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Recommended Citation

Steven H. Resnicoff, *Supplying Human Body Parts: A Jewish Law Perspective*, 55 DePaul L. Rev. 851 (2006)

Available at: <https://via.library.depaul.edu/law-review/vol55/iss3/5>

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SUPPLYING HUMAN BODY PARTS: A JEWISH LAW PERSPECTIVE

*Steven H. Resnicoff**

INTRODUCTION

This Article addresses two related, but distinct, questions: (1) whether, under Jewish law, it is ethical for someone to buy or sell precious body parts; and (2) whether, given Jewish law's perspectives, it would be appropriate for the United States to adopt a distribution system that would give preference to people who volunteer to be prospective donors.

Before endeavoring to answer the first question, however, it is useful to ask why one might care what Jewish law has to say on these matters. Three principal groups of people should explore Jewish law's responses to organ transplantation. First are those who seek to abide by Jewish law and, therefore, must know its rules. Second are individuals who respect Jewish law, who are curious about it, and who might be persuaded by its teachings. Third are those who, even if they neither follow nor respect Jewish law, are nonetheless concerned lest secular law unnecessarily, and painfully, impinge upon the religious values of those who do. These people must know what Jewish law prescribes to ensure that secular law is carefully circumscribed to avoid any needless conflict.

Those falling within the first group—those already committed to Jewish law—might be interested not only in a discussion of the applicable Jewish law rules but also in a detailed, painstaking demonstration, drawing on a plethora of sources, of how these rules are derived. After all, Jewish law is a legal system, with all of the elements of such a system, including primary and secondary sources of law, hierarchies of literary and human authorities, maxims of legal interpretation, and particularized processes for resolving tension between and among apparently conflicting legal principles. At one time, Jewish law even had

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an institution, the Great Court (the *Sanhedrin ha-Gadol*) that could promulgate definitive pronouncements regarding matters to which lower authorities disagreed.¹ Nevertheless, various historical and sociological developments caused that institution to cease functioning approximately 1,600 years ago.² I assume that most readers of this Article fall into the second or third group. Consequently, Part II, while eschewing the nuances of Jewish law, briefly describes the doctrines that are most relevant to our discussion. Part III discusses how these doctrines interact to provide answers as to whether precious body parts may be sold. Part IV explores whether, from a Jewish law perspective, it is appropriate for the United States to adopt a distribution system that prefers, as donees, those who volunteer as prospective donors. It explains that secular law, relying on a definition of death that is rejected by a large number of Jewish law authorities, harvests body parts from, and in the process kills, people who, according to such Jewish law authorities, are still alive. Given that Jewish law does not permit individuals to have their lives shortened by volunteering for such procedures, a distribution system that prefers such volunteers would unfairly discriminate against Jews based on their religious beliefs and practices.

II. AN INTRODUCTION TO THE PRINCIPALLY RELEVANT JEWISH LAW DOCTRINES

Many Jewish law duties are relevant to an analysis of Jewish law's view regarding the transfer of precious body parts. The most prominent include the following:

1. The duty to preserve human life;³
2. The duty to preserve one's own health;⁴

1. ENCYCLOPEDIA JUDAICA (Keter Publishing Co., CD Version 1.0 (1997)) (search "Sanhedrin").

2. *Id.*

3. See, e.g., BABYLONIAN TALMUD, *Sanhedrin 73a*, translated in BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIME 71 (1984) ("How do we know that if one sees his fellow drowning in a river, or a wild animal mauling him, or robbers attacking him, one must save him? Therefore it is said, 'neither shalt thou stand idly by the blood of thy neighbor' (Lev. 19:16). . . ."); J. DAVID BLEICH, JUDAISM AND HEALING 22 (1981) ("The value with which human life is regarded in the Jewish tradition is maximized far beyond the value placed upon human life in the Christian tradition or in Anglo-Saxon common law."). See also 2 HERRING, *supra*, at 10-17 (1989); IMMANUEL JAKOBOVITS, JEWISH MEDICAL ETHICS 45-58 (1959); Steven H. Resnicoff, *Jewish Law Perspectives on Suicide and Physician-Assisted Dying*, 13 J.L. & RELIGION 289, 314-16 (1998-1999).

4. Resnicoff, *supra* note 3, at 296-301. See also SHULHAN ARUKH, *Hoshen Mishpat* 427:9-10. The *Shulhan Arukh*, authored by Rabbi Yosef Caro in the sixteenth century, is largely regarded as the most authoritative code of Jewish law. See, e.g., ARYEH KAPLAN, THE HANDBOOK OF JEWISH THOUGHT 240 (1979). ("Because of the near universal acceptance of the Shulchan

3. The duty not to commit suicide;⁵
4. The duty not to murder anyone—even if the person expresses the desire to die;⁶
5. The requirement not to desecrate, and not to profit from, a cadaver;⁷ and
6. The duty to refrain from an act that might violate biblical law, even if the violation is uncertain.⁸

A. *The Duty to Preserve Human Life*

Jewish law regards each human life as supremely valuable. In discussing the creation of Adam, the first human being, the Talmud explains:

[O]nly a single human being was created in the world [at first], to teach that if any person has caused a single soul to perish, Scripture regards him as if he had caused an entire world to perish; and if any human being saves a single soul, Scripture regards him as if he had saved an entire world.⁹

Unlike common law, Jewish law imposes an affirmative duty to save a person's life through one's direct intervention or through the use of one's resources. The clearest biblical basis for this rule is the verse that states, "Do not stand idly by your fellow's blood."¹⁰ If necessary to rescue a person, one must violate every provision of Jewish law except for those relating to immoral sexual acts, idolatry, or murder.¹¹

The cherished status of human life is independent of secular concerns with the supposed "quality of life." As Rabbi Shlomo Zalman Auerbach (1910–1995) wrote:

We have no yardstick to measure the value and importance of life, even in terms of Torah and the commandments, for we violate the Sabbath even for an aged invalid afflicted with boils, even though he is deaf and dumb and completely insane, and even though he is

Arukh, its decisions are considered binding, unless otherwise indicated by the leading authorities of succeeding generations.".)

5. Resnicoff, *supra* note 3, at 301–12; see also BLEICH, *supra* note 3, at 158–61.

6. Resnicoff, *supra* note 3, at 312–14; see also 2 ABRAHAM S. ABRAHAM, NISHMAT AVRAHAM 319–25 (Abraham S. Abraham trans., 2003) (citing views of various leading Jewish law authorities); BLEICH, *supra* note 3, at 134–45; JAKOBOVITS, *supra* note 3, at 275–76.

7. See BABYLONIAN TALMUD, *Avodah Zarah* 29b. See also 2 HERRING, *supra* note 3, at 110–12.

8. See *infra* text accompanying notes 38–39.

9. BABYLONIAN TALMUD, *Sanhedrin* 37a, translated in J. David Bleich, *Life as an Intrinsic Rather Than Instrumental Good: The "Spiritual" Case Against Euthanasia*, 9 ISSUES L. & MED. 139, 140 (1993).

10. *Leviticus* 19:16.

11. SHULHAN ARUKH, *Yoreh De'ah* 195:3, 157:1; MAIMONIDES (1138–1204), *MISHNEH TORAH, Hilkhot Yesodei ha-Torah* 5:1.

incapable of performing any of the commandments and his life seems merely a burden and great suffering to his family and prevents them from studying Torah and performing commandments—and even if, in addition to their great anguish, his family becomes more and more impoverished. Even so, it is a duty for the leaders of the Jewish nation to be involved in saving him and in violating the Sabbath [if necessary to do so].¹²

Nor, as a general matter, does the importance of human life depend on its anticipated length. Every instant of life is of transcendental value.¹³ Indeed, human life is so sacred that one must attempt a rescue at the cost of transgressing other obligations, even if there is only a slight chance that the rescue will be successful.¹⁴

Jewish law imposes parameters on the burden one must endure in the fulfillment of a commandment, even regarding this commandment to rescue others. Although there is some disagreement among the authorities, the majority view seems to be that one must exhaust up to all of one's resources in order to save another person's life.¹⁵

12. SHLOMO ZALMAN AUERBACH, *MINHAT SHLOMO* 91. Similarly, even if a person suffers so much that he tries to commit suicide, normative Jewish law requires that others try to save him, regardless of whether they must violate the Sabbath laws to do so. See, e.g., MOSHE FEINSTEIN (1895–1986), *IGGEROT MOSHE*, *Yoreh De'ah* II:174(3), *Yoreh De'ah* III:90; YITZHAK HERZOG (1888–1959), HEIKHAL YITZHAK, *Even ha-Ezer* I:3; ELIEZER WALDENBURG (b. 1917), TZITZ ELIEZER VIII:15, *Kuntras Mechivat Nefesh*, chapter IV, XVII, *Kuntras Refuah b'Shabbat*, chapter 11 (citing authorities); OVADIAH YOSEF (b. 1920), YABBIA OMER VIII, *Orah Hayyim* 37 (citing authorities); MENASHE KLEIN (b. 1925), *MISHNE HALACHOTH* VIII:56, IX:399.

