medical establishment and an understanding of the cumulative effects of medical study:

When there can be great benefit to all humanity,  
where there is an issue of saving lives, we see no

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<sup>20</sup> See *infra* Section I.C.

<sup>21</sup> RABBI ABRAHAM ISAAC KOOK, RESPONSA DA'AT KOHEN 199; FARBER, *supra* note 3, at 353.

<sup>22</sup> RABBI BEN-ZION MEIR ḤAI UZZIEL, RESPONSA MISPHEI UZZIEL, *Yoreh De'ah*, vol. 1, 28; FARBER, *supra* note 3, at 348-51, 354-58; Uzziel (at 355) makes a point of saying that there is also no difference "between executed criminals and those who are not." This is a sharp contrast to the historical treatment of the bodies of criminals. For example, the British Murder Act of 1752 (repealed in 1828) mandated—not permitted, but mandated—that the bodies of murderers be either hanged in chains or, more relevant for our purposes, publicly dissected. Similarly, a 1789 New York law established that only the cadavers of criminals could be dissected.

reason to forbid it . . . this definitely is considered lifesaving. [Here he argues that “patients with similar illnesses to the deceased always exist, whether in that specific hospital or somewhere else. Moreover, if doctors never pathologically examine the corpse, then these illnesses will remain incurable.”<sup>23</sup>]

Anyone who knows anything about medicine, how the discipline has developed and advanced, and what advantages this has brought [to the world] cannot have even a moment’s doubt about its benefits. This is especially true nowadays, when surgical procedures to heal the sick have been greatly developed and through this very many ill people who were approaching the gates of death have been healed. Certainly, autopsying a corpse offers great assistance in understanding an illness and its effects on various parts of the body, as well as [for learning] proper surgical practice and healing. In the face of lifesaving and benefits to the living, there is no degradation and no desecration of the deceased’s body, for the dead person feels no degradation or desecration and the living know that this is not meant as a desecration, but fulfills an essential need and is performed with proper respect and with [agreement] that the body will be turned over for burial with proper honors after the autopsy.<sup>24</sup>

Rabbi Uzziel, however, is concerned that his permissiveness might encourage trafficking in bodies and might even construe a property interest in the body. He is therefore careful to limit his permission only for the purpose of advancing medical knowledge and only if payment is not given to the deceased’s relatives—“there is no greater desecration than commercializing the deceased’s body.”<sup>25</sup> He also states that “students must handle the corpses with the utmost respect, and meticulously bury all body parts and entrails following the dissection.”<sup>26</sup>

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<sup>23</sup> Brody, *supra* note 2.

<sup>24</sup> FARBER, *supra* note 3, at 348-51, 349.

<sup>25</sup> *Id.* at 350.

<sup>26</sup> Brody, *supra* note 2.



Rabbi Uzziel's decision was an early indication that the element of *sakanat nefesh lefaneinu*<sup>29</sup> might be reevaluated. Another was the opinion of Rabbi Abraham Karelitz (1878-1953), known as the *Hazon Ish*, who wrote that "the real distinction is not about whether [the ill person] is before us. Rather, [the real distinction is] whether at the time there is a prevalent ailment – even if there is no ill person before us at the moment."<sup>27</sup>

As the possibilities for permissible dissections increased, the question of whether religious Jews could donate their bodies to science came to the fore. The interest in the question was heightened by the establishment of Israeli medical schools. In 1947, the provost of the Hebrew University and the head of Hadassah Medical Center posed the question to the Ashkenazi Chief Rabbi Isaac ha-Levi Herzog (1888-1959).<sup>28</sup> Herzog specifically avoids the question, writing an eight-part responsum "as insights that came to mind . . . [and] an exercise in theoretical Torah study" but not one that was meant as a practical ruling. However, in part six of this essay, he hints that he agrees with Rabbi Ettlinger that receipt of permission from the cadaver donor before death is key to a permissive approach.<sup>29</sup> In a responsum that was published posthumously, Rabbi Herzog laid out six conditions he believed would be grounds not for permitting dissection, but also for not opposing it:<sup>30</sup>

