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## **RENAL TRANSPLANTATION: LIVING DONORS AND MARKETS FOR BODY PARTS—HALAKHA IN CONCERT WITH HALAKHIC POLICY OR PUBLIC POLICY ?**

**D**ue to medical technological innovation, doctors can now keep alive, and frequently restore to proper health, patients who not that long ago might have been incurable. One of the most significant advances in biomedical technology in the latter half of the twentieth century involves the successful transplantation of human organs from living donors. In the early 1980s, kidney transplantation was expanding rapidly due to the development of improved immunosuppressive medication. With the accelerated pace and success of this type of transplantation, coupled with the increased demand for transplants, human kidneys are yielding a value above and beyond any sentimental or elemental value.

The concerns raised by the recent surge in this biotech industry can be divided roughly into two questions. First, from the perspective of Jewish law, does a Jew have an obligation to donate his kidney to another fellow Jew? Second, if such a medical procedure is allowable, ought he or she be compensated for this transplantable organ? What are the public policy considerations in promoting or banning selling of kidneys? Are these considerations grounded in halakha or in the writings of secular contemporary thinkers which serve as the source for arriving at a halakhically principled position?

This issue regarding the propriety of organ donation must be viewed within its legal-axiological construct. Though this topic has been frequently discussed in various forums, except until recently, scant attention has been given in contemporary writings towards articulating and examining the implications of its varying legal-axiological frameworks and its implications for the permissibility of selling kidneys. As we

will show, renal transplantation can be viewed within two different frameworks: either reflecting an ongoing tension of two imperatives, *pikku'ah nefesh*, i.e., the saving of human life versus *habbala*, i.e., wounding or through the prism of *habbala*, i.e., is wounding for the sake of rescue permitted? In our ongoing discussion, the ramifications of these varying constructs will be studied and hopefully clarified. Moreover, except until recently, there have been equally few discussions regarding the impact of public policy considerations in promoting or banning these sales. Hopefully, our study will contribute to the contemporary debate regarding the role of public policy in halakhic determination in general, and in renal transplantation, in particular.

As we know, the permissibility of a kidney transplant provides us with one of the many illustrations of the overarching and paramount significance of *pikku'ah nefesh*, i.e., the preservation of human life. *Pikku'ah nefesh* suspends all biblical prohibitions excluding idolatry, homicide, and certain sexual offenses. Here, we are dealing with the preservation of human life being effectuated by a surgical procedure which involves the sacrifice of a human organ. In effect, the procedure entails "*habbala*," i.e., wounding which usually is prohibited whether it is self-inflicted or inflicted by others. Nevertheless, as we will show, given that halakhic strictures are suspended for the purposes of preservation of human life, *is the proscription against habbala equally set aside in cases of kidney transplants?*

Even assuming that the strictures of *habbala* are overridden, there is a preliminary question which must be addressed: What is the scope of an individual's duty in preserving his own life as well as that of his fellow man? The answer lies with how various decisors perceive the attendant degree of risk. If the situation is viewed as "halakhically risk-free," the mandate to preserve life is operative. While this question is rooted in classical halakha, the issue has become imbued with concrete significance in the context of various contemporary discussions, including kidney transplants.<sup>1</sup>

Theoretically speaking, depending upon the particular transplantation, the scope of a living donor's obligation may involve one of the following questions.

(1) May a person sacrifice his life by donating an organ to his fellow Jew if it is needed to save his life?

(2) Is a donor obligated to endanger himself, i.e., to undergo significant medical risk, in order to save the life of another?

(3) In the absence of significant medical risk, is one obligated to sacrifice a limb in order to save another individual?

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Does renal transplantation result in the sacrifice of the donor's life, endangerment of the donor's life, or the posing of no significant medical risk for the donor? Upon ascertaining the state of medical risk, it becomes the arbiter's responsibility to define what constitutes acceptable risk by halakha. Is halakhically acceptable risk identical with the medical community's definition of risk, society's appraisal of risk-taking or simply the arbiter's definition of risk?

To respond to these issues and understand the varying positions, we need to briefly review the talmudic duty of rescue.<sup>2</sup>

The Talmud views the provisions regulating the duty to rescue as a resolution of the interplay between a positive and a negative commandment emerging from two different spheres of Jewish law, namely the law of finders and the rules of criminal omissions. The Talmud states (*Sanhedrin* 73a),

From where do we know that if a man sees his neighbor drowning . . . he is bound to save him? From the verse, "Do not stand idly by the blood of your neighbor." But is it derived from this verse? Is it not rather from elsewhere? From where do we know (that one must rescue his neighbor from) the loss of himself? From the verse, "And you ought to restore him to himself." From that verse I might think that it is only a personal obligation, but that he is not bound to take the trouble of hiring men (if he cannot deliver him himself); therefore, this verse teaches that he must.

If the duty of rescue would have been governed exclusively by the law of the finder, then the scope of a rescuer's involvement would have been limited to personal involvement. The law of criminal omissions mandates that an individual's duty in rescue is not eclipsed by personal involvement. The rescuer, while attempting to render assistance to the endangered party, is obligated to incur the expenditures required for the rescue.

In short, the duty of rescue comprises two elements:

(1) personal involvement and (2) financial expenditures.

As indicated by Rashi,<sup>3</sup> the duty is not limited to simply the physical act of rescue. Rather "*hazor al kol ha-tsedadim*," i.e., involve your total being in the entire process, even if it means the need to suffer pain during the time of rescue.<sup>4</sup> Hence, R. Shelomo Zalman Auerbach concludes that a living kidney donor is obligated to accept excruciating pain in cases of saving human life.<sup>5</sup>

Though the above cited talmudic source does not offer a clear-cut

definition towards defining risk-taking, nevertheless, by utilizing the examples of drowning and robbery as examples of situations which mandate rescue, there is an implicit assumption that a person is obligated to assume some degree of risk in saving another fellow-Jew.<sup>6</sup> However, in a responsum penned by the sixteenth century legist, R. David ben Ibn Abi Zimra (known by the acronym Radvaz) guidelines are offered towards defining the risk:<sup>7</sup>

Even if there is a slight doubt as to the danger, such as [the rescuer] saw someone drowning in the sea or being attacked by robbers or by a wild beast, in all of which [circumstances] there is some doubt as to the danger [posed to him], yet he must save [the other person]. . . . But to save a life . . . even when there is doubt as to the danger [to the rescuer's life], [the rescuer] must rescue [the imperiled person], and this appears in the Yerushalmi.

Elaborating upon the underlying meaning of the nomenclature “a slight doubt as to the danger,” in the same responsum, Radvaz writes:

In any case, if the doubt tends towards certainty, he [the rescuer] does not need to sacrifice himself to save his fellow Jew, and even where there is a significant doubt, he does not need to do so, for who said that your fellow's blood is redder? Perhaps your blood is redder. But if the doubt is not significant, but tends towards rescue and he did not endanger himself and did not save the person, he has transgressed the commandment “do not stand idly by the blood of your neighbor.”

In short, there are three types of risk which potentially may confront the would-be rescuer:

- (1) the possibility of death is almost certain;
- (2) a rescue operation the success of which is highly probable, i.e., slight doubt as to the danger; and
- (3) a situation of doubt as to the danger.

Adopting this yardstick, Radvaz argues that the talmudic cases of drowning, robbery and mauling by a wild animal are illustrations of “a slight doubt as to the danger,” i.e., “*ketsat sakkana*.” In other words, under these circumstances, there is a high probability for a successful rescue; hence, if one chooses to refrain from assuming the risk, one transgresses the prohibition “do not stand idly by the blood of your neighbor.”

On what basis are these instances of “a slight doubt as to the danger” rather than “a doubt to the danger,” i.e., a “*safek sakkana*”? Since,

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according to numerous decisors,<sup>8</sup> one must abstain from a rescue which involves a possible danger to one's life, had these rescue situations been viewed as cases of "*safek sakkana*," there would be a prohibition for placing one's life in possible mortal danger. Nevertheless, according to Radvaz's understanding, these situations do not rise to the threshold of risk which forbid the rescue, but rather mandate intervention! For Radvaz, these various categories of risks are to be defined by the arbiter based on his personal understanding of risk, utilizing legal logic, i.e., *sevara*. Consequently, drowning, robbing, and mauling by a wild beast are examples of "a slight doubt as to the danger."

On the other hand, addressing renal transplants, R. Ovadia Yosef suggests a more concrete framework for defining "halakhic risk":<sup>9</sup>

One who observes a mitstva will not experience an evil thing, since the majority [of people] do not endanger themselves.

At first glance, it would seem that the position being advocated is that for any uncommon danger in the eyes of society, an individual who is performing a mitstva is protected from this danger. However, such a posture would contradict the talmudic rule "*shelubei mitstva einan nizakin*," i.e., individuals performing a mitstva will not be harmed, as referring only to cases of unconventional hazards.<sup>10</sup> Moreover, R. Yosef is conflating two different rationales which serve as a justification for divine protection for someone who endangers himself, "*shelubei mitstva einan nizakin*" and "*shomer peta'im . . .*"—God protects the simple.<sup>11</sup> The "safety net" of *shomer peta'im* is applicable either in situations where the endangered person is performing the mitstva<sup>12</sup> or in cases of common dangers, regardless of whether the endangered person is performing a mitstva or not.<sup>13</sup> Addressing the hashkafic underpinnings for the latter justification, in a related context, R. J. David Bleich observes:<sup>14</sup>

the Gemara cites the verse "the Lord preserves the simple" (Psalms 116:6) as granting sanction to place . . . trust in divine providence and to ignore possible danger. The Gemara itself dispels what would be an obvious contradiction by stating that certain actions which contain an element of danger are permitted since "the multitude has trodden thereupon." The concept embodied in this dictum is not difficult to fathom. Willfully to commit a daredevil act while relying upon God's mercy in order to be preserved from misfortune is an act of hubris. . . . Nevertheless, it is universally recognized that life is fraught with danger. Crossing the street, riding in an automobile . . . all involve a statistically

significant danger. . . . Such actions are indeed permissible since “the multitude has trodden thereupon” i.e., since the attendant dangers are accepted with equanimity by society at large. Since society is willing to accept the element of risk involved, any individual is granted dispensation to rely upon God who “preserves the simple.”

In short, one can apply the rule *shomer peta'im Ha-Shem*, i.e., God preserves the simple, for all attendant dangers which society accepts with equanimity such as saving a drowning person. There must be some minimal threshold that must be reached for halakha to identify it as “a risk.” For Radvaz, pursuant to R. Yosef’s understanding, whereas a risk characterized as “a slight doubt as to the danger” is a halakhically acceptable risk, “a doubt to the danger” is unacceptable. Since in the latter situation, society is unwilling to accept the risk involved, therefore, in such circumstances, the rescuer must be concerned with his own self-endangerment and one is proscribed from saving human life. However, in cases of societal acceptance of the risk such as renal transplants, such an act is *mandatory*. And in the words of R. Yosef, you will be granted divine protection. Unlike Radvaz, in the eyes of R. Yosef, our issue is resolved through the prism of the halakhic recognition of socially acceptable risk based upon the perception of the medical risk or alternatively based upon the fact that the endangered person is engaged in the performance of a mitzva. R. Levi Halperin agrees that society’s acceptance of the risk permits the transplantation, however, there exists no obligation to donate a kidney; it is an act of piety, i.e., *middat hasidut*.<sup>15</sup> Similarly, though such a procedure entails a risk, nevertheless for R. Shelomo Dichovsky and R. Shaul Yisraeli<sup>16</sup> in cases where donor compensation is necessary for sustaining one’s livelihood, it is permitted to undergo a transplant.<sup>17</sup> Here again, decisors impute societal willingness to risk a life in order to sustain oneself as grounds for allowing a renal transplant. Whereas these decisors argue that sustaining a livelihood is a justification for assuming the risk, R. Yosef and R. Levi Halperin contend that societal willingness to undergo the transplant based on the low threshold of risk serves as the grounds for the donation. For Rabbis Yosef and Halperin, whether the donor is sustaining a livelihood from the funds disbursed for this transplant is not factored into the equation.

