

Sale Or Donation Of Human Organs

Rabbi Alfred Cohen

In the past few decades, medical procedures which were once considered fantasy have entered the world of the commonplace. We scarcely marvel anymore that livers, corneas, even lungs and hearts can be transplanted from one person to another, let alone that blood, semen, and eggs are routinely transferred. With new realities, however, come new ethical and religious questions which need to be addressed. The new reality is that there are now thousands upon thousands of desperately ill persons waiting for organs vital to their survival to become available for transplantation; the reality is that every day, 15 people die while waiting for these scarce organs.¹ Predictably, a new situation has developed, with sick people or their families offering huge sums of money to prospective donors for their body parts.

In this study, we will consider the religious questions which may attach to the phenomenon of selling human organs – usually for transplantation but possibly also for research. Does halacha (Jewish law) countenance it? Even though transplantation of human organs is obviously a modern development, it is fascinating to observe that the ancient Jewish law remains our constant and unfailing resource for finding solutions and guidelines for even the most arcane contemporary situations.

1. Ronald Bailey, "The Case for Selling Human Organs", *Reason Magazine*, April 18, 2001, at <http://reason.com/rb/rb041801.shtml>.

Rabbi, Cong. Ohav Yisroel, Monsey, N.Y.;
Rebbe, Yeshiva University H.S.

The question is multi-faceted: first of all, is a Jew even permitted to have organs removed without reference to his own health? Secondly – and this is the major question we want to address herein – even if our research concludes that organ donation is permissible, we need to confront a more basic issue, one which resonates in many other aspects of Jewish practice. Namely, if a person gets financial remuneration for performing a mitzvah act – is it still a mitzvah? We will need to analyze the essence of a mitzvah, which means “commandment”: The customary paradigm is that when a person fulfills the command of G-d, he is performing an act of service and devotion to his Creator, which elicits divine favor. Doing this same act “*shelo lishmah*”, not for the “sake of Heaven” but for pecuniary remuneration, may rob it of its value and transform it from a positive action into a crass commercial undertaking antithetical to all religious values, possibly rendering it *assur*, forbidden.

Although sale of human organs is illegal in this country, a lively black market flourishes nevertheless, and those with the wherewithal and the connections can often obtain these organs relatively quickly, rather than languishing for years on a waiting list.² This has given rise to a debate among ethicists, lawyers, doctors, even economists, about legalizing and regulating the sale of human organs.³ Few doubt that ultimately this practice

2. Even a cursory search reveals that this black market exists and is accessed by many persons in need. See, for example, “Organ Shortage Fuels Illicit Trade in Human Parts”, at NationalGeographic.com/news, January 16, 2004; “Dozens Killed for Body Parts,” originally published in *The Sunday Times*, July 29, 2001, appearing at www.vachs.com; “Brazil: Poor Sell Organs to Trans-Atlantic Trafficking Ring,” at www.ipsnews.net, 8/11/05. In November 2005, the New York Times featured an article by a doctor relating how she had purchased (through the Internet!!!) an oorgan to save her own failing health.

3. Henry Hansmann, “The Economics and Ethics of Markets for Human Organs”, in *Organ Transplantation Policy: Issues and Prospects*, Duke

will be sanctioned in one form or another in many areas of the modern world. It is quite appropriate, therefore, to consider the questions from the vantage of Jewish law, particularly as Jews are in no way immune from the ravages of disease and will undoubtedly need to address these issues not only from a theoretical position but equally from an intensely personal need.

A number of preliminary issues need elucidation before we can properly examine the question whether selling one’s organs removes the donation from the category of “mitzvah”: these factors include the following, not necessarily in the order they will be considered: When is it permitted to “damage oneself” (*chovel be’atzmo*)? What about the issue of a donor putting himself into a precarious situation by agreeing to donate an organ (*safek sakanat nefashot*)? Removal of an internal organ such as a kidney is certainly major surgery, and general anesthesia also carries risks. Is an individual permitted to endanger himself in order to save another person’s life? May one be obligated to do so? Is there a prohibition against stealing an organ, or other chicanery, in order to save someone’s life? Our inquiry will also direct us to a number of Jewish ethical and religious values ancillary to the specific question of selling or even donating human organs. Only from the vantage of a thorough grounding in Jewish thought can we approach the inherent question if a person merits a mitzvah if he gets paid for his actions.

The mitzvah to save a life: parameters and limitations

The primary mitzvah to save someone’s life or preserve their health, if possible, is derived from the biblical mandate to return a lost object (*Devarim 22:2 – vehashevoto lo*), which would include also restoring a fellow Jew’s lost health. Another

University Press, 1989. Professor Hansmann is Sam Harris Professor of Law, Yale Law School.

source for this mitzvah is “*lo ta’amod al dam re’acha* (*Vayikra* 19:16), “do not stand [idly] by your fellow’s life” [literally, “his blood”]. This directive mandates taking an active role to save another person.

Although these biblical commandments are readily understandable, they are not absolutes and may not apply automatically when the saving of life might harm the one doing the mitzvah of saving; other Torah principles may also apply. *Sefer Chassidim*, for example, cautions that although it is a great mitzvah to save someone from drowning, if the rescuer would himself be in danger of drowning as well, it is better not to attempt the rescue.⁴ How much risk is acceptable in order to save someone’s life? Is it permitted for a person to place his own health in question, possibly even precipitate his own death in order to maximize another’s chances for survival? This question has been addressed since ancient times and up to the present, without definitive resolution.