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| <p>(א) שמא בדבר שהוא כל<br/>כך תועלת לרבים לחנך<br/>רופאים מומחים אין בזה<br/>בוזין לא למת ולא לחי,</p> | <p>(1) Perhaps in a matter that is of such great utility to the public as training qualified doctors, there would not be an insult to the deceased or to the living;</p> |
| <p>(ב) מאחר שציווה בחייו<br/>ומהמשפחה מסכימה,</p>   | <p>(2) Assuming the deceased instructed that this be done and that the family agrees to it;</p>  |

<sup>29</sup> This concept was first raised by Landau, *see infra* p. 428, and would be translated as "if there is life-threatening danger to a person who is right here, before us."

<sup>27</sup> RABBI ABRAHAM KARELITZ, HAZON ISH, *Mourning* 208:7; FARBER, *supra* note 3, at 358-359.

<sup>28</sup> RABBI ISAAC HA-LEVI HERZOG, *Autopsies for Medical Study*, QOL TORAH 1, no. 2–3 (5707/1947): 1–6; vol. 1, no. 4 (5707/1947): 1–4; vol. 1, no. 5 (5707/1947): 1–4; vol. 2, no. 1 (5708/1947): 1–3; vol. 2, no. 2 (5708/1947): 1–3; vol. 2, no. 7–12 (5708/1948): 1–3; vol. 3, no. 5–6 (5709/1949): 1–3; vol. 3, no. 7–8 (5709/1949): 1–2 in FARBER, *supra* note 3, at 364-66.

<sup>29</sup> FARBER, *supra* note 3, at 367.

<sup>30</sup> Excerpt from manuscript in FARBER, *supra* note 3, at 367-68.

- (ג) מפני הספק שמא יש כאן ענין של פיקוח נפש, (3) Since it is possible that doing this contributes to saving lives;
- (ד) בתנאי שלא ינהגו מנהג בזיון בשעת הלימוד ושלא בשעת הלימוד, (4) On the condition that [medical students] do not treat the body with disrespect, whether during lessons or outside of lessons;
- (ה) שלא יבזו את הבשר שאין צריך להם אלא יסלקוהו ויבטיחו בטיפול כימי שלא יסריח ויקברוהו, (5) That the unused body parts not be treated with disrespect, but when anything is removed, a chemical be poured upon each part so that it does not stink, and all of them be sent for burial;
- (ו) שאחרי השימוש ימסרו את הכל לקבורה. (6) At the end of the process, the entire body should be buried.

The growing understanding of the importance of autopsies for medical research led to permissive approaches by leading rabbinic scholars, even though those approaches were sometimes written as theoretical opinions rather than as legal rulings. These approaches required specific innovations in the Jewish legal system since there had previously been no framework for cadaver donation. As indicated above, one consensus that emerged among rabbinic decisors who permitted whole body donation was that arrangements had to be made to save and then properly bury all dissected organs and body parts. Another area of interest to the rabbis involved the freedom of disposition. Rabbinic rulings stated that the decision to donate one's body had to be specifically delineated by the deceased; it could not be done by the deceased's family members or physicians.<sup>31</sup>

While these rulings were not codified in Judaic legal codes, they did have an impact on the Israeli legal system. As background, every previous ruling party over this territorial region had recognized that, because Israel is considered sacred to so many, there was an acute need to respect individual religious belief. The

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<sup>31</sup> Brody, *supra* note 2. I have found no evidence that allows for a presumed intent of the donor. I also have not found specific rules regarding the attestation requirements necessary to survive the scrutiny of allowing whole-body donation under religious law.