Other decisors relate to the permissibility of the procedure in terms of assessing the weight of the *safek* in terms of the state of medical science rather than society’s willingness to accept the risk. According to R. Mordechai Halperin,<sup>18</sup> though one cannot obligate an individual to be a

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donor, nevertheless, due to the low risk, i.e., undergoing nephrectomy, one is permitted to donate a kidney. Other decisors, including R. Eliezer Waldenburg and possibly R. Weiss, argue<sup>19</sup> that such a transplant entails a *safek sakkana*; therefore, one is proscribed from donating one's kidney to save another. A contrary position espoused by R. Feinstein and others<sup>20</sup> is that even in cases of self-endangerment entailing moderate medical risk, one is permitted to save his fellow-Jew from death where there is a high probability of saving a human life. Today, given the statistical likelihood of success of renal transplants and even assuming that the donor is placing himself in a "*safek sakkana*," these authorities would sanction transplantation of the kidney from a live donor.

In short, the foregoing suggests that the permissibility or non-permissibility of transplants hinges upon determining the degree of risk associated with a nephrectomy as defined by medical assessment. As we have seen, whether risk will be determined simply based upon the arbiter's perception, state of medical technology, or societal willingness to accept the risk is subject to debate. Assuming that the procedure is "halakhically risk-free," then *pikku'ah nefesh* will override *habbala*.

On the other hand, other contemporary authorities assert that *pikku'ah nefesh* cannot suspend the proscription against *habbala*.<sup>21</sup> In effect, self-injury is proscribed and the prohibition against battery is construed as a stricture ancillary to the prohibition of homicide, i.e., *avizrayhu* and therefore the situation is defined as "*nefashot*" or "*safek nefashot*," i.e., precarious or possibly precarious situation, which mandates the avoidance of jeopardizing one's life.<sup>22</sup> Hence, a transplant will not be allowed. In short, the issue of the permissibility of transplants reflects a polarity, an ongoing dialectic, the tension of two imperatives (preservation of human life versus wounding) with the staking out of a halakhic normative position(s) at each pole.

Alternatively, without resorting to view our issue as a study in polar opposite duties, one can contend that this question is to be resolved in one-dimensional terms, through the prism of "*habbala*."<sup>23</sup> Is wounding for the sake of rescuing human life permitted? Relying upon Rambam's ruling and reminiscent of a Tosafist position,<sup>24</sup> one contemporary decisor observes,<sup>25</sup>

One is prohibited from injuring oneself as well as one's fellow-man. Not only a person who commits an injury, but also one who beats an innocent person of Israel, be it a minor or an adult . . . if the Torah warned us against exceeding in the beating of a sinner, this prohibition extends a

fortiori to beating an innocent person . . . the prohibition against injuring another, or oneself . . . seems to stem from the disrespect shown towards the injured person. . . . When injury to oneself is done to save life, it does not show disrespect; on the contrary, it is a noble act, and rather than being forbidden, it constitutes “pious conduct.”

In effect, adopting the normative position, this stance reaffirms the prohibition against self-inflicted harm or assaulting another fellow-man. However integral towards defining the contours of the prohibition is the *motivation* in committing the act. Should the wounding be administered in a contentious manner, i.e., *derekh nitsayon*, or in a disrespectful fashion, i.e., *derekh bizayon*, then such an action constitutes *habbala* and is prohibited.<sup>26</sup> Consequently, if an individual is willing to sustain an injury in order to save the life of another, i.e., an action of respect, then this act is sanctioned as a case of privileged battery and hence, a donor may undergo a transplantation procedure. The legitimacy of such an act of self-injury is no different than undergoing reconstructive surgery which is permissible according to certain legists.<sup>27</sup>

In short, our study indicates that there is a minority opinion reflective of the positions of R. Unterman, R. Waldenburg, and possibly R. Weiss that renal transplantation constitutes either *habbala* or *safek sakkanna* and therefore it is prohibited. However, most decisors assume that either *pikku'ah nefesh* suspends the prohibition against *habbala* or that *habbala* in a respectful fashion is permissible and therefore conclude that either there exists an obligation, i.e., *mitsva*, or it is permissible, i.e., *middat hasidut*, to donate one's kidney for preserving another person's life.

## II.

The varying halakhic constructs for understanding the permissibility of renal transplants either in one or two dimensional terms, i.e., *preservation of life through habbala* or *the preservation of life versus habbala* have their ramifications and applications in the hotly debated issue of revenues derived from the sale of human tissue and commercial rights in selling kidneys. Seemingly, the legalization of organ procurement will increase the number of kidneys transplanted annually and thus save the lives of individuals who would otherwise die. However, our society argues that there is more at stake in the biological revolution than just saving life or avoiding death. Vexing ethical and policy questions are raised in the secular professional literature on various levels. First, the



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body is intimately bound up with conceptions of dignity, individual worth, and personal identity and therefore, payment for kidneys ought to be morally objectionable. The importance of bodily integrity to a sense of personal integrity and worth has been echoed in the words of Harvard law professor and former Solicitor-General Charles Fried,<sup>28</sup>

Moral personality consists, as Kant said, of the capacity to choose freely and rationally. But the capacity to choose implies a system of wants or ends, and so naturally moral personality implies a desire for happiness, a desire to choose and attain a conception of the good. . . . Now, a claim to respect for physical and intellectual integrity implies a claim to the conditions under which a sense may develop of oneself as a free, rational, and efficacious moral being. . . .

But should persons be selling their kidneys?...Certainly if what I have argued about the primacy of bodily integrity is correct, then anybody not acting under the compulsion of unjustly desperate circumstances would not want to engage in such commerce.

Accordingly, the underlying Kantian idea is that kidney selling violates one's humanity and impairs one's rationality and autonomy. Responding to this concern, Kenneth Arrow views the introduction of financial incentives as expanding individual choice:<sup>29</sup>

Economists typically take for granted that since the creation of market increases the individual's area of choice it therefore leads to higher benefits. Thus, if to a voluntary blood system we add the possibility of selling blood, we have only expanded the individual's range of alternatives. If he desires satisfaction from giving, it is argued, he can still give, and nothing has been done to impair that right.

Others oppose markets in body parts because of commodification, i.e., the incompatibility between objects with a market price and human dignity.<sup>30</sup> However, it is difficult to understand why the selling of kidneys is singled out as abhorrent to society's sense of dignity, while the sale of hair and blood, is not.<sup>31</sup> The grounds for the distinction may lie either in the fact that kidneys are essential body parts and hair and blood are not or that the latter are replaceable and the former are non-regenerative.<sup>32</sup> Others like Fried and Cynthia Cohen argue<sup>33</sup> that, in a certain sense, selling a body part may be equivalent to selling one's self, a form of self-enslavement. In the final analysis, there is a considerable emotional resistance to permitting the sale of kidneys because promoting an "everything for sale" mentality will impede the development of altruism

and a sense of community and will lead to a decline in the gratuitous donations of kidneys.<sup>34</sup> Countering this claim, the fact remains that the demand for kidneys largely exceeds the supply. Those in need of these transplants often are registered on waiting lists for months, even years, anxiously awaiting a suitable match. Therefore, reliance upon the forces of generosity guiding tissue from the donor to the consumer is insufficient to satisfy the current demand. Financial incentives are necessary to locate an adequate number of kidneys to satisfy the ever-increasing demand. Furthermore, the perceived risks extend beyond commerce of human materials. Some claim that use of the market rhetoric, when applied to human body parts, allows us, albeit unconsciously, to accept the values of acquisitiveness and self-interest implicit in that language.<sup>35</sup> As James White notes,<sup>36</sup>

When we speak our languages we cannot help believing them, we cannot help participating, emotionally and ethically and politically, in the worlds they create and in the structures of perception and feeling they offer us.

When speaking in market terms, one is focusing on individuals who interact with each other through transactions involving the exchange of tangible and intangible resources. Rather than being “value neutral,” market discourse talks about the acquisitive, self-interested individualism, and instrumental values that promote the perpetuation of the economic system; in effect, rhetoric creates reality. To shield oneself from the latent dangers of marketplace language either one must<sup>37</sup>

begin by assuming markets, and force opponents to defend non-sale as the exception or begin with some conception of human decency . . . and decide how to best pursue it, electing market mechanisms only where they are appropriate to enhancing human freedom and welfare, but remaining careful not to reduce the worth of everything to its market price.

In sum, market discourse, the development of an individual driven by the engine of self-interest rather than altruism, the denigration of human dignity, the impairment of personal self worth, and the enslavement of the personality have served as moral rationales for opposing the promotion of organ donation for pecuniary gain in American society.

Given these concerns of according respect to humanity and the value of individual autonomy and self-worth, does halakha allow kidney sales for commercial gain?

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Adopting the paradigm of *pikku'ah nefesh* versus *habbala* as the model for analyzing our problem and pursuant to the decisors who argue that *pikku'ah nefesh* overrides *habbala*; whether the transplant is a case of altruistic volunteering or pecuniary gain is irrelevant. Given that we place supreme value on the mitsva of preservation of life, consequently, it becomes the sole deciding factor. Even if the donor's motivation is for commercial gain; in the wider scheme of things, it becomes an irrelevant consideration.<sup>38</sup>

On the other hand, those who advance the overriding nature of *habbala* and thus oppose transplantation would ban the sale of kidneys, i.e., *le-khathila*. Nevertheless, they would equally uphold the validity of selling kidneys, i.e., *be-di'avad*. Seemingly, given the prohibited nature of the activity, how could one justify (ex post facto) receiving payment for a kidney? One must draw a clear distinction between the prohibited act of *habbala* and the readiness of two parties to execute their personal obligations, i.e., the transfer of monies for undergoing the act of *habbala*. In the words of a renowned twentieth century Israeli jurist,<sup>39</sup>

We see clearly that Jewish law does not establish a causal connection between the commission of an offense and the voiding of a civil contract. . . . The violation of the law or of morality is one thing, and the legal validity of the contract is another—to the extent that the fulfilling of the contract itself does not activate the offense. . . . Precisely because Jewish law does not distinguish between law and morality, and that practically every performance of an obligation is at the same time a fulfillment of a religio-moral commandment—as the “the commandment” of repaying a debt of monetary obligation—the non-fulfillment of a contract entered into through a violation of law will only turn out to be an additional offense to supplement the original one committed by the transgressor.

A donor's willingness to receive payment does not constitute the commission of the prohibited act. Rather the act is improper and the compliance with the condition of the agreement merely serves as the grounds for a claim for payment. Hence, if an individual paid for the organ, and then he wants to decline the donor's offer: if the donor still intends to undergo the procedure, then the individual is precluded from returning the monies. In effect, having consummated an agreement with the donor, there are no grounds for setting aside the arrangement. Barring any unforeseen circumstances, the commitment is irrevocable.<sup>40</sup>

On the other hand, adopting the model that the commission of *habbala* for the purpose of saving human life is permitted, would the

selling of kidneys be sanctioned? As we discussed, the motivation for the act of *habbala* will be the determining factor in allowing the action. Given that renal donation for financial gain involves two motivations, i.e., preservation of life and remuneration, which motivation will be the deciding factor in evaluating the propriety of the action? Some decisors contend that any *habbala* for the purpose of commercial gain is prohibited.<sup>41</sup> Others argue that if the end result of *habbala* is the preservation of life, commercial gain from the process is permitted.<sup>42</sup> For example, a living donor selling his kidney may be motivated by the notion that he ought to rescue someone else's life and that he ought to earn money to pay for his child's education. Pursuant to this opinion, selling a kidney by the donor would be sanctioned. Another authority contends that if in the absence of pecuniary incentives, the donor would have refrained from undergoing the transplantation, then, the sale of a kidney is forbidden.<sup>43</sup> In short, the varying positions revolve around their understanding of whether selling kidneys are to be classified as *habbala* administered in a contentious manner, i.e., *derekh nitsayon*, or in a disrespectful fashion, i.e., *derekh bizayon*, actions which are proscribed. In effect, the rabbinic consensus is that the procedure that facilitates the removal of a kidney constitutes assault. Whether its removal for profit violates *human dignity* is subject to debate.