13. See 2 ABRAHAM, *supra* note 6, at 320 (quoting the views of various authorities:

“The *Gesher HaChaim* explains that since there is neither a measure nor a boundary to the worth of a life, one cannot differentiate between a tiny fraction of life and a period one hundred million times greater. . . . Rav [Immanuel] Jakobovitz . . . writes: The worth of a person's life is immeasurable and therefore cannot be divided; each and every fraction of it is infinite.”)

See also BLEICH, *supra* note 3; Resnicoff, *supra* note 3, at 290–96.

14. See BABYLONIAN TALMUD, *Sanhedrin* 84a; see also SHULHAN ARUKH, *Yoreh De'ah* 195:3, 157:1; MAIMONIDES, *MISHNEH TORAH*, *Foundations of the Torah* 5:1; Resnicoff, *supra* note 3, at 315.

15. The general rule is that to fulfill a positive or active commandment, one must use up to twenty percent of one's wealth, but to avoid transgressing a negative or passive commandment, one must exhaust up to all of one's wealth. There is, however, disagreement as to how to characterize the duty “not to stand idly by.” Although it is phrased as a negative commandment, its effect is to command action. See generally RABBI ABRAHAM ZVI HIRSCH EISENSTADT (1813–1868), *PITKEI TESHUVAH*, *Yoreh De'ah* 157:4 (citing authorities); 3 ABRAHAM, *supra* note 6, at 309–11 (2004) (citing authorities). Nevertheless, most authorities seem to characterize it as a negative commandment. See, e.g., FEINSTEIN, *supra* note 12; RABBI ZVI HIRSCH SHAPIRA (1893–1937), *DARKEI TESHUVA*, *Yoreh De'ah* 157:57.

B. *The Duty to Preserve One's Own Health*

Jewish law demands that a person take care of his or her health.¹⁶ The Talmud¹⁷ seems to cite two explicit biblical passages, "Beware for yourself and greatly beware for your soul"¹⁸ and "But you shall greatly beware for your souls,"¹⁹ as the basis for this duty.²⁰ Consequently, many major Jewish law authorities state that these verses require that a person avoid recklessly dangerous activities and affirmatively take steps to safeguard his or her health.²¹ Moreover, if one's very life is at risk, then the duty to preserve life, discussed above, is also triggered.

C. *The Duty Not to Commit Murder*

The biblical rule, "Thou shalt not murder," is clear.²² One may not kill even to save one's own life.²³ Thus, the Talmud reports that a person went to the sage named Rava, and told him: "Mari Deroi told me, 'Go kill Ploni and, if you do not, I'll kill you.' . . . [Rava] told him, 'Let him kill you, but you may not kill [Ploni].'"²⁴ Nor would it matter if Levi were physically handicapped, mentally deranged, terminally ill, comatose, or had only moments left to live. One may not rescue oneself by hastening another's death.²⁵

Indeed, as a general rule, one may not commit murder, or even turn someone over to be killed by others, in order to save many lives. The Tosefta²⁶ states: "When heathens say to a group of Jews, 'give us one

16. See, e.g., SHULHAN ARUKH, *Hoshen Mishpat* 427:9-10; see also 3 ABRAHAM, *supra* note 6, at 322-25; MAIMONIDES, MISHNEH TORAH, *Hilkhot Deot* 4:1.

17. BABYLONIAN TALMUD, *Berakhot* 32b.

18. *Deuteronomy* 4:9.

19. *Id.* at 4:15.

20. Although the context of these verses suggests that they apply to the protection of one's spiritual health, the scope of these injunctions is not so narrowly limited. See RABBI BORUCH HALEVI EPSTEIN (1860-1941), TORAH TEMIMAH, *Comment to Deuteronomy* 4:9. See generally Steven H. Resnicoff, *Jewish Law: Duties of the Intellect*, 1 U. ST. THOMAS L.J. 386, 387 (2003) ("Jewish law is not a literalist tradition" but instead relies on authoritative interpretations of the texts).

21. See, e.g., MAIMONIDES, MISHNEH TORAH, *Hilkhot Rotzeah* 11:4; R. JOSEPH BEN MOSES BABAD (1800-1874/5), MINHAT HINNUKH, *Commandment* 546. Various other doctrinal sources are also mentioned. See, e.g., RABBI MENACHEM SLAF, SMOKING AND DAMAGES TO HEALTH IN THE HALACHAH 3-16 (1990); Resnicoff, *supra* note 3, at 297.

22. *Exodus* 20:13; *Deuteronomy* 5:17.

23. MAIMONIDES, MISHNEH TORAH, *Hilkhot Yesodei ha-Torah* 5:1.

24. BABYLONIAN TALMUD, *Pesahim* 25b.

25. See, e.g., BABAD, *supra* note 21, *Commandment* 34 (explaining that the prohibition against murder applies equally to someone with only a moment to live and someone with many years to live); MAIMONIDES, MISHNEH TORAH, *Hilkhot Rozeah u'Shemirat ha-Nefesh* 2:7 ("There is no difference between one who kills a healthy person or who kills person who is ill and dying . . .").

26. See ENCYCLOPEDIA JUDAICA, *supra* note 1 (search "Tosefta").

of your group and we will kill him, and if not, we will kill you all['] all must be killed rather than surrendering even one Jew."²⁷

D. *The Duty Not to Commit Suicide*

Although committing suicide would clearly transgress the duties to preserve one's health and human life and would violate the prohibition against murder, many authorities find an additional, specific proscription against suicide from the verse, "The blood of your lives will I require."²⁸ Jewish law regards suicide as especially opprobrious for many reasons.²⁹ First, suicide constitutes a rejection of the duty to cope successfully with the religious challenges of this world and the commandment to "be holy."³⁰ Second, suicide committed out of despair reflects a lack of trust in God's ability to remedy one's predicament or God's authority to impose punishment for one's transgressions.³¹ Third, suicide deprives a person of valuable opportunities that are available only while one is alive, including the chance to repent for past sins.³² Fourth, although under Jewish law death itself can effect expiation for a person's past sins, death through suicide adds yet an additional sin.³³

E. *The Duty to Bury a Body, Not to Desecrate or Profit From It*

The body of a person who is executed for having committed a capital offense is thereafter briefly hung on a tree.³⁴ Nonetheless, an explicit biblical verse forbids leaving the body on the tree overnight, requiring instead that it be buried on the same day as the execution.³⁵ Why? Because Jewish law posits that the dignity of human life requires that the human body, even the body of an executed criminal,

27. TOSEFTA, *Terumot* 7:20, translated in Nahum Rakover, *The One vs. the Many in Life and Death Situations*, in 8 JEWISH LAW ASSOCIATION STUDIES 129, 130 (E.A. Goldman ed., 1996).

28. *Genesis* 9:5. See, e.g., MAIMONIDES, *MISHNEH TORAH, Hilkhot Rotzeah u'Shemirat Nefesh* 2:3; BABYLONIAN TALMUD, *Shevuot* 28a; BABAD, *supra* note 21. Some authorities disagree, however, maintaining that suicide falls within the prohibition against murder found in *Exodus* 20:13. See J. David Bleich, *Survey of Recent Halakhik Periodical Literature: Treatment of the Terminally Ill*, 30 TRADITION 51, 79–80 n.12 (1996) (citing this view).

29. For a longer, and more detailed, discussion of the Jewish view regarding suicide, see Resnicoff, *supra* note 3, at 301–12.

30. *Leviticus* 19:2.

31. RABBI YEHIEL MICHOEL TUKAZINSKY (1871–1955), *GESHER HA-HAYYIM I*, at 269–70.

32. See generally Fred Rosner, *Suicide in Jewish Law*, in JEWISH BIOETHICS 317, 327 (Fred Rosner & J. David Bleich eds., 1979).