The *Yerushalmi, Terumot* (at end of chapter 8), rules that even if there is possible danger involved, a person must undertake to save the life of a fellow Jew who is certainly in danger of losing his life. אִם צָרִיךְ אָדָם לְהַכְנִיס עֲצָמוֹ לְסַפֵּק סָכְנָה בְּדִי לְהַצִּיל חֵבֵרִי (מְוֹדָאֵי סָכְנָה). However, the author of *Beit Yosef* does not mention such a rule, for he notes that the Rif, Rambam, and Rosh all fail to include it. He concludes that apparently they were of the opinion that the Babylonian Talmud did not agree with this rule. Consequently, the position of *Beit Yosef*, who is universally accepted as a major *posek*, appears to be that a Jew is not obligated to endanger himself even to save someone’s

4. *Sefer Chassidim*, No. 674; whether this principle would extend to a case of saving not only one individual but a larger group, is discussed in a number of places: See Mishnah *Makkot* 12b; *Klei Chemdah, parshat Pinchas* (at beginning); *Leor Hahalacha* p. 15; *Mishpat Kohen* 143; “*Hatzalat Nefashot*”, *Encyclopedia Talmudit*, footnote #73.

life.⁵

Beit Yosef’s ruling is not challenged, but its application is fleshed out in a variety of ways by later *poskim*. Rav Waldenberg addresses the question whether there is an obligation or even a mitzvah for a person to donate an organ, such as a kidney, to another individual who will die if he does not get a transplant.⁶ In the course of his detailed analysis,⁷ Rav Waldenberg examines the position of Radvaz, who discusses specifically whether a person must sacrifice a limb in order to save a person who will otherwise definitely die,⁸ summing up the Radvaz’s conclusions:

1) There is no obligation to endanger one’s life in order to save another; someone who does so is deemed *chassid shoteh* “a pious fool” (with exceptions that will be noted hereinafter).

2) If a person wants to donate an organ to someone else, when that donation will not endanger his own life, he is acting with piety (“*midat chassidut*”). He distinguishes between an internal organ, which for him represents a dangerous donation [i.e., a kidney], and other body parts, such as blood or skin. Since no significant danger arises in the latter situation, he considers it a highly laudable gift.

What we may glean from this rabbinic discussion indicates that one need not place oneself in danger in order to save

5. For further on this topic, see *S’ma*, and *Beit Yosef, Choshen Mishpat* 426; *Pitchei Teshuva*, *ibid*, #2; *Shu”t Radvaz*, 1052 and 10582. *Tzitz Eliezer* VIII 15, 10, 13 and XIII 101; *Iggerot Moshe, Yoreh Deah* 2, 174:4; Rav Ovadia Yosef, *Sefer Dinei Yisrael*, vol. 7, p. 25. *Mishnah Berurah* 329:19.

6. *Tzitz Eliezer* IX:45. Although it is possible for a person without functioning kidneys to undergo dialysis at regular intervals, life expectancy is certainly diminished under such circumstances, not to speak of quality of life.

7. Some sources he refers to include: *Beit Yosef*, 426; *Shulchan Aruch, Choshen Mishpat*, 426; *Aruch Hashulchan*, 426. *Pitchei Teshuva*, *ibid*, note 2, also mentions further references from the Babylonian Talmud.

8. *Shu”t Radvaz* 626.

another person; on the other hand, one should weigh realistically how probable that danger might be to the rescuer. In the case of organ transplant, if no significant danger exists, it is considered by many to be a highly meritorious act.⁹

When it comes to donation of body parts, rabbinic literature differentiates between various scenarios. Obviously, not all body part donations are equal – blood or semen are not comparable to a kidney or liver lobe. Already in the Gemara¹⁰ the rabbis concluded that there is no problem with a person's cutting off hair and selling it to someone else.¹¹ Depending on a number of factors, the major obstacle to donating body parts is, for many leading modern *poskim*, the *issur* of causing pain or wounding oneself. The pain involved in giving blood or bone marrow is relatively mild and, since the body will soon generate

9. Based on *Pitchei Teshuva* and *Aruch Hashulchan* to *Choshen Mishpat* 426. *Shemirat Shabbat Kehilchata* has an interesting comment: Assume a scenario where a person has cooked food for himself for Shabbat. His neighbor becomes deathly ill and needs food, but doesn't have any. If the first person doesn't give him his own already-cooked food, the sick person will have to cook on Shabbat to save his health. *Shemirat Shabbat Kehilchata*, chapter 32, No. 166, rules that the first person is not obligated to give or share his food with the other. See also *Ahavat Chesed* (by the Chafetz Chaim) II, chapter 20, who writes that since it is a negative commandment not to allow someone to die, a person must spend all his money to prevent it. However, the Chatam Sofer, *Orach Chaim* 526, has written that saving a life is a negative commandment which requires no action; in such a circumstance, a person need spend only up to 20% of his assets to perform it. As far as the Chatam Sofer is concerned, the determining criterion is whether the mitzvah requires an action or not, not whether it is a positive or negative commandment. What is interesting is that R. Shlomo Zalman Auerbach wonders whether each individual is obligated to spend up to 20%, or, if others are also obligated but do not contribute, how does that affect his obligation? *Minchat Shlomo* II, 86 #4.

10. *Nedarim* 65b, *Yerushalmi Shabbat* 11.

11. R. Moshe Feinstein even rules that it is permissible to sell one's blood (*Iggerot Moshe*, *Choshen Mishpat* I, 103). This speaks directly to the issue of whether payment obviates the mitzvah status of an action, and we will return to it. It is also obvious that it is hardly legitimate to apply the permit to sell hair or blood to the case of a kidney. We will return to this question as well.

replacements, these procedures hardly present a halachic issues.¹² Skin grafts, on the other hand, may be more problematic. To donate a kidney requires major surgery, involving considerable pain and danger, not only in the procedure but also leaving the donor in more precarious health.

Modern medical techniques have evoked responses from *poskim* which run the gamut from laudable, to acceptable, to forbidden. Before considering their positions, we need to examine more closely additional religious factors which inform their conclusions.

The prohibition to injure oneself (*chovel be'atzmo*)

The Gemara in *Bava Kamma* 91b notes that it is forbidden for a person to intentionally cause physical damage to his own body.¹³ In their commentary, the Tosafot conclude that it is *assur* to inflict a wound in one's body (*chovel be'atzmo*) even if he benefits from it. Following the principle laid down by the

12. Rav Moshe Feinstein was asked (*Iggerot Moshe*, *Choshen Mishpat* I 103) whether one could sell his blood to a blood bank (as distinct from donating it for a specific person in need, which is permissible). He permits it – if it is acceptable to give it away for nothing, there is no problem with getting money for it. He addresses the talmudic text (*Bava Kamma* 91b) which precludes a person's causing himself physical injury; although Tosafot rule that wounding oneself is *assur* even if the person receives benefit for doing so, which would make it seem *assur* to give blood unless to save a life, Rav Moshe issues a lenient ruling, arguing that blood-letting was a common medical procedure in earlier generations and consequently does not qualify as "wounding". On the contrary, it was considered a beneficial procedure. Therefore, he concludes, "it may be that there is no reason to forbid this [type of] injury, and one who wants to be lenient should not be prevented, since this is a strong argument."