Alternatively, the suggestion has been advanced that since *habbala* is punishable by a fine, therefore donor remuneration represents damages for the personal injury, degradation, and pain suffered. The fine, fixed by halakha, is assessed to recompense the victim, i.e., the donor, for injury, pain, embarrassment, medical costs, and time lost from work. Pain is calculated according to the social position of the involved parties. To measure pain, either the arbiter would estimate how much money the man would be prepared to pay to avoid the pain resulting from the injury or how much a man wants to give to amputate his hand whether by the sword or by a drug. Additionally, the assessment would factor into the calculation of whether payment should be for pain incurred during the time of battery or possibly also subsequent pain caused by the assault. In short, given the weighing and balancing of various factors in arriving at this calculation, it is unsurprising for one contemporary decisor to conclude that the donor.<sup>44</sup>

may take compensation for pain, and given that there is no fixed amount, consequently, it is within the donor's discretion to establish the amount of compensation for his pain.

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Beyond the possible violations of human dignity and the experiencing of pain and personal degradation, what are the other *hashkafic* implications of selling kidneys? In short, how does one categorize kidneys? Should it be analogized to replaceable organs such as blood and hair? There are obvious differences between selling a kidney and selling hair or blood plasma. First, whereas hair and blood are regenerative organic material, a kidney is non-regenerative. Second, though phlebotomy and hair removal is simple and quick with no attendant side effects, parting with a kidney involves major surgery, an invasive procedure, leaving the donor with only one kidney. Despite these differences, numerous rabbinic authorities permit the sale of a kidney, hair,<sup>45</sup> and blood plasma.<sup>46</sup> Whereas the sale of hair and blood is viewed as a respectable means for sustaining one's livelihood<sup>47</sup> and fails to constitute *habbala*,<sup>48</sup> the sale of a kidney is not construed as a violation of bodily integrity, i.e., *habbala*, given its redeeming value and purposiveness. If we take bodily integrity in its literal sense, then phlebotomy for sale of blood plasma clearly violates it.<sup>49</sup> Nonetheless, from the fact that kidney donation (rather than phlebotomy) provides an illustration of an activity involving a potential violation of bodily integrity, i.e., *habbala*, we may conclude that the halakhic definition of bodily integrity does not dovetail with the meaning of bodily integrity, in its literal sense. Hence, whereas kidney transplants involve *habbala*, a phlebotomy does not constitute *habbala*.

The implications of viewing selling kidneys as an illustration of "*habbala*" which is beneficial are far-reaching, beyond the instructive insight that the halakhic meaning of bodily integrity is not synonymous with physical integrity in its literal sense. Decades ago, there was a contemporary debate regarding the ownership rights of Jews in their bodies. The discussion focused upon our autonomy vis-à-vis our bodies. The varying approaches emerged from two contemporary decisors sharing their halakhic perspective concerning the validity of a contractual agreement between Shakespeare's Shylock and Antonio.<sup>50</sup> As we all have read, according to Venetian law as recorded by Shakespeare in *The Merchant of Venice*, "a pound of flesh" was an acceptable form of damages in cases of breaking a contract. Assuming that the agreement between Shylock and Antonio provided for the repayment of the latter's debt with a pound of flesh, would such an agreement be halakhically binding upon Shylock? For R. Zevin, the starting point is the question of how life is created. According to the secularist, the question is one of biogenetics. From our perspective, God owns everything. Since God created our bodies and owns them, therefore man may use his body in accordance

with the conditions and limitations established by the Creator, as articulated in the rules of halakha. Relying upon the normative ruling that “a man does not have exclusive authority over his body,”<sup>51</sup> argues R. Zevin, man has no right to consent to removal of one’s body parts. Consequently, the Venetian agreement would be unenforceable. On the other hand, though R. Yisraeli concurs with R. Zevin’s conclusion, he contends that man retains co-ownership along with God in one’s body. Man’s limited ownership rights are governed by halakha.<sup>52</sup> In short, both decisors concur that consent for the removal of a portion of one’s flesh constitutes self-inflicted injury, i.e., *habbala*, and therefore, is prohibited. However, the line of reasoning for their respective views differs. According to R. Zevin, such removal undermines the notion that God is the sole arbiter over the disposition of the human body. On the other hand, for R. Yisraeli, though God exercises ownership over man’s body, an individual has a degree of autonomy over his body, its exercise being defined by halakha. Therefore, given that there is a halakhic proscription against *habbala*, one cannot consent to a removal of a pound of flesh. It is the halakhic system, rather than the fact of God’s dominion, in the eyes of R. Yisraeli, that prohibits the excision of human flesh.

For R. Ariel,<sup>53</sup> this debate has ramifications for the propriety of selling kidneys. Pursuant to R. Zevin’s reasoning, one cannot sell one’s kidney since ownership of one’s body, including the kidney, resides with God rather than man. On the other hand, from R. Yisraeli’s perspective, man has limited ownership of his body, therefore, the possibility exists that the sale of a kidney would be sanctioned. Implicit in this posture is the unarticulated notion that man has a quasi-proprietary interest in his kidney. Despite God’s ownership rights, so to speak, there is broadly speaking, “a bundle of rights” that may be exercised by man, within certain halakhic parameters to be sure, with respect to his kidney: principally, the right to possess it, to exclude others from removing it, and donate and/or sell it to another individual.<sup>54</sup> Analogously speaking, R. Ariel contends that man’s decisional authority vis-à-vis his kidney is akin to transferring a legal instrument of indebtedness, i.e., *shtar hov*, to his friend. Though the creditor has not acquired the *shtar* in order to collect his debt, nevertheless, he possesses the instrument until the debtor repays his debt. Until the time of the repayment, the creditor can sell the *shtar*, i.e., its worth, to any third party willing to purchase it.<sup>lv</sup> Though in one situation we are dealing with money and the other with a kidney, the common denominator is the recognition of man’s decisional authority vis-à-vis his body parts and financial assets.

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Whether in fact the donor's decision to sell his kidney will be permissible is dependent on how one views nephrectomy for financial incentive. Is it a case of a beneficent act or is it "*habbala derekh bizayon*" or "*nitsayon*"? Utilizing the Fried-Cohen perspective,<sup>56</sup> the

Moral personality consists...of the capacity to choose freely and rationally. But the capacity to choose implies a system of wants or ends . . . a desire to choose and attain a conception of the good. The right (freedom and rationality) establishes the moral foundations on which we build our lives.

Accordingly, an individual's decision or decision-making process is not neutral; it must be in congruence with standards of self-worth and self-respect. For Fried and Cohen, the selling of kidneys undermines these moral standards and impairs our rationality and autonomy. As we have seen, whether man's decision to sell his kidney for commercial gain is halakhically proper is a matter of much debate. Some say it is intrinsically valuable and dignified; whereas others claim that it is wrong to engage in such activity.<sup>57</sup> In effect, whereas the Fried-Cohen school of thought views selling kidneys as a reflection of personal impairment, those that impart halakhic affirmation of these commercial sales give credibility to the donor's decisional authority. In short, a religious legal system may support the sale of kidneys, whereas thinkers, with a secular orientation, may oppose the practice. Though a secular orientation may view the sale of kidneys as an impairment of rationality and autonomy, a halakhic perspective will perceive it as a purposive act of the donor's authority. Moreover, halakhically speaking, it is equally a purposive action from the perspective of the person who buys the kidney. One can acquire from another person by means of a *kinyan*, i.e., the acquisition of legal rights by a symbolic act, objects with which one intends to benefit oneself. Hence, one cannot acquire the right to hurt someone else or acquire something only for the purpose of damaging the acquired object. For example, a creditor cannot acquire the right to place a debtor into prison or as in the *Merchant of Venice* scenario, Shylock, the creditor cannot obligate himself to receive Antonio's "pound of flesh" which is devoid of beneficial value. However, R. Zalman Nehemiah Goldberg observes acquiring something of beneficial use such as a kidney for transplantation purposes is an efficacious transaction, even if remuneration is required.<sup>58</sup>

### III.

The foregoing suggests that for numerous decisors, selling of kidneys is halakhically proper. In fact, there is record evidence in secular professional literature that these sales are legally and morally acceptable.<sup>59</sup> However, slippery slope advocates would contend that selling kidneys would create an international black market where the sellers will be disproportionately poor and in effect widen the existing gap between the rich and the poor, an ethically indefensible policy. Furthermore, ignorance regarding the nature and risk of nephrectomy as well as burdening society with unfunded costs should serve as grounds for prohibiting the functioning of a market for human organs. Summarizing these various concerns and fears expressed in the literature, one legal commentator notes,<sup>60</sup>

If organs were sold, it is reasonable to expect that disproportionately poor people, often minorities, would be persuaded or exploited into selling their kidneys simply to escape debt. Conversely it would primarily be the wealthy who could afford to purchase them . . . the law would prevent poor people from becoming the only “sellers,” and it would provide both poor and wealthy individuals equal access to those organs being supplied—irregardless of their ability to pay.

The potential for exploitation is not merely a theoretical or academic concern. Newspaper and medical journal accounts of black markets in organs document the fact that poverty is the driving force behind the sales. A recent study in *JAMA* confirmed that 96% of black market kidney sellers in India agreed to the sale in an effort to escape financial hardship. . . .

Another legitimate concern posed by allowing a market for human organs is that the sellers would lack sufficient information to properly weigh the consequences on themselves and society when they make the choice to trade their organs for cash . . . . Compounding this problem is that potential sellers often suffer from “optimism bias”—i.e., even if they understand the precise risks involved, they often believe that those risks simply “won’t happen to me”. . . . Furthermore, sellers might impose unknown risk on buyers by concealing adverse health information in their own past so as not to be ruled out as a potential candidate for sale. . . .

In fact, data from today’s black market reinforces this conclusion. Of the sellers in India’s black market kidney trade, 86% reported that their health had deteriorated substantially from its pre-sale condition. Not surprisingly . . . four out of five sellers would not recommend that oth-



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ers follow their lead in selling organs. . . .

While health deterioration borne by a human organ seller may fall on her own shoulder . . . the private calculus in agreeing to a sale (i.e., the amount of money received versus the predicted risks to the seller's health) may be substantially different than the overall considerations facing society. Because sellers may lack information or overestimate their resiliency, the state can be expected to bear significant medical costs to care for some of those individuals in the future—costs that sellers will ignore in making their own decision because they do not bear them. . . .

In response, whatever our moral sentiments and pragmatic considerations are regarding allowing commercial sales of human organs, we have an obligation to inquire seriously into these difficult issues.<sup>61</sup> One must address the other part of the story, the thousands of people awaiting a kidney—the prospective recipients whose lives will be saved and enhanced if they receive a kidney or otherwise experience the prospect of dying, or possibly suffering needlessly, if they do not. How does halakha view these public policy considerations banning the sale of kidneys? Are these policy considerations reflective of halakhic norms or are they beyond the pale of halakha, and nonetheless incorporated into a principled halakhic position?

If, in fact, *pikku'ah nefesh* is an overriding concern, uppermost in the minds of many authorities, and there are halakhic grounds for sanctioning these sales, can we sit by the sidelines and prohibit the sale of kidneys, allowing our fellow-Jews who need a kidney to die or suffer needlessly?<sup>62</sup> Seemingly, at first glance, despite all of R. Lau's reservations (which are similar to others) about commerce in kidneys we should wholeheartedly endorse his conclusion:<sup>63</sup>

However, I have not found in a halakha a way to prevent a person whose life is in danger from saving himself by spending his own money. It is not apparent to me how this can be denied him, based on the claim that another man who is in similar danger is unable to save himself because he lacks funds. The prevailing principle is, "All that a person has may be given to save his life."

Moreover, this line of argumentation seems to be self-evident and affirmed by our own study.

