Post-Mortem Circumcision

מילה אחר מיתה

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This teshuvah was approved unanimously (16-0-0) on April 6, 2016. Voting in Favor Rabbis Pamela Barmash, Miriam Berkowitz, Noah Bickart, Elliot Dorff, Baruch Frydman-Kohl, Susan Grossman, Reuven Hammer, Joshua Heller, Jeremy Kalmanofsky, Jane Kanarek, Gail Labovitz, Amy Levin, Jonathan Lubliner, Daniel Nevins, Micah Peltz, and Jay Stein.

עולם לברית בבשרכם בריתי והיתה

My covenant shall be in your flesh as a sign of an eternal covenant

שאלה:

In the event of the tragedy of a stillbirth or the death of an infant boy, must there be a *brit milah*, circumcision, before burial? Many male Jews from the former Soviet Union did not have a *brit milah* as children and, even after emigrating, did not arrange for their circumcision. When they die, must they be circumcised before burial? In either case, if circumcision is required, would this be considered part of the regular preparation for burial or, would the surviving family have to be informed and provide explicit consent?

תשובה:

The core mitzvah

The first *mitzvah* of the Torah that is particular to our people is the commandment to Avraham:

וַיֹּאמֶר אֱ-לֹהִים אֶל־אַבְרָהָם וְאַתָּה אֶת־בְּרִיתִי תִשְׁמֹר אַתָּה וְזַרְעֲךָ אַחֲרֶיךָ לְדֹרֹתָם: זֹאת בְּרִיתִי אֲשֶׁר תִּשְׁמְרוּ בֵּינִי וּבֵינֵיכֶם וּבֵין זַרְעֲךָ אַחֲרֶיךָ הִמּוֹל לָכֶם כָּל־זָכָר: וּנְמַלְתֶּם אֵת בְּשַׂר עָרְלַתְכֶם וְהָיָה לְאוֹת בְּרִית בֵּינִי וּבֵינֵיכֶם: וּבֶן־שְׁמֹנַת יָמִים יִמּוֹל לָכֶם כָּל־זָכָר לְדֹרֹתֵיכֶם.... וְהָיְתָה בְרִיתִי בִּבְשַׂרְכֶם לִבְרִית עוֹלָם: וְעָרֵל | זָכָר אֲשֶׁר לֹא־יִמּוֹל אֶת־בְּשַׂר עָרְלָתוֹ וְנִכְרְתָה הַנֶּפֶשׁ הַהִוא מֵעַמֶּיהָ אֶת־בְּרִיתִי הֵפַר:

> *God said to Avraham, "As for you, you shall keep my covenant, you and your offspring after you throughout their generations. This is my covenant, which you shall keep, between me and you and your offspring after you: Every male among you shall be circumcised. You shall circumcise the flesh of your foreskins, and it shall be a sign of the covenant between me and you. Throughout your generations every male among you shall be circumcised when he is eight days old.… So shall my covenant be in your flesh an eternal covenant. Any uncircumcised male who is not circumcised in the flesh of his foreskin shall be cut off from his people; he has broken my covenant."*[1]

[1] Genesis 17:9-14

The practice of circumcision has been attacked in the ancient world, within Christian society, under Nazi and Soviet totalitarianism, and in contemporary culture.[2] Yet, with great perseverance and dedication, Jews have continued to place the "seal of the covenant" on our male children at the age of eight days.

From Biblical days, circumcision was understood as a defining ritual of male identity within the Israelite community. According to Biblical and rabbinic tradition, this *mitzvah* was carried out prior to the Exodus and before entry into the Land of Promise.[3] The Torah states that *karet*, being cut off, is a consequence of non-circumcision: "The male that does not circumcise his flesh, that person shall be cut off from its people".[4] Whatever *karet* might mean, it is usually applicable for an active violation of one of the prohibitions of Torah (מצוות לא תעשה). It is, however, stipulated for failure to perform two positive *mitzvot*, circumcision and participation in the Passover offering, each of which can be considered to be defining of membership in the national community.[5]

What if someone dies before circumcision?

There is a standing tradition that were an infant to die before being circumcised, there should be a post-mortem circumcision at the grave. It is commonly understood that infants who die prior to

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[2] An historical review may be found in Michelle Klein, A History of Brit Milah," *A Time To Be Born: Customs and Folklore of Jewish Birth* (1998) on line: http://www.myjewishlearning.com/life/Life_Events/Newborn_Ceremonies/History_and_Themes/Ceremonies_for_Boys/History.shtml
The perspective of classical Greco-Roman writers is found in F.M. Hodges, "The ideal prepuce in ancient Greece and Rome: male genital aesthetics and their relation to lipodermos, circumcision, foreskin restoration, and the kynodesme",*The Bulletin of the History of Medicine* 75 (3): 375–405. Daniel Boyarin discusses the attack on "carnal Israel" by the Church Fathers in *Carnal Israel: Reading Sex in Talmudic Culture*, California, 1993, pp.31-60. Robin Judd details opposition in Nazi Germany and before in *Contested Rituals: Circumcision, Kosher Butchering, and Jewish Political Life in Germany, 1843-1933*, Cornell, 2007, p.244. Jehoshua A. Gilboa reviews the unofficial campaign conducted by the USSR in *A Language Silenced: The Suppression of Hebrew Literature and Culture in the Soviet Union* (London, 1982), pp. 34–35.
Dan Bollinger presents an extensive listing of contemporary anti-circumcision efforts in "Circumcision (And Its Opposition) As Causes", *The New Encyclopedia Of Unbelief*, ed. Tom Flynn, Prometheus, 2007, p. 193-195.

[3] See Joshua 5: 1-9. Maimonides writes, בשלשה דברים נכנסו ישראל לברית: במילה וטבילה וקרבן. מילה היתה במצרים שנאמר: וכל ערל לא יאכל בו. מל אותם משה רבינו שכולם ביטלו ברית מילה במצרים חוץ משבט לוי ועל זה נאמר: ובריתך ינצורו. Israel entered the covenant [with God] through three acts: circumcision, immersion, and sacrifice. Circumcision took place in Egypt, [before the Paschal sacrifice, of which Exodus 12:48] says: 'No uncircumcised person shall partake of it.' Moses our teacher circumcised [the people]. For with the exception of the tribe of Levi, the entire [people] neglected the covenant of circumcision in Egypt. Regarding this, [Deuteronomy 33:9 praises the Levites,] saying: 'They upheld Your covenant.' *Mishneh Torah, Forbidden Relationships* 13.1-2.

[4] Genesis 17:14. Rambam rules that there is a lifelong obligation to fulfill this commandment and that *karet* applies to the violator of this commandment only upon death. *Mishneh Torah, Book of Love: Laws of Circumcision* 1.2.

[5] Numbers 9:13

the eighth day are routinely circumcised before burial.[6] I recall such an experience in a congregation that I served. A rabbinic colleague described it to me as quite benign, as there is no bleeding. An essay by Dr. Mark Litwin in the *New York Times* discussed his complicated feelings as he carried out this ritual.[7]

What is the origin of this tradition? The earliest connection of circumcision to infant death is in a midrash which states that just as Avraham, following his circumcision, sat at the entrance to his tent to welcome people on a hot day, so in the future, he will greet Jews in the world-that-is-coming.

א"ר לוי לעתיד לבא אברהם יושב על פתח גיהנם ואינו מניח אדם מהול מישראל לירד לתוכה. ואותן שחטאו יותר מדאי מה עושה להם? מעביר את הערלה מעל גבי תינוקות שמתו עד שלא מלו ונותנה עליהם ומורידן לגיהנם. הה"ד (שלח ידיו בשלומיו חלל בריתו. כחום היום לכשיבוא אותו היום שכתוב בו) מלאכי ג (כי הנה היום בא בוער כתנור כחום היום.