13. This is one of the issues involved in cosmetic surgery. For a full discussion, see David Ettengoff, "Halachic Implications of Cosmetic Surgery," in the *Journal of Halacha and Contemporary Society* XV, p. 79, as well as XLVIII of that Journal, P. 29, in the article by Dan Geisler, "Cosmetic Surgery in Halacha". Whether a dieting regimen which causes pain is permitted is discussed by *Iggerot Moshe*, *Choshen Mishpat*, II, 65-66.

Tosafot, we would have to say that surgery for removal of an organ to give to someone else would be an unjustified damage to the body. (In a life-or-death situation, however, presumably the objection of Tosafot would be removed.¹⁴)

Rav Moshe Feinstein, however, reads the situation quite differently, relying on the Rambam, who writes that *chavala* (wounding oneself or another person) is forbidden only if it is done for the purpose of injury or degradation (*derech bizayon/derech nitzachon*).¹⁵ By extension, Rav Moshe rules, if a person “wounds” himself for a perceived benefit, it would be permissible. Consequently, he permits an unmarried girl to have cosmetic surgery which she hoped would enhance her ability to get married.¹⁶ Rav Feinstein has opened a new window on this talmudic text; his explanation permits surgery which is done for the benefit either of the person or someone else; following this rationale, organ donation would be permitted.

Organs from living donors

As we have seen, a major question in Jewish thought is whether it is permissible for a person to place himself in a situation which might be life threatening in order to save the life of a person in mortal danger. Although, as noted above, the Radvaz rules that a person is in no way obligated to enter into a potentially hazardous situation even to save another’s life, he does term it a highly laudable act (“*midat chassidut*”).¹⁷ At the

14. *Shemirat Shabbat Kehilchata* chapter 36:3, note 4, rules that a pregnant woman is permitted to opt for a Caesarean section to save the life of her unborn child, even though she is “wounding” herself, when her own life is not threatened.

15. Rambam, *Hilchot Choveil Umazzik* 5:1. (Variant versions of this text exist in different editions).

16. *Iggerot Moshe, Choshen Mishpat* II 66.

17. The specific question which he was asked to rule upon was a situation where the government threatened to kill a certain Jew unless another Jew

end of his *teshuva*, Radvaz adds the following:

“Her ways [the Torah’s] are ways of pleasantness”, and it is necessary that the laws of our Torah will accord with reason and rational thought. How could it occur to us that a person should allow his eyes to be blinded or his hands to be cut off...so that his friend should not be killed? Therefore, I cannot countenance any ruling [such as] this, other than an act of outstanding piety [*midat chassidut*]. Blessed is the portion of one who can withstand this; however, if there is [even] a possible danger to his life [in the procedure], then he is a pious fool [*chassid shoteh*], for the potential danger to his own life takes precedence over the certain [danger] for his friend.

Other *poskim*, however, feel differently and incline towards the view that a person is obligated even to suffer pain, if that is all that is involved in saving the other’s life.¹⁸ Among these *poskim* is R. Shlomo Zalman Auerbach, who writes that a person should certainly be willing to undergo pain in order to save a *choleh lefanenu* – a person presently suffering from disease, whose life (or limbs) will be saved by the procedure. Furthermore,

allowed his arm to be cut off. *Shu”t Radvaz*, III 1052 (627), cited in *Pitchei Teshuva* 157:15; *Shach* 3; *Or Sameach* 7 *Hilchot Rotzeach* 5:1 (if it is a question of danger to a limb, not life); *Iggerot Moshe, Yoreh Deah* II 174, #4; *Tzitz Eliezer* X 25:7 rules that a parent may donate an organ to a child as long as there is no mortal danger involved in the procedure and the recipient’s life will be saved thereby; *Yechave Da’at* III 84; *Minchat Yitzchak* VI 103; *Klei Chemda, parashat Ki Teitzei*, p.192 (he discusses whether the rule may change in the case of saving a large group or even the entire nation, such as in the case of Esther); *Nishmat Avraham, Yoreh Deah* pp. 263-266, discusses the specific danger involved in donating each organ.

18. *Or Sameach, Hilchot Rotzeach* 7:5. It is interesting to note that he cites the Radvaz (above) as his source. See also *Tosafot Yom HaKippurim, Yoma* 82, d.h. “*ve’im omrim*”; *Ha’amek She’elah, parshat Shelach* 129:4; *Chochmat Shlomo, Choshen Mishpat* 426:1; *Encyclopedia Talmudit*, “*hatzalat nefashot*”, p. 350; see also *Ketubot* 33b.

he sanctions participation in medical studies which involve only minor pain – such as testing blood– in order to further medical knowledge. On such matters, he rules, the person does have control (*ba'alut*) over his body.

The pain of one person for the life of another

Although we might intuitively think that every Jew should be prepared to tolerate some pain in order to save another's life, there is actually a great deal of discussion of this point in rabbinic literature,¹⁹ but no clear consensus emerges. Based on a talmudic text in *Nedarim 80a*, it seems that people are entitled to take advantage of their legal rights in order to protect their own interests, even to the detriment of others: It depicts a theoretical case of two cities, where City A has a well which provides water for them and also flows to City B. However, it transpires that there is only enough water to meet the needs of the residents of City A. The Gemara rules that they are allowed to shut off access for the people in the second city. "They are permitted to shut off [the water] so that it doesn't flow to the other city...for the water is theirs and their lives take precedence over the lives of others." Furthermore, continues the Gemara,

[The water for] their laundry comes before the laundry of the others. [If it is a matter of] the lives of the others and the laundry [of the residents of the first town], the lives of the others take precedence over the laundry [of the first town]. But R. Yossi says that their laundry takes precedence over the lives of the others.