Ottoman Turks called this the Millet system. The parts of life that reflected one's persona—birth, death, marriage and divorce—were ruled by religious law. The Turks, followed by the British and eventually the Israelis, recognized each religious community as being autonomous and defined those areas of law as “belonging” to the religious community. Therefore, the rabbinate had significant weight in determining matters related to death, including the permissibility of autopsies and cadaver donations. In 1944, the head of Hadassah Hospital had reached an agreement with the rabbinate permitting autopsies in four situations: (1) legal requirement, (2) to establish cause of death, (3) to save lives, or (4) in cases of hereditary disease.<sup>32</sup> No fewer than three doctors had to testify by signature to the necessity of the autopsy, and all dissected organs were to be kept for burial.<sup>33</sup> This agreement was codified in the Israeli Knesset's Law of Anatomy and Pathology, passed in 1953.<sup>34</sup> An additional requirement, passed in 1980, required the permission of a first degree relative. The 1980 law also required a five-hour wait between the death notification to the family and the start of the autopsy, which gave a relative time to retract permission.<sup>35</sup>

That same year saw the publication of one of the greatest expansions to the concept of “before us.” The author was the Ashkenazi Chief Rabbi of Israel, Shlomo Goren (1917-1994). Goren writes:

When the state and the nation are responsible for the continuity of medical service in Israel, and for the health of the people living in the country, and we know from the outset that in another few years we will need a certain number of doctors of high caliber, in order to ensure the health of the people, and if we do not maintain medical schools, the country will be left without doctors, and it is clear to us that without autopsies performed in medical schools we will not be

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<sup>32</sup> FARBER, *supra* note 3, at 365. See Louis Isaac Rabinowitz, *Autopsies and Dissections*, ENCYCLOPEDIA JUDAICA, [http://www.jewishvirtuallibrary.org/jsource/judaica/ejud\\_0002\\_0002\\_0\\_01631.html](http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0002_0_01631.html).

<sup>33</sup> Norman R. Goodman et al., *Autopsy: Traditional Jewish Law and Customs “Halacha,”* 32 AM. J. FORENSIC MEDICINE & PATHOLOGY 300, 300 (2011).

<sup>34</sup> *Id.* at 300-01.

<sup>35</sup> Daniel Benharroch et al., *Computerized Tomography Scanning and Magnetic Resonance Imaging Will Terminate the Era of the Autopsy - A Hypothesis*, 7 J. CANCER 116 (2016).

able to produce doctors worthy of that name - this is called “that the sick person is before us,” since the Jewish state is responsible for the health of the population and must plan its services for the long term.<sup>36</sup>

Thus, Rabbi Goren saw an absolute necessity for autopsies (and by implication cadaver donation) in the context of Israel being a nation-state.

How were these questions explored in the American context, which by this point in time had become another society that contained a large Jewish population, but not one where a Jewish nation-state had such responsibilities?

### III. EXAMINING THE QUESTIONS IN THE CONTEMPORARY AMERICAN SOCIETAL CONTEXT

The first question on this topic in the American context occurred in 1852, at what is now the Mount Sinai Hospital in New York, which, at the time, was a sectarian institution. Dr. Mark Blumenthal, the Hospital’s Attending Physician, asked permission of the hospital board to perform a postmortem examination to evaluate a diagnosis he had made. A sharply divided board wrote to Rabbi Nathan Adler, Chief Rabbi of the British Empire, seeking his religio-legal input; the Orthodox presence in the United States was so minor at this point that major questions were often fielded to European rabbis. Rabbi Adler advised that autopsies were forbidden, with two exceptions. One exception was that an autopsy would be permitted if the deceased had died from an unknown illness and if other patients exhibited similar symptoms.<sup>37</sup> The compelling interest in the preservation of life played a decisive role in his ruling.

Similar questions came up in early twentieth century

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<sup>36</sup> RABBI SHLOMO GOREN, TORAT HAREFUAH 225-41, 235 (2000) (adapted from RABBI SHLOMO GOREN, MEOROT, iss. 2 (1980)) (for a translated version of the excerpt in TORAT HAREFUAH 235, see Rabbi Jonathan Ziring, *Shlomo and David – R. Shlomo Goren and Prime Minister David Ben Gurion*, YESHIVA UNIV., [https://www.yutorah.org/\\_cdn/\\_materials/R-Goren-535436.pdf](https://www.yutorah.org/_cdn/_materials/R-Goren-535436.pdf)).