> Rabbi Levi said: In the world-that-is-coming, Avraham will sit at the entrance to Gehennom, and will not allow circumcised Jews to go down into it. What will he do with those who sinned too much?[8] He will remove the foreskin from infants who died before they could be circumcised, affix them to [the sinners] and send them down to Gehennom. As it says in Psalms (55.21): *He puts forth his hand to those who were at peace, who desecrate the covenant. In the heat of the day* refers to the day which will be coming, as it is written, *Behold, the day is coming which burns like an oven* (Malakhi 3). [That is,] like *the heat of the day*.[9]

From this foundational midrash, it appears that one who is uncircumcised is sent to Gehinnom, while those who are circumcised are protected from this fate. According to this midrash, the foreskins of infants who die prior to circumcision are transferred to those who sin, eliminating the "safety net" for adult sinners and removing the barrier that might prevent innocent infants from entering Paradise.

Another midrash imagines circumcision as the "entry card" to Paradise:

בעת שישראל הולך לבית עולמו יש מלאך ממונה בגן עדן שלוקה לכל בר ישראל שהוא מהול ומביאו בגן עדן.

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[6] See Maurice Lamm, *The Jewish way in death and mourning* (1969), pp. 215–216: "The custom is to circumcise male infants who have not undergone circumcision until then, usually during taharah." Also Yekutiel Yehudah Greenwald, *Kol Bo Avelut*, 3:8, pp. 201-2, and Eugene Cohen, *Guide to Ritual Circumcision and Redemption of the Firstborn*, p. 22.

[7] http://www.nytimes.com/2011/01/25/health/views/25cases.html?_r=4&sq=circumcision&st=cse&adxnnl=1&scp=4&adxnnlx=1296165636-1ktQyeg41ZPv5hXxXwVrqA&

[8] See *TB Eruvin* 19a. ההיא שעתא בגיהנם, ואתי אברהם אבינו ומסיק להו ומקבל להו-בר מישראל שבא על בת עובד כוכבים דמשכה ערלתו ולא מבשקר ליה. [The wicked] are under sentence to suffer in Gehenna, but our father Abraham comes, brings them up and receives them, except for an Israelite who had intercourse with the daughter of an idolater, since his foreskin is lengthened so that he cannot be discovered."

[9] *Beresheet Rabbah* 48.8. Summarized by Louis Ginzberg, *Legends of the Jews*, v.1, p. 306: "Abraham's activities did not cease with his death, and as he interceded in this world for the sinners, so will he intercede for them in the world to come. On the Day of Judgment he will sit at the gate of Hell, and he will not suffer those who kept the law of circumcision to enter therein."

> When an Israelite [dies and] goes to the [eternal] world, an angel responsible for [the entrance to] the Garden of Eden checks that every [male] Israelite is circumcised and [then] brings him into the Garden of Eden.[10]

The belief that circumcision was critical for afterlife probably set the conceptual basis for the halakhic discussion that followed.[11]

The first legal authority to rule about post-mortem infant circumcision was Rabbi Nahshon bar Tzadok, the head of the Academy of Sura from 874-882.[12]

> ודאשתאלית קטן דשכיב בגו שמונה ימים כו׳ הכין חזינן דלא צריך למימהליה מ״ט וביום השמיני אמר רחמנ׳.
> אוי מהלין ליה על קבריה כי היכן דנהיגין ל״צ לברוכי דמחתך בשר הוא ואם מברך מוציא ש״ש לבטלה. עד הנה.
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> [Regarding that which] you asked: a boy who died within eight days [of birth, what should be done?] We see it this way: it is unnecessary to circumcise him. What is the reason [for not doing so]? The Torah states, "On the eighth day." [However,] if they do circumcise him at his grave, as they do, it is unnecessary to recite a blessing, since this is merely cutting flesh. And if one does bless, this articulates the Heavenly Name for nothing.[13]

Since the Torah states that the *mitzvah* applies on the eighth day and, sadly, this is not possible, Rav Nahshon Gaon indicates that this procedure is unnecessary.

However, Rabbi Nahshon reports a custom of post-mortem circumcision of infants and guides the questioner regarding proper practices: (1) It is to be carried out at the graveside. (2) Because this is not a commandment, it is simply cutting flesh[14] and a blessing is not required. (3) Indeed, a blessing should not be recited, since to do so would use the Divine Name in vain.

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[10] *Tanhuma, Tzav* #14. See Louis Ginzberg, *Legends of the Jews*, 6: 341; Saul Lieberman, "Some aspects of after life in early rabbinic literature", in *Harry Austryn Wolfson Jubilee Volume 2*, pp. 495-532 (particularly, pp.525-27); and Elliot R. Wolfson, "Circumcision and the Divine Name: A Study in the Transmission of Esoteric Doctrine", in *Jewish Quarterly Review*, v. 78: 1/2 (1987), pp. 77-112 (particularly, p. 79, n.5).

[11] Notwithstanding the principles "one does not derive *halakhah* from *aggadah*" (*TY Pe'ah* 2.4 and *TY Haggigah* 1.8) and "one should not rely on *aggadah* [for halakhic decision making]", (*Otzar Ha'ge'onim: Haggigah,* pp.67-69), the influence of *aggadah* and *kabbalah* on halakhah was significant. Rabbi Wayne Allen, "Circumcising the Dead," in *Perspectives on Jewish Law and Contemporary Issues (*2009), notes that *Yad Malakhi* (#72) indicates that when aggadic sources do not contradict Talmudic teaching, they may be cited as the bases of Jewish practice. On this, see *Responsa Radbaz* #1111 who prefers to practices mentioned in the Zohar; *Responsa Rabbi Tzvi Ashkenazi* #36; *Responsa Rabbi Jacob Emden* #47). Also see, "Reflections on the Halakhic Status of Aggadah", Yair Lorberbaum, "Reflections on the Halakhic Status of Aggadah," *Diney Israel* 24 (2007), pp.11-27. http://www.cardozo.yu.edu/sites/default/files/Yair%20Lorberbaum,%20Reflections%20on%20the%20Halakhic%20Status%20of%20Aggadah.pdf.

[12] See the densely annotated comment of Boaz Cohen, *Kuntres Hateshuvot*, Budapest (5690/1930) p. 23, which refers to many of the sources discussed in this *teshuvah*.

[13] *Teshuvot Hage'onim Sha'arei Tzedek*, Jerusalem 5746, 3:5:5, p. 22.

[14] According to *TB Shabbat* 136a, circumcision on Shabbat is permissible because the child may live past 30 days. If the child were to subsequently die, the circumcision would be extraneous but not prohibited, since this would simply be "cutting flesh."

Later, various aggadic traditions were joined to the tradition of Rav Nahshon, offering a rationale for his opinion. Rabbi Avraham ben Isaac of Narbonne (c. 1110 – 1179) in his *Sefer Ha'eshkol* reports the custom and adds an explanation for the circumcision.

והיכא דמית ינוקא ולא הוי בר תמניה יומי, משום דלא תיעול ערלתיה (מיניה) עימיה, נהיגי גבן דמהלין ליה בבית הקברות להסיר חרפתו ממנו.

> When an infant who did not reach eight days dies- in order for his foreskin to not ascend [to heaven] with him, we have a practice to circumcise him in the cemetery to remove his disgrace from him.[15]

This description of the practice adds the notion that the retention of the foreskin would be shameful.

The Bible terms the foreskin as a "disgrace".[16] The idea of "removing the disgrace of Egypt" became a significant rationale for post-mortem circumcision. Rabbi Yehudah ben Barzillai of Barcelona (end of 11th c), who may have been Rabbi Avraham's teacher, indicated that this explanation was not offered by Rav Nahshon, nor was it to be found in the Torah or rabbinic writings.

ונהגו למול בן שמת קודם שיגיע בן שמונה... וכן כתב גאון [נחשון]. מיהו לא ידעינן למנהג טעם מן התורה ולא מדברי סופרים. מיהו שפיר למיעבד הכי דלא תיעול ערלתיה עמיה. כך כתב ר׳ יהודה בר ברזילאי ז״ל.

> We have a custom to circumcise a boy who dies before reaching the eighth day. … So wrote the Gaon [Nahshon]. Although we do not have a reason from the Torah or from the Rabbis [of the Talmud], nonetheless, it is good to do this, so that [the child] will not have the foreskin on him. So wrote R. Yehudah ben Barzillai, of blessed memory[17].

This explanation may draw from the foundational midrash of *Beresheet Rabbah* that imagines Avraham, the first to be circumcised, waiting at the gates of Gehinnom to place the foreskins of deceased infants on those Jews who sinned "too much" so as to enable the innocent infants to enter Paradise.

