

A Jewish perspective on compensation for kidney donation

Alan Jotkowitz M.D.

Introduction

Worldwide there is a dearth of organs available for solid organ transplantation. Currently there are close to one hundred thousand people on waiting lists for organ donation in the United States.¹ As a result of this situation various proposals have been suggested to increase the number of organs available for transplantation. They include donation by default and priority for receiving of organs to those willing to donate. In addition, many patients travel to other countries sometimes under dubious and ethically problematic conditions. In the last ten years we have also witnessed the growth of the "transplant tourism" industry. In most countries with underground economies in transplants such as Colombia, India, Pakistan and the Philippines organs are bought from the poor and sold to wealthy foreign patients. China has become notorious for using organs from executed prisoners.² In response to this crisis there have been renewed calls to legalize the selling of kidneys from living donors. The worldwide leader in this endeavor has been Iran, which in 1988 instituted a compensated and regulated living-unrelated donor renal transplant program.³ As a result, the number of transplants increased dramatically and by 1999

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the transplant waiting list was eliminated. The government provides the recipient with a monetary award (approximately \$1200) and health insurance. In addition, recipients provide rewarding gifts to donors and in the case of poor recipients this award is provided by charitable organizations. In the Iranian experience, 84% of the compensated donors were classified as poor, 16% were middle class and none were wealthy. Of the recipients, 50% were poor, 36% were middle class and 13% were wealthy.⁴

In 2003 a protocol for paid kidney donation in Israel was developed. According to the protocol there will be a single waiting list for all patients, and the donor will not be allowed to choose a recipient. All expenses of the donor relating to the transplant will be covered by the National Transplant Center and the donor will receive a tax-free payment of \$20,000.⁵ Concerns have also been raised about Israeli patients traveling to China to receive organs from dubious sources and receiving funding from Israeli health maintenance organizations and insurance companies.⁶ In 2008 the Knesset passed a law providing limited benefits to those who donate a kidney for altruistic reasons but prohibiting organ

¹ Steinbrook R. Organ Donation after Cardiac Death. *N Eng J Med* 2007;357:209-213.

² Chapman J. Should we pay donors to increase the supply of organs for transplantation? No. *BMJ* 2008;336:1343 (14 June)

³ Ghods AJ, Savaj S. Iranian model of paid and regulated living-unrelated kidney donation. *Clin J Am Soc Nephrol*. 2006 Nov;1(6):1136-45.

⁴ Ibid

⁵ Friedlaender MM. A protocol for paid kidney donation in Israel. *Isr Med Assoc J*. 2003 Sep;5(9):611-4.

⁶ Lavee J. Organ transplantation using organs taken from executed prisoners in China--a call for the cessation of Israeli participation in the process Harefuah. 2006 Oct;145(10):749-52, 781. Hebrew.

sales either in Israel or abroad.⁷ The purpose of this article is to review briefly the halachic issues relating to organ donation and the moral correctness of compensated organ donation from a Jewish ethical perspective.

Ethical issues

There are a number of arguments against financial compensation for organ donation

1. **Medical-** Inadequate pre-transplantation screening has resulted in CMV, HIV, hepatitis, malaria and tuberculosis infections. There have also been reports of poor surgical technique, inadequate wound care and improper immunosuppressant medications, in addition to the surgical risks and lack of follow up care for the donor
2. **Economic-** In developing countries donors typically receive less than \$2000 while middlemen and surgeons often charge more than \$80,000.⁸ Research in India and Pakistan demonstrates that most of the donors profits go directly to debt collectors, and their financial situation rarely improves after the operation.⁹ There are also fears that families will also demand compensation for cadaveric organs.
3. **Ethical-** The most powerful arguments against compensating donors are the moral ones. The pursuit of social justice and equality in healthcare has been recognized as one of the cardinal principles of modern medical ethics.¹⁰ A system where a desperate impoverished person is left with no choice but to sell his or

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her organs is incompatible with this principle. Other ethicists object to compensation on the basis of commodification of the human body.¹¹ Prostitution and the selling of organs are examples of activities in which the body is treated as an object and are morally objectionable. Exploitation, potential harm, flawed consent and possible coercion all play a role in this process. There is also the concern that legalization of compensation will eliminate the altruistic motive to donate.