<sup>37</sup> JOSEPH HIRSH & BEKAH DOHERTY, THE FIRST HUNDRED YEARS OF THE MOUNT SINAI HOSPITAL OF NEW YORK 1852-1952 (1952). The other exception was if an autopsy would help exonerate a murder suspect by showing the deceased died of natural causes. For the text of Rabbi Adler’s responsum, see correspondence between T.J. Seixas and Rabbi Dr. Nathan Adler, *Jews’ Hospital in New York*, XIV THE OCCIDENT AND AMERICAN JEWISH ADVOCATE 3, 32-35 (1856), [bit.ly/AdlerXIV](http://bit.ly/AdlerXIV).

Denver, Colorado, at the National Jewish Hospital for Consumptives, which was run by Orthodox Jews. The hospital sought and obtained rabbinic sanction to perform autopsies and learn more about tuberculosis. However, their efforts were met with steep opposition from a group calling itself *Yaqra de-Shikhvi* (honor of the dead).<sup>38</sup> Rabbinic leadership had come to the United States by this time, and each side cited American Orthodox rabbinic leaders who supported its views.

Notably, two *roshei yeshivah* (rabbinic deans) of the Rabbi Isaac Elchanan Theological Seminary in New York (which would later become the rabbinical school of Yeshiva University) stood on opposite sides of the issue. (Interestingly, both rabbis served pulpits in Manchester, England, and then in New Jersey at various points in their careers.)<sup>39</sup> In a series of articles published between 1908 and 1909, Rabbi Elazar Meir Preil (1878-1933) argued for a strict reading: “it is forbidden to autopsy a Jew’s cadaver in order to learn the nature of a disease even if sick people who need it are before us, since the medical application is uncertain.”<sup>40</sup> This approach might be the most stringent one we have seen thus far.

Rabbi Avraham Aharon Yudelovich (1850-1930, also spelled Yudelowitz) disagreed. He penned several works on this topic, one directly in response to Rabbi Preil<sup>41</sup> and one in response to another rabbi, Tzvi Shimon Album.<sup>42</sup> In his response to Album, Yudelovich writes that “many treatments for various illness have been developed by physicians through autopsy . . . doctors say there is a chance that by autopsying the dead they can figure out the cause of the illness, and perhaps, through autopsy, they can devise a treatment for the illness . . . it is [therefore] permitted to autopsy the cadavers of patients who have died from tuberculosis.” Yudelovich believed in the possibility that lives could be saved, which was enough of a reason for him to permit the autopsies in Denver.

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<sup>38</sup> *Id.* at 383.

<sup>39</sup> Biographical information courtesy of Yeshiva University’s Rabbi Isaac Elchanan Seminary, *Historic Roshei Yeshiva*, <https://www.yu.edu/riets/about/mission-history/historic-roshei-yeshiva>.

<sup>40</sup> RABBI ELAZAR MEIR PREIL, *Yagdil Torah* 8 (5669/1908–9) 3:15; FARBER, *supra* note 3, at 390.

<sup>41</sup> RABBI AVRAHAM AHARON YUDELOVICH, RESPONSA BEIT AV HĀMISHAI 356; *see* FARBER, *supra* note 3, at 392.

<sup>42</sup> RABBI AVRAHAM AHARON YUDELOVICH, RESPONSA BEIT AV HĀMISHAI 355; FARBER, *supra* note 3, at 393, 398-99.

Half a century later, in New York, the issue arose again. At a major Jewish medical ethics conference in 1963, Rabbi Immanuel Jakobovits of New York (1921-1999, later to become Chief Rabbi of England) expressed concern that the Jewish refusal to permit autopsies could have negative societal consequences for both Jewry and the larger world. He stated that because a significant percentage of New York hospital patients are Jewish, the rabbis “have been warned that if the number of people willing to be autopsied goes too far down because of the religious objection to dissection, the rabbis will be blamed as having caused the closure of these hospitals, since in New York a hospital cannot function as a teaching hospital . . . if the number of bodies dissected does not reach at least 30 percent of the deceased patients.”<sup>43</sup> Like Rabbi Goren, he expanded the definition of “before us,” although based on a different set of concerns, including societal ones: “there are sick people ‘before us’ everywhere who are waiting for results of anatomical studies. That which is discovered here today [the conference was held in Israel] could help a patient in New York tomorrow . . . without autopsies, it will certainly be impossible to save the ill . . . the benefit . . . goes well beyond the attempt to come up with new treatments for mortal diseases . . . [one can also try] testing the efficacy of various drugs and treatments, whose potential to help or harm cannot be substantiated except by autopsy.”<sup>44</sup>

