

# CENTER FOR MODERN TORAH LEADERSHIP

Center for Modern Torah Leadership



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"Taking Responsibility for Torah"

## CREATIVITY AT THE CUTTING EDGE OF HALAKHAH

### WEEK TWO SUMMARY OF SBM 2019

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How does Jewish law respond to changes in scientific knowledge and technical capacity? One window into this issue is Shu"t Noda B'Yehudah 2:YD:210, written by the renowned eighteenth-century posek Rabbi Yechezkel Landau of Prague. Rabbi Landau's ruling demonstrates the power and necessity of halakhic creativity in response to such changes, and also some of its risks and perhaps inevitable pitfalls.

R. Landau's son-in-law R. Leib Fischels reported a disagreement between two rabbis in London - henceforth the *matir*=permitter, and the *oseir*=forbidder - whether to allow doctors to autopsy a man who died after surgery to remove a bladder or kidney stone, in the hope of developing safer, less invasive surgery for future patients. The case appears to pit the concern of *nivul u'vizayon bameit* (=marring and disgrace of the corpse/deceased) against the obligation to save lives, *pikuach nefesh*.

The *matir* cites two precedents in which apparent *nivul bameit* is halakhically permitted.

First, Tanakh reports without disapproval that Yaakov, Yosef, and the kings of Israel were embalmed. While one might claim that embalming is for the honor of the dead, and is therefore not considered *nivul*, the *matir* argues that the autopsy in our case is parallel, because the dead will be honored by bringing healing to other patients.

Second, Shut HaRashba cited by RAMO YD363:2 permits children to fulfill their father's wish to be buried with his ancestors by exhuming him and pouring lime over his body to expedite its decomposition.

The *oseir* cites a ruling by R. Akiva recorded in Gemara Bava Batra 155a prohibiting an autopsy. The proposed aim of the autopsy was to determine whether or not the deceased had reached puberty at the time of death; if he had not, this would retroactively invalidate his sale of his father's property shortly before death.

At face value, the *oseir's* case - *nivul* of a cadaver in order to ascertain biological details of the deceased's death - seems very similar to our topic of medical autopsy. However, the *matir* responds that the cases are not parallel at all. Rabbi Akiva teaches us that one cannot do

*nivul* for financial gain, but why would that mean that one cannot do *nivul* in order to save lives?!

R. Fischels agrees with this disproof. However, he contends that one can even go further, and prove the *matir's* permission from the *oseir's* source. It's true that Rabbi Akiva forbids the heirs from autopsying the body - but the Talmud implies that the buyers of his property would be permitted to demand an autopsy!

R. Landau is quick to justify the *oseir*, however. He argues that autopsies in London likely require the permission of the family, and therefore, if one does not distinguish between autopsies for gain and autopsies for medical knowledge, the *oseir's* proof would be valid. R. Landau makes clear that he offers this defense for the honor of the *oseir* rather than because he agrees with him, and he agrees with the *matir's* original disproof.

However, Rabbi Fischels claims that the *matir* has also not brought any proofs relevant to permitting *nivul*. Why? Because neither embalming nor pouring lime are properly defined as acts of *nivul*, even though they alter the corpse. Rather, embalming **prevents** *nivul* by preserving the body in its pre-decomposed state, and pouring lime prevents *nivul* by rapidly taking the body to its fully-decomposed, non-repulsive state - fleshless bones. Autopsies, by contrast, are actually *nivul* and must be justified by some competing value.

R. Fischels here effectively distinguishes *nivul* of the body from *kevod* of the deceased person. We are left to consider how he would rule in a case where we are both being *menavel* the body, and *mechabad* the person.

R. Fischels claims that he does have a valid proof for permitting the autopsies. This proof is from Talmud Chullin 11b. The Talmud there seeks to prove that we can rely on probability in capital cases from the fact that we do not require murder victims to be autopsied, even though an autopsy might show that they were *treifot* (people with holes in vital organs that will kill them quickly), whom it is not a capital crime to kill. The Talmud responds that this cannot be a valid proof, as why would we rely on probability when autopsying was possible?! Rabbi Fischels argues that the Talmud clearly thinks that an autopsy would be justified to save the life of the accused murderer.

Rabbi Landau responds that this is backwards thinking. If we could not rely on probability, then nobody could be executed without autopsy. The autopsy therefore serves to enable the execution, not to prevent it!