There also exist arguments in favor of compensation:

Medical- There is a global shortage of organs available for transplantation. In the United States there is a 100,000 people waiting list for a kidney transplant and the average waiting time is five years. It is simply a matter of life and death as the annual death rate for potential candidates has increased from 6.3% in 2001 to 8.1% in 2005.¹² The hope is that allowing financial compensation will increase the pool of donors as occurred in Iran. In addition, by making the transaction legal the care of donors and recipients will improve.

Economic- Proponents of compensation are in favor of a regulated system where the compensation for the donor will come from the government or private sources eliminating some of the improprieties in the donor-recipient relationship.¹³ Some suggest that instead of a lump sum compensation the donor should receive potentially life-altering benefits such as a mortgage for a house, lifelong health insurance or university tuition for his or her children, thereby eliminating the influence of money lenders. Compensation for the middlemen will also be eliminated in this system.

Ethical- The British philosopher Janet Radcliffe-Richards maintains that the arguments

⁷ Available in *The Journal of Medicine and Law* 2008 June, vol. 38: pp 180-191. Hebrew

⁸ Turner, L. Let's wave goodbye to "transplant tourism" *BMJ* 2008;336:1377 (14 June)

⁹ Ibid

¹⁰ Medical professionalism in the new millennium: a physician charter. *Ann Intern Med.* 2002 Feb 5;136(3):243-6.

¹¹ for an insightful discussion of the issue see **Wilkinson S.** Commodification arguments for the legal prohibition of organ sale. *Health Care Anal.* 2000;8(2):189-201.

¹² **Matas AJ.** Should we pay donors to increase the supply of organs for transplantation? Yes. *BMJ* 2008;336:1342 (14 June)

¹³ Ibid

against compensated organ donation are "attempts to justify the deep feelings of repugnance which are the real driving force of prohibition, and feelings of repugnance among the rich and healthy no matter how strongly felt, cannot justify removing the only hope of the destitute and dying".¹⁴ She agrees that despair and poverty is the driving force behind most compensated kidney donations, but the answer is not to eliminate the best option that many people have to improve their circumstances, but to work to lessen world poverty so nobody would want to sell an organ. If problematic informed consent is the issue, then we should insist on adequate pre-donation information and the availability of counseling. In response to the argument that it is unfair for the rich to have treatments unavailable to the poor, then we should ban private medicine and most healthcare available in the West which is not available in the developing world.

Halachic issues: Compensated donors

The halachic issues involved in compensation for organ donation have been discussed previously by Rabbi Y.M. Lau, former chief Rabbi of Israel. He distinguishes between two cases

1. A situation where the organ was taken without permission from the donor, and now he requests payment for the organ. In this case the halachic questions revolve around whether a person's organs belong to him and if he has ownership rights to sell them. The question if one is allowed to benefit from one's organs is also relevant. Notwithstanding these significant halachic objections they are not relevant when the recipient's life is in danger because of the overriding commandment to save a life.
2. The more common situation is where a person is willing to donate an organ for adequate

compensation for the pain and suffering he will endure. That this is halachically allowed is obvious to Rabbi Lau.

Rabbi Lau was also concerned about the potential inequalities that compensated donation might cause in healthcare:

One might object [to compensated donation] because of the need to have equality in the healthcare system. However, according to halacha one is not allowed to prevent a person from saving himself using his own financial resources. I do not understand how one can forbid this because another person in a similar situation does not have the resources to save himself.¹⁵

There is no fundamental Jewish legal prohibition against financial compensation for tissue or organ donation

The normative halachic approach to this question is best summarized by Professor Avraham Steinberg who writes:

There is no fundamental Jewish legal prohibition against financial compensation for tissue or organ donation. Almost all rabbinic authorities who expressed an opinion stated clearly that from a halachic or Jewish moral point of view there is nothing wrong in receiving reasonable compensation for an act of self-endangerment, whereby one still adequately fulfills the most important commandment: to save life.¹⁶

Notwithstanding this relatively straightforward halachic pronouncement, there exist dissenting opinions which maintain that the motivation of the donor should play a role in the permissibility of the donation. The starting point for this argument is the opinion of Rabbi Moshe Feinstein regarding the nature of the prohibition of Chavala (assault).¹⁷ In codifying the laws of Chavala the Rambam writes "One is prohibited from injuring oneself as well as his fellow man. Not only a person who causes injury, but also one who assaults a non-guilty Jew, be it a minor or an adult, a man or a

¹⁴ Radcliffe-Richards J, Daar AS, Guttman RD, Hoffenberg R, Kennedy I, Lock M, Sells RA, Tilney N. The case for allowing kidney sales. *International Forum for Transplant Ethics. Lancet.* 1998 Jun 27;351(9120):1950-2.