33. *Id.* at 326. See also MAIMONIDES, *MISHNEH TORAH, Hilkhot Teshuva* 1:4, 2:1.

34. *Deuteronomy* 21:22. See ENCYCLOPEDIA JUDAICA, *supra* note 1 (search "Capital Punishment").

35. *Deuteronomy* 21:23.

not be subjected to unnecessary indignity.³⁶ Moreover, Jewish law requires a speedy burial for all those who die³⁷ and prohibits one from utilizing a cadaver for personal profit.³⁸

F. The Duty to Refrain From an Act That Might Violate Biblical Law, Even if the Violation Is Uncertain

As already noted, murder is biblically forbidden. But what if it is uncertain whether a particular act will kill someone? Is carrying out the act biblically prohibited, or does it depend on whether the act actually causes someone's death?

Jewish law has a general rule that deals with situations in which a particular act may or may not violate Jewish law. If the prohibition at stake is biblical in nature, rather than one that was rabbinically promulgated, then Jewish law rules stringently; it forbids the act even if it is uncertain whether the act will violate the prohibition.³⁹ Because the prohibition against murder is biblical, even if it is uncertain whether a particular act will constitute murder, the act is forbidden.⁴⁰

As will be discussed in Part IV, secular law, relying on the concept of "brain death," permits the harvesting of body parts from persons who, according to perhaps the majority of the most influential Jewish law authorities, are either certainly or at least possibly alive.⁴¹ As a result of the harvesting procedures, however, such patients defini-

36. BABYLONIAN TALMUD, *Sanhedrin* 47a (prohibition against "Nivul ha-Met"). See generally Reuven Fink, *Halachic Aspects of Organ Transplantation*, 5 J. HALACHA & CONTEMP. SOC'Y 45, 46-47 (1983).

37. BABYLONIAN TALMUD, *Sanhedrin* 46a. See Fink, *supra* note 36, at 48-49.

38. BABYLONIAN TALMUD, *Avodah Zarah* 29b. See Fink *supra* note 36, at 47-48.

39. See, e.g., MAIMONIDES, *MISHNEH TORAH*, *Hilkhot Mikvaot* 8:6; YOM TOV VIDAL OF TOLOSA (second half of the fourteenth century), *MAGGID MISHNEH*, *Hilkhot Shabbat* 27:3. See also Michael J. Brody & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685, 1816 (1997).

40. See, e.g., 2 ABRAHAM, *supra* note 6, at 319.

41. See, e.g., Yitzchok A. Breitowitz, *The Brain Death Controversy in Jewish Law*, <http://jlaw.com/Articles/brain.html> (last visited Jan. 8, 2006). As noted by Rabbi Breitowitz,

Most contemporary *poskim* [Jewish law authorities] in Eretz Yisroel [Israel] (other than the Chief Rabbinate) have unequivocally repudiated the concept of death based on neurological or respiratory criteria. Of special significance are letters signed by R. Shlomo Zalman Auerbach and R. Yosef Elyashiv, widely acknowledged as the leading *poskim* in Eretz Yisroel (if not the world), stating that removal of organs from a donor whose heart is beating and whose entire brain including the brain-stem is not functioning at all is prohibited and involves the taking of life. Unfortunately, these very brief communications do not indicate if the *psak* [ruling] is based on *vadei* (certainty) or *safeik* (doubt)

Id. (internal citations omitted). See also *infra* text accompanying notes 68-71.

tively die. Consequently, according to these authorities, such procedures are forbidden by the prohibition against murder.⁴²

III. DOES JEWISH LAW PERMIT THE SALE OF PRECIOUS BODY PARTS?

Whether Jewish law permits the sale of precious body parts involves two questions. First, does Jewish law permit the transfer of body parts? Second, does Jewish law permit the transferor to be paid for those body parts? Each question will be examined separately.

A. *May Precious Body Parts Be Transferred?*

1. *Inter Vivos Transfers*

The first four doctrines discussed in Part II interact so as to permit the transfer of body parts from living donors in some instances and to proscribe them in others. The easiest case for permitting such a transfer would be if it were necessary to save another person's life and it could be accomplished without any detrimental effect on the donor. Under such circumstances, the duty to preserve Jewish life would likely require the transfer, and none of the other three doctrines would be relevant. Nevertheless, a transfer generally does entail some detrimental effect on the transferor, and this fact requires an evaluation not only of the scope of the obligation to rescue but also of the other three doctrines.

The issue of giving up a precious body part to save another person's life was not introduced into Jewish law literature by the modern medical breakthroughs that have made life-saving organ transfers possible. Indeed, the seminal question did not involve the transfer of a body part but rather its loss. The issue arose as a result of a cruel choice imposed upon a Jew by a sadistic, non-Jewish despot.⁴³ Perhaps the earliest, extant rabbinic analysis was authored by Rabbi Menachem Recanati, a late thirteenth-century, early fourteenth-century Italian sage.⁴⁴ He considered a situation in which a feudal ruler demanded that a particular Jew allow the amputation of one of his "nonessential" limbs, such as a hand or a foot.⁴⁵ If the Jew refused, the tyrant would kill another Jew in the community. Employing an *a fortiori* argument, Recanati ruled that the first Jew must submit to the amputation in

42. See Breitowitz, *supra* note 41.

43. See J. David Bleich, *Compelling Tissue Donations*, 27 TRADITION 3, 61 (1993).

44. See THE RISHONIM 194 (Hersh Goldwurm ed., 2d ed. 2001).

45. MENACHEM RECANATI, RECANATI, *Responsa* 470.

order to save the other person's life.⁴⁶ Specifically, he noted that Jewish law does not permit a person to violate the Sabbath laws in order to save an unessential limb.⁴⁷ Thus, one "sacrifices" a limb to preserve the Sabbath. Yet Jewish law requires a person to violate the Sabbath to save a life.⁴⁸ Consequently, he argued, one must sacrifice a limb to save a life.⁴⁹

Others, such as Rabbi David ibn Zimra, known as the *Radbaz*, (1480–1573), who served for over forty years as the Chief Rabbi of Egypt,⁵⁰ and Rabbi Shabtai HaKohen, known as the *Shakh*, (1622–1663), a leading Lithuanian authority,⁵¹ disagreed with Recanati, but their respective reasons are arguably ambiguous.⁵² Rabbi Moshe Feinstein (1895–1986), one of the most influential Jewish law authorities of the twentieth century, explained—and endorsed—the *Shakh's* reasoning.⁵³ He said that the duty not to stand idly by when one could rescue another is a negative commandment compelling one to exhaust up to all of one's wealth in effectuating a rescue.⁵⁴ The question, reasoned Feinstein, is whether loss of a limb constitutes a greater sacrifice than the loss of all of one's money.⁵⁵ If it does, fulfillment of the commandment does not require one to bear it.⁵⁶ Inasmuch as no Talmudic sources suggest that one would have to endure the loss of a limb—and, indeed, they may suggest the contrary—he reasoned that a person is not obligated to sacrifice a limb to save someone else's life.⁵⁷

Another consideration might also prevent a person from being required to sacrifice a body part to save another person. Suppose there are multiple people who could serve as effective donors for the one person who needs a body part. If so, then none of these prospective donors may be personally required to volunteer as the donor. Instead,

46. *Id.*

47. *Id.* See also 1 ABRAHAM, *supra* note 6, at 203 (2000); SHULHAN ARUKH, *Oreh Hayyim* 328:17.

48. 2 KAPLAN, *supra* note 4, at 39 (Abraham Sutton ed., 1992); SHULHAN ARUKH, *Oreh Hayyim* 328:2; see also 1 ABRAHAM, *supra* note 6, at 185; RECANATI, *supra* note 45.

49. RECANATI, *supra* note 45.

50. THE EARLY ACHARONIM 79–81 (Hersh Goldwurm ed., 1989).

51. *Id.* at 167–69.

52. See 3 ABRAHAM, *supra* note 6, at 313 (discussing the views of Recanati, Radbaz, and *Shakh*); see also SHAKH, COMMENTARY TO SHULHAN ARUKH, *Yoreh De'ah* 157, *sif koton* 3.