Nevertheless, this conclusion may be qualified by the rules emerging from the ransoming of captives, i.e., *pidyon shevuyim*. According to the Mishna in *Gittin* (4:6), among the various regulations that were

instituted for the sake of maintaining societal order, i.e., *tikkun ha-olam*, was that “*ein podin et ha-shevuyin yoter me-al demeheim*,” i.e., one cannot comply with a ransom demand which is in excess of their worth. As elucidated upon by the Talmud,<sup>64</sup> the justification for this rabbinic legislation, i.e., *takkana*, is either to avoid *dubka de-tsibbura*, i.e., communal impoverishment, or *de-lo li-grevu ve-letu tefei*, i.e., to discourage our enemies from making exorbitant demands for similar acts in the future. Whether the purpose of this regulation of prohibiting redemption for more than the captive’s value was either to avoid the imposition of heavy financial burdens upon the community or to discourage the possibility of extortion or blackmail in the future is a subject open to much debate. Given that the Talmud did not resolve the grounds for this regulation and in light of other talmudic passages which seemingly implement or contradict this *takkana*,<sup>65</sup> some decisors argue that the rationale is in order to discourage future kidnapping, others argue it is because of the fear for public impoverishment, and some claim that the legislation rests upon both views.<sup>66</sup> Equally in dispute is whether this *takkana* applies in cases of *pikku’ah nefesh*.<sup>67</sup> Accordingly, some argue that physical danger is sufficient reason for redeeming a captive at any price.<sup>68</sup> Others demur, claiming that the *takkana* applies even in cases of mortal danger. Hence, danger is not a sufficient consideration in a case of captivity to permit ransoming at exorbitant sums of money.<sup>69</sup>

Employing the rules of *pidyon shevuyim* to serve as a framework for the propriety of permitting market exchanges in kidneys would yield the following results: First, we need to define the nature of our concern. Some warn that a market for live kidney procurements threatens the continued viability of cadaveric organ procurement. Assuming that public safety is the grounds for the *takkana* dealing with ransoming captives and is applicable even in cases of mortal danger, then analogously speaking, there is legitimate concern for the continuing availability of cadaveric organ procurement, i.e., future markets. To put it another way, the allowance of commerce in such human components may dissuade people from selling their right to harvest their kidney upon death.<sup>70</sup> Ought we to service the current individuals who are seeking to sustain their lives with use of economic incentives, or are we fearful for future life endangerment, given the possible decrease in cadaveric kidney procurement? Evaluating this situation from the perspective of *pidyon shevuyim*, the paramount significance of *de-lo li-grevu ve-letu tefei*, i.e., safeguarding public safety, leads us to conclude that there ought to be a ban on markets for live donors.

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What happens if the motivation for legislation banning the sale of kidneys is a societal-economic concern rather than fears of future life endangerment? As we explained, some worry about depletion of communal funds and the exploitation of poor people by the international market in kidneys. As we have noted, communal impoverishment, i.e., *dubka de-tsibbura*, is a militating factor for proscribing the payment of inordinate sums to abductors. Assuming that public impoverishment is the grounds for the *takkana* and is applicable even in cases of physical danger, then analogously, there is a distinct possibility that the “deep pockets” of the community will be tested in allowing the marketing of kidneys.<sup>71</sup> Ought we sustain donors with the use of financial incentives, or are we concerned about adding more fuel to an existing black market? Here again, utilizing the perspective of *pidyon shevuyim*, the importance of communal impoverishment leads us to conclude that there ought to be a ban on markets for live donors.

In short, whether one employs the line of argument of public impoverishment or possible future physical endangerment, the conclusion is that there should be a legislative ban on such markets. Moreover, if in the case of ransoming which involves the performance of a mitsva, i.e., *pidyon shevuyim*, there is a regulation prescribing a ceiling for expenditures for ransom, a fortiori, in kidney donation which according to most authorities is an act of pious conduct, i.e., *middat hasidut*, there ought to be a prohibition against such commerce!

In the final analysis, though the two rationales underlying the legislation of *pidyon shevuyim*, *de-lo li-grevu ve-letu tefei* and *dubka de-tsibbura*, may lead to different results,<sup>72</sup> nevertheless, both reasons convey the overarching significance of the community over individual needs. In effect, both topics, the ransoming of captives and renal transplantation convey the identical halakhic notion.

On a conceptual plane, the varying rationales underlying the legislation of *pidyon shevuyim* address the two different yardsticks which assess the continued stability of the community.

*De-lo li-grevu ve-letu tefei* serves as one of the avenues for guaranteeing the *physical survival of the tsibbur*, i.e., the community. Hence, an individual of financial means, wishing to ransom a captive, even in a case where the physical endangerment of the captives is at stake, may not yield to extortion lest the future survival of the community be threatened.<sup>73</sup> In other words, even though the purpose for ransoming is to save human life, nevertheless, if the effect of such an act entails possible danger, i.e., *safek sakkana*, for the Jewish community, the action is

forbidden. Analogously, despite the immediate saving of human lives, kidney sales ought to be banned, lest the community be exposed to possible future endangerment due to potential donors' reluctance to participate in cadaveric kidney procurement arrangements. Even though numerous arbiters argue that an *individual* is exempt from saving human life in cases of possible self-endangerment,<sup>74</sup> nonetheless, a *community*, R. Goren opines,<sup>75</sup> has a responsibility to protect itself from potential loss of human life. On similar grounds, he argues that during wartime, the conventional rules of *pikku'ah nefesh* do not apply. Consequently, possible self-endangerment does not exempt a Jewish soldier from entering the battlefield.<sup>76</sup> In short, the exposure to *possible physical danger* serves as one of the rationales for the establishment of a uniquely singular standard for the community.

On the other hand, *dubka de-tsibbura* conveys to us the idea that the *tsibbur* is equally defined by an *economic* yardstick. Though an *individual* with financial means wishing to ransom a captive may be permitted to pay inordinate sums, the *community* cannot be exposed to economic hardship.<sup>77</sup> To put it another way, even though ransoming involves the saving of life, if the effect of such an action leads to possible communal impoverishment, the act is forbidden. This conclusion is pursuant to the opinion that only an individual is obligated to expend all their financial resources in order to perform a mitsva which involves a negative act, i.e., *mitsva lo ta'aseh*. However, to avoid bankruptcy, the public treasury may expend only a maximum of one-fifth of its net assets for life preservation.<sup>78</sup> In effect, the depleting of public funds is akin to *pikku'ah nefesh*.<sup>79</sup> Analogously speaking, despite the immediate saving of human life, the selling of kidneys ought to be banned, lest the community be financially overburdened with subsidizing kidney procurement and be victimized by the exploitation of the black market.<sup>80</sup> Even if one contends that these economic and social concerns presently are nonexistent, nonetheless, the probability of these events transpiring in the future suffices for outlawing the sale of kidneys which involves the likelihood of saving many lives.<sup>81</sup> As R. Moshe Hershler notes,<sup>82</sup>

Underlying the reason for *dubka de-tsibbura*, we uncover a fundamental principle in the laws of rescue. The community is empowered to set up practices or communal ordinances for the benefit of its community even though the net result is that individuals will be endangered or will prevent the rescue of individuals . . . for purposes of the betterment of the community, one may disregard individual endangerment.

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In sum, though R. Hershler's words were limited to unraveling the implications of *dubka de-tsibbura*, his words equally apply towards uncovering the meaning of *de-lo li-grevu ve-letu tefei*. Communal needs rise and above and beyond individual needs, even in cases of immediate individual life-threatening situations. In various contexts, the *tsibbur* as defined both in terms of public safety and fiscal stability assumes paramount significance above and beyond individual needs. In effect, the ban of selling kidneys will allow for development of feelings of altruism, a concern equally voiced in the professional literature<sup>83</sup> and reinforces the individual's ties to the community as a collective entity promoting the values of safety and fiscal stability.

In conclusion, the foregoing presentation reflects a tense, vibrant, ongoing dialectic functioning within the varied positions emerging from the subject of renal donation and the market for body parts. On one level, does the preservation of human life suspend the halakhic strictures against wounding oneself? Alternatively, is self-inflicted harm for the sake of saving human life permitted? Differing responses have been given to these questions resulting with ramifications for the issue of selling kidneys for pecuniary gain.

Assuming that this dialectic resolves itself with a position affirming kidney donation and the legitimacy of its sale which is reflective of the majority opinion,<sup>84</sup> nonetheless, there remains a second dialectic. Given the potential danger to life and socio-economic considerations, ought one ban commerce in kidneys? On one hand, there is the opportunity to save human life. On the other hand, kidney donation for pecuniary gain, as the literature indicates has negative consequences. As we have shown, the mitsva of *pidyon shevuyim* imparts a perspective and direction to resolve this question. The public policy considerations for promoting or banning the sale of kidneys are *reflective* of these halakhic norms of *pidyon shevuyim* rather than simply imbibing the views of contemporary philosophers, ethicists, and social critics. How are the norms of ransoming captives to be implemented? Within the framework of *pidyon shevuyim*, as enunciated by R. Ovadia Yosef,<sup>85</sup> the norms are to be governed by:

*ko'ah bet din la'akor davar torah be-shev ve-al ta'aseh*, i.e., rabbis are empowered to issue a directive uprooting a biblical injunction "to sit and not do."

There is a rule that rabbinic authorities and/or a court are empow-

ered, under certain conditions, to uproot a biblical directive through passive abrogation, i.e., “to sit and not do.”<sup>86</sup>

Pursuant to the mishnaic explanation of “*mi-penei tikkun ha-olam*,” i.e., for reasons of societal betterment,<sup>87</sup> rabbinic authorities as well as communal governments represented by *tovei ha-ir*, i.e., lay judges or communal representatives, were authorized to direct its citizenry to refrain from performing the biblical imperative to save captives, i.e., *shev ve-al ta’aseh*,<sup>88</sup> if acceding to exorbitant ransom demands would result in community debilitation.<sup>89</sup> Analogously, the argument has been advanced that contemporary rabbinic authorities are empowered to ban commerce in kidneys given various societal concerns, akin to those which are factored into the issue of ransoming captives.<sup>90</sup> Whether, in fact, legislation “*le-migdar milta*,” i.e., protective regulation,<sup>91</sup> banning trade in kidneys will be introduced by rabbinic authorities or communal authorities depends upon whether contemporary decisors feel themselves qualified to legitimate the passage of such rabbinic and/or communal ordinances in the Jewish communities of the diaspora and Israel after the completion of the Talmud.<sup>92</sup> Assuming there exists legitimate authority for passing such an ordinance, then, prior to its passage, one must address the rationality of the arguments supporting the commercial ban on kidney procurement. If, upon review and study, there is sufficient justification for supporting such a ban, the ordinance ought to be passed. In the absence of justification, the sale of kidneys should be permitted.<sup>93</sup>

May it be the will of Ha-Shem that we will return to learn these issues in response to an inquiry; a study without practical application, in the format of “*derosh ve-kabel sakhar*.”