How could R. Yossi say that the people in City A can withhold

19. There is even discussion in rabbinic literature if extreme pain, such as torture, might reduce the severity of a sin which would otherwise be strictly prohibited, such as agreeing due to torture to perform idolatrous acts, or murder or sexual immorality. See *Shita Mekubetzet, Ketubot 33b*, and the opposing view of Tosafot, *ibid*.

life-saving water from people in the next town just so that they can wash their own clothes?!²⁰ It seems bizarre! Perhaps we have to look more closely at the options: how much inconvenience do the people in the first town have to accept in order to help out the other town? In his commentary on the talmudic text,²¹ R. Ovadia Yosef concludes that we must be discussing a situation of the relative inconvenience of each town rather than the convenience of one group over the death of the others. Where the residents of the second city still have the option of moving elsewhere or procuring water from a different, less convenient source, town A can restrict its water supply to its own residents. However, if no alternative exists, the Gemara has indicated that the residents of City A have to suffer the discomfort attendant upon sharing their water in

20. There is a possible explanation offered later in the Gemara, that it was believed that if people could not bathe themselves and wash their hair, it might lead to blindness, and having to wear dirty clothes could bring about dementia. *Chochmat Shlomo* maintains that one need not suffer humiliation or extreme embarrassment in order to save someone in mortal danger; however *Iggerot Moshe, Yoreh Deah II, 174:3* rejects that position. After begging forgiveness of the illustrious scholars who accept that ruling, Rav Feinstein writes "It is clear that this is an absolute error...Heaven forbid the the words of *Chochmat Shlomo* should be repeated...."

21. *Torah sheh B'al Peh*, XIX, 1973 p. 21. This may be analogous to the situation portrayed in *Even Haezer 80:12*, where a pregnant woman who is experiencing great discomfort wants to eat certain food to alleviate it, which food may harm her baby. The ruling in *Shulchan Aruch, Even Haezer* is that "there are those who say that the husband cannot prevent her from ingesting these items even though there is danger to the fetus, because her physical pain takes precedence [over the life of the fetus!]. However, there are those who say he can prevent her." There is a general rule that when the *Shulchan Aruch* cites two opinions, each labeled "there are those who say", it is an indication that the *Shulchan Aruch* rules according to the second option. Accordingly, the normative ruling of the *Shulchan Aruch* is that the husband is able to prevent his wife from endangering their child, albeit she suffers pain in the process. See also the *Magen Avraham 156* and *Choshen Mishpat 22* and *Beit Shmuel, Even Haezer ibid*, No. 15.

order to save the lives of their fellow Jews.²² For many decisors of Jewish law, this principle applies not just in the case of water, but in any situation where Jews can help other Jews; they have to be prepared to experience some discomfort.

Getting paid for a mitzvah

Having established that many *poskim* rule that donating an organ to save someone else's life, while not mandatory, is nevertheless a great mitzvah,²³ we move to another scenario – instead of donating the organ, selling it. There may well be people who are not moved by altruism to endanger or damage their bodily health by donating a body part, but who would nevertheless be prepared to do so if there were a considerable financial incentive. The current reality is that many people sell their blood to blood banks; without the financial incentive, rare blood types would be in even higher demand than they currently are.²⁴

22. Obviously, not all pain has equal valence. The inconvenience of not having water to wash clothing hardly compares to the pangs of not having water to drink! As mentioned earlier, in the talmudic scenario, not being able to wash their clothing would have created intolerable discomfort, or worse, for the residents of the town.

23. Notwithstanding the text in *Yerushalmi Terumot* cited previously, that one is obligated to enter into a possibly dangerous situation in order to save someone in mortal danger, *Beit Yosef* rules that a person need not do so. His ruling reflects the fact that neither Rambam, Rosh, nor Rif cite it.

24. However, at the present time it is illegal in the United States to get paid or to pay for an organ for transplant. Numerous voices have been raised challenging this position as counterproductive (see notes 1-3) and leading to many deaths which could have been prevented. According to the United Network for Organ Sharing there are more than 75,000 individuals listed on various national organ transplant waiting list (see note 1). The president of this organization, Patricia Adams, has pointed out that there simply are not enough organs being donated to meet the high demand. Legalizing sale of organs would seem to make eminent economic and medical sense. However, there are those who decry this suggestion, claiming that it decreases respect for human life and the sanctity of a person's body. The current system, they

In secular American society, some powerful arguments have been made for permitting an economic incentive to enter into the transplantation process. Leading economists point out that since we do not flinch at the sale of blood, platelets, semen, or eggs, it seems irrational not to treat bodily organs as economic commodities. The laws of supply and demand would guarantee that a great many more organs would become available, thus saving many lives. To maintain some kind of taboo on the sale of organs is actually, in their eyes, not increasing respect for life but rather allowing hundreds of needless deaths each year.²⁵

How does Judaism view it – is a person despicable for not being willing to help someone unless he gets paid? Would he still be performing a mitzvah, even if he receives compensation? Obviously, the altruistic individual is worthy of the highest praise, but what about the more mercenary one? What is the status of his action – forbidden? tolerable? Perhaps even a mitzvah?

Judaism sees a mitzvah as an action seeking to comply with the Divine will, and therefore it is generally forbidden to accept payment for the performance of a mitzvah.²⁶ However, getting paid for performing a meritorious act need not always be seen as mercenary or despicable, nor did our Sages automatically express contempt for persons who put their own welfare ahead of others'. An example which may serve as a precedent for our issue can be found in a talmudic text relating to a midwife or doctor who are called upon to tend a distant patient on the Sabbath.²⁷ The Gemara permits these individuals to return home

claim, establishes a personal link between donor and recipient; it should be publicized and advocated more forcefully. Absent this intense personal response, they claim, in the long run there will be less, not more organs available.

25. See Footnote 3.

26. Mishnah *Nedarim* 37a; *Yoreh Deah* 221.

27. *Beitza* 11b.

on Shabbat, after the patient has been attended to and there is no longer any danger to his/her life (although the caregivers will be traveling more than the permitted distance on Shabbat, and carrying their instruments as well). The rationale is simple – if the medical caregiver knows that once (s)he tends to the patient (s)he will be stuck far away from home for the remainder of the Sabbath, the midwife or doctor might simply refuse to go in the first place. Therefore, Jewish law permits them to return, understanding that we cannot simply rely on their good will.

In view of the current dearth of organs for persons desperately in need, the reality is that we may need to offer an incentive to people to do something important and lifesaving, and not rely only on their love of others. That is certainly the outlook of *Chazal*, who understood that if a caregiver would be greatly inconvenienced on Shabbat, he or she would be reluctant to get involved in the mission altogether. In the present situation of organ need, the same rationale might apply.