53. FEINSTEIN, *supra* note 12, *Yoreh De'ah* II:174(4).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* See generally J. DAVID BLEICH, 4 CONTEMPORARY HALAKHIC PROBLEMS 275–79 (1995) (citing authorities).

there might be only a communal obligation to try to ensure that one of them steps forward.⁵⁸

But Jewish law addresses not only that which is required or proscribed. It also provides guidance as to what is favored or disfavored. Even most of the authorities who rule that there is no duty to lose a limb in order to save someone else's life maintain that one may voluntarily make such a sacrifice and that whoever does so is indeed praiseworthy.⁵⁹

What about situations which do not require loss of a limb, but instead involve risk to the rescuer's own life? Where the risk is minimal, Jewish law may in fact obligate one to undertake the rescue.⁶⁰ Accordingly, some authorities rule that one must make donations of blood or skin when necessary to save someone's life.⁶¹ At least one contemporary authority, Rabbi Ovadiah Yosef (b. 1920), a former Israeli Chief Rabbi, suggested that one ought to make a renal donation in order to save someone's life.⁶² The threat to life need not be imminent. Even if a recipient has the use of a dialyzer, a kidney transfer is deemed life-saving if it statistically increases the recipient's life expectancy.⁶³ Most authorities, however, rule that although making such a donation is meritorious, it is not required.⁶⁴

Yet, there is a limit to such altruism. According to most Jewish law authorities, one may not generally give up one's life to save the life of someone else.⁶⁵ One does not promote human life by trading his or her life to save the life of another. Consequently, if it is more likely

58. *Id.*

59. *Id.* at 279–81 (citing authorities).

60. *Id.* at 277 n.12 (“Rabbi Unterman suggests that, in making a decision, the potential rescuer should ask himself if he would incur the identical danger in order to rescue a cherished possession. If yes, he should cherish the life of his fellow equally and accept the danger.”). See also RABBI YEHIEL MICHAL HALEVI (1829–1908), ARUKH HA-SHULHAN, *Hoshen Mishpat* 426:4 (in deciding whether to rescue another, one should not be overly careful about one's own safety).

61. See, e.g., RABBI MOSHE MEISELMAN, HALAKHAH U-REFU'AH II:118 (donations of blood and skin are required); RABBI SHMUEL HALEVI WOSNER, SHEVET HA-LEVI V:119 (blood donations are obligatory). But see TZITZ ELIEZER XIII:101(6) (blood donations are not obligatory). See generally AVRAHAM STEINBERG, 3 ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS 1096, 1103 nn.68–69 (Fred Rosner trans., 2003); see also 2 ABRAHAM, *supra* note 6, at 345–47.

62. OVADIAH YOSEF, YEHAVEH DA'AT III:84. See STEINBERG, *supra* note 61, at 1095 (construing Yosef's position as requiring such a kidney donation).

63. See, e.g., BLEICH, *supra* note 3, at 132. Cf. 2 HERRING, *supra* note 3, at 97–98 (citing authority permitting kidney transplantation if it provides a greater likelihood of survival). If the use of dialysis was equally effective to preserve the patient's life, at least one authority would forbid use of a cadaver organ. *Id.* at 118.

64. See STEINBERG, *supra* note 61, at 1095, 1103, nn.62–63 & 65.

65. See JAKOBOVITS, *supra* note 3, at 98; see also 2 HERRING, *supra* note 3, at 104. See generally 1 ABRAHAM, *supra* note 6, at 217–18; 2 ABRAHAM, *supra* note 6 at 345–46; 3 ABRAHAM, *supra* note 6, at 313–17; Bleich, *supra* note 43, at 60–61.

than not that the rescue will cost the rescuer his or her own life, then the commandment to preserve one's own health and the injunction against suicide take precedence, and the rescue is proscribed.⁶⁶

2. *Cadaveric Transfers*

Theoretically, the alternative of cadaveric donations would avoid conflict with the commandment to preserve one's own health and the injunction against suicide. It would only involve the principle of preserving human life (which would favor such donations) versus the special rules regarding cadavers (which would seem to disfavor such donations).

According to many authorities, where Jewish law perceives that cadaveric donations could save life, the importance of preserving human life would trump the otherwise applicable rules regarding cadavers.⁶⁷ Support for this view is even stronger if the deceased had consented in advance to such transfers.⁶⁸ Consequently, as a matter of Jewish law, such transfers might be required or, at least, permitted and praised. There is disagreement, however, as to precisely what types of transfers should be characterized as life-preserving. Thus although most authorities believe that a corneal transplant to a person who is completely blind is permitted as life-preserving, some authorities would not permit a transfer to a recipient who already has one functioning eye.⁶⁹ Transfers for mere cosmetic purposes, except in cases in which the recipient could thereby be saved from extreme psychological or emotional distress, are similarly unlikely to be permitted.⁷⁰

66. YOSEF, *supra* note 62.

67. See, e.g., STEINBERG, *supra* note 61, at 1096 (asserting that most authorities rule that a transplant procedure to save life "waives" the prohibition against desecrating the dead). Moreover, there may also be technical reasons under Jewish law why one or more of the rules regarding cadavers would simply not apply to the constructive transplantation of cadaveric body parts for the purpose of saving lives. For example, the prohibition against benefiting from a cadaver may be inapplicable to benefits obtained in unusual manners, such as the benefit derived from a transplant. *Id.* Similarly, once a body part is transplanted, it may be deemed to be a live part of the live donee, and any benefit obtained from it may be considered to be a benefit derived from the living. *Id.* See also 2 ABRAHAM, *supra* note 6, at 342–45.

68. STEINBERG, *supra* note 61, at 1096–97. See also OVADIA YOSEF, YABBIA OMER III, *Yoreah De'ah* 20, 21 (with prior consent of deceased, one can even transplant a cornea to a donee who already has one functional eye). Cf. Fink, *supra* note 36, at 52 n.19 (stating that most rabbinic authorities would not permit cadaveric transplants without the prior consent of the deceased).

69. See, e.g., RABBI UNTERMAN, SHEVET MI-YEHUDAH 313–22 (allowing cadaveric transplant of corneas to donees who are blind in both eyes but not to those who still have one functioning eye).

70. There is no Jewish law obligation to improve one's appearance that would override the general rules regarding the need to bury a cadaver. See *supra* text accompanying notes 34–38.

But even many supposedly cadaveric organ transfers that could probably preserve a recipient's life are likely to be forbidden under Jewish law. Why? The most coveted organs, such as the heart and kidneys, rapidly deteriorate once the donor's heart stops beating.⁷¹ The brain death definition is designed to enable physicians to treat "donors" as dead before their hearts stop beating, even though, under Jewish law, these donors may not yet be dead. If the donors are still alive before the removal of the organs, surgery removing their organs kills them. Consequently, such surgery violates the Jewish law against murder. Even if, in a particular case, it is uncertain whether the donor is alive at the time of the surgery, Jewish law's rule regarding uncertainty, discussed at the end of Part II, prohibits the operation lest it constitute murder.⁷² For similar reasons, Jewish law would not allow a person to consent in advance to being a donor in such a situation, because by doing so one would be guilty of causing his or her own death.⁷³

3. *Criteria for Determining Death*

But why would secular physicians take organs from other human beings who might be alive? First, some commentators actually believe in establishing priorities based on the "quality" of a person's life.⁷⁴ They are therefore willing to allow physicians to cause the deaths of people who they believe have a terribly inferior "quality of life" in order to save the lives of others whose perceived quality of life is better.⁷⁵ Second, perhaps more importantly, those who want desperately to save prospective transplant recipients but are unwilling to kill live donors are legally, and perhaps morally, able to rely on a modern defi-

71. See Breitowitz, *supra* note 41.

72. See *supra* text accompanying notes 39–42.

73. By enabling the physicians involved in the procedure to operate, thereby causing death, the patient giving such consent might also violate Jewish law's rules against causing or assisting others to sin. See generally Steven H. Resnicoff, *Helping a Client Violate Jewish Law: A Jewish Lawyer's Dilemma*, in 10 JEWISH LAW ASSOCIATION STUDIES 191 (H.G. Sprecher ed., 2000).

74. See, e.g., David Randolph Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850, 888 (1986) (identifying cognitive abilities as distinguishing "human" life from other life forms, and proposing that the lack of such abilities should define human death so that "[n]o longer will the law favor artificially maintaining someone in an inhuman state").