## NOTES

1. For rabbinic responsa, contemporary rabbinic and scholarly expositions, see R. Avraham Avraham, *Nishmat Avraham* II (Jerusalem: Schlesinger Institute, 5753), *Yoreh De’ah* 157, nos. 3-4; *Nishmat Avraham* IV (Jerusalem: Schlesinger Institute, 5753), *Yoreh De’ah*, pp. 211-213, 264-265 and 349; R. Ya’akov Ariel, *Be-Ohela Shel Torah* (Kfar Darom: Makhon ha-Torah ve-haArets, 5758), *Hoshen Mishpat* no. 100; R. Naftali Bar Ilan, “Bone Marrow Transplants: Halakhic Perspectives” [in Hebrew], *Sefer Assia* 9 (5764), p. 354; R. J. David Bleich, *Contemporary Halakhic Problems* IV (N.Y.: Ktav, 1995), pp. 273-287; R. Shelomo Dichovsky, “Rescue and Treatment: Halakhic Scales of Priorities” [in Hebrew], *Dine Israel* 7

- (5736), p. 45; R. Moshe Feinstein, *Iggerot Moshe, Hoshen Mishpat* I, no. 103, *Yoreh De'ah* II, no. 174: *Anaf*, no.4; R. Shelomo Goren, "The Selling of Kidneys According to Halakha" [in Hebrew], in *Torat ha-Refu'a* (Jerusalem: Mesorah le-Am, 5761), p. 127; R. Levi Yitshak Halperin, *Teshuvot Ma'aseh Hoshev* IV (Jerusalem: Scientific Institute for Technology of Halakha, 5757), nos. 54-68; R. Mordechai Halperin, "Removal of Organs from a Live Donor: Halakhic Perspectives" [in Hebrew], *Assia* 45-46 (Tevet 5749), p. 34; R. Moshe Herschler, *Halakha u-Refu'a* II (Jerusalem: Regensburg Institute, 5741), p. 122; Aaron Kirschenbaum, "The Good Samaritan and Jewish Law," *Dine Israel* 7 (5736), p. 7; R. Yisrael Lau, *Teshuvot Yabel Yisrael*, II, nos. 61, 74-75 and "Organ Sales for Transplantation" [in Hebrew], *Tehumin* 18 (5758), p. 125; R. Shalom Offen, "The Saving of Lives in Situations of Potential Danger" [in Hebrew], *Itturei Kohanim* 86 (Nissan 5752); R. Shabtai Rappaport, "Sales of Organs from a Living Donor for Transplant: Motivation and Decision Making," in *Equitable Distribution of Human Organs for Transplantation*, ed. Alfredo Rabello (Jerusalem: Sachar, 2003), p. 97; Daniel Sinclair, "Organ Transplants in Jewish Law: Traditional Doctrine and Modern Policy," in *ibid.*, p. 109; R. Abraham Sherman, "Organ Donation for Pecuniary Gain" [in Hebrew], *Tehumin* 20 (5760), p. 353; R. Avraham Steinberg, "Renumeration for Organ Donation: Ethical and Halakhic Perspectives" [in Hebrew], in *Kovets ha-Tsiyyonut ha-Datit: Zerach Warhaftig Jubilee Volume* (Jerusalem, 5762), p. 417; R. Eliezer Waldenburg, *Tsits Eliezer*, IX, no. 45, X, no. 25, chapters 7 and 28; R. Yitshak Weiss, *Teshuvot Minhat Yitshak*, VI, no. 103; Elimelech Westreich, "One Life for Another in the Holocaust: A Singularity for Jewish Law?" *Theoretical Inquiries in Law* 1 (July 2000), p. 1; Michael Wygoda, "Organ Donation from Live Donors and Trade in Them" [in Hebrew], *Assia* 71-72 (5763), p. 24; R. Shaul Yisraeli, *Teshuvot Havot Binyamin* III, no. 109; and R. Ovadia Yosef, "A Responsum Regarding the Permissibility of a Kidney Transplant" [in Hebrew], *Dine Israel* 7 (5736), p. 25; "The Law of Kidney Donation" [in Hebrew], *Halakha u-Refu'a* III (Jerusalem: Regensburg Institute, 5743), p. 61 and *Teshuvot Yehaveh Da'at* III, no. 84.
2. Ronnie Warburg, "A Parent's Decision to Withhold Medical Treatment: A Case Study in Competing Analogies," *Dine Israel* 17 (1993-1994), p. 35, 42-43.
  3. Rashi, *Sanhedrin* 73a.
  4. R. Avraham Gombiner (Poland, circa 1637-1683), Magen Avraham, *Shulhan Arukh Orah Hayyim* 156 (end); and R. Naftali Tsevi Berlin, (Russia, 1817-1893), *Ha-Emek She'ela, Parashat Shelah*, 129:4. Cf. Za'ir Zahav's and R. Yaakov Emden's views recorded in *Nishmat Avraham*, II, *Yoreh De'ah* 157:4 (2). For an attempt to reconcile these conflicting views, see Bleich, *supra* n. 1, at p. 283, note 25. Cf. with R. Moshe Hershler who opines that the factor of experiencing pain is relevant regarding performance of all positive actions, i.e., *mitsvat asseh*, excluding the rescue of human life. See R. Moshe Hershler, *Halakha u-Refu'a*, IV (Jerusalem: Regensburg Institute, 5745), p. 363. For further discussion, see R. J. David Bleich, "Palliation of Pain" *Tradition* 36:1 (2002), pp. 89, 90-94.

5. R. Avraham, supra note 1 at pp. 66-67 and R.Yosef, *Dine Israel*, supra note 1, at p. 31.
6. Though the Talmud Yerushalmi observes that one must place one's life in possible danger in order to preserve the life of another, most authorities argue that the risk addressed in this passage is of a higher threshold than the one referred to in the Talmud Bavli. For further discussion regarding the passage in the Yerushalmi, see Kirschenbaum, supra note 1, at pp. 42-44; Bleich, supra note 1, at pp. 275-278. Given the absence of a definition of what constitutes risk has led other decisors to conclude that "everything depends upon the individual circumstances." R. Yehiel Epstein (Belarus, 1829-1908), *Arukh ha-Shulhan*, *Hoshen Mishpat* 426:4; and R. Avraham Eisenstadt (Poland, 1813-1868), *Pithei Teshuva*, *Hoshen Mishpat* 426.
7. *Teshuvot Radvaz* V, no. 1582 (no. 218) The translation of this responsum has been culled from Westreich, supra note 1, at p. 12. This responsum contradicts *Teshuvot Radvaz*, III, no. 1053 (628). For various attempts to reconcile this seeming contradiction, see Bleich, supra note 1 at pp. 276, note 10 and 280, note 20; Westreich, supra note 1, at pp. 14-15.
8. See Bleich, supra note 1, at pp. 276-278.
9. Presumably, the risk involved in organ amputation which is the question addressed in Radvaz's responsum is categorized based upon his knowledge of sixteenth century Egyptian medicine. For the dating of the above cited responsum (supra note 7) see Boaz Cohen, *Kuntres Ha-Teshuvot* (Jerusalem: Makor, 5730), p. 47.

In addition to utilizing societal risk and performance of a mitsva as the grounds for allowing kidney transplants (see text accompanying note 14), R. Yosef, at an earlier juncture of his responsum, alludes to the assessment of risk based upon medical technology as another independent yardstick. Though R. Yosef, as well the majority of arbiters, endorse Radvaz's categories of risk, nevertheless, whereas Radvaz himself utilizes human perception towards defining the type of risk, the others assess the state of medical science and/or the assumption of societal risk in arriving at a definition of "halakhic-risk."

10. *Pesahim* 8a-b, R. Shelomo Z. Auerbach, cited in *Shemirat Shabbat ke-Hilkhata* I (Jerusalem: Feldheim, 5739), p. 39, note 4. However, the exception would be an individual who engages in the learning of Torah *lishmah* (for its own sake) who is protected from common dangers. See *Sotah* 21a. Cf. R. Israel Isserlein (Germany, 15th cent.), *Terumat ha-Deshen* no. 211; and R. Moshe Sofer (Hungary, 1762-1839), *Teshuvot Hatam Sofer*, *Even ha-Ezer*, no. 23 who opine that such an individual should not rely on divine protection in a situation deemed to be dangerous. Their conclusion dovetails with the posture that an individual may always decide to refrain from relying upon "the safety net" even in halakhically sanctioned cases. See R. Yom Tov Ishbili (Spain, ca. 1200-1264), *Hiddushei ha-Ritva*, *Yevamot* 72a; R. Joseph Karo, *Tur*, *Bet Yosef Yoreh De'ah* 172; and *Teshuvot Tsits Eliezer*, IX, no. 17, *Kuntres Refu'a be-Shabbat*, Chapter 2.
11. For its application and scope in the Babylonian Talmud, see *Shabbat* 129b; *Yevamot* 72a; *Avodah Zarah* 30b; *Nidda* 31b and in the Jerusalem Talmud, see *Terumat* 8:3.



## TRADITION

12. R. Abraham Borenstein (Poland, 1839-1910), *Teshuvot Arnei Nezer Orach Hayyim*, no. 454:2; *Teshuvot Hatam Sofer Orach Hayyim*, no. 196; *Iggerot Moshe, Yoreh De'ah*, II, no. 97; and R. S.Z. Auerbach, supra note 10.
13. As the Talmud states: "the multitude has trodden thereupon." See *Shabbat* 129b and *Yevamot* 71b. For application of this rationale in varying contexts, see R. Hayim Grodzinski (Russia, 19th cent.), *Teshuvot Abi'ezer, Even ha-Ezer*, no. 23; R. Solomon Lifschutz (Warsaw, 19th cent.), *Teshuvot Hemdat Shelomo*, no. 46; R. Malkiel (Lomza, 19th cent.), *Teshuvot Divrei Malki'el, Even ha-Ezer*, no. 70; R. Shneur Zalman of Lublin (20th cent.), *Teshuvot Torat Hesed*, II: *Even ha-Ezer*, no. 44; R. Shelomo Z. Auerbach cited in *Nishmat Avraham Yoreh De'ah* 155:2(2); *Tsits Eliezer*, supra note 10; *Iggerot Moshe, Yoreh De'ah*, II, no. 49 and *Hoshen Mishpat*, II, no. 6. In situations where emerging evidence indicates that either the act has become dangerous or that society begins to view it as dangerous, one must refrain from such behavior. See R. Mordechai Ya'akov Breisch (Switzerland, 1895-1977), *Teshuvot Helkat Ya'akov*, III, no. 11; R. Isser Unterman (Israel, 20th cent.), *Shevet mi-Yehudah* (Jerusalem: Mosad ha-Rav Kook, 5744), I, *Sha'ar* 1:19; and R. Eliezer Waldenburg (Israel, 21st cent.), *Tsits Eliezer*, XV, no. 39. Moreover, an individual who is educated and informed to the point of realizing that societal acceptance of a particular risk is ill-founded ought to refrain from endangering himself. See *Terumat ha-Deshen*, supra n. 10 and *Teshuvot Minhat Shelomo, Tanina* no. 37. Others argue that the rule 'the multitude has trodden thereupon' is limited to the dangerous situations enumerated in the Talmud. See *Teshuvot Helkat Ya'akov, Yoreh De'ah*, no. 39. Cf., *Tsits Eliezer*, I, no. 37.
14. Bleich, supra note 1, at pp. 285-286.
15. Levi Halperin, supra note 1, at 60. However, upon concluding his response, he adds that it is *middat hasidut*, i.e., an act of piety, to offer a donation.
16. Dichovsky, supra note 1 at p. 59 and Yisraeli, supra note 1.
17. *Bava Metsi'a* 112a. For its application in other contexts, see R. Yehezkel Landau (Prague, 1713-1793), *Teshuvot Noda bi-Yehudah*, II, *Yoreh De'ah*, no. 10; R. Aryeh Balchover (Russia, 19th cent.), *Teshuvot Shem Aryeh*, no. 27; R. Israel Kook (Israel, 20th cent.), *Teshuvot Mishpat Kohan*, no. 143; *Iggerot Re'iyah* (Jerusalem: Mosad ha-Rav Kook, 1985), III, *Iggeret* no. 852; *Tsits Eliezer*, IX, no. 17, 5:9; and R. Herschel Schachter, *Be-Ikvei ha-Tson* (Jerusalem: Flatbush Bet Midrash, 1997), pp. 228-229. For undertaking military conscription in order to sustain a livelihood, see sources cited in Y. Z. Kahana, *Mehkarim be-Sifrut ha-Teshuvot*, (Jerusalem: Mosad ha-Rav Kook, 5733), pp. 163-167 and R. Ya'akov Zisburg, "Traveling Endangerment in Living in Israel" [in Hebrew], *Tehumin* 17 (5757), pp. 86, 90, note 10.
18. Mordechai Halperin, supra note 1.
19. *Tsits Eliezer*, IX, no. 45; X, no. 25, *Perakim* no. 7 and no. 28; and R.Y. Weiss (Israel, 21st cent.), *Teshuvot Minhat Yitshak*, VI, no. 103. Given that the current medical risks of nephrectomy are minimal, these arbiters would have to revisit their above referenced 1960 rulings in order to determine whether the medical procedure continues to be a "*safek sakkana*" for the donor.
20. Feinstein, supra note 1; *Yabel Yisrael*, supra note 1, at 75; and R. Ya'akov