Rabbi Landau concedes that the language of the Talmud leans toward Rabbi Fischels' reading, **וכי תימא משום איבוד נשמה דהאי ננוליה** - were you to say that we should do *nivul* (to the victim) for the sake of (preventing) the loss of life (of the killer). How can this be explained?

R. Landau explains that the Torah mandates that halakhah always adopt the positions that minimize executions. This special concern for capital defendants means that autopsies would always be **required** in capital cases even if they are not permitted for the purpose of saving life in other circumstances. Therefore, R. Fischels cannot prove from here that medical autopsies are permitted.

R. Landau then expresses his incredulity at the entire conversation. Why were Rabbi Fischels, the *matir*, and the *oseir* bringing evidence as to whether *nivul* particularly is permitted to save lives? It's clear that even the possibility of *pikuach nefesh* (lifesaving) overrides all prohibitions that are not *yeihareig v'al ya'avor* (require one to die rather than transgress). Therefore, since *nivul* is plainly not *yeihareig v'al ya'avor*, medical autopsies should obviously be permitted?!

R. Landau therefore contends that the real issue is whether halakhah considers the generation of new medical knowledge that can save lives to be "lifesaving." He concludes that it is only considered lifesaving if one can point to a "sick person before us," who may be saved by the new knowledge. Thus, the Talmud in Chullin permits autopsies to save the life of someone already convicted and liable for execution, and the Talmud in Yoma permits digging people out of construction debris on Shabbat. But if there are no patients in hand, the statistical likelihood that such patients exist elsewhere, or will eventually appear here, does not create a halakhic imperative of lifesaving.

R. Landau argues that this distinction is pragmatically necessary. Otherwise, lifesaving would be used to allow all medical work on Shabbat, including crafting medical instruments. As well, autopsies would end up being performed for the most remote medical concerns, even general anatomical curiosity. In an act of *reductio ad absurdum*, R. Landau lists these outcomes and cries, "Heaven forbid that we permit this!"

To better understand why R. Landau felt compelled to draw the radical distinction of *lefaneinu* without bringing further proof, it is important to understand the communal issues facing the London at the time. When the *she'eilab* was asked, human bodies were being used more and more systematically for medical research; specifically, a surgeon from France had recently proved that he had used information gained from autopsies to develop a better treatment for bladder stones - the very same disease as in our

question! The increased reliance on autopsies for medical education, together with the lack of refrigeration technology available and Christians' religious reservations on signing off on autopsying their bodies, meant that schools were desperate for cadavers. Permitting autopsies for medical research in R. Landau's time would have meant the end of traditional Jewish burial; it would have made redundant an ancient rite that had hitherto characterized Jewish communal life.

R. Landau thus offers a creative distinction that was consistent with his precedents but did not emerge from them. It is not clear whether he would have made this distinction without the practical pressures he faced.

The role of halakhic creativity in response to societal and technological changes is even more striking when we follow the *sugya* through to the formative years of the modern State of Israel. R. Yechiel Weinberg in Shu"t Sridei Eish 2:92 ruled for a rabbi in Manchester, England, that autopsies were generally forbidden, citing Rabbi Landau. However, he later wrote a letter (Writings 1:22) arguing forcefully that they must be permitted in Israel. He notes that developments since R. Landau's time, such as the advent of telephones and radio, mean that we are more connected and the effect of research on patients is felt much more immediately. Therefore, all patients anywhere can be considered *lefaneinu*. As well, the newly-formed State of Israel simply needs medical schools, and therefore anatomy labs - outsourcing a country's medical care would be ludicrous. Moreover, Israel would suffer international criticism if it had below-par medical care, the Israeli Rabbinate would be severely criticized if religious concerns lowered the quality of the country's health care.

The severe limit placed by the R. Landau on the permissibility of autopsies through his *lefaneinu* distinction forces R. Weinberg to push back with an equally innovative re-classification of the effects of medical research as *lefaneinu*.

How much concern should poskim have for the transience of the societal conditions their *teshuvot* address? In hindsight, It was inevitable that R. Landau's creative distinction would need to be replaced once the desperate need for cadavers receded, or as autopsies became a more essential part of medical practice generally. Perhaps poskim should find ways of building sunset provisions into their rulings, or other ways of allowing their successors greater leeway to "start from scratch" when situations changed in relevant ways. Perhaps that is not a formally legitimate move with regard to laws that are deoraita under Biblical authority. R. Landau's creative ruling, and Rabbi Weinberg's creative response, throws into relief both the power and shortfalls of using halakhic creativity in *pesikab*.

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