

Cash for Kidneys: May One Sell His Organs?

Adapted from the writings of Dayan Yitzhak Grossman

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Libertarian law professor Ilya Somin writes:

The United States has a severe shortage of kidneys available for transplant. As a result, many thousands of people die every year, and thousands more are condemned to years of painful and costly kidney dialysis until they are finally able to get off the waiting list for organs. Recently, organ transplant organizations have been attempting to alleviate perceived racial disparities in access to organ transplants through policies that in some ways increase the role of racial considerations in deciding who gets priority in the transplant queue, and in other ways reduce it.

Both have attracted the ire of Dr. Stanley Goldfarb, a prominent conservative advocate and commentator on health care policy...But both he and his left-wing opponents in these debates ignore by far the best way to alleviate kidney shortages for patients of all races: legalizing organ markets...

Sadly, neither OPTN (the Organ Procurement and Transplantation Network) nor its critics on the right support the one proposal most likely to eliminate the kidney shortage, and thereby save many thousands of lives, white and black alike. That can be done by legalizing organ markets, and allowing medical providers to pay kidney donors. In a nation of over 300 million people, allowing compensation should enable us to easily generate the 30,000 to 40,000 kidney donations per year needed to eliminate the waiting list entirely.

In previous writings, I have criticized standard arguments against organ market legalization, such as concerns that it would be too dangerous for organ donors, claims that it amounts to immoral “commodification” of the body, and fears that it would lead to exploitation of the poor (see also here). Paying for organs is also likely to be much cheaper than the enormous cost of keeping people on kidney dialysis while they languish on the waitlist...the Trump Administration increased allowable compensation for expenses incurred by organ donors; they deserve great credit for that. But much more can be achieved by legalizing payments over and above expenses. After all, there would be shortages of almost any good or service if consumers were not allowed to pay more than it cost producers to provide.[1]

We have previously discussed halachic perspectives on kidney donation in general;[2] in this article and a planned follow-up, we consider the question of charging and paying for organ donation. We shall see that the halachic consensus aligns more closely with the laissez-faire, libertarian stance of allowing payment for organs espoused by Professor Somin than with the current secular legal and ethical consensus that opposes such payment.

There are two potential grounds for objection raised by halachic authorities: a technical one, stemming from the general prohibition against charging for the performance of a mitzvah, and a public policy one, based on concerns that allowing it will result in various negative societal consequences. This article considers the former issue, and the follow-up will *iy"H* consider the latter.

Charging for the performance of a mitzvah

The Mishnah states:

If one takes his fee for judging, his verdicts are void; for testifying, his testimonies are void; for sprinkling or for consecrating *chatas* water, his water is like cave water and his ashes are like the ashes of an ordinary burning.

The Gemara explains:

From where do we know these laws? Rav Yehudah said in the name of Rav: For the *pasuk* says: "See I have taught you statutes and laws as Hashem, my G-d, commanded me." Just as I was taught the Torah by Hashem for free, so too, you were taught the Torah by me for free.[3]

As we recently discussed, saving another from harm is included in the mitzvas *asei* of returning lost property (*hashavas aveidah*) and the mitzvas *lo sa'aseh* of not standing over the blood of your friend (*lo sa'amod al dam rei'echa*);[4] accordingly, halachic authorities extend the prohibition against charging for the performance of a mitzvah to the provision of medical care.[5] (Regarding the common practice today for even religiously observant physicians to charge for their services, see the sources cited in the notes.[6])

The major exception to this prohibition is that it is permitted to recoup any expenses incurred in the performance of a mitzvah, both out-of-pocket expenses and opportunity costs. The Mishnah mentions this dispensation with regard to *hashavas aveidah*,[7] and later halachic authorities extend it to other mitzvos, including the provision of medical care.[8]

In light of the prohibition against charging for mitzvos in general and for the provision of medical care in particular, R' Yaakov Ariel rules that if the donation of an organ is necessary to save the recipient's life and it does not entail any danger to the donor, such a donation is mandated by the mitzvos of *hashavas aveidah* and *lo sa'amod*, and it is accordingly prohibited to charge for the organ itself, and one may only charge compensation for any lost income and pain involved in the donation.[9]