- Levy, "An Inquiry into New Medicines and Halakhic Problems" [in Hebrew], *No'am* 13 (5731), pp. 77-82.
21. *Shevet mi-Yehudah*, p. 53; and Mordechai Halperin, supra note 1, at pp. 332-336.
  22. Mordechai Halperin, supra note 1.
  23. For the articulation of our issue in one-dimensional or two-dimensional terms, see Wygoda, supra note 1.
  24. Rambam, *Hilkhot Hovel u-Mazzik* 5:1; and Tosafot, *Bava Kamma* 91b,s.v. *el'la hai*.
  25. Rappaport, supra note 1, at pp. 98,105.
  26. Rambam, supra note 24, at *Hovel u-Mazzik* 5:1. For variant readings, see Frankel, ed. *Mishneh Torah, Sefer Nezikin*. See also, Rambam, *Hilkhot She'vuot* 5:17. Though most decisors proscribe self-inflicted injury (*Encyclopedia Talmudit* [Jerusalem: Yad ha-Rav Herzog], XII, s.v. *hovel*), nevertheless, it is sanctioned if it serves a purpose. Even R. Meir Abulafia (Rama) (Spain, circa 1165-1244) and R. Joel Sirkes (*Bah*) (Poland, 1555-1614) who allow self-inflicted injury, only permit it if has beneficial consequences. See R. Shelomo Luria (Poland, 1510-1573), *Yam Shel Shelomo, Bava Kamma* 8:59.
  27. *Teshuvot Helkat Yaakov*, III, no. 11; R. Menashe Klein (N.Y., 21st cent.) *Mishneh Halakhot*, IV, nos. 246-247; *Iggerot Moshe, Hoshen Mishpat*, II, nos. 65-66; and R. Bakshi-Doron (Israel, 21st cent.), *Teshuvot Binyan Av*, I, no. 50. Cf. *Tsits Eliezer*, XI, no. 41; and R. Shmuel Wosner (Israel, 21st cent.), *Teshuvot Shevet ha-Levi*, VI, no. 198.
  28. Charles Fried, *Right and Wrong* (Cambridge: Harvard, 1978), pp. 123, 142. See also Leon Kass, "Organs for Sale? Propriety, Property and the Price of Progress," *Public Interest* 107 (1992), pp. 72, 73; Mario Morelli, "Commerce in Organs: A Kantian Critique," *Journal of Social Philosophy* 30 (1999), pp. 315, 320. Among the difficulties with this approach is that the kidney seller, despite his loss of a kidney, still retains his personal integrity, i.e., rationality and autonomy. Cf. with a halakhic approach described in our text accompanying notes 53-57. Secondly, we generally promote laws to deal with violation of someone else's rights. And here, from a Kantian perspective, we are asking the law to enforce a duty to oneself. See Lori Andrews, "My Body, My Property," *Hastings Center Report* 16 (1986), pp. 28, 37; and Gerald Dworkin, "Markets and Morals: The Case of Organ Sales," in *Morality, Harm and the Law*, ed. Gerald Dworkin (Boulder, Co.: Westview, 1994), p. 155. Though aware of the latter flaw in his argumentation, Fried chooses not to address this contention. See Fried, *ibid.*, p.142.
- For additional discussions of a Kantian perspective regarding the selling of body parts, see Stephen Munzer, "Kant and Property Rights in Body Parts," *Canadian Journal of Law and Philosophy* 6 (1993), p. 339; and Cynthia Cohen, "Selling Bits and Pieces of Humans to Make Babies: The Gift of the Magi Revisited," *Journal of Medicine and Philosophy* 24 (1999), p. 288.
29. Kenneth Arrow, "Gifts and Exchanges," *Philosophy and Public Affairs* 1 (1972), p. 350.
  30. Stephen Munzer, "An Uneasy Case Against Property Rights in Body

Parts,” *Social Philosophy and Policy* 11 (1994), p. 259; Margaret Jane Radin, “Market Inalienability,” *Harvard Law Review* 100 (1987), p.1849; Margaret Radin, *Contested Commodities* (Cambridge: Harvard, 1996); and Leon Kass, *ibid.* Cf., with others who contend that placing a price tag on something need not be the only measure of its value. Buying a wedding ring or obligating spousal support does not reflect the value of these relationships. We simply acknowledge that the monetary exchange is one aspect of the human relationship. In fact, placing a price tag on a kidney might suggest that we reward with money what we cherish. See Marjorie Shultz, “Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality,” 1990 *Wisconsin Law Review* (1990), pp. 297,336.

31. James Childress, “Ethical Criteria for Procuring and Distributing Organs for Transplantation,” in *Organ Transplantation Policy, Issues and Prospects*, eds. James Blumstein and Frank Sloan (Durham: Duke University, 1989), pp. 87,101. Though blood is sold on the open market, nevertheless, legally it has been viewed as “a provision of service” rather than “a sale of a product.” See Helen Bergman, “Case Comment: *Moore v. University Regents of California*,” *American Journal of Law and Medicine* 18 (1992), pp. 127, 135-136. Cf. *Carter v. Interfaith Hosp. of Queens*, 304 N.Y.S. 2d 97,101 (N.Y. Sup. Ct. 1969) and *Green v. Commissioner*, 74 T.C. 1229, 1234-5 (1980). However, in reality, it is a two billion dollar American industry. See Danielle Wagner, “Comment, Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology,” *Duquesne Law Review* 33 (1995), pp. 931, 945.

However, the argument has been advanced that even though selling blood is not intrinsically demeaning to human dignity, it becomes so where poverty forces people to sell their blood to survive. See Stephen Munzer, *infra* note 35, at p. 56. Cf., Andrews, *supra* note 28, at p. 32.

32. Cynthia Cohen, *supra* note 28, pp. 288, 299; and David Lamb, *Organ Transplants and Ethics* (London: Routledge, 1990), p. 136.
33. Fried, *supra* note 28, at p. 142; Cohen, *supra* note 28, at p. 294; and Abouna G.M., et al, in *Organ Replacement Therapy: Ethics, Justice, Commerce*, eds. W. Land and J. Dossetor, (N.Y.: Springer, 1991), pp. 164-172.
34. Peter Singer, “Altruism and Commerce: A Defense of Titmuss Against Arrow,” *Philosophy and Public Affairs* 2 (1973), pp. 312, 317; Thomas Murray, “On the Human Body as Property: The Meaning of Embodiment, Markets and the Meaning of Strangers,” *Journal of Legal Reform* 20 (1987), pp. 1055, 1056-57; and Amitai Etzioni, “Organ Donation: A Communitarian Approach,” *Kennedy Institute of Ethics Journal* 13 (2003), p. 1. Pursuant to this line of reasoning, the introduction of financial incentives for organ procurement should produce little or no increase in organ availability. In fact, within the context of blood donations, this issue has been debated and there is no clear-cut empirical evidence indicating such a conclusion. See Richard Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (N.Y.: Pantheon, 1971) and Arrow, *supra* note 29. Though there is a substantial body of evidence indicating that altruism is prevalent among humans (see C. Daniel Batson and Laura Shaw, “Evidence for Altruism: Toward a Pluralism of Prosocial Motives,” *Psychologi-*

- cal Inquiry* 2 [1991], p. 101), nonetheless, altruistic behavior is hard to calibrate. See Oded Stark and Ita Falk, "Transfers, Empathy Formation and Reverse Transfers," *American Economic Review* 88 (1998), p. 271; and William Landes and Richard Posner, "Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism," *Journal of Legal Studies* 7 (1978), pp. 83, 95.
35. Margaret Radin would extend the argument and claim that this language of discourse alienates and precludes us from applying moral valuations of the processes of the marketplace. See Radin, Market Inalienability, *supra* note 30, at pp. 1884-1887. For an overview of the emerging modes of evaluation implicit in that language, see Stephen Munzer, *A Theory of Property* (Cambridge: Cambridge University, 1990). Moreover, due to the pervasiveness of market rhetoric, the rest of society may begin to conceptualize themselves in market terms and thus cause irreparable damage to its citizenry. See the oft-cited article, Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral," *Harvard Law Review* 85 (1972), pp. 1089, 1111-1112. Cf. Thomas Grey, "The Disintegration of Property," in *Nomos XXII: Property*, ed. J. Pennock and J. Chapman, (N.Y.: New York University, 1980), p. 69; and Marjorie Shultz, "Questioning Commodification," *California Law Review* 85 (1997), pp. 1841, 1860.
36. James White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago, 1990), p. 50. For an earlier treatment of the impact of the law's rhetoric in shaping culture, see James White, "Laws as Rhetoric: The Arts of Cultural and Communal Life," *University Chicago Law Review* 52 (1985), pp. 684, 693-695 and Katharine Bartlett, "Re-Expressing Parenthood," *Yale Law Journal* 98 (1988), pp. 293, 294-295.
37. Kass, *supra* note. 28, at p. 75.
38. At first glance, such a conclusion is counterintuitive. Generally speaking, one may not receive remuneration for the performance of a mitsva. See Mishna *Bekhorot* 4:6; and *Shulhan Arukh, Yoreh De'ah* 336:2. Among the suggested rationales for this ruling is that since the action is a byproduct of fulfilling a divine obligation rather than an individual decision to benefit another person, therefore, one is unable to receive compensation. See Rambam, *Perush ha-Mishna Nedarim* 4:2 and R. Shabbetai b. Meir (Poland, 1621-1662), *Siftei Kohen, Shulhan Arukh Yoreh De'ah* 221:22. Nonetheless, if one is performing the mitsva as part and parcel of one's gainful employment, e.g., a physician, or if societal needs dictate that remuneration be forthcoming in order to promote the saving of human life, compensation is permitted. See *Shulhan Arukh Hoshen Mishpat* 246:5; and R. Israel Lifshitz (Germany and Poland, 1782-1861), *Tiferet Yisrael Nedarim* 4:2. Hence, pursuant to the latter reasoning, Rabbis Levi Halperin, Mordechai Halperin, and Ariel argue that the Israeli government should introduce legislation promoting organ procurement and the curbing of discriminatory practices. See Ariel, *supra* note 1, at p. 490; Levi Halperin, *supra* note 1, at p. 67; Mordechai Halperin, *supra* note 1, at p. 339. This proposal is predicated upon the halakhic legitimacy of Israeli leg-

isolation. The issue of the halakhic legitimacy of secular legislation is beyond the scope of this presentation.

Clearly, if the individual refrains from his earning a livelihood in order to perform a mitsva, he is entitled to wages as a “*po’el battel*,” i.e., an unemployed worker. See Ramban, *Torat ha-Adam*, 44. This wage has a dual meaning: Either it is referring to receiving the full extent of his lost earnings, or we estimate how much an individual is willing to receive in wages in order to perform a mitsva. See *Ketubbot* 105a; *Bekhorot* 29b. Whether in the latter category of “*sekhar battala*,” i.e., unemployment wage, the calculation is limited to the “idle time” or encompasses the time expended for preparing to do the mitsva, i.e., *tirha*, is subject to debate. See Tosafot, *Bava Metsi’a* 68a, s.v. *ve-noten* and Tosafot, ad. locum, s.v. *ke-po’el*. Consequently, R. Yisraeli contends that in cases where the donor leaves his ordinary work, he may be compensated for his lost earnings, i.e., *sekhar battala*. However, any other third party who is involved with the donor and/or the recipient is precluded from receiving monies. See Yisraeli, supra note 1.