75. Robert D. Truog, *Is It Time to Abandon Brain Death?*, 27 HASTINGS CTR. REP. 29 (1997); Robert Truog & Walter Robinson, *Role of Brain Death and the Dead-Donor Rule in the Ethics of Organ Transplantation*, 31 CRITICAL CARE MED. 2391 (2003) (acknowledging that "brain dead" patients are not really dead but arguing that it is nevertheless morally justified to take their vital organs); 2 ABRAHAM, *supra* note 6, at 317–18 (citing views).

inition of death, namely “brain death,” which defines prospective donors as dead.⁷⁶

Although a rigorous analysis of the brain death definition is beyond the purview of this paper, a brief discussion of it and of its relationship to Jewish law is essential. First, secular law definitions of death are not *per se* valid under Jewish law. What constitutes “death” is a matter of fundamental importance under Jewish law and is established by Jewish law authorities based on Jewish law sources. Second, according to many (and quite possibly most) major Israeli⁷⁷ and American⁷⁸ Jewish law authorities, the brain death definition and standards, as widely adopted and applied in the United States, do not conclusively establish when someone is dead. According to these and other Jewish law authorities,⁷⁹ most people who are secularly declared brain dead are, under Jewish law, either definitely alive or at least possibly alive. Consequently, operating on these persons to remove their vital organs—even for the purpose of saving someone else’s life—would be absolutely forbidden. Even surgery on such patients to take something that might otherwise be considered nonessential, such as skin or blood, would likely be forbidden because, given their precarious positions, any such procedure might be considered, under Jewish law, as endangering their lives.⁸⁰

76. See *infra* notes 86, 92 and accompanying text (explaining that the brain death standard was intended to accomplish this result).

77. See 2 ABRAHAM, *supra* note 6, at 307–17 (surveying various views); BLEICH, *supra* note 57, at 331–34; Breitowitz, *supra* note 41; see also J. DAVID BLEICH, TIME OF DEATH IN JEWISH LAW 144–45, 159 n.40, 177 (citing the views of Rabbis Shlomo Zalman Auerbach, Yosef Shlomo Elyashiv, Nathan Gestetner, Elazar Kahanow, Nisim Karelitz, Yitzhak Kulitz, Yehoshua Neuwirth, Eleazar Shach, Moshe Sternburch, Eliezar Waldenburg, Yitzhak Weisz, and Shmuel Wosner). Although the Israeli Chief Rabbinat Council permits liver transplants under certain circumstances, it is debatable as to whether this position involves approval of the brain death standard. BLEICH, *supra*, at 143–48.

78. BLEICH, *supra* note 77, at 159 (citing Rabbis Isaac Hutner and Yaakov Ruderman); BLEICH, *supra* note 57, at 347 n.56 (citing Rabbi Yaakov Kamenetsky); see also RABBI MENASHE KLEIN, MISHNE HALACHOT VII:386; Joshua Kunin, *Brain Death: Revisiting the Rabbinic Opinions in Light of Current Medical Knowledge*, 38 TRADITION 4, 48–62 (2004); Herschel Schachter, *Determining Death*, 17 J. HALACHA & CONTEMP. SOC’Y 32, 40 (1989) (one must act strictly not to remove organs from a person who is “brain dead”); Ahron Soloveichik, *Death According to the Halacha*, 17 J. HALACHA & CONTEMP. SOC’Y 41 (1989). The position of Rabbi Moshe Feinstein is the subject of debate. See, e.g., BLEICH, *supra* note 77, at 171–76; BLEICH, *supra* note 57, at 343–50. Although there is also some question regarding the position of Rabbi Joseph Soloveichik, Bleich counts him as one of the authorities who refused to accept the brain death standard. BLEICH, *supra* note 77, at 176–77.

79. For example, the former Chief Rabbi of the British Commonwealth, Immanuel Jakobovits, is another who did not endorse the brain death standard. See 2 HERRING, *supra* note 3, at 127.

80. See, e.g., 2 ABRAHAM, *supra* note 6, at 187; Yitzchok A. Breitowitz, *What Does Halachah Say About Organ Donation?*, JEWISH ACTION (2003).

This is not the place to evaluate the contrary Jewish law perspective view that would permit transplant surgeries on patients who are declared to be brain dead.⁸¹ As mentioned in the Introduction to this Article, Jewish law currently lacks any institution authorized to definitively resolve such disputes.⁸² Instead, individual Jews are bound by the rulings of the authorities whom they regard as authoritative.⁸³ For the large numbers of religiously observant Jews who follow the views of authorities who find the brain death standards inadequate, surgeries on such patients are forbidden, falling within the scope of the Jewish law prohibition against murder.⁸⁴

It is not only Jewish law authorities who question or reject the brain death approach.⁸⁵ Indeed, the development of the brain death criteria is a relatively recent innovation and reflects a sharp break from past practices that regarded patients as alive as long as their hearts

81. See, e.g., Fred Rosner & Moshe David Tendler, *Definition of Death in Judaism*, 17 J. HALACHA & CONTEMP. SOC'Y 14 (1989) (arguing that brain stem death is death under Jewish law). See generally 2 HERRING, *supra* note 3, at 99–105; Breitowitz, *supra* note 41.

82. See *supra* note 1. See also Yitzchok A. Breitowitz, *How a Rabbi Decides a Medical Halacha Issue*, <http://www.jlaw.com/Articles/decide.html> (last visited Jan. 28, 2006). Rabbi Breitowitz explained:

When there is a supreme body like the 70-member Sanhedrin [the Sanhedrin ha-Gadol], their [*sic*] decision (by a majority) would be binding and preclusive on the minority dissenters but in the absence of such an authoritative body (as is the case today) there can be multiple halachic approaches . . . with none of them being “wrong” or “illegitimate.”

Id.

83. Rabbi Hirsch wrote:

In all doubtful cases consult a scholar who, in virtue of his knowledge of the law and his recognized conformity to it, is qualified to give a decision. If therefore you recognize him on account of his knowledge and his character as a faithful exponent of the law, follow his decision and turn aside neither to the right nor to the left . . .

RABBI SAMSON RAPHAEL HIRSCH, *HOREB: A PHILOSOPHY OF JEWISH LAWS AND OBSERVANCES* 384 (I. Grunfeld trans., 4th ed. 1981). See also KAPLAN, *supra* note 4, at 244, 248, 256–57; Moshe Sokol, *Personal Autonomy and Religious Authority*, in *RABBINIC AUTHORITY AND PERSONAL AUTONOMY* 169, 209 (Moshe Z. Sokol ed., 1992); MISHNAH, *Avot* 1:6 (“Acquire for yourself a teacher”); Breitowitz, *supra* note 82.

84. See *supra* notes 41, 77–80 and accompanying text.

85. See, e.g., M. Potts & D. W. Evans, *Does It Matter That Organ Donors Are Not Dead? Ethical and Policy Implications*, 31 J. MED. ETHICS 406 (2005). Potts and Evans wrote:

In the last ten years, fresh attacks on brain death criteria have eroded their perceived invulnerability. Their conceptual and empirical foundations are collapsing. Calixto Machado and Alan Shewmon, in a newly published anthology, note that there are still worldwide controversies over the very concept of human death and the putative neurological grounds for diagnosing it . . .

Id. See also Paul A. Byrne & George M. Rinkowski, Abstract, “Brain Death” Is False, 15 ISSUES L. & MED. 107 (1999); Nicholas Tonti-Filippini, Abstract, *Revising Brain Death: Cultural Imperialism?*, 14 ISSUES L. & MED. 225 (1998).

continued to beat.⁸⁶ Nor was the brain death definition justified by any novel medical insights or discoveries.⁸⁷ Instead, in 1968, brain death was offered as a “new criterion” by an Ad Hoc Committee of the Harvard University Medical School, which admitted to being driven by practical concerns regarding (1) the ongoing grief of the families of patients in an irreversible coma; (2) the need to free up beds in intensive care units; and (3) the removal of obstacles to the obtaining of organs for transplantation.⁸⁸ The committee proposed to define as dead anyone in a state of “irreversible . . . coma [with] no discernible central nervous system activity.”⁸⁹ This proposal led to the promulgation of the Uniform Determination of Death Act (UDDA) in 1980, which provides, among other things, that anyone who has suffered “irreversible cessation of all functions of the entire brain, including the brain stem, is dead.”⁹⁰ This standard seems to have been adopted, either by statute or by judicial opinions, throughout the United States.⁹¹

Some explicitly or implicitly criticize the application of the UDDA standard as a disingenuous effort to define live patients as dead to enable physicians to “harvest” organs without having to face criminal liability for having murdered the patients from whom they were taken.⁹² Interestingly, the proposal of defining people as dead upon

86. See, e.g., D. Alan Shewmon, “Brainstem Death,” *“Brain Death” and Death: A Critical Re-Evaluation of the Purported Equivalence*, 14 ISSUES L. MED. 125, 142 (1998). Shewmon stated:

In summary, the notion of “brain death” as bodily death turns out to be logically and physiologically incoherent. Historically, the introducers of “brain death” intended a radical redefinition of death in terms of loss of personhood by virtue of permanent unconsciousness, for the purely utilitarian purposes of turning off ventilators and [commencing] organ transplantation.