Rabbi David ben Yosef Abu-Dirham (Spain, c. 1340) also reports the decision of Rav Nahshon. He adds another custom and also provides different background reasoning.

כתב רב נחשון גאון: ינוקא דאיתיליד והוי בר תלתא או ד׳ יומין, הכי רגילין [וגמרינן]. כי ניחא נפשי׳ דמהלין לי׳ על קבריה ולא מברכין על המיל׳. ומסקין ליה שמא. דכד מרחמין ליה מן שמיא, והוי תחית המתים, הויא ידיעה בינוק׳ ומבחין לי׳ לאבוה.

אמר רב אדא בר אהבה :מלין אותו ממה נפשך ;אם חי הוא - שפיר קא מהיל ,ואם לאו- מחתך בבשר הוא.

[15] *Otzar Hage'onim: Shabbat, #420, p.138,* based on *Shaarei Tzedek* 22a, 1. Reiner pp. 462-3, cites the text from *Sefer Haeshkol*, ed. Shalom Albeck (Jerusalem 2004), v.2, p. 2. Presumably, because this circumcision was considered beneficial to the deceased child, it was not viewed as desecrating the corpse. See *TB Ketubot* 11a regarding the provision of benefits to a person without prior consent.

[16] See Genesis 34.14, "We cannot do this, to give our sister to a man who has a foreskin, for it would be a disgrace to us." Also, when Joshua circumcises the male Israelites after entry to the Land of Israel, "The Eternal said to Joshua, "Today I have rolled away from you the disgrace of Egypt" (Joshua 5:3-9).

[17] R. Aharon Hakohen of Lunel, Orhot Hayyim, ed. M.E. Schlesinger (New York, 5619) v.2, p.11, cited in Reiner, p. 463.

R. Nahshon Gaon has written: [If] an infant (boy) was born and was three or four days old at his death, this is our custom and our tradition. We circumcise him at the grave but we do not recite the blessing over the circumcision. We bestow a name upon him so that, when mercy is shown him from heaven and the dead are resurrected, there will be knowledge in that child and he will discern his father.[18]

This citation of Rav Nahshon adds the custom of bestowing a name on the deceased child. While the tradition of naming a child at a *brit milah* was well-established,[19] the idea of giving a name to a dead child seems to be a new development. The reason stated for this practice is now linked to a belief in physical resurrection; the patronym will enable the child will recognize his father.[20]

This practice and its theological linkage must have passed from Spain to Constantinople, for it was criticized by Yehudah Hadasi (Constantinople, mid 12th c.) a Qaraite scholar.

והוא שטען הקראי :ככה הורו ריבונין רועיך ועושים עד היום .ומלים לנערים המתים בני שני ימים ובני שלש ויותר ביד המילדת, שלא צוה אלהיך. ואומרי׳ שלא יקומו ערלים בתחית מתיך….וכל זה המעש אינו נכון …כי בריתו על החיים צוהו….

וכתוב אשר לא ימול את בשר ערלתו ונכרתה. ובאמור ונכרתה הבננו כי הברית על החיים היא מצווה ולא על המתי׳, כי הם כבר נכרתו מארצך.

A Qaraite claimed: "Thus did the rabbis, your shepherds, teach and practice to this day: they circumcise, by the hand of a midwife, dead children who died after only two or three days, or a bit more. None of this was commanded by your God. For they say that uncircumcised [males] will not arise at the time of resurrection…. And this entire activity is not correct…. For [God's] covenant [of circumcision] was commanded for the living…. And it is written "the person who does not circumcise the flesh of the foreskin shall be cut off [from his people]." From the statement "[the person] shall be cut off" we understand that the the covenant [of circumcision] applies to the living and not to the dead. For they are already cut off from your land.[21]

The criticism by Yehudah Hadasi indicates that the procedure was carried out by midwives, women who would often be involved with a newborn child.

While Hadasi's criticism initially refers to the involvement of women in what is typically a male ritual, two other objections follow. He first finds fault with the theological rationale of physical

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[18] *Otzar Hage'onim: Shabbat,* ed. B.M. Lewin. Jerusalem, 5690/ 1930, #420, p. 138, referencing Abu-Dirham p.191 [column 2] and *Kol Bo*, Laws of Circumcision. Also see *Mahzor Vitri* of Rabbenu Simhah, ed. Shimon Hurvitz, Jerusalem 5723/ 1963.

[19] Ivan G. Marcus, *The Jewish Life Cycle* (Seattle, 2004), p.61, who notes that the earliest attestation of this custom is found in Luke 1.59-63.

[20] Reiner, p.465, shows that the earliest version of this tradition is offered by Rav Yitzhak ibn Ghiyyat of Lucena (Spain, 1038–1089) in *Shaarey Simhah,* ed. Yitzhak Dov (Seligman Baer) Bamberger (Fürth, 1862), *Hilkhot Evel*, p.41. This perspective is also adopted by Ramban, *Torat Ha'adam*, in *Kitvey Rabbenu Moshe ben Nahman* (Jerusalem, 5724), v. 1, p. 87. See Daniel Lasker, "Original Sin and its Atonement According to Hasdai Crescas," *Daat*, 20 (1988), p. 130, n.21 who suggests that the idea of post-mortem circumcision took on popular meaning as a salvational act in a way comparable to the Christian concept of infant baptism.

[21] *Otzar Hage'onim, p.138,* citing *Eshkol Hakofer,* 113b.

resurrection, a belief opposed by the Qaraite community: "For they [the rabbinic Jews] say that uncircumcised [males] will not arise at the time of resurrection." Hadasi then articulates an objection that later we shall see the Rabbis of Rome bring. Hadasi applies it specifically to the mitzvah of circumcision: since the punishment for non-compliance is to be "cut off" and the infant is already "cut off" because of his death, this *mitzvah* would not apply to him.

It is possible that there was a correlation between the popular conceptualization of circumcision as a type of salvic ritual and the elite mystical teaching that imagined circumcision to be essential to experiencing the Divine. Elliot Wolfson details texts indicating that the Pietists of Ashkenaz and the Kabbalists of Castille shared a common belief that the "seal" of circumcision was essential to the revelation at Sinai and to to the possibility of a visual experience of God.[22] These ideas may have affected the theology of subsequent halakhic authorities who accepted the perspective of Rav Nahshon Gaon regarding post-mortem circumcision.

An alternate approach

At the end of the eleventh century, almost 150 years after Rav Nahshon, a question about post-mortem circumcision was addressed by Rabbi Shlomo Yitzhaki to the three sons of Rabbi Yehiel of Rome - Natan (c. 1035 – 1106), Daniel and Avraham.

ולענין שאילתא דשאיל שלמה היצחקי מן מר נתן ומר דניאל ומר אברהם בנו ומרנא ר׳ יחיאל מן מתא רומא ז״ל על קטן שמת קודם שמונה ימים אם צריך לתתוך בשר ערלתו לאחר מותו ואם לא. כך היא התשובה.

ודאי נהוג נשי דידן למחתכיה בקרומית של קנה ,אבל לאו מצוה היא שכך מקובלים אנו דחתוך בשר הוא ולאו מידי קעביד ואסיר .משום דבן שמונת ימים אמר רחמנא. והאי לאו בר תמניא הוא .וכי יהיב קוב"ה מצוות ,לחיי הוא דיהיב ולא למיתי. דכיון כשמת אדם נעשה חפשי מן המצוות...

כן אורי רב היי גאון מהאי קרא ואתה את ברייתי תשמור :כל שישנו בשמירה ישנו בברית ,יצאו מתים שאינם בשמירה .הלכך לא מחתכינן, ועוד בר מן דין ובר מן דין אשכחנא בבראשית [רבה] בסדר וירא אליו. א"ר לוי לעתיד לבוא אברהם. יושב על פתח גיהנם ואינו מניח אדם מהול מישראל לתוכה ואותם שחטאו יותר מדאי מהו עושה להם ,מעביר את הערלה מע"ג תינוקות שמתו עד שלא מלו, ונותנה להן ומורידן לגיהנם ,הה"ד שלח ידיו בשלומיו חלל בריתו מאי טעמא שלח ידיו בשלומיו ,משום דחלל בריתו .מכלל דלא מחתכינן לידו [=להו] דאי מחתכינן להו היכי מעבירי?