Moreover, even if one claims that compensation is prohibited, nonetheless, the mitsva of *pikku’ah nefesh* allows the rescuer entitlement to full recovery for any expenditure involved in the rescue operation, i.e., *sekhar tirha*. See supra text accompanying note 2; *Shulhan Arukh Yoreh De’ah* 336:3. For a working definition of *sekhar tirha*, see differing opinions recorded in R. Ephraim Navon (Turkey, 1677-1735), *Mahaneh Efrayim, Hilkhot Sekhirut*, 17. Hence, Rabbis Goren, Yisraeli, L.Y. Halperin, M. Halperin, and others allow the donor to recoup any medical and nonmedical costs associated with the transplantation. See Goren, supra note 1; Yisraeli, supra note 1; Levi Halperin, supra note 1; and Mordechai Halperin, supra note 1. Cf., however, R. Ephraim Navon (*Mahane Ephraim, Hilkhot Avadim* 3) who does not mandate compensation for expenses in the ransoming of captives, a position at variance with many authorities. See *Bet Yosef, Tur Yoreh De’ah* 252; and Rema, *Shulhan Arukh, Yoreh De’ah* 252:12. Secondly, if there is an explicit understanding between the parties to pay a stipulated fee for procuring the organ, the payment must be made. See *Torat ha-Adam* 45; R. Yom Tov Vidal, *Maggid Mishneh* (Spain, 14th cent.) *Hilkhot Gezela Ve’aveda* 12:7; and Levi Halperin, supra note 1; Steinberg, supra note 1. In cases where the stipulated amount is an exorbitant sum, in excess of the organ’s fair market value, the donor may have no cause of action for the collection of this fee. Though decisors have addressed this question, en passant, within the context of selling organs, (Mordechai Halperin, supra note 1) there is much discussion and debate in other areas. See *Yevamot* 106a; *Bava Kamma* 116a. For a summary of the various opinions, see R. Shelomo Cohen (Salonika, 16th cent.), *Teshuvot Maharshal*, I, no. 79 and II, no. 80. Similarly, in the absence of a halakhically bona fide agreement, i.e., a promise to pay, whether the fee is collectible is open to further discussion. See *Teshuvot Yabel Yisrael*, no. 28.

Alternatively, according to numerous decisors, kidney donation is a praiseworthy action, i.e., *middat hasidut*, rather than an obligation (see text accompanying notes 7 and 15; Feinstein, supra note 1), therefore, accepting

compensation poses no problem. See Levi Halperin, *supra* note 1, and Yisraeli, *supra* note 1. The underlying premise is given the fact that the ordinary Jew is exempt from the obligation; consequently, it is not viewed as a “mitsva.” See Rashi, *Hullin* 130b, s.v. *ve-od*; Tosafot, ad. locum, s.v. *tanna*. For a philosophical ramification of this conclusion, see David Shatz, “‘As Thyself’: The Limits of Altruism in Jewish Ethics,” in *Reverence, Righteousness and Rachmanut: Essays in Memory of Rabbi Dr. Leo Jung*, ed. Jacob J. Schacter (New Jersey: Jason Aronson, 1992), pp. 251, 267-268.

Others have contended that the prohibition against accepting remuneration for performance of a mitsva is limited to Jewish educators engaged in the teaching of Torah. See Mordechai Halperin, *supra* note 1, at p. 339, note 79. Hence, selling kidneys poses no problem. In light of the assumption in rabbinic discussions that this rule applies to other professions, such as a physician, *dayan*, *mesader kiddushin*, and possibly a *mesader gittin* and a *shadchan*, the advocacy of such a position is highly problematic.

39. Moshe Silberg, *Talmudic Law and the Modern State* (N.Y.: Burning Bush, 1973), p. 82.
40. Our conclusion flows from a talmudic discussion (*Bava Kamma* 93a), “If the plaintiff said: Maim my eye . . . on the understanding that he would be exempt, and he maimed him, he would be exempt. . . .” His exemption would be limited to damage payments, i.e., *nezek*. However, he would remain liable for any monies involved in fulfilling the provisions of the contract, despite its illegality. See R. Shelomo Zevin, *Le-Or ha-Halakha* (Tel Aviv: Avraham Tsiyoni, 5717), pp. 315-317.
41. Tosafot, *Bava Kamma* 91b, s.v. *ella*; *Mishneh Halakhot*, IV, no. 245; and R. Moshe Zorger (U.S., 20th cent.), *Teshuvot va-Yeshev Moshe*, no. 94:9.
42. *Iggerot Moshe, Hoshen Mishpat*, I, no. 103; R. S. Z. Auerbach, *Nishmat Avraham IV, Hoshen Mishpat* 420:1; and Sherman, *supra* note 1, at p. 361.
43. Rappaport, *supra* note 1, at p. 108.
44. Ariel, *supra* note 1, at 485-487. See also, Yisraeli, *supra* note 1. In fact, currently, the Israeli Knesset is discussing a proposal to promote voluntary donations by offering significant remuneration to the donor due to the risk of nephrectomy, pain, and lost days of work rather than permitting selling kidneys.
45. Mishna *Nedarim* 9:5; *Nedarim* 65b; Mishna *Arakhin* 1:4; *Arakhin* 7b; and R. Yaakov b. Asher (Germany, 1270-1343), *Tur Shulhan Arukh Yoreh De’ah* 349:2.
46. *Iggerot Moshe, Hoshen Mishpat*, I, no. 103; R. Shelomo Auerbach, *Nishmat Avraham Yoreh De’ah* 349:3; and *Teshuvot va-Yeshev Moshe*, no. 93. Whether a blood donation is obligatory, see the varying positions recorded in Bleich, *supra* note 1, at p. 285, notes 27 and 29.
47. Yerushalmi *Shabbat* 6:1; *Teshuvot va-Yeshev Moshe*, *ibid*; and *Teshuvot Shevet ha-Levi* 5, *Hoshen Mishpat*, no 219. Cf., *Mishneh Halakhot*, *op. cit*.
48. Though in the context of reconstructive surgery R. Feinstein concludes that the element of pecuniary gain will not label the medical procedures as “*derekh bizayon*” or “*derekh nitsayon*,” regarding blood donations, it does not even constitute *habbala!* See *Iggerot Moshe, Hoshen Mishpat*, I, no.

- 103, II, nos. 65-66. Cf., *Mishneh Halakhot*, op. cit. Though a phlebotomy is an invasive procedure, in the mind of R. Feinstein it does not constitute “*habbala*.” See *Nishmat Avraham Yoreh De’ah*, 349, p. 265, who questions this conclusion.
49. In fact, R. Povarsky (Israel, 20th cent.), *Bad Kodesh*, IV, no. 52 in an oral communication construes blood as a body part and concludes that there is no obligation to donate one’s organ. See Avraham Goldmintz, “Blood Donation Through the Process of Pheresis” [in Hebrew], *Assia* 67-68 (Shevat 5761), pp. 93, 96, note 20. However, most authorities fail to endorse this view. See supra notes 47-48.
50. *Le-Or ha-Halakha*, supra note 40, at pp. 310-328.
51. R. Shneur Zalman, (Russia, 1745-1813), *Shulhan Arukh ha-Rav, Hilkhot Nizkei Guf ve-Nefesh*, section 4. Regarding God’s ownership of the human body, including that of the non-Jew, see Lau, supra note 1, at pages 126-128.
52. *Ammud ha-Yemini*, no. 16:16-32. For a rejoinder, see *Le-Or ha-Halakha*, supra note 40, at pp. 330-335.
53. Ariel, supra note 1, at pp. 485-486.
54. We are utilizing the term “bundle of rights” as a description of the donor’s authority vis-à-vis his kidney. Our use of the term is not to be confused with the Anglo-American legal definition of property as “a bundle of rights.” For a similar analysis regarding a progenitor’s decisional authority vis-à-vis preembryos, see this writer’s, “Solomonic Decisions in Frozen Preembryo Disposition: Unscrambling the Halakhic Conundrum,” *Tradition* 36:2 (2002), p. 31.
55. Ariel, supra note 1, at p. 487. For a persuasive disanalogy, see Ariel, op. cit. For a similar conclusion regarding the evidentiary rule that a formal admission by a defendant is construed as equal to “the evidence of a hundred witnesses,” see Nachum Lamm, “A Defendant’s Admission is Regarded as Equal to the Evidence of One Hundred Witnesses” [in Hebrew], *Bet Yitshak* 38 (5766), p. 309.
56. *Right and Wrong*, supra note 28, at p. 123.
57. Text accompanying notes 42-44. A secular argument has been advanced that selling a kidney is morally equivalent to selling a person, i.e., enslavement. See text accompanying note 33. Though some decisors such as Rabbi Zalman N. Goldberg, Ariel, and Sherman have addressed this argument, upon review, we find that analyzes of numerous halakhic institutions and norms are required prior to arriving at any conclusion. Given that the systematic and detailed nature of such an inquiry entails the writing of a monograph, we will refrain from responding to this claim.
58. R. Zalman N. Goldberg, “Acquisition in the Selling of Kidneys” [in Hebrew], *Ateret Shelomo* IV (5757), pp. 49, 54-55.
59. R. Schwindt and A. Vining, “Proposal for a Future Delivery Market for Transplant Organs,” *Journal of Health Politics, Policy and the Law* 11 (1986), p. 483; Henry Hansmann, “The Economics and Ethics of Markets for Human Organs,” *Journal of Health Politics, Policy and the Law* 14 (1989), p. 57; James Blustein, “The Case for Commerce in Organ Transplantation,” in *Politics and the Human Body: Assaults and Dignity*, eds. Jean Elstain and J. Timothy Cloyd (Nashville: Vanderbilt University

- Press, 1995), pp. 176, 179-180; Gregory Crespi, "Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs," *Ohio State Law Journal* 55 (1994), p. 1; and Robert Veatch, "Why Liberals Should Accept Financial Incentives for Organ Procurement?" *Kennedy Institute of Ethics Journal* 13 (2003), p. 19.
60. Steven Calandrillo, "Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage," *George Mason Law Review* 13 (2005), pp. 69, 93-96.
61. For a rejoinder to these arguments, see Abouna et al, supra note 33, at 166; Ruth Faden and Tom Beauchamp, *A History and Theory of Informed Consent* (N.Y.: Oxford University, 1986), pp. 337-373; G. Tadd, "The Market for Bodily Parts: A Response to Chadwick," *Journal of Applied Philosophy* 8 (1991), pp. 95, 97; and Calandrillo, supra note 60, at pp. 98-105.
62. As we noted at the outset of our presentation, our discussion is limited to defining our obligation towards the Jewish community. Whether we have a responsibility to promote or oppose this market of selling organs for non-Jewish society or whether non-Jewish society is obligated to address this issue is beyond the scope of this essay.

This portion of our essay is based upon Dr. Michael Wygoda's (Director of Jewish Law Department, Israel's Ministry of Justice) incisive analysis of this issue. See Michael Wygoda, "Organ Sales- The Authority of Legislation and its Parameters" [in Hebrew], Israel's Ministry of Justice, Advisory Opinion No. 19, Tevet 5764 which recently appeared in *Afikei Yehuda, Memorial Volume for R. Yehuda Gershuni*, ed. Itamar Warhaftig, p. 309 (Jerusalem: Ariel, 5765). For an English version of Wygoda's essay see "Organ Selling, Jewish Law and Israeli Law" (manuscript on file with this author). Let us note that our subsequent discussion is reflective "of the words of a student in the presence of his rabbi," i.e., "*ke-talmid bi-fnei rabbo*," rather than the development of the position(s) of a particular decisor(s) regarding this matter, and implicitly adopts the position of the *Tsemah Tsedek*. See infra note 90.

This section of our presentation has implications for a halakhic perspective regarding the ongoing secular legal debate regarding formalism vs. anti-formalism and positivism and neopositivism. The primary issue is whether the halakhic legal system is a "closed legal system" in which decisions can be deduced by logical means from predetermined legal rules, principles, and standards without reference to halakhic and/or secular social aims, policies, and moral values. Addressing this matter is beyond the scope of this essay.

63. R. Lau, supra note 1, at p. 136. This translation is culled from Wygoda, *ibid.*, pp. 3-4.
64. *Gittin* 45a.
65. R. Asher b. Yehiel (Germany, 1250-1357), *Piskei Ha-Rosh*, *Gittin* 4:44; and R. Nissim Gerondi (Spain, ca. 1290-ca. 1375), *Ran al ha-Rif*, *Gittin* 45a, s.v. *ve-ein*; *Gittin* 58a (redemption of a captive child); *Kerubbot* 52a (redemption of a captive wife).
66. R. Shelomo Luria (Poland, 1510-1573), *Yam Shel Shelomo* in the name of the R. Yoel Sirkes (Poland, 1561-1650) known by the acronym *Bah*, *Gittin* 4:66; *Tur Shulhan Arukh Yoreh De'ah* 252:4; and *Shakh*, *Shulhan Arukh Yoreh De'ah* 252:4.



