

Part II—Cash for Kidneys: May One Sell His Organs?

Adapted from the writings of Dayan Yitzhak Grossman

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Our previous article considered the applicability of the prohibition against charging for the performance of a mitzvah—*ma ani bechinam, af atah bechinam*—to commerce in human organs; this one considers some of the public policy arguments against allowing the buying and selling of organs. R' Levi Yitzchok Halperin raises the concern that allowing payment for organ donation will result in the commodification of organs and the operation of market forces driving the price of this lifesaving good to extremely high levels, and he anticipates a dystopian future in which

only extraordinarily wealthy individuals who need organ transplants will be able to pay the asking prices, while those lacking financial resources who need organ transplants will be turned away with the excuse of an insufficiency of donated organs...[1]

As a precedent for the idea of prohibiting voluntary economic transactions that serve the interests of the transacting parties because allowing them would be inimical to the broader and longer-term interests of society, Rav Halperin adduces the injunction against redeeming captives for “more than their value”:

Mishnah: One may not ransom captives for more than their value, for the benefit of society...

Gemara: What is the meaning of this reason, “for the benefit of society”? Does it mean that this prohibition was enacted to prevent a burden on the community, or so that idolaters will not be encouraged to capture people?

Come, learn from the following incident: Levi ben Darga ransomed his daughter for 13,000 golden dinars (from his personal funds; this proves that the *issur* was enacted to prevent a financial burden on the community, because if it was intended to deter abductions, Levi would not have been permitted even to use his own money to pay an exorbitant price).

Abaye said: Who says he acted with the consent of the Chachamim?

Maybe he acted without their consent.[2]

The halacha accepts the view that the injunction against redeeming captives for more than their value is to avoid incentivizing the seizing of captives;[3] Thus a voluntary transaction that would benefit a captive is prohibited on the grounds that allowing such transactions is against the broader, long-term interest of society.

But Rav Halperin concludes that this is not a basis to forbid charging for organ donation, for various reasons:

- Allowing the payment of exorbitant ransoms is likely to cause an increase in kidnapping, whereas allowing charging for organs will not increase illness and the need for transplant, only raise the price to exorbitant levels, so this Gemara cannot serve as a source.
- Economic self-interest is likely to keep prices reasonable, as organ donors

who charge unreasonable prices will likely fail to find buyers.

- Although we do not redeem a captive for more than his value, the captive himself is not bound by this restriction.[4] And according to some opinions, it is only the community that is so restricted, but an individual may redeem his relative (and perhaps anyone else) for more.[5]

Rav Halperin accordingly concludes that

There is no basis to prohibit asking for and receiving financial compensation for organ donation, and on the contrary, any objection to this is likely to forestall possibilities of salvation for those who need them.

He does recommend, however, that such payments be funded by governments, which will serve to limit prices and to relieve the recipients of the financial burden.

Prof. Somin (see previous article) has been a longtime advocate for allowing payment for organ donation:

The arrest of [a Brooklyn rabbi] for trying to broker the sale of a kidney has rekindled public debate over the possibility of legalizing organ markets. This is an issue I teach every year in my property class. Each time, one of the most common objections raised is the claim that organ markets must be banned because they will lead to “exploitation” of the poor. Obviously, the exploitation argument is often raised elsewhere as well.

There are several major problems with the argument: It is inconsistent with allowing poor people to engage in far riskier activities for pay; it doesn’t even begin to prove that preventing the “exploitation” is an important enough value to justify the deaths of thousands of people for lack of organs; and it overlooks the fact that poor organ donors are likely to benefit from organ markets. Finally, even if all these points are unpersuasive, the exploitation argument still can’t justify banning organ sales by the nonpoor as well...

Many organ market critics may be unaware of the fact that the risks of donating a kidney (the main proposed organ market) are actually very small...If it is somehow wrong to allow poor people to assume these very minor risks in exchange for pay, why should they be allowed to brave vastly greater dangers for money? Military personnel, firefighters, police officers, and others accept far greater risks to life and limb than kidney donors do. And, of course, they are paid to do so. Should poor people be banned from entering those professions? NFL players, most of whom come from poor backgrounds, risk very serious injuries. On average, they also lose about 2-3 years of life expectancy for every season they play. Yet no one argues that poor people should be banned from professional football. If it is permissible to “exploit” poor people for the sake of providing entertainment to football fans, shouldn’t we be able to do so for the sake of saving thousands of lives?[6]

This would seem to be a halachically cogent argument. As we have discussed several times,[7] many (albeit not all) *poskim* do allow the

assumption of a certain nontrivial amount of risk in the course of earning one's livelihood (including R' Moshe Feinstein, who permitted earning a living via "the game of throwing balls" despite the danger involved[8]), based on a Gemara that seems to take for granted that workers routinely risk their lives in the course of earning their daily wages:

The *pasuk* says: "And for it he risks his life." Why did this worker climb a high ramp, or suspend himself on a tree, placing himself in mortal danger? Was it not for his wage?[9]

And so Prof. Somin's point would seem to be an eminently logical one: Why should offering a poor person payment for his kidney be any more exploitative than offering him a dangerous job in exchange for a paycheck?

[1]Shu"t Ma'asei Chosheiv *cheilek* 4 *siman* 24 pp. 65-66.

[2]Gittin 45a.

[3]Shulchan Aruch Y.D. 252:4.

[4]Tosafos *ibid.* s.v. *Delo*; Shulchan Aruch *ibid.*

[5]See Bach *ibid.*; Shach *ibid.* s.k. 4.

[6]Ilya Somin. "Exploitation" of the Poor is a Poor Reason to Ban Organ Markets: The Volokh Conspiracy. Jul. 28, 2009, and cf. Ilya Somin. A Poor Rationale for Banning Organ Markets. The Volokh Conspiracy. Nov. 1, 2013.

[7]Hurricane Housing: When a Storm is the Norm. Bais HaVaad Halacha Journal. Sept. 20, 2018; Value Judgment: What's a Life Worth? Bais HaVaad Halacha Journal. Sept. 17, 2020; Risk Factors: Can You Be Too Safe? Bais HaVaad Halacha Journal. Jul. 15, 2021.

[8]Shu"t Igros Moshe C.M. *cheilek* 1 *siman* 104.

[9]Bava Metzia 112a.