Although there was clearly a movement in certain circles to allow for autopsy on life-saving grounds, there was another hurdle that needed to be cleared: the consent of the donor.<sup>45</sup>

#### IV. THE BODY AS PROPERTY

“American succession law embraces freedom of disposition, authorizing *dead hand* control, to an extent that is unique among modern legal systems.”<sup>46</sup> This is in sharp contrast to the Jewish legal tradition. Under Jewish law:

The one basic norm of the Jewish law of property is that the earth is the Lord's. While a man lives, God

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<sup>43</sup> RABBI IMMANUEL JAKOBVITS, *The Problem of Autopsy in Halakhic Theory and Practice*, TORAH SHE-BE-AL-PEH 6 (1964/5724): 61-66; FARBER, *supra* note 3, at 375-76.

<sup>44</sup> *Id.* at 378-79.

<sup>45</sup> Briefly discussed above, *see infra* p. 428-29.

<sup>46</sup> ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 1 (10th ed. 2017).

indulges him some power over things, especially their use and enjoyment. However, after his death his power to dispose must revert to the Master. That is why it was held in the Talmud that the laws of inheritance as set forth in the Bible must be obeyed. An owner of property has no control over the manner in which his belongings shall be distributed after his demise. That is up to God, the Ultimate Owner.<sup>47</sup>

That said, over the course of history, Jewish law had found ways for testators to assert their own disposition. One method was to make gifts in one's lifetime that would take effect upon death. One might think, then, that if one made a gift of one's body, and that if dissection could be proven to be permissible, this element of the problem might be solved. However, in its place a new question must be asked, namely: who owns the body?

Life, Jewish tradition argues, is not the person's to begin with. This is expressed nicely by Philo in *De Cherubim*:

I am formed of soul and body, I seem to have mind, reason, sense, yet I find that none of them is really mine. Where was my body before birth, and whither will it go when I have departed? . . . Whence came the soul, whither will it go . . . Even now in this life, we are the ruled rather than the rulers, known rather than knowing . . . Is my utterance my own possession, or my organs of speech? A little sickness is a cause sufficient to cripple the tongue and sew up the lips of the most eloquent, and the expectation of disaster paralyses multitudes into speechlessness . . . All this surely makes it plain that what we use are the possessions of another, that neither glory, nor wealth, nor honours, nor offices, nor all that makes up body or soul are our own, not even life itself. And if we recognize that we have but their use, we shall tend them with care as God's possessions, remembering from the first, that it is the Master's custom, when He will, to take back His own.<sup>48</sup>

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<sup>47</sup> RABBI EMANUEL RACKMAN, *A Jewish Philosophy of Property: Rabbinic Insights on Intestate Succession*, MODERN HALAKHAH FOR OUR TIME 172 (1995).

<sup>48</sup> PHILO, ON THE CHERUBIM 113–8 (ii, p. 75ff.), translated in Hans Lewy, 3 JEWISH PHILOSOPHERS: PHILO SELECTIONS 34–35 (2006).

In some ways, this concept accords with general international law: there are no financial incentives for cadaver donation and, although some states in the U.S. have tax benefits for organ donors, “the nearly universal worldwide ban on the sale of human organs for transplant is a classic example of a moral limit to the market, enacted into law.”<sup>49</sup> Within Jewish law there are, however, mechanisms by which items can be transferred from divine ownership to human ownership. Dr. Madeline Kochen writes that “all things and people are understood to have originated as gifts from God,” and therefore contain a “divine lien.”<sup>50</sup> In fact, the notion of a “sale” may in and of itself not be relevant in the Jewish legal context because it is not the exchange of money that is potentially problematic, but rather obligational categories that limit ownership of the body.