But since in general one should not get paid for doing a mitzvah, how is it permissible to pay a doctor for healing the sick, or a *mohel* for doing a *milah*, or a Rebbe for teaching? The rabbis ruled that he is entitled to receive payment for the time and effort he expends. The Rebbe is not being paid for teaching (which is a mitzvah) but for his time, when he could have been earning money. This is called “*sechar batala*”. Through this legal rationale, he is considered as having done a mitzvah for free, but being paid for the time he took from gainful employment in order to perform the mitzvah.²⁸

Thus, it follows that although it is a mitzvah for the doctor – just as for any Jew – to help a fellow Jew, yet if he is not prepared to do it without pay, he may demand payment. But

28. See the end of *Yoreh Deah* 336.

the question remains – is it still a mitzvah? Once the Talmud has established the principle that one is not permitted to get paid for doing a mitzvah,²⁹ it may create a sort of “catch-22” conundrum: (a) If a person does get paid, does it mean that his action was not a mitzvah? (b) Specifically, if donating an organ is not a mitzvah (because he is being paid for it), does it then become forbidden, due to the *issur* of causing oneself bodily harm (*chovel be’atzmo*)? Or may we posit that the person is not being paid for the organ, but rather being compensated for the pain he undergoes in having it removed?

Let us consider the primary question: does getting paid obviate the mitzvah status of one’s actions? In his responsa *Iggerot Moshe*,³⁰ Rabbi Moshe Feinstein tangentially seems to offer an answer to this question. Rav Moshe was asked by a doctor whether he could switch his hospital rotation for Shabbat with another doctor, a non-observant Jew. In his answer permitting it, Rav Moshe noted that

When the [non-observant] doctor remains at home, he will be deliberately transgressing the Sabbath with any activity that comes up, no less than the forbidden activities that he does in the hospital. But it is more likely that [the actions he does in the hospital] are diminished [in their severity] because there are many sick people for whom it is permitted [to do these things on the Sabbath], and many of the [doctor’s] actions are [only] forbidden rabbinically, while what he does at home is mostly forbidden on a biblical level.

In this responsum, R. Moshe Feinstein has inherently assumed that a mitzvah remains a mitzvah, even if a person is getting

29. *Bechorot* 36a.

30. *Orach Chaim* 79. See also *She’elot Uteshuwot Ketav Sofer, Orach Chaim* 59.

paid to do it. Albeit the non-observant doctor is carrying out his duties in the hospital as part of his job, he is nevertheless performing a mitzvah by healing the sick [and therefore his activities are permitted on the Sabbath]. Despite his being paid, for R. Moshe that apparently does not alter or diminish the mitzvah aspect of his actions. Applying this reasoning to our question about payment for organ donation, we could conclude that it is permissible to get paid, because it could be subsumed under the rubric of compensation for the pain and loss of time involved.

Nevertheless, the opposite approach is adopted by R. Shlomo Zalman Auerbach, as reported by the author of *Shemirat Shabbat Kehilchata*. For Rav Auerbach, if a person performs a good deed as part of his job, without the intention to fulfill a Divine mandate, it is no mitzvah.

The issue under discussion was whether a person who is in urgent need of medical care on the Sabbath should seek to be healed by an observant doctor or go to a non-observant one (assuming both are equally qualified). One might think that it would be better not to cause a Sabbath-observant doctor to violate the Sabbath sanctity, yet that is not the conclusion of Rav Auerbach, who advises going to the Sabbath observer to be treated, even though that doctor will now have to undertake actions which are generally forbidden on Shabbat:

Inasmuch as his [the doctor's] intent is to do a mitzvah, while the non-observant doctor [will be violating Sabbath] only for the profit he will gain. And even though [the medical care] is considered a mitzvah act, still it is like the case of an individual who intended to eat pork and [inadvertently] ate a piece of lamb.³¹

31. *Shemirat Shabbat Kehilchata*, chapter 32, #45, note 125. The same sentiment is found in *Beit HaLevi al HaTorah, Parshat Shmot, s.v. "vaya'ar et*

It is evident that these rabbinic responsa conflict on a seminal issue: for Rav Auerbach, one's intent is a major factor in determining the status of an action. If a person is healing the sick just because he is being paid, Rav Auerbach does not consider him to be performing a mitzvah. However, Rav Moshe Feinstein holds that regardless of motivation, if one is performing a mitzvah act, it is a mitzvah nonetheless.

This issue had been discussed earlier, in the *Mishnah Berurah*,³² citing a text in *Bava Metzia 82a*. The Gemara there debates whether a person who lends a pauper money in order to be able to use the pawn the pauper leaves with him – whether that lending can be considered a mitzvah. Two conflicting opinions are recorded, which indicates that at least some rabbis were willing to concede mitzvah status to an act that was done – at least in part – for pecuniary reasons.³³ Relying on these precedents, perhaps a person selling an organ for transplant could claim that inasmuch as he is performing a mitzvah, it removes the prohibition of injuring oneself.³⁴ On the other hand, it is necessary to be mindful that a number of major *poskim* do not sanction the practice at all.

Bnei Yisrael."

32. *Biur Halacha* 38:8, d.h. "kotvei." The question was whether a *sofer*, a man writing a *Sefer Torah*—for pay—could be considered as doing a mitzvah; if so, then he might be able to rely on the principle "*ha'osek bemitzvah patur min hamitzvah*", that a person involved in performance of one mitzvah does not have to stop in order to perform another mitzvah. The *Mishnah Berurah* rules that indeed he is considered as performing a mitzvah albeit he is paid for his work.

33. In a somewhat related vein, the *Mishnah Berurah* 328:24 rules that a midwife may receive payment for delivering a child on Shabbat, and he reiterates this in 526:32. The same conclusion is reached in *Shemirat Shabbat Kehilchata* 28:67; *Har Tzvi, Orach Chaim* I 204; *Tzitz Eliezer* VIII 15:13; *Yabia Omer* V 25. To explain why such payment is *muttar*, see *Nishmat Avraham, Orach Chaim*, 306, who discusses whether the same guidelines would apply to a doctor working in a hospital on Shabbat.