87. Marie-Andree Jacob, Book Review, 26 POL. & LEGAL ANTHROPOLOGY REV. 165 (2003) (reviewing MARGARET LOCK, *TWICE DEAD: ORGAN TRANSPLANTS AND THE REINVENTION OF DEATH* (2002)) (“The ‘new’ brain death was crafted in North America in the middle of the twentieth century as a means to achieve an end: maximizing post-mortem organ procurement. Thus it is at its core a utilitarian death. Peter Singer, for example, has pronounced it a ‘convenient fiction.’”).

88. *A Definition of an Irreversible Coma*, 205 JAMA 85 (1968). French investigators first described the clinical criteria of “brain death” in 1959. Nevertheless, they did not allege that brain death is the same as actual death. See K.G. Karakatsanis & J.N. Tsanakas, *A Critique on the Concept of “Brain Death,”* 18 ISSUES L. & MED. 127 (2002).

89. *A Definition of an Irreversible Coma*, *supra* note 88.

90. UNIF. DETERMINATION OF DEATH ACT § 1 (1980).

91. Breitowitz, *supra* note 41.

92. Consider, for example, the comments of Dr. Norman Fost, Director of the University of Wisconsin’s Program in Medical Ethics:

The notion of brain death, Dr. Fost said, was concocted about 20 years ago by medical specialists who wanted to increase the supply of organs for transplants. “They said, ‘Let’s have a statute saying a person is dead when the brain is gone so we can take the heart out and not be accused of killing anybody,’” he said.

the irreversible cessation of their entire brains, including their brain stems, was predicated upon the assumption that those who satisfied this criteria would inevitably cease breathing—and die—within an extremely limited period of time, certainly no longer than several days.⁹³ Yet a subsequent study by a former proponent of the brain death standard⁹⁴ contradicts this assumption.⁹⁵ The study evidenced approximately 175 cases of brain death with survival of at least one week, eighty of whom survived at least two weeks, approximately forty-four of whom lasted at least four weeks, about twenty at least two months, and seven at least six months.⁹⁶ One brain dead patient was still alive after fourteen and one half years.⁹⁷ These findings are especially noteworthy because the strongest of the brain dead patients may well have been used as organ donors. There is no way of ascertaining how long they might have lived had their treatment been continued. Indeed, as the study's author remarked, "BD [brain death] is nearly always a self-fulfilling prophesy of somatic demise through organ harvesting or discontinuation of support."⁹⁸

Even if the "irreversible cessation of all functions of the entire brain, including the brain stem" were to constitute death, a proposition with which Jewish law does not necessarily agree, the tests used to determine whether there has been such cessation simply do not work. Robert Truog, for instance, stated:

[T]here is evidence that many individuals who fulfill all of the tests for brain death do not have the "permanent cessation of functioning of the entire brain." In particular, many of these individuals retain clear evidence of integrated brain function at the level of the brainstem and midbrain, and may have evidence of cortical function.⁹⁹

Citing various studies, Truog commented, "This evidence points to the conclusion that there is a significant disparity between the standard

Gina Kolata, *When Death Begins*, N.Y. TIMES, Apr. 20, 1997, § 4, at 1. See 2 ABRAHAM, *supra* note 6, at 307 (citing this view); Norman Fost, *Reconsidering the Dead Donor Rule: Is It Important That Organ Donors Be Dead?*, 14 KENNEDY INST. ETHICS J. 249 (2004). See also MICHAEL H. SHAPIRO ET AL., *BIOETHICS AND LAW: CASES, MATERIALS AND PROBLEMS* 943 (2d ed. 1981) ("Most commentators agree that the desire to facilitate organ transplantation was the primary force moving the Committee.").

93. This assumption is certainly a strange one in which to ground a definition of death. In Jewish law, of course, the fact that a person will surely die soon would hardly be a reason to define the person as dead now.

94. See Shewmon, *supra* note 86, at 126 (discussing his change of position).

95. *Id.* at 135; see D. Alan Shewmon, *Chronic "Brain Death": Meta-Analysis and Conceptual Consequences*, 15 NEUROLOGY 1538 (1998); see also Kunin, *supra* note 78, at 51–54.

96. Shewmon, *supra* note 95, at 1540.

97. *Id.*

98. *Id.* at 1542.

99. Truog, *supra* note 75, at 29.

tests used to make the diagnosis of brain death and the criterion these tests are purported to fulfill.”¹⁰⁰ In their 2002 article, Doctors Karakatsanis and Tsanakas not only asserted that the brain death concept is “based on an unproved hypothesis,” but cited extensive evidence proving that the brains of patients declared to be brain dead continued to function.¹⁰¹

Also citing such evidence, Rabbi J. David Bleich, a professor at Cardozo School of Law, characterized the brain death definition as a “semantic sleight of hand.”¹⁰² He compared it to similarly suggested “definitions” that would have permitted the killing of the unwanted young:

Some time ago, an eminent scientist and Nobel laureate, Dr. James Watson, made the startling proposal that “birth” be defined not as parturition or emergence of the baby from the womb, but as occurring some seventy-two hours after this event. Consequently, if a baby is not yet “born” and is found to be physically or mentally defective, it could be destroyed with impunity up to the moment of “birth.” As a result of lexicographical sleight of hand, infanticide within seventy-two hours of parturition would be relabeled as feticide; since abortion no longer carries with it opprobrium, unwanted babies could be readily (and morally) disposed of in this manner.

In a similar vein, England’s Nobel Prize-winning biologist, Dr. Francis Crick, has advocated legislation under which newborn babies would not be considered legally alive until they are two days old and certified as healthy by medical examiners. Michael Tooley,

100. *Id.* at 30. This conclusion is especially persuasive as it comes from a person who actually favors promoting the procurement of organs. He suggests that, on policy grounds, we allow the taking of the needed organs from patients who are in an irreversible coma even though they are still alive. Indeed, he recognizes that “[t]he most difficult challenge for [his] . . . proposal would be to gain acceptance of the view that killing may sometimes be a justifiable necessity for procuring transplantable organs.” *Id.* at 36. As discussed in Part II, Jewish law would not permit killing even a person who has only a moment of life left in order to save someone who seems likely to live many years.

101. Karakatsanis & Tsanakas, *supra* note 88, at 140–41. See also PETER SINGER, *RETHINKING LIFE AND DEATH* (1994). Singer has written:

We think of the brain primarily as concerned with processing information through the senses and the nervous system, but the brain has other functions as well. One of these is to supply various hormones that help to regulate several bodily functions (for example, the antidiuretic hormone . . .). We now know that some of these hormones continue to be supplied by the brains of most patients who, by the standard tests, are brain dead. Moreover, when brain-dead patients are cut open, in order to remove organs, their blood pressure may rise and their heartbeat quicken. These reactions mean that the brain is still carrying out some of its functions, regulating the responses of the body in various ways. As a result, the legal definition of brain death, and current medical practice in certifying brain-dead people as dead, have come apart.

Id. at 36.

102. J. David Bleich, *Moral Debate and Semantic Sleight of Hand*, 27 *SUFFOLK U. L. REV.* 1173, 1193 (1993).

professor of philosophy at Stanford University, would grant even greater latitude. He argues that human babies, even after birth, are no more than kittens and cannot bear rights until they have awareness of themselves as persons. Accordingly, he finds no reason to view with disapprobation the killing of any child within the first two weeks of life.¹⁰³

B. *May Precious Body Parts Be Bought and Sold?*

The Jewish law duty to rescue not only permits but encourages someone to donate a body part if doing so is necessary to save another person's life and will not seriously endanger the donor's own life.¹⁰⁴ Similarly, Jewish law would encourage the use of a cadaver's body parts, at least if the deceased had previously consented, if necessary to save a person's life.¹⁰⁵ Nevertheless, it would not allow the removal of vital organs from someone declared brain dead under secular law, so long as he or she is still alive under Jewish law, because doing so would kill the donor.¹⁰⁶

The next question is whether someone could sell or buy such body parts. I will first consider organs originating from live donors and then organs from cadavers.