¹⁵ Lau Y.M. Selling organs for transplantation. *Tehumin* 1998;18:125 Hebrew

¹⁶ Steinberg A. Compensation for kidney donation: a price worth paying. *Isr Med Assoc J.* 2002 Dec;4(12):1139-40

¹⁷ Responsa *Iggrot Moshe Choshen Mishpat* vol.2:66.

woman, in a quarrelsome way (or a debasing way) transgresses a negative commandment".¹⁸ Based on this Rabbi Feinstein maintains that one is only liable for assault if it is done in a "quarrelsome or debasing" manner. Because of this understanding of the prohibition he allows cosmetic surgery because clearly the surgical assault is not done in a "quarrelsome or debasing" manner. In the same responsum he takes note of the fact that one is not

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allowed to let someone injure you in order to obtain loan forgiveness, because even though one is benefitting financially from the assault he still considers it done in a debasing manner.¹⁹ According to Rabbi Feinstein motivation therefore plays a role in establishing whether an act is defined as assault. In extrapolating this principle to organ donation, one could infer that donating an organ for altruistic reasons would not be considered bodily assault in a debasing manner, but selling one's organs for money might so be considered. In contradistinction, Grazi and Wolowelsky argue that "inadequate motivation does not undermine the inherent ethical value of the act itself, or provide an exemption to the obligation to perform a mitzvah".²⁰

Extending this principle of Rabbi Feinstein's, Rabbi Shabtai Rappoport maintains that motivation plays a primary role in the halachic question of allowing the selling of organs.²¹ Rabbi Rappoport maintains "It follows that donating an organ (i.e. kidney) in order to save life, is not obligatory, but should be encouraged as an act of piety.....however when the motivation is earning a

living, such a major injury, and the ensuing medical risk definitely forbid that organ sale"²² Recognizing the possibility of the existence of two donor motives; an altruistic one and a financial one, Rabbi Rappoport suggests a simple test to distinguish between the two. Would the donor be willing to donate his kidney if there was no possibility of financial gain? If not, then the motivation is defined for halachic purposes as financial and the donation is prohibited.

Another approach as to why compensated organ donation should not be allowed has been suggested by Michael Wigoda.²³ He cites the opinion of former Chief Rabbi Unterman who maintains that "one is not allowed to save oneself by injuring another".²⁴ In other words, *pikuach nefesh* (saving life) does not override the prohibition of assault. Wigoda suggest two possible explanations for this position:

1. Many authorities rule that one is not allowed to steal in order to save oneself if you have no intention of returning the money, and therefore one is not allowed to injure another because there is no equivalent financial compensation for a physical injury.²⁵
2. Assault is viewed as an extension of the prohibition of murder, and similar to murder there is no dispensation of the prohibition even to save a life.

According to these two explanations why then is altruistic donation allowed?

Wigoda answers based on Rabbi Feinstein's explanation of the prohibition of assault. An act is only defined as assault if it is done with the motivation to debase the victim and would not apply in an altruistic donation, but would apply if the donation was for compensation.

¹⁸ Maimonides Laws of Chovel and Mazik Chapter 5.

¹⁹ Responsa Igrot Moshe Choshen Mishpat vol.2:66.

²⁰ Grazi RV, Wolowelsky JB. Jewish medical ethics: monetary compensation for donating kidneys. *Isr Med Assoc J.* 2004 Mar;6(3):185-8

²¹ Rappoport SA. Sale of organs from living donor for transplant: motivation and decision making in an equitable distribution of human organs for transplantation, ed. Mordechai Rabello Jerusalem, 2003.

²² Ibid

²³ Wigoda M. Living organ donation and its commercialization. *Assia* (Hebrew) 18, 5-24,2003

²⁴ Responsa *Shevet Me-Yehuda* p. 53, 1984.

²⁵ For further discussion of this issue see Mark Dratch, "His Money or Her Life? Heinz's Dilemma in Jewish Law," *The Journal of Halacha and Contemporary Society*, XX (Fall 1990)

For Wigoda following Rabbi Feinstein, the donor's motivation is the crucial factor in deciding whether a donation is acceptable. This formulation shares much in common with Michael Slote's conception of virtue ethics.²⁶ From the perspective of virtue ethics, an "act is morally acceptable if and only if it comes from virtuous motivation involving beneficence or caring (about the well being of others) or at least doesn't come from bad or inferior motivation involving malice or indifference to others".²⁷

Thus, similar to Rappoport and Wigoda's halachic analysis, organ donation is considered ethical only if done on the basis of an altruistic motivation.