To properly explore this, we must look into the three types of property obligations in Jewish law, described by Kochen as follows:

- 1) Property obligations toward God (those directly donated to God, e.g., sacrifices),
- 2) Obligations toward specific societal sectors (e.g., priestly tithes),
- 3) Obligations toward the poor.<sup>51</sup>

The latter two obligations are a form of *tzedakah*, described by Rabbi Jonathan Sacks as an “untranslatable virtue” that “lies at the heart [of] Judaism’s understanding of . . . interpersonal duties.” Sacks describes the distinction between possession and ownership. “What we possess, we do not own,” he writes, “we merely hold it in trust for G-d”:

If there were absolute ownership, there would be a difference between justice (what we are bound to give others) and charity (what we give others out of generosity). The former would be a legally enforceable duty, the latter, at best, the prompting of benevolence or sympathy. In Judaism, however, because we are not owners of our property but merely guardians on G-d’s behalf, we are bound by the conditions of trusteeship, one of which is that we share part of what

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<sup>49</sup> MADELINE KOCHEN, ORGAN DONATION AND THE DIVINE LIEN IN TALMUDIC LAW 12 (2014).

<sup>50</sup> *Id.* at 1.

<sup>51</sup> *Id.* at 13.



we have with others in need. What would be regarded as charity in other legal systems is, in Judaism, a strict requirement of the law and can, if necessary, be enforced by the courts.<sup>51</sup>

“Charity” is a poor translation of *tzedakah*. Charity, according to the *New Oxford American Dictionary* is “the voluntary giving of help, typically in the form of money, to those in need.”<sup>52</sup> *Tzedakah*, in Jewish law, is not voluntary. It is an obligation.

This obligation to give of one’s self—to sacrifice of one’s self—was explored by Marcel Mauss in *The Gift*. Mauss, who explicitly lists “the Hebrew *zedaka*” in his exploration of the development of a theory of alms, writes that the meaning of the term *zedaka* changed from “justice” to “alms” in “the Mishnaic era . . . [during] the victory of the ‘Poor’ in Jerusalem, [at] the time when the doctrine of charity and alms was born, which, with Christianity and Islam, spread around the world.”<sup>53</sup> Mauss discusses the societal value of sacrificing one’s life for someone else or sacrificing one’s wealth to charity, which are paths to acquiring social stature and even fame. This seemingly voluntary gift-giving can create obligations; the person to whom a gift is given may feel obligated to return the favor, even if they did not ask for or need the gift in the first place.

In the Jewish legal context, the two obligations that are forms of *tzedakah* (e.g., priestly tithes and poor tithes) create societal bonds. The act of donating is not an act of charity; it is the fulfillment of an obligation. Kochen writes that there has been an “influence of liberal conceptions of personhood and property . . . [to] a focus on individual self-preservation . . . and bodily integrity” on certain Jewish legal decisors’s opinions, as opposed to “limits to self-ownership resulting from divine ownership of the human body . . . and the obligations to others that flow therefrom.”<sup>54</sup> Kochen posits that *tzedakah* obligations are not just gifts from one person to another. As one source, she cites a Talmudic passage in *Kiddushin*, which states *כי קא זכו משלחין גבוה קא זכו*—“When [the priests] acquire [food from the tithes], it is from the table of the Most High that they

<sup>51</sup> Rabbi Jonathan Sacks, *Tzedakah: The Untranslatable Virtue*, COVENANT & CONVERSATION RE’EH (Aug. 9, 2007), <http://rabbisacks.org/reeh-5767-tzedakah-the-untranslatable-virtue/>.

<sup>52</sup> *Charity*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2016).

<sup>53</sup> MARCEL MAUSS, *THE GIFT* 23 (translated in W.D. HALLS, TAYLOR & FRANCIS E-LIBRARY (2002)).

<sup>54</sup> KOCHEN, *supra* note 45, at 13 (referencing BABYLONIAN TALMUD, *Kiddushin* 52b).

acquire.” In other words, the priests’ food belongs neither to the donor nor to the recipient, but rather to God.<sup>55</sup> The human donor’s act of ceding ownership is like giving a gift to God; the recipient has an entitlement to the divine gift.<sup>56</sup> Kochen discusses this in the context of organ donation; she contends that the act of organ donation fulfils two obligations: *pikuach nefesh*<sup>57</sup> and the obligation to “make a return gift to God.”<sup>58</sup> Just as giving the priestly tithe is a way of ceding ownership to God, so too is donating one’s organ to his fellow. Thus, organ donation is not the direct transfer of a bodily part from one person to another, but a transfer that passes through the divine realm, placed on “the table of the Most High” at the holy moment of transfer.