Regarding the question asked by Shlomo Yitzhaki of Master Natan, Master Daniel and Master Avraham, the children of our Rabbi Yehiel of Rome (may his memory be a blessing). This is the response:

Certainly our women have the custom of cutting [the foreskin] with a sliver of reed, but it is not a commandment. For we have received a tradition that it is [only] a cutting of the flesh, and nothing [of ritual significance] is accomplished, and it is prohibited.[23] [For] the

[22] Elliot Wolfson, *Circle in the Square* (1997), p.32 and notes, and the original essay, "Circumcision and the Divine Name", p. 80.

[23] Shaye J.D. Cohen, *Why Aren't Jewish Women Circumcised?: Gender and Covenant in Judaism* (2005), p. 41, contends that the word "and it is prohibited" (*v'asur*) is out of place. "If we set these words aside,

> Torah says [this commandment applies] at the age of eight days (Genesis 17:12), and he is not eight [days] old. When the Holy one, who is blessed, gave the commandments, he gave them to the living, and not to the dead. When a person dies he is free from the commandments[24]….
>
> Rav Hai Gaon supported this with a verse, "And you shall observe my covenant" (Genesis 17.9). Whoever has the possibility of observing [the commandments], also has the covenant. This excludes the dead who cannot observe. Therefore we do not cut [the foreskin].
>
> Moreover, we derive one thing from another in *Beresheet [Rabbah]*, regarding the portion "He appeared to him" (Genesis 17:9). Rabbi Levi said, In the future to come, Avraham will sit at the entrance to Gehinnom. He will not allow any circumcised Israelite man to enter. What does he do to those who sinned too much? He transfers the foreskin from the children who died before being circumcised and affixes them [on the sinners] and brings them down to Gehinnom. That is what is intended by the verse, "He sent out his hands to a friend who violated a covenant" (Psalm 55:20). Why did "he send out his hand to a friend"? Because he "violated His covenant." Thus, we do not cut [the foreskin of the infants], for if they were cut off, how would [Avraham] accomplish this?

This report from the Rabbis of Rome indicates that the procedure was (1) a non-halakhic custom carried out on a deceased child who has no *mitzvah* obligations. (2) Those carrying out the circumcision are women.[25] (3) The surgical instrument used is a reed.[26] (4) The act is not

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the responsum is clear and consistent: post mortem removal of the foreskin is permissible but not necessary ("nothing is accomplished"), because the commandment of circumcision becomes operative only on the eighth day of life, not before…. These rabbis did not approve of postmortem circumcision and, if asked before the fact whether it should be done, they would have replied in the negative. This moderate condemnation of the practice was not sufficient for some later reader who thought that the practice was not only unnecessary but also prohibited. This reader, I suggest, added the words "and it is prohibited" to the first sentence."
Also see Avraham Reiner, "Circumcision of Stillbirths: Between Custom, Halakha, Geography and History" (Hebrew), *Zion* 79.4 (2014), n.20, who agrees that the term is a later interpolation. Rabbi David Golinkin directed me to Reiner's excellent article which is available on-line:
https://docs.google.com/viewer?a=v&pid=forums&srcid=MDUwMjIxODM4NjI5Nzc5MDk1NTMBMDU3NzAzMDc1MzIyODE2MTU0MDUBdV9WWW16QVJnaThKATAuMQEBdjI

[24] On the idea of the dead being absolved of the obligations of *mitzvot*, see *TB Shabbat 30a and 151b, Niddah* 61b. On the prohibition of the reed for circumcision, see *TB Hullin* 116b. See the discussion on this in Reiner, pp. 461-462.

[25] Although circumcision was routinely carried out by Ethiopian women, the role of women within the larger halakhic tradition was controversial. Although women were permitted by some authorities to circumcise, this was generally when appropriately skilled men were not available. See Reiner, pp. 455-57. Some see the involvement of women in post-mortem circumcision of infants as an assertion of female authority in what would usually be a male dominated ritual. In 1987, as Chair of the CJLS, Rabbi Joel Roth, responding to an inquiry from Rabbi Jack Segal, wrote, "There is no objection to allowing a woman to serve as a *mohelet* in our day. Even the Rama does not say that it is forbidden, only that 'it is the custom to seek a man.'"

[26] See *TB Hullin* 16b which expressly prohibits the use of a reed for circumcision.

prohibited, but should not be done. These rabbinic respondents may not have prohibited the activity, but are deeply skeptical of its value.

As Avraham Reiner has shown, the language of the Rabbis of Rome clearly shows familiarity with the language of Rabbi Nahshon. By citing Rav Hai Gaon (Babylonia/Iraq, d. 1038) in support of the position that the *mitzvot* were given for the living, not the dead, this rabbinic trio position the issue as a difference of opinion between two *gaonim*.[27] Additionally, they subversively re-read the foundational midrash on the subject to actually question the value of post-mortem circumcision. If the infants were circumcised after death in this world, this would deprive Avraham of foreskins in the afterlife to affix to the sinners headed to Gehinnom. However, the opinion of the Rabbis of Rome (and Hai Gaon) did not dominate subsequent halakhic discussion of the issue.

Another Italian scholar, Rabbi Menahem ben Shlomo (Italy, 1100s) discusses the practice of post-mortem circumcision in his midrashic collection, *Sekhel Tov*.

> וקטן שמת קודם שנימול אין מחתכין ערלתו ,שנאמר ואתה בריתי תשמור (בראשית יז ט), וכיון שמת אדם נעשה חפשי מן המצות, שנא׳ במתים חפשי וגו׳ (תהלים פח ו) ואין לומר כדי לזכותו לחיי עוה״ב אינו צריך. דה״ג בתלמוד ירושלמי במס׳ שביעית דפליגי התם רבנן ור״א ,ואמר ר״א דאפי׳ נפלים של ישראל באין לחיי עוה״ב ,והלכתא כר״א דהוא בתרא...
>
> A child who died prior to being circumcised should not have his foreskin removed. As it says, "You shall observe my Covenant" (Gen. 17.9). When a person dies, one is freed from the [obligations of] the commandments. As it says, "free among the dead" (Psalm 88.6). And certainly, [circumcision] is not necessary to merit him to life in the world-that-is-coming, for we have [already] established this in Tractate Shevi'it of the Talmud Yerushalmi. There the Hakhamim and Rabbi Eliezer dispute; and Rabbi Eliezer stated that Jewish still-borns even enter the world-that-is-coming. And [the legal principle is that] the law is according to Rabbi Eliezer.

Rabbi Menahem adopts the same argumentation that we have seen from the Rabbis of Rome: the mitzvot are for the living, not the dead. He also adds a reference to a Talmudic debate about whether still-born babies enter the world-that-is-coming, affirming the position of Rabbi Eliezer that circumcision is not a prerequisite for the beatitude of afterlife.

The peripatetic biblical exegete, Rabbi Abraham ibn Ezra (Spain, 1089- England,1164), also offered his opinion on the subject. In his commentary to Genesis 17.14, he indicates that those who support post-mortem circumcision believe that this affects the future soul-life of the child.

> ונמלתם את בשר ערלתכם. והטועים יחשבו כי אם מת הנער ולא נמול, אין לו חלק לעולם הבא. ואין פירוש הנפש כרצונם. כי הנפש כמו איש. וטעמו גוף שיש לו נפש. וכן נפש כי יחטא.
>
> Those who are mistaken imagine that an uncircumcised child who dies has no share in the world-that-is-coming. [However,] the meaning of the word *nefesh* is not [soul,] as they think. Actually, *nefesh* denotes a person, and its meaning is "a body that has a soul." Similarly, "a person who shall sin".[28]

[27] Reiner, p.468, n.57, questions whether this attribution to Rav Hai Gaon is correct. However, it would fit with the general disagreements between Sura (Nahshon Gaon) and Pumpedita (Hai Gaon).
[28] Ibn Ezra on Genesis 17:14.