1. *Organs From Live Donors*

There is no apparent rule that would prevent the donor from charging a reasonable price for donating a body part. Assume, for instance, that a person were required to provide a body part in order to fulfill the duty to rescue discussed in Part II. When necessary to save someone else's life, a rescuer must use up to all of his or her resources to effectuate the rescue.¹⁰⁷ Nevertheless, if the person rescued is financially able to do so, he or she must compensate the rescuer for the resources so expended.¹⁰⁸ Presumably, such compensation should include both the rescuer's out-of-pocket expenses as well as physician and hospital costs.¹⁰⁹ Whether such payment could specifically include a designated "price" for the body part may be subject to de-

103. *Id.* at 1192 (internal citations omitted).

104. *See supra* notes 59–64 and accompanying text.

105. *See supra* notes 59–64 and accompanying text.

106. *See supra* notes 41, 72–73, 77–80 and accompanying text.

107. 1 ABRAHAM, *supra* note 6, at 216–17; 2 ABRAHAM, *supra* note 6, at 345–46; 3 ABRAHAM, *supra* note 6, at 313–17; Resnicoff, *supra* note 3, at 300–01.

108. 3 ABRAHAM, *supra* note 6, at 310 (citing various sources).

109. These expenses are necessary to provide the body parts required for the donee's rescue.

bate.¹¹⁰ A number of authorities have indicated that they are similar to other body materials, such as hair and blood, which can be sold.¹¹¹ In any event, a live donor ought to be able to receive a negotiated price for pain and suffering, and this could obviate the need for a distinct “line item” for the body part.¹¹²

If a person could charge for providing a body part, the recipient could surely pay to receive it. But suppose that Jewish law would not permit a donor to charge. Could the person who needs the body part still agree to pay for it? Ordinarily, it is forbidden for one Jew to cause, or even to assist, another Jew to violate Jewish law.¹¹³ Paying someone who is not permitted to receive payment would seem to violate this ban. Nevertheless, if a person needs the body part in order to save his or her life, the importance of saving that life, including one’s own, trumps this prohibition.¹¹⁴

Of course, the commercialization of body parts presents a plethora of potential problems ranging from the clearly criminal to the tragically exploitative. Indeed, such commercialization exists today in many parts of the world amidst reports of myriad alleged abuses.¹¹⁵ Would Jewish law permit such commercialization in light of the societal ills it might produce? Or, given the dangers such commercialization poses to the general public, would Jewish law prohibit the sale of life-preserving body parts even though some people need those body

110. See, e.g., Yisroel Meir Lau (b. 1937), *The Sale of Body Parts for Transplantation*, 18 TEHUMIN 135 (exploring the extent to which a person “owns” a body part and has standing to sell it).

111. See generally FRED ROSNER, BIOMEDICAL ETHICS AND JEWISH LAW 347–54 (2001) (citing various authorities); 3 ABRAHAM, *supra* note 6, at 270–74. Abraham has written:

[A]n organ donor who not only puts himself into danger (albeit small) but actually gives the recipient a part of his body; surely he can ask whatever price he wishes. And the patient who had no other choice will certainly be obliged to pay him the price that was agreed upon.

3 ABRAHAM, *supra* note 6, at 271.

112. See, e.g., Lau, *supra* note 110. See also ROSNER, *supra* note 111, at 350.

113. See Resnicoff, *supra* note 73, at 192.

114. See 2 ABRAHAM, *supra* note 6, at 73–74 (one can commit a transgression not involving idolatry, murder, or sexual immorality in order to save one’s life).

115. See, e.g., Tom Hays, *Funeral Parlour Scam: Body Parts Carved Up in Back Rooms, Sold to Tissue Bank for Use by Americans, Canadians*, HAMILTON SPECTATOR, Dec. 24, 2005, at A12, available at 2005 WLNR 20885997; Kathryn Knight, *The Child Sold for His Organs*, DAILY MAIL, Feb. 26, 2005, 46, available at 2005 WLNR 2964660; Daniel McLaughlin, *Bulgarian Hospital Faces Inquiry Over Alleged Sale of Organs*, IRISH TIMES, Jan. 9, 2006, at 8, available at 2006 WLNR 448144; Nina Muslim, *National Plans to Sell Vital Organs to Pay Off Debts*, GULF NEWS, Oct. 29, 2005, available at 2005 WLNR 17518057 (discussing black market sales in various countries by the financially impoverished); Larry Rohter, *The Organ Trade: A Global Black Market; Tracking the Sale of a Kidney on a Path of Poverty and Hope*, N.Y. TIMES, May 23, 2004, at 11.

parts to stay alive? How does Jewish law respond to such “policy” considerations?

Traditionally, Jewish law responds to such considerations through its legitimate leadership, which may promulgate decrees prohibiting conduct that would otherwise be permissible—or even required—by Jewish law.¹¹⁶ Contemporary Jewish communities, however, lack the well-defined, coherent political and juridical autonomy necessary to produce leaders with sufficiently recognized authority to legislate on such matters.¹¹⁷ Nevertheless, there is at least one historical event that suggests that if such an authority did exist today, it might not prohibit someone from trying to save his or her own life by purchasing a body part.

This historical case was a judicial response to kidnappers. There is a special Jewish law obligation to ransom a Jewish captive.¹¹⁸ Perhaps as a result, kidnappers in ancient times discovered that by seizing Jews they could often extort a greater ransom than if they had kidnapped a non-Jew. This encouraged them to target Jews.¹¹⁹ The problem became so severe that, in order to deter such activity, the sages issued a decree that forbade people from ransoming anyone for more than “his worth,”¹²⁰ generally understood as the value the person would fetch if sold as a slave. Nevertheless, even in this case, the sages permitted someone who was a captive to ransom himself or herself at any price.¹²¹ Furthermore, Jewish law authorities disagree as to whether the prohibition applies at all in situations in which a captive’s life, rather than merely his or her liberty, is threatened.¹²² Based on this precedent, even if there were a universally recognized Jewish law authority today, it might well be quite reluctant to order a person not to purchase body parts to save his or her life. Moreover, any public pol-

116. R. YOSEF CARO (1488–1575), BEIT YOSEF, *Yoreh De’ah* 342; SHAKH, *supra* note 52, *Yoreh De’ah* 342, *sif koton* 4.

117. See generally Jonathan Cohen, *Halakhic Issues: Survey*, in MODERN JUDAISM: AN OXFORD GUIDE 341–51 (Nicholas de Lange & Miri Freud-Kandel eds., 2005).

118. SHULHAN ARUKH, *Yoreh De’ah* 252.

119. See Alfred Cohen, *Ransom or Exchange of Prisoners*, 46 J. HALACHA & CONTEMP. SOC’Y 61 (2003).

120. See BABYLONIAN TALMUD, *Gittin* 45a; SHULHAN ARUKH, *Yoreh De’ah* 252:4. There are certain exceptions. *Id.*

121. *Id.*

122. See EISENSTADT, *supra* note 15, *Yoreh De’ah* 252, *sif koton* 4; Tosafot, *Gittin* 58a, s.v., *kol*; See also Cohen, *supra* note 117, at 68.

icy harms from the commercialization of body parts might well be outweighed by the public policy gains, including the saving of lives.¹²³

2. *Organs From Cadaveric Sources*

As explained, according to most authorities, where there would otherwise be a conflict, the Jewish law obligation to save life trumps the various prohibitions which might prohibit transfers from those who, as a matter of Jewish law, are truly deceased.¹²⁴ Nevertheless, where there is no such conflict, those prohibitions still apply.¹²⁵ Thus, although the prohibition against benefitting from a cadaver does not prevent a person from using it to save someone's life, the prohibition would preclude someone from making a profit by selling the body part.¹²⁶ A charge to cover one's expenses, however, would be permitted.¹²⁷ Moreover, if the person providing the body part is unwilling to do so unless he or she receives a high price, the person who needs the body part could pay the price demanded.¹²⁸

IV. PREFERENCES FOR THOSE WHO VOLUNTEER AS DONORS?

Body parts that can be effectively transplanted are a scarce resource. Some commentators have proposed that secular authorities provide a preferred status for those who themselves have volunteered to be organ donors.¹²⁹ I will not compare this proposal to Jewish law's own rules regarding the allocation of scarce resources.¹³⁰ Nor will we explore the constitutional or statutory soundness of such a proposal or even whether the proposal would have the salutary impact predicted. Instead, I will attempt to examine the "fairness" of this proposal in light of prior discussion. Unfortunately, given time and space constraints, even this discussion will be relatively cursory.