Notwithstanding their moral persuasiveness, the arguments of Rappoport and Wigoda seem forced from a straightforward halachic perspective, and the question remains if there exist any other factors driving their respective halachic opinions. Hayim Soloveitchik has perceptively pointed out that occasionally halachic masters have to look for shaky leniencies to justify behavior on the part of their community. In this vein, he cites the example of the Ashkenazi response to martyrdom, where various tosafists try to find halachic leniencies to rationalize the behavior of their constituents regarding voluntary martyrdom. He writes "they did this by scrounging all the canonized and semi-canonized literature for supportive tales and hortatory aggadah, all of dubious legal worth. But by massing them together, Ashkenazi scholars produced, with a few deft twists, a tenable, if not quite persuasive, case for the permissibility of suicide in times of religious persecution.....What had taken place was that law

²⁶ Slote, Michael, *Morals from Motives*, Oxford University Press, 2001. For an enlightening discussion of the relationship of Jewish ethics to virtue ethics see Y. Blau *The Implications of a Jewish Virtue Ethic*, Torah. u-Madda Journal 9 (2000): 34-36. 35. and a classic in the field Walter Wurtzberger's *Ethics of Responsibility*, Philadelphia:JPS 1994

²⁷ Slote, Michael, *Morals from Motives*, Oxford University Press, 2001.

and logic had led men to an emotionally intolerable conclusion, one which denied their deepest feelings and more significantly, their deepest religious intuitions, and so the law as reinterpreted."²⁸

The question therefore arises are there are other factors in paying kidney donors which deny one's deepest feelings and religious intuitions and if so what are their roles in the halachic process

Kevod Habriyot

The principle of kevod ha-beriyot (human dignity) is mentioned in the *gemara* in reference to proper burial of a corpse, personal hygiene and public nudity. But its scope, however difficult to define, is much broader. In the words of the Rambam, in urging a judge to be compassionate, "whatever [he does] let all his actions be for the sake of Heaven. And let him not regard kevod habriyot lightly; for it overrides rabbinic prohibitions". Rabbi Aharon Lichtenstein has suggested several tentative guidelines for the use of the principle in halachic decision-making:

1. "Personal dignity must be significantly, albeit briefly, fractured, rather than merely ruffled";
2. "Genuine dignity must be involved, not superficial vanity";
3. "Where the prospect of hurting another is also present.....it is conceivable that the principle may be much more broadly defined".²⁹

All these factors certainly are relevant when discussing the issue of compensation for organ donation. The prospect of having to undergo a major surgical procedure and donate a kidney because of dire financial circumstances is certainly a significant genuine assault on personal dignity

²⁸ Soloveitchik, H. *Religious Law and Change: The Medieval Ashkenazic Example* AJS Review, Vol. 12, No. 2 (Autumn, 1987), pp. 205-221

²⁹ Lichtenstein, A. *Mah Enosh*: Reflections on the Relation between Judaism and Humanism, Torah Umadda Journal vol. 14 2006/7 pp. 1-61

with the potential to cause harm. The principle of *kevod ha-beriyot*, according to Rabbi Lichtenstein, is a fundamental Jewish value and should play a greater role in halachic decision making.

Moral

Avi Sagi and Daniel Statman have argued for the existence of an autonomous morality in Judaism as opposed to one based on divine command.³⁰ They further argue that the nature of the halachic system based on human discretion and understanding is more consistent with an autonomous theory of mortality. To buttress their opinion they invoke a responsum of the Radvaz. The Radvaz argues that one should not be required to cut off one's hand to save a fellow Jew because "and furthermore it is written its ways are pleasant and the laws of our Torah have to be acceptable to our reason and logic and how can someone suggest that a person is required to blind himself or amputate his leg or arm so his friend should not die".³¹

"Interpretations of the Torah must be consistent with human reason. In this text [responsa of the Radvaz], "reason and logic" are synonymous with moral understanding which, as Ha-Radvaz sees it, would rebel against the notion of forcing a human being to sacrifice a limb to save someone else's life".³²

To many people the selling of organs appear to be a violation of universal morality for the reasons cited previously.