Cohen explains: "The proponents of post-mortem circumcision argued that in Genesis 17:14 the word *nefesh* means 'soul,' so that … if the body is not circumcised the soul is cut off. Ibn Ezra rejects this interpretation… we may presume that ibn Ezra would have added, 'and a person who is less than eight days old is not bound by the law of circumcision, and cannot be punished for violating it.' For its proponents, postmortem circumcision is necessary to save souls."[29] Since during this time, Ibn Ezra had been in Italy, a sojourn during his peripatetic journeys, we begin to see that the rabbinic consensus within Italy was opposed to post-mortem circumcision.[30]

Among Ashkenazic authorities, the position of the Rabbis of Rome is restated by Rabbi Yitzhak ben Moshe of Vienna, the author of *Or Zaru'a*.[31] He approvingly reviews their responsum and adds:

וכן השיב מורי ה״ר שמחה ,דאפי׳ בחול אינו מנהג תורה להסיר ערלת נפלים, מהתא דבראשית רבה.

> And so my teacher, Rabbi Simhah of [Speyer also] responded, that even during a weekday, it is not a Torah custom to remove the foreskin of a still-born, [which can be understood] from *Beresheet Rabbah*.[32]

Since this was not a mitzvah, post-mortem circumcision would be prohibited on Shabbat when there would be concern for carrying the necessary instruments and for unnecessary cutting. Rabbi Simhah of Speyer and his student, Rabbi Yitzhak ben Moshe of Vienna, make it clear that this procedure is also forbidden on weekdays.[33]

Resurgence of the custom

Those decisions were not, however, the end of the discussion. The custom persisted and grew in importance. The circumcision of deceased infants may have provided comfort and consolation to a mourning family, a reassurance that their deceased baby boy would be visibly Jewish. It continued to be linked to the belief in life after death.

Rabbi Gershom ben Yaakov "the Cutter" reported the position of the Rabbis of Rome, but did not completely accept it. He carefully considered the midrash of Avraham at the gates of Gehenna and wondered how the foreskin of the deceased infant might be transferred to those who have sinned "too much." Rabbi Gershom creatively suggests that the foreskin be placed in the hand of the dead child so that the angel "will take it from his hand."

He goes on to distinguish between a still-born who is less developed (and for whom circumcision is not warranted) and a more developed still-born or baby who would have been circumcised had he lived.

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[29] Shaye J. D. Cohen, p. 42. Also see p.237, n.145 for a references to what became an understanding of circumcision as having a sacramental quality.

[30] Reiner notes that the Italian rabbis discuss the question in relation to the world-that-is-coming and not physical resurrection.

[31] Rabbi Gershom ben Yaakov "the Cutter" in *Rules of the Covenant of Circumcision*, states that he found the *teshuvah* of the Rabbis of Rome in a book by Rabbi Shmuel ben Natronai, known for transmitting Italian traditions to Ashkenaz. Rabbi Shmuel was probably the conduit to Rabbi Yitzhak of Vienna. See Reiner, p. 470.

[32] *Or zarua*, *Hilkhot milah* (Zhitomir, 1862), v.2, p. 52, referring to the midrash about Abraham using the foreskins of uncircumcised children for those who sinned "too much".

[33] See Reiner, p. 470.

קטן שכלו לו חדשי׳ וסימנים מוכיחים עליו ,שערו וצפרניו ,וראוי היה למול אם לא היה מת בתוך ח׳. לאותו ודאי מעבירין ערלתו .לפי שאינו כנפל גמור, שאם היה חי היינו מלים אותו מילה טובה וכשרה .השתא נמי אנו מטיבין לו וכורתין ערלתו בצרור או בקרומית של קנה ,אבל לא באיזמל ובלא ברכה ולאו משום שהיא מצוה ,כי המצוה נתנה לחיים ולא למתים, שנא׳ במתים חפשי וכיון שמת אדם נעשה חפשי מן המצות. ומהני׳ ליה להצילו מאש של גיהגם, וכדי שיכנס לגן עדן עם שאר בני ברית קדש. אבל נפלים גמורים שלא הגיעו לכלל ט׳ חדשים ולא היה להם סימנים לגמרי אין חותכין ערלתן והקב״ה שולח מלאך ומעבירין ערלתו ממנו ונותן לאותן שחטאו יותר מדאי ומורידן לגיהנם.

A child who has completed [a full term of] his months and has indications of this by [the development of] his nails and hair, and who would have been ready to be circumcised if he had not died within the eight [days]: certainly that his foreskin should be removed. For he is not like a complete still-born. Had he lived, we would have provided him with a proper and good circumcision. Now too, we do good for him and cut off his foreskin with a flint or the edge of a reed, but not with a knife and without a blessing. We do not do this because it is a mitzvah, for the commandments were given to the living and not to the dead. As it says, "the dead are free". Just as when a person dies, one is freed from [the obligations of] the commandments. [But this circumcision] aids him and saves him from the judgment of Gehennom. And it is appropriate for him to enter Gan Eden along with others who have [the sign of] a sacred covenant. But a completely [undeveloped] still-born who has not yet reached nine months, nothing should be done to him. His foreskin should not be cut. The Holy One will send an angel to transfer the foreskin from him to those who have sinned too much and will be sent down to Gehennom. [34]

In this Tosafistic way, Rabbi Gershom "the Cutter" affirms both the popular pattern noted by Rabbi Nahshon, applying it to late-term stillbirths and babies who have died, and the halakhic prohibition promulgated by the Rabbis of Rome, applying this to under-developed stillbirths.

Maimonides (Cordoba, 1135 - Egypt, 1205) did not discuss this custom in his *Mishneh Torah*. We might have expected him to have known of Rabbi Nahshon's description of the practice. While he treated gaonic opinions with respect, Rambam felt confident to ignore or reject them. The idea of a *mitzvah* as a protective action does not fit the theological approach of Maimonides to Jewish law.[35] Moreover, the notion that anything physical would be necessary for afterlife, would not correlate with his philosophical theology.[36]

However, the *Hagahot Maimoniyot* of Rabbi Meir ben Yekutiel HaKohen (d. Rothenberg, 1298), a critical commentary on the *Mishneh Torah*, does discuss post-mortem circumcision and re-affirms the practice. However, he differentiates between those infants who were viable enough to be buried on the second day of yom tov, who should still not be circumcised, and those babies who were not at all viable, who should not be interred on the second day of the festival. He returns to the rationale of avoiding a *herpah* (disgrace) for the child. Still, he makes it clear that post-mortem

[34] *K'lallei Hamilah l'R Gershom ben Yaakov Hagozer*, in *Zikhron Brit Rishonim* (Krakow and Berlin, 1892), p. 92-93.
[35] See Moshe Halbertal, *Maimonides: Life and Thought* (2014), pp. 175-181, 216-220.
[36] Rambam, *Mishneh Torah: Teshuvah* 8.2, with reference to *TB Berakhot* 17a.

circumcision is not a mandated commandment and should be carried out with instruments that would ordinarily not be used for halakhically warranted circumcisions.[37]

Another rabbinic traveler, Rabbi Asher ben Yehiel (Germany, 1250/9 - Toledo, 1327), who brought Ashkenaz jurisprudence to Spain, simply states:

קטן שמת קודם שנמול, מלין אותו על קברו

A child who dies before being circumcised is circumcised at the grave.[38]

Similarly, his son, Rabbi Yaakov ben Asher (Cologne, 1270 – Toledo, c. 1340), cites Rabbi Nahshon Gaon without providing any aggadic rationale

ינוקא דמית ולא הוו ליה שמונה יומין נהגינן דמהלין ליה אבי קברא.

A child that dies prior to the eighth day - we have a custom that he is circumcised at the grave."[39]

Apparently, this custom was now so common in Spain that it was codified by the Rosh and the Tur without question, without offering non-halakhic explanations and without discussing who should carry out the post-mortem procedure.

In his legal review of the *Tur*, Rabbi Yosef Karo (Toledo, 1488 – Safed,1575) summarizes and consolidates the case for post-mortem circumcision, citing Nahshon Gaon, the *Kol Bo* book of practices, *Hagahot Maimoniyot* and Rabbenu Yeruham (ben Meshullam (Provence,1290 - Toledo,1350) to indicate that a deceased infant should be circumcised. He gives what have become the standard reasons for the practice: (1) so that the deceased child will not bear the disgrace of a foreskin; and (2) the provision of a name, so that the child would be able to identify his father in *olam haba*. Rabbi Karo also references the midrash in Beresheet Rabbah, thus linking all the ideas together.