His *rebbe*, R' Shaul Yisraeli, rejects this argument, maintaining that organ or tissue donation, although permitted and a mitzvah, is not mandatory. He accordingly declares that "there is no basis at all to forbid one who donates part of his body to request and accept payment in compensation for his donation." He is unclear, though, as to the bounds of acceptable compensation. He initially states that "the amount of the payment may be established by agreement between the donor and someone from family of the recipient," but he subsequently draws an analogy to the compensation established by the Torah for personal injury, and writes: "This payment, as

long as it is within reasonable limits, should not be seen as extortion or something unethical, because organ donation causes the donor physical suffering and sometimes psychological suffering as well.”[10] It is not entirely clear why he takes for granted the existence of a requirement of “reasonable limits” and why he links the payment to the halachos of personal injury compensation, given that the rule of *ma ani bechinam* does not apply. But in practice, it seems that the opinions of teacher and student may not be that far apart, even if their theoretical approaches differ. Rav Yisraeli qualifies that only the donor may request payment for his donation, but individuals or organizations that broker donations between donors and recipients are mandated to do their work by the mitzvah of *hashavas aveidah* and are prohibited from charging compensation beyond their costs. (As we have noted above, though, the established custom is that physicians do charge for their services, and it is difficult to understand why a professional, full-time organ donation facilitator should be any different from a physician in this regard. Perhaps Rav Yisraeli is not referring to such professionals.)

Like Rav Yisraeli, R’ Levi Yitzchok Halperin concludes that since, in his view, it is not at all clear that there is a real obligation to donate an organ, and it may be merely a matter of piety (*midas chasidus*), the rule of *ma ani bechinam* does not apply and it is permitted to request compensation. He adds that it is clear that someone who foregoes any payment beyond compensation for his financial costs is acting in the ideal manner of true *midas chasidus*, but he nevertheless suggests that even one who does insist on compensation for the organ itself does not thereby lose the mitzvah of organ donation (but he is somewhat tentative regarding this last point).[11]

[1]Ilya Somin. Race, “Wokeness,” and Kidney Transplant Shortages. The Volokh Conspiracy (Reason).

<https://reason.com/volokh/2023/04/14/race-wokeeness-and-kidney-transplant-shortages/>.

[2]Organ Meets: The Changed Landscape of Living Kidney Donation. The Bais HaVaad Halacha Journal. Mar. 18, 2022.

[3]Bechoros 29a

[4]Under Fire: Must Someone Be Saved from a Danger of His Own Making? (Part I) The Bais HaVaad Halacha Journal. Apr. 13, 2023.

[5]Toras Ha’adam *Sha’ar Hasakanah*; Tur Y.D. *siman* 336; Shulchan Aruch *ibid. se’if* 2.

Tosfos HaRosh (Brachos 60a) cites the view of R’ Yaakov of Orléans that when the Gemara states (there and Bava Kama 85a) that “and he shall heal (*verapo yerapei*)”—from here we learn that permission is granted to a doctor to heal,” it is carving out an exception from the general prohibition against charging for the performance of a mitzvah. But this view is not accepted by other authorities.

Cf. Nishmas Avraham (Second Expanded Edition) Y.D. *ibid.* pp. 438-41.

[6]Shu”t Igros Moshe Y.D. *cheilek* 4 *siman* 52; Nishmas Avraham *ibid.* pp. 439-40; Rav Wilner, *Bedin Sechar Harofei*, Assia 1, 1979.

[7]Bava Metzia 2:9.

[8]See the sources cited in n. 5.

[9]Shu"t Be'ahalah Shel Torah 1 *siman* 100.

[10]Chavas Binyamin *kerech* 3 p. 63.

[11]Shu"t Ma'asei Chosheiv *cheilek* 4 *siman* 24 p. 65. Cf. the comprehensive discussion of our topic in R' Avraham Steinberg, *Temurah Avur Trumas Eivarim*, and cf. R' Zvi Ryzman, *Trumas Eivarim Betashlum*, Olamot.