34. *Mishnah Berurah* rules that we follow the talmudic opinion which deems the action a mitzvah despite the monetary compensation.

Donating Organs for Research

A number of years ago, the White House was in the process of formulating a position on organ donation for medical research, and various religious organizations submitted documents explaining their respective positions on that issue. Rabbi Moshe Sherer, then president of Agudath Israel in America, turned to Rav Moshe Feinstein for guidance and, based on Rav Feinstein's input, reported the following points as being essential Jewish beliefs:

- 1) In Jewish thought, a person is not the owner of his body; G-d is.
- 2) For sure, the family of a deceased person (or someone who cannot speak for himself) is not in charge of the body and should have no say.³⁵
- 3) The body of a deceased person is *assur behana'ah* – forbidden to be used for any purpose.
- 4) A person has to be buried with all body parts intact, or at least in the state it was in at the time of death. To do otherwise is considered *nivul hamet*, a disgraceful mutilation of the dead.

These principles have been accepted for millennia; there is nevertheless some room for a "lenient opinion". Any option of performing an autopsy or harvesting organs for research or donation relies on the famous responsum issued in the eighteenth century by R. Yechezkel Landau, where he added an important exception to these principles: if there is a *choleh lefanenu*, a sick person before us, whose life or health will benefit from the autopsy or other procedure on the dead body, it is permitted.³⁶ For example, if five people have been struck with a mysterious

35. The same is found in *Le'Or HaHalacha*, in an essay titled "Shylock".

36. *Noda Biyehuda II Yoreh Deah* 210, in a query regarding a kidney operation.

malady, and one of them succumbs, this proviso of R. Landau permits performing an autopsy so that the doctor may study the ravages of the disease and learn how to treat the other sick persons.

However, only a "clear and present danger" to another sick person allows for suspending the prohibition of mutilating a dead body. Healing the sick after using organs for research is such a nebulous prospect that many consider it forbidden by Jewish law; we may find ourselves on the proverbial slippery slope – although medical knowledge may be enhanced and advanced by this kind of study, it is something of a stretch to term the benefits as accruing to a *choleh lefanenu*, a sick person laying there in front of us.

The author of *Nishmat Avraham*, an important book on modern medical issues, writes that he approached R. Shlomo Zalman Auerbach about the permissibility of donating or selling one's body, while alive, to be used for research after death, and the rabbi wrote back, "G-d forbid that a person should sell or give away his body."³⁷ *Nishmat Avraham* continues by citing the opinion of *Iggerot Moshe*,

According to the law of the Torah which our rabbis of blessed memory have received, from mouth to mouth going back to Moshe Rabbenu, may he rest in peace, which we received at Sinai – no person is the owner [*ba'al*] of his body to direct [what to do] with his body, even for one limb...and certainly children and relative have no authority over it [the body].³⁸

It is appropriate, however, to point out that the *Chazon Ish* held that if a sick person was involved in some kind of medical experiment for a major disease before his death, an autopsy

37. *Nishmat Avraham, Yoreh Deah* 349: 3:1.

38. *Ibid.*

should be performed. This is not because the deceased is not master of his own body but rather because if he was suffering from a common disease [such as cancer] to which many are susceptible, the information gleaned from an autopsy might help researchers determine how effective the experimental medicine was. Since the autopsy and research may help save many lives, it is permitted.³⁹

The sharply divergent opinions of major halachic decisors makes it evident that this issue remains in need of definitive resolution.⁴⁰

Stealing in order to save one's life

When a person or his loved one is desperately ill and in need of a transplant, there is almost nothing they will not do to save that life. Being placed on the bottom of a transplant list which has thousands of names on it is, for some, tantamount

39. Some would argue that since so many kinds of transplants can now be successfully performed, and the need is very great, it is therefore permissible to sign an "organ donor" card, so that one's organs can be harvested for use by others. The rationale given is that since so many people need organs, it is akin to a case of universal *pikuach nefesh*. However, this appears to the present author (and many others) to be an unwarranted leap, beyond the limits of the halacha. At the present time, the Uniform Anatomical Gift Act does allow for a person to limit his proposed donation to specific individuals, or for the donor to designate a particular rabbi who would make the ultimate decision if a donation would indeed be warranted. For those who want to sign an Organ Donor card and yet meet the requirements of Jewish law, this proviso would be essential.

40. In *Torah She'be'al Peh* XI 5729, Rav Untermann, who was then Chief Rabbi of Israel, extended the concept of *choleh lefanenu*, a sick person who is presently here and will benefit from the procedure, to permit soldiers in the Israeli army to erect a field hospital on Shabbat, even if at the time there were no casualties. Since there would almost certainly soon be persons needing immediate medical care, he extended the principle to include them. This may serve as a precedent allowing for harvesting of certain organs, even if there is not a sick person waiting to have a transplant—because surely there will be one soon who can benefit from the organs.

to a lingering death. In fact, many thousands of people do die while waiting for a donor organ. In such desperate circumstances, those who have the connections try to get their names put at the top of the list, to qualify for immediate transplantation. How ethical is such a practice? Bear in mind that by employing various machinations to get one's name at the top of the list, one has in effect taken a heart or a lung or a kidney away from someone who had a previous claim on it. That person, too, is desperately ill. Does Jewish law allow such an action? It is also well known that there exists a black market for organs. Those with the connections and the money can buy an organ and have it transplanted almost at once. (We will discuss later the ethics of inducing someone to undergo drastic surgery just for the money.)

In a broader sense, we need to ask – how far may one go in order to save his life? Although it is well known that one may do virtually everything to save a life (*pikuach nefesh*) short of the three cardinal prohibitions of idolatry, murder, and sexual immorality, it is nevertheless necessary to contemplate that the rights of others may represent limitations to these efforts.

In *Bava Kamma*⁴¹ the Talmud explores this question in the context of an incident which involved King David. According to the Gemara, King David was at one time involved in a battle with the Philistines and sought to approach their camp by burning down adjacent fields.⁴² The Gemara reports that prior to undertaking this, King David asked the *Beit Din* whether he was permitted to save his life if it meant destroying the property of someone else:

מהו להציל את עצמו בממון חברו שלחו ליה אסור להציל עצמו
בממון חברו

41. 60b. See also *Yad Ramah, Sanhedrin* 74.