כתב גאון: ינוקא דמית ולא הי' ל' ח 'יומין וכו'. וכ"כ כלבו וזו"ל :נהגו למול בן שמת קודם שיגיע להיות בן ח' בצור ובקנה בבית הקברות להסיר חרפתו ממנו, שלא יקבר בערלתו כי חרפה היא לו, כ"כ הר"ד אבודרהם בשם גאון.

וכתב עוד בשם רב נחשון גאון רגילין דמהלין על קבריה ולא מברכין על המילה. ומסקי' ליה שמא דכד מרחמי ליה מן שמיא והוי תחיית המתים הויא ידיעה לתינוק ומבחין ליה לאבוה.

והא דרב נחשון כתבה הרא"ש בסוף מ"ק וכ"כ ר"י (נ"א ח"א) בשם רבינו הגרשוני שיש לנו קבלה שמוהלים אותו על קברו ומשימים לו שם לזכר שירחמוהו מן השמים ויחיה בתחית המתים ויהיה בו דעה יכיר את אביו עד כאן לשונו.

ובהג"מ פ"א מהלכות מילה כ' שמה שנהגו להסיר ערלת הנפלים בצרור ובאבן הוא משום תקנת הפושעים דאמרי' בב"ר מעביר הערלה מן הקטנים שמתו ולא מלו ונותנה על פושעי ישראל.

The Gaon wrote that when an infant who did not live eight days dies, and so forth. And the Kol Bo wrote, we customarily circumcise a boy who died prior to reaching the eight day with a flint or a reed in the cemetery. This is to remove his disgrace from him, so that he not be buried with his foreskin, for this would be a disgrace for him.'" So wrote Rabbi David Abu-Dirham in the name of the Gaon.

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[37] *Hagahot Maimoniyot to Mishneh Torah: Book of Love, Laws of Circumcision 1:10.*

[38] Rosh on *Moed Qatan*, ch 3, #135.

[39] *Arba'ah Turim*, *Yoreh De'ah* 263,

> Additionally, he wrote in the name of the Gaon Rabbi Nahshon: We customarily circumcise at the cemetery, but do not recite a blessing for this circumcision. We give him a name so that, when mercy is shown him from heaven and the dead are resurrected, there will be knowledge in that child and he will discern his father.
> And Rav Nahshon's opinion was written by the Rosh at the end of Moed Qatan. This is what Rabbi Yeruham wrote in the name of our master, Rabbi Gershuni: we have a tradition that the infant is circumcised at the grave and given a name for memory, so that when heaven will have mercy and he will live during *tehiyyat hametim* (resurrection), he will have awareness to recognize his father.
> And *Hagahot Maimoniyot*, in the first chapter of the Laws of Circumcision, wrote that the practice of removing the foreskin of miscarried [foetuses] with a flint or a stone is to improve the lot of sinners. As stated in Beresheet Rabbah, the foreskin is transferred from the children who died uncircumcised and affixed to the sinners of Israel.[40]

Although earlier authorities simply referred to the practice as customary, Rabbi Karo makes this a decisive ruling in his *Shulhan Arukh*:

> תינוק שמת קודם שיגיע להיות בן ח 'מלין אותו על קברו בצור או בקנה ,ואין מברכים על המילה, אבל משימים לו שם לזכר שירחמוהו מן השמים ויחיה בתחתית המתים.
>
> An infant who dies before reaching the age of eight days - we circumcise him at his grave with a flint or a reed. We do not recite a blessing for the circumcision, but we do give him a name for memory, when heaven will have mercy on him and he shall again live during resurrection.[41]

In neither the *Bet Yosef* nor the *Shulhan Arukh* does Rabbi Karo indicate that there were opposing opinions about this issue, although the *Derishah* commentary to the *Tur*, Rabbi Yehoshua ben Alexander HaKohen Falk (1555–Lemberg, 1614) mentions that Rabbi Meir haKohen of Rotenburg (Worms, c.1220-1293) prohibited post-mortem circumcision, even on the second day of *yom tov*.[42]

Rabbi Eliyahu (Gaon) of Vilna, in his commentary to the *Shulhan Arukh*, is notably clear: מדינא לא צריך מילה ..., "from a legal perspective, circumcision is not warranted." Hearkening back to the Gaonic authorities and the rabbis of Rome, he states that this action does not fulfill any mitzvah. However, reflecting the developed rationale, he indicates that such a circumcision is performed only to avoid burial of the child in what was felt to be the shameful state of being uncircumcised.[43]

By the middle of the 19th century, the practice of post-mortem circumcision has taken on such significance that practices which ordinarily would be prohibited are legitimated. Rabbi Abraham Hirsch Eisenstadt (Russia, 1812–1868) cites a number of authorities, including Rabbis Akiva Eiger and Yehezkel Landau about what should be done if the infant were buried without circumcision:

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[40] *Bet Yosef*: *Yoreh Deah* 263.
[41] *Shulhan Arukh Yoreh Deah* 263:5
[42] *Derishah* n.2 on *Tur Yoreh Deah* 263. Almost all the authorities that mandate post-mortem circumcision indicate that it should not take place when it would involve a violation of even second day of yom tov, since it is not an obligatory act.
[43] *Beur HaGra* 263:10

ואם שכחו וקברו אותו לפני שמלוהו .פותחים קברו כדי למולו .הגהות רע"א) .ואם קברוהו יחד עם אמו אין פותחים את הקבר בגלל בזיון אמו .אבל קורים לו שם.(אם כבר עברו כמה ימים מקבורתו, אין לפתוח הקבר כדי למולו, שלא לראות בניוולו .פ"ת .וכך כתב גם הנודע ביהודה תנינא יור"ד קס"ד שאם כי בקטן לא שייך חרדת הדין, אבל איסור ניוול יש בו.

> If they forgot and buried [the deceased infant] prior to circumcising him, they should open the grave in order to circumcise him; *Glosses of Rabbi Akiva Eiger*. (If they buried [the infant] with his mother, the grave should not be opened to avoid disrespect to the mother. But he should be given a name.) If a number of days had already passed after the burial [of the infant], the grave should not be opened to circumcise him, so that [the baby] not be seen in his degradation. Also see *Noda b'yehudah Tanina: Yoreh De'ah* 164, who wrote that although fear of judgment is not applicable to a child, we still remain concerned that he not be degraded.[44]

Post-mortem circumcision had become such a dominant practice that it warranted disinterment in some cases to ensure that the child was properly prepared for afterlife. Most later compilations of Jewish law, such as *Arukh Hashulhan*[45] and *Mishnah Berurah*, follow the rulings of Rabbi Karo.[46]

It seems that post-mortem circumcision of still-births[47] and infants, although initially disputed, came to be common custom because circumcision took on a sacramental quality. It may also have had and still may have an important role in consoling bereaved parents. The opportunity to name a child at this time may also be comforting to parents.[48]

Contemporary sensibilities may not share the theological orientation of those who were focused on the physicality of afterlife. Rather than see post-mortem circumcision as having emotional or spiritual benefit, some may even recoil from what might be taken as physical alteration to the corpse of a baby.

In our time, when post-mortem procedures must be formally authorized, it should not be assumed that the parents automatically approve this practice when they give a ***hevra kadisha*** responsibility

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[44] *Shulhan Arukh Yoreh Deah* 263, *Pithey Teshuvah* 11. The imperative to disinter the body is later mentioned in the *Kitzur Shulhan Arukh* 163.7.

[45] *Arukh Hashulhan* 263:17. ודבר זה קבלה ספי הגאונים, this matter is a tradition from the *geonim*.

[46] See Abraham Steinberg, *Nishmat Ha'adam* on *Yoreh Deah* 263, http://98.131.138.124/articles/NA2/NishmatAbraham.YD.263.asp. Also see: Yitzhak Zilberstein and A. Wilensky, פגים ונפלים ביחידת טיפול נמרץ ילודים: היבטים הלכתיים – שאלה ותשובה Assia, v.6. (5749/1989) http://www.daat.ac.il/daat/kitveyet/assia/pagim-2.htm.