123. See, e.g., Gary Becker, *A Modest Proposal: How Much for That Kidney in the Window? A Free Market in the Sale of Human Body Parts Could Save Thousands of Lives*, CHI. SUN-TIMES, Jan. 15, 2006, at B3.

124. See *supra* notes 12–14 and accompanying text. See also J. DAVID BLEICH, *BIOETHICAL DILEMMAS: A JEWISH PERSPECTIVE* 67 (1998).

125. See *supra* notes 34–38 and accompanying text.

126. If, however, the money so paid is to be used to save the life of another person, receipt of the payment is permitted. See ROSNER, *supra* note 111, at 351.

127. Jewish law prohibits benefitting from the cadaver; simple receipt of reimbursement for expenses does not constitute a "benefit."

128. ROSNER, *supra* note 111.

129. See, e.g., Mark S. Nadel & Carolina A. Nadel, *Using Reciprocity to Motivate Organ Donations*, 5 YALE J. HEALTH POL'Y L. & ETHICS 293, 294 (2005).

130. See, e.g., ABRAHAM, *supra* note 6, at 181–87; Fred Rosner, *The Rationing of Medical Care: The Jewish View*, 6 J. HALACHA & CONTEMP. SOC'Y 21 (1983).

In part, the proposal is to prefer those who have already donated one of their organs, such as a kidney. Such a sacrifice, to save the life of another person, is praiseworthy. To the extent that those who observe Jewish law have had the same opportunity as those who do not observe Jewish law to donate organs during their lives, in a manner permitted by Jewish law, the proposal appears to be fair.

Nevertheless, the vast majority of people who are waiting for organ transplants have not previously donated organs. Instead, the thrust of the proposal and its overwhelming impact would be to confer a preference on those people who have volunteered to “donate” organs upon their demise. Moreover, given the extent to which the demand for organs far exceeds the supply, providing a preference to such people might, in practice, exclude those who do not so volunteer. Of course, if those who observe Jewish law have the same opportunity to volunteer as those who do not, then, once again, the proposal might seem fair. In fact, however, those who observe Jewish law do not have the same “opportunity” to volunteer to be cadaveric donors. Indeed, they are not even effectively presented with the same choice. Why? The choice is whether to agree to allow one’s organs to be surgically removed upon being defined under the secular brain death standard. Those who do not observe Jewish law and who accept brain death as “death” are simply asked to agree that their organs be used after their death. Those who follow Jewish law and do not accept brain death as “death,” however, are asked to agree that surgeons be allowed to surgically remove their organs while they are still alive—and, thereby, kill them. Moreover, although contributing one’s organs after death may not offend a person’s religious scruples, contributing one’s organs while still alive under Jewish law—even though characterized as being brain dead under secular law—constitutes dereliction of the duty to preserve one’s life and improperly enables, or assists, the operating surgeons to violate the Jewish law against murder.¹³¹ Consequently, agreeing to such contributions is religiously forbidden. As a result, providing a preference for those who agree to being cadaveric donors—under the prevailing secular brain death standard—is profoundly unfair.

131. It would not matter whether the surgeon was Jewish. Under Jewish law, the prohibition against murder applies to the killing of both Jews and non-Jews. See, e.g., MAIMONIDES, *MISHNEH TORAH*, *Hilkhot Melakhim* 9:4; BABYLONIAN TALMUD, *Sanhedrin* 57. Consequently, if a Jew authorizes a surgeon to kill him or her by taking his or her organs, the Jew has wrongfully enabled the surgeon to transgress the law against murder. See generally Resnicoff, *supra* note 3, at 324–37.

Of course, some body parts, such as corneas, can be useful even if physicians wait until the donor is dead, even as a matter of Jewish law. A system that would provide preferences to Jews who agree to donate such body parts once they are dead as a matter of Jewish law would be less objectionable. Even such a system, however, ought to account for the fact that Jewish law only allows cadaveric organ donations to the extent necessary to save life. Cadaveric donations for purposes of general medical research, for instance, are not permitted.¹³² Consequently, Jews should be entitled to a preference even if their consent were restricted to life-preserving transplantations. Any other system would demand more from Jews—violation of their religious law—than from non-Jews.

Interestingly, two proponents of the preference system assert that “[r]eligions that forbid organ donations would seem, almost necessarily, to reject organ transplantation generally, and thus their believers would not desire organs at all, certainly not a preference over others who had chosen not to donate.”¹³³ Perhaps some religions forbid all organ donations, and perhaps this statement is true as to them. But those proponents offered no proof for their claim. Judaism has a nuanced approach to organ donations. Thus, while Jewish law permits some donations, it requires a person to preserve his or her life¹³⁴ and, therefore, it does not allow a person to permit himself or herself to be cannibalized while still alive. Similarly, Jewish law would not permit a doctor to participate in surgery that would “harvest” such organs because this would violate the Jewish prohibition against murder.¹³⁵ Nor would it permit a person, even a person who needs an organ to save his or her life, to persuade a “donor” to agree to the operation or to persuade a doctor to perform it.¹³⁶ Nevertheless, Jewish law would permit a person—Jewish or non-Jewish—to accept such organs if they have already been harvested.¹³⁷

132. The prohibition against mistreating a cadaver, *see supra* note 37, is biblical in nature and can only be pushed aside for a serious purpose, such as prolonging the life of a particular person, and not for the speculative benefit that might arise from research. *See* 2 HERRING, *supra* note 3, at 106–07.

133. Nadel & Nadel, *supra* note 129, at 324.

134. *See supra* notes 16–21 and accompanying text.

135. *See supra* note 130 and accompanying text.

136. *See* Resnicoff, *supra* note 3, at 335–37, 346–47. One may not cause someone else to violate the prohibition against murder even in an attempt to save one’s own life. *See* 2 ABRAHAM, *supra* note 6, at 307–08; Resnicoff, *supra* note 73, at 201–22.

137. *See, e.g.*, 2 ABRAHAM, *supra* note 6, at 316; Soloveichik, *supra* note 78, at 45–47. The position of Jewish law in this scenario is similar to its position allowing the use of valuable data, if any, from Nazi medical experimentation on Jewish victims. The past evil is a *fait accompli*; the important challenge in the present is to save human life. *See* BLEICH, *supra* note 57, at 223, 231, 233.

To appreciate this rule, consider the following case. Suppose Alex desperately needs a kidney transplant and he is on a list of prospective recipients. Bob and Carl have an argument, and Bob hits Carl on the head with a blunt instrument. When Carl arrives at the hospital, he is declared brain dead. Yet, as explained above, Jewish law may consider Carl to still be alive.¹³⁸ Because Carl had previously signed a donor card, the hospital operates and takes Carl's kidneys (and certain other organs), which are now available for transplantation. May Alex accept one of the kidneys? Under Jewish law it was forbidden for Bob to strike Carl. The fact that he did so is tragic, even though it led to the kidney being made available. Under Jewish law, however, the fact that the kidney became available in this tragic way is not a reason why Alex should refuse the kidney and die. On the contrary, Alex's duty to preserve his life¹³⁹ obligates him to take the kidney.

Indeed, under Jewish law, it was a tragedy for the surgeons to take Carl's kidney until Carl was definitely dead as a matter of Jewish law. The fact that, as a matter of Jewish law, the surgeons may be guilty of murder for operating as early as they did is still not a reason why Alex should refuse the kidney and die. The list of prospective organ recipients is long and replete with people who do not observe Jewish law. Carl's kidneys—and his other organs—would have been taken for other recipients even if Alex had clearly announced in advance that he would not accept those organs. Consequently, under Jewish law, Alex did nothing wrong by registering as a recipient, and he did nothing wrong by taking the kidney. On the contrary, by taking the kidney he fulfilled his obligation to try to preserve his life.¹⁴⁰

V. CONCLUSION

The Jewish law emphasis on the sanctity of life permits, and may even mandate, certain donations by those whose own lives will not thereby be endangered. Nevertheless, it is this same principle that absolutely forbids surgeries that would prematurely terminate the lives of patients who, under Jewish law, are still alive. An allocation system that would effectively deny Jews life-preserving organs because of the importance they place on human life is unacceptable.

138. See, e.g., *supra* note 41 and accompanying text.

139. See *supra* notes 16–21 and accompanying text.

140. Breitowitz, *supra* note 41. *But cf.* 2 ABRAHAM, *supra* note 6, at 307–08 (as to registering as a recipient in Israel).