42. *Samuel II* 23: – ויחאזה דוד ויאמר מי ישקני מים מבור בית לחם.

The response of the *Beit Din*, according to the plain reading of the Gemara (as presented by Rashi), is that it is forbidden to save oneself at the expense of someone else's property. רש"י: הואיל ואסור להציל את עצמו בממון חברו.⁴³

Rav Moshe Feinstein does not accept that the Gemara is really discussing whether one can save his life by stealing or ruining someone else's property.⁴⁴ If it is permissible even to transgress the Sabbath to save a life, certainly the sanctity of private property would not represent an obstacle to saving one's life! Rather, he writes, the question under discussion, which King David was asking and which the Gemara analyzes in depth, is whether in a case where there is only a possibility of life endangerment, are all prohibitions set aside? King David was not going to die if he didn't use the stratagem of burning a field, but he might have been in more danger. That was his question.

Furthermore, it is necessary to clarify the status of the object which was "stolen" or damaged – does the person who was trying to save his life have to pay for the damage? Does the object become his to keep, inasmuch as he acquired it legitimately to save his life?

Tosafot do not accept Rashi's reading of the talmudic text, but offer a different interpretation. They argue that the topic of discussion cannot be whether it is permissible to steal to save one's life, inasmuch as it is permitted to do far worse things (such as desecrating Sabbath) for that goal. Rather, they interpret

43. D.h. "סאתזילא". A similar situation is discussed in *Bava Kamma* 80a, and the Meiri comments that although in a case of *pikuach nefesh* all restrictions are abrogated...it is nevertheless proper to be very strict about something that was forbidden by the rabbis for fear of causing loss to others. See *Shita Mekubetzet*, *Bava Kamma* 114, *Yoma* 83b, *Aruch Hashulchan*, *Choshen Mishpat* 359:6, for instances where rabbis appropriated other people's possessions in order to save their lives.

44. *Iggerot Moshe*, *Yoreh Deah* I:214.

the question as seeking to define the nature of that act – King David wanted to know if one must pay for the stolen item.⁴⁵ If one does steal or ruin someone else's goods in order to save his life, must he pledge or intend to pay for the loss?⁴⁶ According to Rav Moshe, who follows the reading of Tosafot, that is really what the talmudic debate is about.⁴⁷ As support for his reading of the Gemara, Rav Moshe cites other talmudic texts which, on the surface, appear to be discussing the same question of the permissibility of stealing in order to save one's life, but actually deal with a less obvious situation.⁴⁸

For our issue of harvesting organs from the dead, the importance of the debate between Rashi and the Tosafists lies in the application of their views: According to Rashi, it is not permitted to steal in order to save one's life, but what that really means is that Rashi sees inherent restrictions in how far a person may go to save his life.⁴⁹ Accepting the principle that

45. See Raavad, Ramban, and Rosh to *Bava Kamma*, *ibid*, as well as the Rashba IV:17. Meiri, *Bava Kamma* 60a, also opines that one may seize another's objects in order to save his life, but must pay for them. In footnote #36, *ibid*, sources are cited supporting the position that if one is lacking the money, he may still take the objects, although he has to pledge to repay when he will be able to do so.

46. This view sees the quandary of King David (and the subsequent debate in the Talmud) as not knowing how much he would be taking from each field and therefore not being able to pay for the damage.

47. *Iggerot Moshe*, *Yoreh Deah* I:214.

48. For example, *Ketubot* 19a, which ponders whether one may sign a false IOU in order to save his life. However, see the view of Ramban, as cited by *Shita Mekubetzet*, *ibid*, and *Maharatz Chayut*, *Bava Kamma* 60b. Another example is the text in *Yoma* 83b; see also *Perashat Derachim* 9; *Chida*, *Petach Einayim*, *Temura* 15b; *Sedei Chemed*, *Ma'aracha* 1:16.

49. For discussion of this issue, see *Yam shel Shlomo*, *Bava Kamma*, No. 27, who writes that it is not only permissible to steal to save one's life but absolutely mandatory to do so, "and if he does not...he is responsible for his own death (*mitchayev berafsho*)." But *Binyan Tzion* 167:8; *Sho'el Umaishiv* 141:2, 174; *Devar Yehoshua* III 24 (quoted in *Nishmat Avraham Yoreh Deah*, p. 64) all rule in line with Rashi's interpretation. In their view, the language of the text

stealing is forbidden in such a case would certainly impact on the question of whether it is permissible to use influence or money to have one's name placed at the top of a transplant list, because in effect that is "stealing" someone else's right to receive that organ. However, if we follow Tosafot's rationale that virtually all mitzvot are set aside to save a life, it might be *muttar* to do so.

Acharonim (*poskim* in the early modern era to the present) are divided on this question, which is most germane to the present issue.⁵⁰ The overwhelming majority follow the view of the Tosafot, although some do rule in accordance with Rashi's interpretation. *Binyan Tzion* is one of the latter group; he writes that since it is proper to follow Rashi's approach, it is forbidden to extract organs from a person who has died, even if the potential recipient is presently there and will die without it.⁵¹ Rav Moshe Feinstein in *Iggerot Moshe*, *ibid*, does not accept this view at all, and there are others who agree with him.⁵²

Organs from donors after death

There are three issues attendant upon taking or donating organs from a dead person: (1) There is a principle of Jewish law that a dead person's body is precluded from anyone's receiving benefit (*met assur be'hana'ah*); (2) a dead person should

indicates that the talmudic sages were debating whether it is permissible to appropriate another person's property to save oneself, not whether he has to pay for it. The Gemara would have said "if he takes the item, does he have to pay" rather than saying "can he take it".

50. See previous note, as well as *Shu"t Maharam Schick, Yoreh Deah* 347, 348; *Shu"t Maharsham V* 54; *Chatam Sofer, Yoreh Deah* 319; *idem, Choshen Mishpat* 359:4, "he may not take it except with the intent to pay."

51. *Binyan Tzion* 169; he also cites various talmudic texts which follow Rashi's approach.

52. *Binyan Tzion* 170. If we follow the Tosafists who rule that one has to pay for the items taken – whom does one pay for an organ taken from a dead person? See also *Shulchan Aruch Harav, Gezeleh* 2.

be buried as quickly as possible; (3) it is forbidden to do anything to "disgrace" the body (*nivul hamet*), which after all has been the repository of the soul.