[47] On the question of a required gestational status of a still birth, see Rabbi Avram Reisner, "Kim Li: A Dissenting Concurrence" (YD 374.8, 1992b), http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/reisner_kiyyamli.pdf

[48] See the *teshuvot* by Rabbi Stephanie Dickstein, "Jewish Ritual Practice Following the Death of an Infant who Lives Less than Thirty-one Days" (YD 374.8, 1992a) http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/dickstein_infant.pdf and "Jewish Ritual Practice Following a Stillbirth" (YD 340.30, 1996a) http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/dickstein_stillbirth.pdf.

to prepare the body of the baby for burial. If a *hevra kadisha* mandates post-mortem circumcision, the parents should be consulted and their approval requested.

Despite its codification in the *Shulhan Arukh*, there exists sufficient support for the position that this procedure is halakhically unnecessary. Rabbi Isaac Klein, perhaps reflecting that sensitivity, states that in the event of an infant death, "we should follow Maimonides, who does not mention the practice at all."[49] More significantly, following the rabbis of Rome who based their ruling on Rabbi Hai Gaon, we may reasonably decide that post-mortem circumcision is not required nor should it be encouraged.

Rabbis advising grieving parents should provide spiritual support and guidance as appropriate. Parents may be informed that this custom exists, because it might be consoling to parents to "do something Jewish" for their deceased infant. If desired, the post-mortem circumcision may be carried out by any of the Jews preparing the body for burial and the foreskin buried with the child. However, parents should be clearly instructed that they need not follow this tradition, even if they do proceed to name their deceased child. In such a case, the *hevra kadisha* should be instructed that this practice is not required and that preparations for burial may proceed without post-mortem circumcision.[50]

What about adults?

In discussing the procedure for the circumcision of children who die before the eighth day, the Shakh, Rabbi Shabtai ben Meir HaKohen (Lithuania, 1621– Moravia, 1662), adds, regarding post-mortem circumcision of someone past eight days,

וה״ה הגיע לבן ח׳ אלא שלא נמול בחיים מחמת איזה סיבה.

> This is also the case for one who did reach the eighth day but, for some reason, was not circumcised.[51]

Although the context might suggest that he is referring to an infant, the comment is open-ended. It seems that if this were to be the halakhic disposition for a child, how much more so should we conclude that a post-mortem circumcision should be performed on adult males.[52]

A recent responsum by Rabbi David Golinkin addresses the status of more mature Jews who are uncircumcised. This is the question he was asked:

> *May an uncircumcised Jew have an aliyah, serve as a sheliah tzibbur, have a Bar Mitzvah, a Jewish wedding or burial? Does it make a difference if he or his parents refused to*

[49] Isaac Klein, *A Guide to Jewish Religious Practice* (1979), p. 426. Rabbi Klein seems to be suggesting that the subject not be presented to bereaved parents, unless requested.

[50] See *Halakhic Positions of Rabbi Joseph B. Soloveitchik* (1998), ed. Aharon Ziegler, pp. 153-4, that if parents object to a post-mortem circumcision, the baby should still be interred in a Jewish cemetery. Local rabbis are encouraged to meet with funeral homes and *hevrot kadisha* in a non-urgent setting to review this decision.

[51] Shakh, *Shulhan Arukh, Yoreh Deah* 263:6.

[52] Rabbi Wayne Allen indicates that in an oral communication, Rabbi Eugene Cohen, the long-time head of the Brit Milah Board of the New York Board of Rabbis, affirmed that the same law would apply to adults without exception. See also *Responsa B'mareh habazaq* vol. 6, p. 186 (dated Tevet 5763) addressed to a rabbi in Kosice, Slovakia.

circumcise him for ideological reasons or if he was prevented from having a brit milah [circumcision] by outside forces, such as the Soviet regime?

Rabbi Golinkin provides a wide ranging analysis of modern halakhic authorities on the subject. Some, who ruled strictly, were concerned that circumcision was under attack and sought to protect the primacy of *brit milah*. Others, concerned about keeping uncircumcised boys and men within the Jewish community, were lenient in this regard, often indicating that *brit milah* was one *mitzvah* out of many.[53]

We should be cautious here, as there are some Jews who seek to diminish the significance of *brit milah* and to create alternative rituals to circumcision.[54] While not wishing to diminish the halakhic, theological, historical, social, and covenantal reasons for adhering to the traditional *brit milah*, we are faced with a significant number of Jews, many from the former Soviet Union, who were not circumcised. What should be done as they die and require burial? Is there a difference between a man who had no opportunity to be circumcised and an individual who chose not to have a *brit milah* after leaving the FSU?

The primary focus of Rabbi Golinkin's *teshuvah* is on *bar mitzvah* and being called to the Torah as an adult. He does refer to our question when he cites Rabbi David Tzvi Hoffmann (Berlin, 1843-1921), a significant German halakhic authority. Rabbi Hoffman acknowledges that "an apostate regarding circumcision" denies that *mitzvah* alone, not the entire Torah. Because of this, he reluctantly permits an uncircumcised male to be married.[55] However, when asked about burying an uncircumcised sixteen year-old male in a Jewish cemetery, Rabbi Hoffman gives permission, but indicates that the grave should be separated from others, in order to deter parents from not circumcising their sons.[56]

Rabbi Azriel Hildesheimer (Germany, 1820-1899) cites Rabbi Yitzhak Elhanan Spektor of Kovno (1817-1896), one of the leading authorities of his time (and for whom Yeshiva University's rabbinical school is named RIETS):

> … according to law, we have an established principle that "an apostate regarding circumcision (*mumar l'orlot*) is not an apostate for the entire Torah", as is explicit in *Hullin* fol. 5a, in *Yoreh Deah* 2:7 and in the *Shakh* to *Yoreh Deah* 264, subparagraph 4…

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[53] David Golinkin, "What Is The Halakhic Status Of An Uncircumcised Jew?" *Responsa in a Moment* 9:3, February 2015. http://www.schechter.edu/responsa.aspx?ID=92 There also are Jews, born in democratic non-totalitarian societies, whose parents chose not to circumcise them, yet did not arrange for *brit milah* as an adult.

[54] http://www.jewsagainstcircumcision.org/brisshalom.htm

[55] *Melamed L'ho'il, Yoreh Deah* (1927), 79: דמומר לערלות כמומר לדבר אחד. Also cited in Golinkin.

[56] *Melamed L'ho'il, Yoreh Deah* (1927), 115: מדינא אין לשנות קברות הנער מקבורת שאר פושעי ישראל. אמנם נ"ל דלמגדר מילתא יש למנוע לקוברו בין שאר קברים, לקנוס הכופרים שמפירין בריתו שלא אע"ה ואינם מלים את בניהם למען ישמעו ויראו שעי"ז יהיו בניהם מובדלים מזרע ישראל לגמרי, ואף לאחר מיתה לא יהי' להם קבר בין בניהם של אאע"ה. Also cited in Golinkin. Robin Judd discusses a case in Hanover Germany in 1870 where the *hevra kadisha* refused to bury someone until he was posthumously circumcised. See "Circumcision and Modern Jewish Life" in *The Covenant of Circumcision: New Perspectives on an Ancient Jewish Rite*, ed. Elizabeth Wyner Mark (2003), pp. 142-156. For CJLS rulings, see n.61.

> and therefore, according to law, he should be counted for a minyan and for all the above [i.e., *aliyot* and Bar Mitzvah]. We should not distance them, and one should be concerned lest they stray from the path and leave the collective Jewish people, and even though now they are separating themselves from the congregation, even so one should be concerned lest they go out and, God forbid, persecute our people and our religion as our eyes have seen, due to our great sins in our day. Therefore, in my opinion, one should not distance them entirely and perhaps, as a result, they will [want] a little to return from their evil way until they return entirely with God's help…[57]

Golinkin points out that Rabbi Spektor's opinion permitting an uncircumcised man to participate in synagogue life has two bases: preventing such a person from acting against the Jewish community and drawing the individual "closer to Judaism until he returns entirely."

