# Halachic Aspects of Organ Transplantation

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Over the past twenty years, modern medicine and medical technology have made great and exciting strides in extending life and improving the conditions of life for ill and infirm people. Perhaps the most daring innovation has been that of transplantation surgery. This new technique has given people who were heretofore unable to see because of defective corneas the ability to see the light of day by the use of corneal transplants. People suffering from renal dysfunction who could not bear the rigors and complications involved in hemodialysis have been given a new lease on life afforded them by the possibility of kidney transplants. People plagued with heart disease, the number one killer in the United States, have new hope, given the ever-increasing success of heart transplants.

The question dealt with in this presentation is the permissibility according to Jewish law of these new surgical techniques. Are these surgical procedures in harmony with the halacha?

We will attempt to present the rabbinic rulings and writings on the question of transplants in the hope of clarifying the position of the halacha on these new and monumental inroads in modern medicine.

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In discussing surgical transplantation, an immediate distinction must be made between cadaver transplants and live donor transplants. Each of these categories presents its own peculiar problems. Cadaver transplantation is the process by which an organ from a dead person is transplanted onto a live patient. Live donor transplants involve the grafting of an organ from a live person to a patient who is in dire need of that organ.

The problems presented by cadaver transplants are the following:

1. *Nivul Hamet* — Mutilation of the dead.
2. *Issur Hana'ah* — The prohibition against deriving any benefit from a dead body.
3. *Kevurat Hamet* — The requirement to bury a dead person and all his parts intact.

## 1) Nivul Hamet

The source for the prohibition against mutilation or desecration of the dead is from a biblical verse. "And if a man has committed a capital crime and was executed, you shall hang him upon a tree but do not allow his body to remain on the tree all night."[1] The Talmud expands the definition of this stricture, stating that any act which can be construed as desecration of the dead is included in this prohibition.[2]

The Talmud offers a number of illustrations of what is considered *nivul hamet.* In reference to executing a murderer, the Talmud asks:

> "Perhaps the victim was a *treifah,* a person with a fatal organic disease, which would make the offense unpunishable? [Technically, if someone kills a person

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1. Deuteronomy 21:22,23. The *Sifrei* at the end of *Pesikta* 11, states that the *nivul hamet* implied in the injunction of *lo Talin* is not only hanging the dead on a tree, but all forms of desecration are included in the *issur Torah.* However, Rabbi B. Epstein in his *Torah Temimah* learns that it is merely an *asmachta,* because the verse refers only to executed criminals. Still, from the passage in *Hullin* 11b it is clear that *nivul hamet* is *min ha-Torah.*
2. *Sanhedrin* 47a.

> who was dying anyway, a *treifah,* then he cannot be executed as a murderer.] If you should say, examine the victim's body [to see if he had a fatal disease] — that would be desecrating the dead and, hence, forbidden. Should you then say that since a man's life is at stake, desecration of the dead is allowed, then one could answer that the possibility exists that the murderer struck the victim in a place where he had been suffering from a fatal wound and thus removed any trace of that wound."[3]

Clearly, the procedure under discussion was a post-mortem examination of the victim by checking his internal organs for wounds. This procedure the Talmud rejects as *nivul,* mutilation. Accordingly, it would seem that the removal of an organ from a dead body is precluded by Jewish law, for there could be no greater desecration of the dead than to remove body parts. Obviously, this question must be given major consideration in arriving at a halachic decision.

## 2) Issur Hana'ah

In reference to *issur hana'ah,* the Talmud states that deriving any "benefit" from the dead is prohibited.[4] Most of the rabbis consider this prohibition to be a Torah law. Whether the body of a gentile is included in this prohibition is disputed among the *Rishonim.*[5] Using cadaver organs for the purpose of transplants

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3. *Hullin* 11b.
4. *Sanhedrin* 47b. The Talmud uses a *gezerah shavah* from the burial of Miriam and *eglah arufah, sham - sham.* Rashi *loc. cit., s.v. mekomo tahor* says specifically that the *issur hana'ah* is *mi-d'oraita.* Most of the *Rishonim* hold that the *issur hana'ah* is *mi-d'oraita.* However, Rabbi Jacob Emden in *She'eilat Ya'avets,* no. 41, proves that the *gezerah shavah* is only an *asmachta* and therefore the *issur hana'ah* in only *mi-d'rabbanon.*
5. The *Shulchan Aruch* Yoreh Deah 349:1, states clearly that the *issur hana'ah,* the prohibition against deriving benefit from the dead, is extended to gentiles as well as to Jews. There are, however, rabbinic authorities who disagree and maintain that there is no injunction against deriving benefit from a gentile corpse.