Israel – a Light unto the Nations

The question of selling organs has another dimension in relation to legislation to allow it in Israel.

1. The return of the Jewish people to its ancestral homeland has led to the development of new halachic questions that were simply not

relevant in the Diaspora, and innovative halachic decision-making and makers are needed to answer them. A halachic response was needed to the development of modern economic, judicial, banking, public safety and healthcare systems in the new State.³³

2. The recognition of the theological and historical significance of the State clearly impacts on practical halachic decision making and blur the boundary between halacha and theology which still reverberate today. For example, the vitriolic arguments that still exist on the correct way to observe *shmitta* in a modern heterogenous society and how to deal with the conversion crisis are as much theological arguments as they are halachic. Recognition of the impact of halachic decision making on the wellbeing, both physical and moral, of the national homeland should play a significant role on halachic rulings.

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3. Rabbi Haim David Halevy, former Chief rabbi of Tel Aviv, believed that the State of Israel has a special obligation in the world. He writes;

Notwithstanding the fact that the Torah was only given to Israel, ...there is no doubt in my mind that the majority of commandments between men based on morality and humanism and other Torah values, which human civilization depends on, first and foremost the belief in the existence of God, all of this was given primarily to Israel with the clear purpose that Israel would be "a nation of priests" and through them the rest of the world will recognize these values.....Because it is through the Jewish people, either when they are living independently in their land or scattered in the

³⁰ Sagi, A. and Statman D. Divine Command Mortality and Jewish Tradition. *Journal of Religious Ethics* 1995; 23: pp.39–67

³¹ Responsa Rivash #447.

³² Sagi, A. and Statman D. Divine Command Mortality and Jewish Tradition. *Journal of Religious Ethics* 1995; 23:p. 57.

³³ For further discussion on this issue see Mark Washofsky Halacha and Political Theory: A Study in Jewish Legal Response to Modernity *Modern Judaism*, Vol. 9, No. 3 (Oct., 1989), pp. 289-310

Diaspora, that the world has learned the great values of God's Torah.³⁴

The Jewish people have a singular responsibility to be a beacon of morality for the nations of the world. In Rabbi Halevy's thought the phrase "a nation of priests" represents this idea. If one believes that compensated organ donation is immoral, a law permitting this in Israel would violate this special obligation.

Most contemporary halachic decisors have permitted financial compensation for organ donors, notwithstanding their significant moral qualms, because in the words of Rabbi Lau "I do not understand how one can forbid this because another person in a similar situation does not have the resources to save himself"³⁵ I have suggested that problematic motivation, concern for the dignity of man, universal morality and the nature of the role of the Jewish people in the world might provide a theoretical framework for questioning the halachic validity of the transaction. In the final analysis it is the role of the leaders of the generation to decide if these are significant grounds to forbid compensated organ donation.

International Responsa Project

When a medical procedure raises ethical, moral, or halachic questions, advice from a reliable source is needed. The International Responsa Project provides this service to people all over the world who send their questions – some of general and theoretical, some specific and technical – via e-mail (irp@medethics.org.il), website (www.medethics.org.il), telephone, fax, and post. The questions are answered as quickly as possible by one of the rabbi-doctors at the Institute. The following are samples of recent questions and their answers. Please note that these are answers to specific questions and no general halachic conclusions should be drawn. A competent halachic authority should always be consulted.

Subject: The use of a CPAP machine

Date: August 2009

Answered by: Rabbi Mordechai Halperin, MD

What do you know about the permissibility of using a CPAP machine for the treatment of sleep apnea on Shabbos and Yom Tov? Is there a distinction between machines that need a button to start versus machines that start when the mask is attached?

Sleep apnea is a situation of cumulative pikuah nefesh, meaning that if not treated the patient will eventually end up in an ICU. However, not using it for even one night can give rise to a possibility of pikuah nefesh depending on many other factors and therefore MUST be used every night. Where possible use a Shabbos clock to turn it on and off, or else use the back of your finger to do so if you have to disconnect in the middle of the night.

There is no distinction between machines that need a button to start versus machines that start when the mask is attached, if both actions (pressing the button or attaching the mask) can be done B'shinui.

Refuah Shlema.

³⁴ Haim David Halevy. Torat Hayim, Sefer Shemot p. 91.

³⁵ Lau Y.M. Selling organs for transplantation. Tehumin 1998;18:125 Hebrew