67. For an overview of the varying positions, see R. Ovadia Yosef, “The Entebbe Operation in Halakha” [in Hebrew], *Kinus Torah she-beAl Pei* 19 (5737), pp. 9, 30-37. Whether *pikku’ah nefesh* should be the determinant factor in applying this *takkana* is contingent upon whether one accepts public impoverishment or societal safety as the grounds for this regulation. See, R. Yehudah Gershuni, “Redemption of Captives in Light of Halakha” [in Hebrew], *Kol Tsofayikh* (Jerusalem: Gershoni, 5760), p. 235. Accepting the views of Rabbis Yehudah Gershuni and Moshe Hershtler, we are assuming that the need to protect the public treasury prohibits the payment of inordinate sums for ransoming captives in mortal danger. See Wygoda, supra note 62, text accompanying note 23.
68. Tosafot, *Gittin* 58a, s.v. *kol mammon*; R. Shelomo Luria, supra note 66 and *Gittin* 4:72.
69. R. Moshe b. Nahman (Spain, 1194-1270), *Hiddushei ha-Ramban*, *Gittin* 45a, s.v. *mishum*; R. Meir Lublin (Poland, 1588-1616), and *Teshuvot Maharam Lublin*, no. 15. For possible exceptions and exceptional circumstances to this stance, see *Shulhan Arukh Yoreh De’ah* 252:4; and R. Alfred Cohen, “Ransom or Exchange of Prisoners,” *Journal of Halacha and Contemporary Society* 46 (Fall 2003), p. 61.
70. Once the transplanted kidney is harvested upon the donor’s demise, payment would be made to the beneficiary as provided for by the contract.
71. See text accompanying note 59.
72. R. Yehuda Shaviv, “An Inquiry into *Hilkhot Pidyon Shevuyim*” [in Hebrew], *No’am* 17 (5734), p. 96.
73. *Ibid*, pp. 98-99.
74. Gershuni, supra note 67; and Bleich, supra note 1, at pp. 275-279.
75. Shelomo Goren, “In the Matter of Jibril” [in Hebrew], *Hazofe*, (May 31, 1985) cited by Wygoda, supra note 62, at p. 6, note 17.
76. Shelomo Goren, *Torat ha-Mo’adim* (Tel Aviv: Avraham Tsiyoni, 5724), pp. 174-179; and Goren, *Meshiv Milhama* I (Jerusalem: Ha-Idra Rabba, 5743), p. 12. For earlier precedents, see *Sefer ha-Hinnukh* nos. 93, 425, and 528; R. Joseph b. Moses Babad (Poland, 1800-1872), *Minhat Hinnukh*, mitsva no. 425. R. Naftali Berlin (Russia, 1817-1893), *Ha-Emek Davar*, Genesis 9:5 and Deuteronomy 17:14 and 20:8; and *Teshuvot Mishpat Kohen*, no. 143.
77. Shaviv, supra note 72, at pp. 98-99.
78. Though Hatam Sofer admits that the community has “deep pockets” which mandates certain protective fiscal policies for its citizenry (see *Teshuvot Hatam Sofer*, *Yoreh De’ah*, no. 244), nonetheless, the halakha places limitations upon the fiscal responsibility of the community. See *Teshuvot Hatam Sofer*, *Orah Hayyim*, nos. 32 and 203; *Yoreh De’ah*, no. 334; and *Hoshen Mishpat*, no. 177 (end). Cf. *Rambam*, *Perush ha-Mishna Peah* 1:1; and R. Ya’ir Bacharach, (Germany, 1638-1701), *Teshuvot Havot Ya’ir*, no. 139.
79. Wygoda, supra note 62 at p. 9. For earlier precedent that communal hazard is to be equated to *pikku’ah nefesh*, even though there is no danger or there must be danger, minimally, to one member of the community, see *Ran al ha-Rif*, *Shabbat* 42a (19b per Rif’s pagination); *Hiddushei ha-Rashba Shabbat* 42a; *Hiddushei ha-Ritva Shabbat* 42a; *Maggid Mishneh*,

Hilkhot Shabbat 10:17. R. Yosef Engel (Cracow, 1859-160:22; 1920), and *Teshuvot Ben Porat*, II, no. 10 (Cf. Ramban, *Hiddushei ha-Ramban Shabbat* 42a who argues that in order for danger of communal hazard to constitute a *pikku'ah nefesh* situation, the danger must be present. For this understanding of Ramban's position, see *Ammud ha-Yemini, sha'ar 1, siman 17:9*.) Later arbiters have utilized Ran's position as construing community matters, in general and public *fiscal* matters, in particular, as equivalent to *pikku'ah nefesh*. See Rema, *Shulhan Arukh Yoreh De'ah* 160:22; *Teshuvot Ben Porat*, *ibid.* and R. Hayyim Teitelbaum (Hungary, 1880-1926), *Teshuvot Atsei Hayyim, Yoreh De'ah*, no. 34. Cf. R. Ya'akov Bloi (Israel, contemporary) *Berit Yehudah* 7:22.

80. See text accompanying note 60.

81. Once one assumes that the depletion of communal funds is equivalent to *pikku'ah nefesh* (see *supra* note 79), under what circumstances are we allowed to proscribe the sale of kidneys? Must there be a clear existing danger of exploitation by the black market or does the probability of impending danger of a black market render the present danger sufficient to regard the matter as *pikku'ah nefesh*, hence banning sales of kidneys?

Upon review, we find varying halakhic opinions. For a discussion of these varying approaches towards defining *pikku'ah nefesh* in another context, see Bleich, *supra* note 1, at pp. 188-192. Our presentation incorporates the position that biblical prohibitions may be set aside even in cases of probability of impending danger. See text accompanying note 79.

82. R. Moshe Hershler, "The Obligation of Rescue with your Money" [in Hebrew], *Halakha u-Refu'a* III (Jerusalem: Regensburg Institute, 5743), pp. 37, 48-49.

83. For the literature dealing with the need to promote altruistic behavior, see note 34.

In social and political philosophy, among the typologies suggested to define the community is to differentiate between an organic and an atomistic conception of the social unit. Adopting an atomistic conception implies that one views the community as an aggregate of individuals, each individual pursuing his own goals, with some of his activities benefitting the collectivity. On the other hand, adopting an organic conception implies that the community has its own identity independent of its constituent members. Pursuant to the hashkafic statements of Maharal and R. Yehudah ha-Levi, Prof. Avraham Steinberg argues that the norms of *pidyon shevuyim* teach us that halakha propounds an organic conception of society. See Abraham Steinberg, "Allocation of Scarce Medical Resources" [in Hebrew], *Emek Halakha* II (New York: Yeshiva University, 5749), pp. 91, 104-105. Though we have shown the primacy of the community in this topic, there is no indication that our conclusion entails incorporating an organic conception of the collective. In fact, in other realms of halakha such as a communal animal offering, i.e., *korban tsibbur*—which frequently has been viewed as a prototype institution which reflects the organic nature of the Jewish community—there are authorities who conclude that this institution reflects an aggregate conception. See R. Yehudah's opinion in *Menahot* 92a; *Yerushalmi Pesahim* 4:1 as cited in *Tosafot, Pesahim* 50a, s.v. *makom*. Hence, to impute an organic conception of society in diverse areas

- of halakha is subject to debate.
84. See text accompanying notes 9, 15-18, 20, 25-27, 42-44, 49, and note 39.
85. R. Yosef, supra note 67, at p. 33.
86. *Yevamot* 90a-b.
87. See text accompanying notes 64-68.
88. For this rabbinic authority to legislate by passive abrogation and the meaning of abrogation, see *Yevamot* 89b-90b; Rashi, *Berakhot* 20a s.v. *shev*; Rashi, *Gittin* 36b, s.v. *shev*.
89. For a cursory glance at the historical reality regarding ransoming of captives in various lands, see Gershuni, supra note 67; Israel Schepansky, *Ha-Takkanot be-Yisrael* II (Jerusalem: Mosad ha-Rav Kook, 5753), pp. 51-56; Eliezer Bashan, *Captivity and Redemption: Jewish Society in the Lands of the Mediterranean (1391-1830)* (Ramat Gan: Bar Ilan, 5740).
90. Organ Sales, supra note 62, at 3-4, 10-13. For the authority to introduce legislation by passive abrogation within the context of *pikku'ah nefesh*, see R. Menahem Krochmal (Germany, 16th cent.), *Teshuvot Tsemah Tsedek*, no. 28. Cf. *Iggerot Moshe Orah Hayyim*, I, no. 127 and *Yoreh De'ah*, II, no. 174.
91. For the authority to introduce protective legislation which involves passive abrogation, i.e., *shev ve-al ta'aseh*, see *Hiddushei ha-Ritva Bava Metsi'a* 7a. For the requirement of demonstrating the protective and regulative nature, i.e., *le-migdar milta*, for legislation invoking passive abrogation, see *Teshuvot Mishpat Kohen*, no. 144, p. 327.
92. See Sanhedrin 46a. For varying opinions, see *Piskei ha-Rosh Shabbat* 2:15; R. Isaac ben Sheshet (Spain, 1325-1408), *Teshuvot Rivash*, nos. 115, 214, 241, 271, and 352; *Teshuvot Rashba*, III, no. 411; R. Joseph Colon (Italy, 15th cent.), *Teshuvot Maharik*, no. 17; R. Joseph Ibn Lev (Constantinople, 16th cent.), *Teshuvot Maharibal*, III, no. 54; *Teshuvot Noda bi-Yehudah, Mahadura Kamma, Hoshen Mishpat*, no. 20; and Rema, *Shulhan Arukh Hoshen Mishpat* 2:1. For contemporary discussions, see *Teshuvot Da'at Kohen*, p. 374; R. Isaac Herzog, *Tehukka le-Yisrael al pi ha-Torah*, ed. Itamar Warhaftig (Jerusalem: Mosad ha-Rav Kook, 5749) I, no. 6 and II, nos. 2-4; R. Shelomo Goren, *Sefer Torat ha-Medina* (Jerusalem: Ha-Idra Rabba, 5757), p. 62; R. Abraham Shapiro, "Takkanot in Contemporary Times" [in Hebrew], *Tehumin* 3 (5742), p. 238; R. Bakshi Doron (Israel, 21st cent.), *Teshuvot Binyan Av*, I, no. 75; *Teshuvot Yehaveh Da'at*, II, no. 49, III, nos. 20 and 60. In addressing the viability of legislation banning kidney trade, whereas R. Lau opines that such a ban needs the legislative imprimatur of the Sanhedrin and R. Mordechai Halperin extends such empowerment to the rabbis of the Talmud, the latter admits that rabbinic authorities or *tuvei ha'ir*, i.e., communal executive board, would be authorized to introduce such a ban. See Lau, supra note 1, at p. 136; Mordechai Halperin, supra note 1, at p. 341.
93. For the requirement to furnish a reason prior to abrogating a halakha, see *Hiddushei ha-Ritva Kiddushin* 13b. For the relevant literature regarding the ban of commercial trade in kidneys, see text accompanying notes 28-37 and 59-60. In fact, while dis-

cussing kidney trade, both R. Levi Halperin and R. Yisrael Lau contend that there is no justification in supporting such a ban. See Levi Halperin, *supra* note 1, at p. 67; and Lau, *Yahel Yisrael*, no. 28. Cf. R. Mordechai Halperin who finds that the exploitation of the black market would serve as grounds for such an ordinance. See Mordechai Halperin, *supra* note 1, at p. 340.

Given the absence of a central authority within the Jewish community which would be accepted and empowered to promulgate this legislation, responsibility would reside with the rabbinic and/or communal authorities in every locale to address this matter.

Our study has been limited to the propriety of sanctioning kidney sales. Due to the absence of halakhic discussions regarding its regulation, we have refrained from addressing this possibility.

*TRADITION*