On the face of it, these principles would seem to present an obstacle to removing any organs after death. However, there are *poskim* who do allow it under certain conditions. Rav Ovadia Yosef is lenient and permits it, but insists that there must be a Jewish recipient presently waiting for the organ (*choleh lefanenu*), rather than extracting it to bank for later use.⁵³ Moreover, he does not permit the family to make this decision – only the person himself can indicate during his lifetime that he is willing for his organs to be harvested.

On the other hand, Dayan Weisz, author of *Minchat Yitzchak*, does not sanction organs being removed after death, his reasoning being that saving someone's life through organ donation is a mitzvah – but the dead are absolved from performing any mitzvot, and removal of organs is *nivul hamet*.⁵⁴ Rav Waldenberg, author of the *Tzitz Eliezer*, also would preclude organ donation after death, even if the person gave permission while still alive. However, he would allow it if there presently is a sick person waiting for that organ, due to the overriding importance of *pikuach nefesh*.⁵⁵

Rav Waldenberg's position is detailed in this lengthy responsum, penned after he was approached by a Dr. Abraham to clarify the halacha about organ transplants. Inasmuch as Rav Moshe Feinstein had ruled liberally,⁵⁶ while Dayan Weisz had ruled negatively,⁵⁷ doctors committed to halacha did not

53. *Yabia Omer III Yoreh Deah* 22.

54. V:8; see also *Shevet Halevi I* 211.

55. XIII 91.

56. *Iggerot Moshe, Yoreh Deah II* 174.

57. *Minchat Yitzchak V* 7.

know how to proceed. In his exposition, Rav Waldenberg first posits that a cadaver may not be mutilated; just as one is required to return the soul back to the Creator pure and whole, so, too, the body must go to the grave complete. As for those rabbis who have written that it is permissible, he notes,

ששום אחד מהרבנים והתלמידי חכמים שכתב להתיר בזה בזמננו לא ידא מוכן לקיים את ה"אם אתה עושה כן".

None of the rabbis or scholars who have written to permit it in our day are prepared to act [upon] – “Would you do it?”

Rav Waldenberg adds that it is forbidden to keep the potential donor alive artificially in order to wait for an immediate recipient of his organs, nor is it permissible to do anything to precipitate his death. Rav Waldenberg also notes⁵⁸ that in his day, the Chatam Sofer had forbidden persons to donate their organs for medical research after death, מפני שזה איננו נבנס בגדר פקוח, since it is not directly saving someone’s life.⁵⁹

In another responsum on this topic, Rav Waldenberg again reiterates his opposition to donation of corneas for transplant, even though the cornea effectively has no blood, so it would not entail taking the cadaver’s blood, which circumstance the questioner had thought might be grounds for leniency.⁶⁰

Selling organs

One major hurdle remains for us to confront: who is it that is

58. D. h. “Hein amnam.”

59. *Yoreh Deah* 336. Rav Waldenberg does quote other *poskim* who would allow medical research on cadaver organs, because the body is not being mutilated for any person benefit or pleasure (*hana’ah*), and thus is permissible.

60. *Yoreh Deah* 84. The *Seridei Eish* discusses whether the potential recipient need be blind in both eyes to qualify as sick enough to permit transplant, or whether being blind in one eye is sufficient.

selling his organs? Almost certainly, it will be individuals who are so desperate for money that they are willing to mutilate themselves for it. This is not the same as selling blood, hair, or semen, which are all “renewable resources”. It is also not comparable to a father donating one of his own kidneys to his child. Rather, these sellers of their own body parts are either so poor or so obsessed with money that they are prepared to undergo pain, health deterioration, perhaps even death, in return for great material gain. Undoubtedly, there are many people who will volunteer on such a basis, or who may be induced to do so. What are the ethics of taking advantage of another person’s desperate need or compulsive drive to get rich, or other weaknesses of character? Jewish law might preclude *buying* an organ under such circumstances.⁶¹

The Malbim has a fascinating explanation to offer for a law legislated in the Torah: In *Devarim*,⁶² the Torah teaches that if a man divorces his wife, and she subsequently marries someone else and is divorced by him as well, she cannot thereafter remarry her first husband. Why not, asks the Malbim? He turns to a text in *Sifre* 134 commenting on this verse, and explains it as follows:

When the verse writes “and do not bring sin upon the Land,” our early Sages have explained that it leads to despicable things when [people] switch wives. The rich men will “put their eyes” on the wives of the poor to mislead the poor man [and convince him] in his great poverty to divorce his wife for a certain interval, for a large payment of money, and he [the rich man] promises that the wife will thereafter return to him. When she

61. Due to the prohibition of *lifnei iver* (placing an obstacle before a person who is “blind” to the consequences of his actions).

62. 24:4. The interpretation of Malbim, as well as those of other commentaries, is cited in the *Sha’arei Aharon* to that verse, p. 787.

sees how good it is for her to live in the house of the rich man, she will not return to [the poor former husband], and he will be roused by jealousy to take revenge and thereby come to spilling blood.

Similarly, the Ramban earlier had commented on that verse:

The reason for this negative command is so that people will not swap their wives with each other, to write her a divorce paper at night and take her back the next morning. This is the reason for “and do not contaminate”, to warn *Beit Din* about this matter.

What the Torah is teaching us is that it is despicable for a person to use his wealth/power/position to coerce the poor to do what they don't really want to do just because they need money so badly. Without considering any other halachic aspects of the question, this issue alone seems to create an untenable situation.

The possibility of such an eventuality is presaged in the Torah's teaching about a divorced woman remarrying her husband. Then, as now, it is the responsibility of the *Beit Din*, which in Jewish society was not just a court but also had quasi-legislative functions, to maintain the proper morality within the community.⁶³ In considering the wisdom of permitting human organs to be purchased by private individuals, we have to be mindful of the many pitfalls which loom, not only to the persons involved, but also to the fabric of society.

63. *Orach Chaim* 529:4: “The *Beit Din* has to appoint policemen on the holidays [when people would come from all over to celebrate in Jerusalem], who will go around and check gardens and vineyards and on riverbanks, to make sure that people do not congregate there to eat and drink, men and women, and possibly come to engage in sin...”