Golinkin also cites Rabbi Yehiel Yaakov Weinberg (Lithuania, Berlin, Switzerland; 1885-1966), who was asked in 1926 whether an uncircumcised boy can have a Bar Mitzvah and read the Haftarah. Although he indicates that this is permitted, he acknowledges that in some situations, there may be a desire to erect a fence to prevent further disregard for Jewish law. Rabbi Weinberg suggests that this is a matter best determined by the rabbis directly involved (what we would call the *mara d'atra* principle):

> The matter is in the hands of the rabbis who stand guard for the Torah. If they know that by preventing this honor to the father and to the son, they will return them to the good path, then they should prevent them from having an *aliyah* to the Torah, but if, God forbid, this will cause them to remove themselves entirely from the congregation, then they should draw them close, since, according to law, it is permissible to call up to the Torah both the father and the son.[58]

But what about someone who is already dead? Neither Rabbi Spektor's fear that one might act against the Jewish community nor his hope and the similar attitude of Rabbi Weinberg that an individual might become more engaged in a life of Jewish observance would apply.

Because of the sentiments and halakhic rulings favouring post-mortem circumcision, it should come as no surprise that in 1993, media coverage disclosed that some burial societies in Israel performed this procedure, without family authorization, to prepare the body for burial. The deceased Jews were from the former Soviet Union. In response, the Ashkenazi Chief Rabbi of

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[57] והנה ע"פ דין הא קי"ל מומר לערלות לא הוי מומר לכל התורה וכמבואר בחולין דף ה וביו"ד סי' ב' סעי' ז' ובש"ך יו"ד סי' רס"ד ס"ק ד' ומבואר בשו"ע או"ח סי' נ"ה סעי' י"א דאף מי שעבר עבירה כ"ז דלא נידוהו נמנה למנין עשרה, וע"כ מן הדין יש לצרפו לעשרה ולכל הנ"ל ולכן אין לנו להרחיקן ויש לחוש שמא יצאו לתרבות רעה ולצאת מן הכלל ואף דעכשיו הם פורשים א"ע מכלל הציבור עכ"ז יש לחוש דשמא יצאו ויהיו רודפין חלילה לכלל עמנו ודתינו כאשר עינינו ראו כזה בעו"ה בעתים הללו. וע"כ לדעתי אין להרחיקן לגמרי ואולי בתוך כך יראו קצת לשות מן דרכם הרעה מעט ומעט עד שישובו לדמרי בעזרה. *Responsa Rabbi Azriel, Orah Hayyim* 5, Tel Aviv, 1969, Translated in Golinkin, *op cit.*

[58] *Seridey Eish (2),* #10, Jerusalem, 1977: הדבר מסור לרבנין העומדים על משמרת התורה, אם יודעים שעל ידי מניעת כבוד זה לאב ולבן יחזירום למוטב אז ירחיקו אותם מעלי' לתורה, ואם חלילה יגרמו בזה שיפרשו א"ע לגמרי מן הציבור, יקרבו אותם מכיון שעפ"י דין מותר לקרות לתורה את הבן ואת האב. Translated in Golinkin, *op cit.*

Israel, Yisrael Lau, ruled that "circumcisions should not be forcibly performed on anyone — whether they are alive or dead. The Chief Rabbinate sees circumcision as a privilege and not something that should be forced on anyone."[59]

In private correspondence with me, Rabbi Yaakov Roza, who is responsible within the offices of the Chief Rabbinate of Israel for halakhic issues related to burial, reconfirmed this as existing policy:

> To the best of my recollection: in 5761 (2001), this question arose from the ***hevra kadisha*** of Tel Aviv. I turned to Rabbi Gaon Yisrael Meir Lau who had been the Chief Rabbi of Tel Aviv in his first term in this office. He turned to Rabbi Gaon Shalom Elishav (of blessed memory) and his response was that the deceased who comes to the ***hevra kadisha*** should be circumcised only with the permission of his family. If the family does not agree, he should be buried without circumcision. I wish to add that it is known that many years ago, in certain communities in Europe there was a prohibition against burial of an uncircumcised Jew in a [Jewish] cemetery. Therefore, one should clarify the custom in each locality. (see *Melamed L'ho'il* 2 (*Yoreh De'ah*) section 79).[60]

In accordance with Rabbi Roza's advice to clarify local situations, it is notable that Rabbi Golinkin refers to Rabbi Pinhas Goldschmidt of Moscow regarding Torah *aliyot* for uncircumcised men. Familiar with the situation of Jews resident in the former Soviet Union and aware that despite many years of Communist rule there are Jews who seek a connection to Jewish life, Rabbi Goldschmidt observed that "If we push them away … the damage is not worth it. Therefore, since according to law, there is no prohibition at all… one should not forbid the uncircumcised from [the Soviet Union] to go up to the Torah."[61]

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[59] Jewish Telegraphic Agency, August 17, 1993. http://www.jta.org/1993/08/17/archive/post-mortem-circumcisions-opposed

[60] The note read:

חוות דעת, המסמך בעניין מילה לנפטרים לא נמצא עד עתה. אולם למיטב זכרוני: בשנת תשס"א (2001) לערך עלתה שאלה זו בחברה קדישא תל אביב. פניתי להרה"ג הרב ישראל מאיר לאו שליט"א שהיה אז הרב הראשי לתל אביב בכהונה הראשונה של במשרה זו. הוא פנה להרה"ג שלום אלישיב זצ"ל ותשובתו הייתה כי נפטר שמגיע לחברה קדישא יש למול אותו רק באישור המשפחה. אם המשפחה לא מסכימה, יש לקבור אותו ללא מילה. הנני להעיר כי ידוע שבקהילות מסויימות באירופה לפני שנים רבות הייתה תקנה שלא לקבור בבית קברות יהודי מי שלא נימול ולכן יש לברר את המנהג בכל מקום ומקום. עיין שו"ת מלמד להועיל חלק ב יורה דעה סימן עט

Rabbi Lau actually served as Chief Rabbi of Tel Aviv from 1988-1993, so this policy was probably introduced during this period.

[61] Responsa *Zikhron Basefer*, Moscow, 1995, *Orah Hayyim*, No. 5, cited in Golinkin, *op cit.* Although this teshuvah refers to halakhically defined Jews, there are many individuals whose father was a Jew, who may ask us for burial. See Rabbi Ben Zion Bergman, "A Matter Of Grave Concern: A Question Of Mixed Burial (YD 367.1, 1991), https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/bergman_grave.pdf and Rabbis Kassel Abelson and Loel M. Weiss, "Burial of a Non Jewish Spouse and Children" (YD 370.1.2010), http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/Burial%20of%20Non-Jewish%20Spouse-Feb%202,%202010.pdf

Again, would this rationale apply to permit burial? Surely the deceased would not become more observant? However, it seems to me that the reasoning of those rabbis dealing with early and advanced stages of assimilation was quite wise and might actually apply to the surviving generation. We are in a long-term effort to reclaim Jews from the former Soviet Union. If family members feel that a revered elder has been treated with disrespect by Jewish authorities, they may be reluctant, in the future, to engage with the existing Jewish community and its rabbinic teachers.[62]

In addition to this consideration, we have already seen that there is no formal *mitzvah* for post-mortem circumcision. Taken together, these reasons are determinative. It would be appropriate for local burial societies, funeral directors and rabbis to explain to a family making arrangements for burial, that even though the deceased may not have been circumcised, this ritual remains a possible privilege even after death. If the family declines this opportunity, the funeral should go ahead and the body prepared as usual (with *tohorah* and *takhrihin*) for burial.

P'saq Halakhah

The *mitzvah* of circumcision is incumbent on all male Jews and remains a great spiritual privilege and significant marker of our heritage and history.

A. At the discretion of the local rabbi, in the event of a still-born, the death of an uncircumcised child, or the demise of an uncircumcised adult, families may be informed of the historic custom of post-mortem circumcision, but instructed that it is not a requirement for burial.
B. A still-born baby or a child who dies uncircumcised may be buried in a Jewish cemetery.
C. Similarly, an uncircumcised adult may be buried in a Jewish cemetery.

[62] This is part of the rationale for the CJLS teshuvah by Rabbi Reuven Hammer regarding the determination of Jewish identity. "On Proving Jewish Identity," YD 268:10.2011 http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/JewishIdentity6.2011.pdf