Under the permissive approaches that have been articulated to allow for cadaver donation, the body, too, would fit the category of that which is placed on the table of the Most High. Although most organs can only be donated once the donor has died, some can be made while both patients live (e.g., kidneys, lungs, liver lobes). When both patients live, it might be easy to mistake the procedure as a simple transfer of a bodily part from one person to another and miss the critical import of the procedure as a transfer that passes through the divine realm. In the case of cadaver donation, however, when all donors must by definition be deceased, it is perhaps easier to consider the donation within the framework of the divine lien. The soul has departed from the body, the required rituals of mourning have descended upon the deceased’s loved ones, the person has clearly gone “to meet their Maker,” as it were. And yet, at that moment of meeting, man has an opportunity to perform a *mitzvah*, a good and holy deed, returning the body to God in a way that saves future lives by educating future physicians. The interruption in the process of mourning—namely the postponement of burial—is a pause in the process of grieving that can highlight for others the transfer of the deceased’s body to the divine realm on its way to the anatomy lab.

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<sup>55</sup> *Id.* at 85, 102.

<sup>56</sup> *Id.* at 99.

<sup>57</sup> For a definition of *pikuach nefesh*, see *infra* p. 427.

<sup>58</sup> *Id.* at 185.; see BABYLONIAN TALMUD, *Sanhedrin* 73a: “How does one know that one must return a person’s lost body [i.e., his life]? The verse teaches: ‘You shall return it [literally, “him”] to him.’” The verse referenced is Deuteronomy 22:2, which is the basis for the law requiring the return of lost objects. It is understood here by the Talmud as a source for the duty to save another’s life.

## V. CONCLUSION

A. *A Path Forward: Voluntary Obligation*

Despite the need for autopsies, cadaver donation cannot be considered an absolute obligation for both legal and religious reasons. Instead, a different mechanism must be used: the seemingly-paradoxical concept of a voluntary obligation.

Kochen cites the Talmudic Tractate *Berakhot*, which describes how “the later generations” used to take advantage of a legal loophole to exempt their produce from the tithing obligation, unlike the earlier generations who eagerly and intentionally made their produce subject to tithing.<sup>59</sup> The Talmud thus acknowledges loopholes that exist in the tithing process and, in Kochen’s view, recognizes that tithing is therefore “a kind of voluntary obligation, given the acknowledged degree to which an individual can evade it.” Cadaver and organ donation operate similarly; in Kochen’s words, “they inherently and ultimately rest on an individual sense of obligation.”<sup>60</sup>

Indeed, as indicated above, one consensus that emerged among the rabbinic decisors who permitted whole body donation was with regard to the freedom of disposition.<sup>61</sup> Only the individual sense of obligation to save lives could overcome the prohibitions of *nivul ha-meit*<sup>62</sup> and deriving “benefit” from a corpse.

The individual sense of obligation is one critical piece. The communal sense of obligation and resulting discussions are a second. The communal obligation for cadaver donation articulated by Rabbis Goren, Jakobovits, and others, and the growing public interest in and need for organ donation allowed rabbinic sages to reconsider risk factors in light of evolving scientific knowledge and public policy considerations and rule these procedures permissible.<sup>63</sup> Together, the systemic obligational ethics that are incumbent upon individual community members and upon the community as a whole create a powerful framework for promoting these types of gifts and aid practitioners of Jewish law in finding ways for man to better contribute his body to the betterment of his fellows.

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<sup>59</sup> KOCHEN, *supra* note 45, at 217 (referencing BABYLONIAN TALMUD, *Berakhot* 35b).

<sup>60</sup> *Id.*

<sup>61</sup> *See infra* p. 435.

<sup>62</sup> *See infra* p. 427 for the definition and translation of *nivul ha-meit*.

<sup>63</sup> To be sure, these procedures have not been universally accepted as permissible and are still considered controversial in many circles.