   *Bet Yosef* in his commentary on the *Tur* brings the *Bedek ha-Bayit* who

would thus seem to be forbidden under the restriction of *issur hana'ah*.[6]

## 3) Kevurat Hamet

There is a positive commandment to bury the dead, "Thou shalt surely bury him."[7] In addition, there is also a negative commandment associated with burial,[8] and that is not to omit from

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quotes *Teshuvoth ha-Rashba* that a gentile corpse is also *ossur be-hana'ah*. However, see the *Bi'ur ha-Gra loc. cit.*, note 1, which cites three separate statements in Rashba's novellae that gentile dead are *muttar be-hana'ah*. Rashba writes that since we learn the *issur hana'ah* from Miriam (see above note 5), then just as Miriam was a Jewess the *issur hana'ah* applies only to Jews and not gentiles. Also cited in the *Gra* is the *Yerushalmi (Shabbat*, chapter 10, *halacha* 6) that a gentile corpse is *muttar be-hana'ah*. See also *Tosafot, Bava Kamma* 10a. See also *Pitkhei Teshuvah, Yoreh De'ah* 349, note 1, who cites *Be'er Heiteiv* of *Ma'harit* that the Jewish dead are *assurim be-hana'ah mi-d'oraita* while gentile dead are only *issurei mi-d'rabbanon*. *Mishneh le-Melech* in a lengthy essay, *Hilchot Avel*, chapter 14, *halacha* 21, proves that Rambam also holds that *meitei akkum muttarim be-hana'ah*.

6. There is some question about organ transplants being considered *ke'derech hana'ah*, the normal mode of deriving benefit. *Mishneh le-Melech, loc. cit.*, holds that *she'loh ke'derech hana'ah be-met* is not a Torah violation. *Radbaz*, part 3 no. 548 is in agreement. That transplants are *she'loh ke'derech hana'ah*, see *Iggerot Moshe, Yoreh De'ah* volume 1, no. 229. But he agrees with Rabbi Akiva Eiger that *she'loh ke'derech hana'ah be-met* is *assur*. Others maintain that transplants are indeed *hana'ah ke'derech* (see *Teshuvoth Ziz Eliezer*, volume 14, no. 84).
7. Deuteronomy 21:23. The Talmud *Sanhedrin* 46b asks, "Where is burial alluded to in the Torah? In the verse 'Thou shalt surely bury him.' " *Tur*, 362:1 agrees that burial is a Torah law. *Radbaz*, volume 2, no. 780 also holds that burial is a Torah law. However, Rabbenu Hannanel in his comments on the *Gemara loc. cit.* states explicitly that burial is a Rabbinic law. Rambam, *Mishneh Torah, Hilchot Avel*, chapter 14, *halacha* 1, writes that burial is a *mitzvah mi-d'rabbanon*. Also see *S'dei Chemed, ma'arechet kuf kellal* 39 for further discussion of Rambam's thesis.
8. *Sanhedrin* 46b. Non-burial of the dead carries with it the stricture, *lo talin*. Organs transplanted to a living person may not be a violation of *lo talin*. In the case of the *Gemara* often quoted by the *Poskim, Erchin* 7b, where the *Gemara* asks in astonishment, "If a person says, 'I hereby bequeath my arm to my daughter,' would we allow it?" It is understood that the arm is never to be committed to burial. In transplantation, however, the organ will eventually be buried upon the death of the recipient. See Rabbi M. Steinberg, *Noam* vol. III pg. 94, also *Noam* vol. IV pg. 202.

interment any limb or organ of the body.[9] Cadaver transplants involve the removal of a body organ from the corpse. In this way, the organ is not brought to burial, in apparent violation of the Torah's directive.

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## Corneal Transplants

With these basic problems in mind, let us first turn our attention to corneal transplantation. The cornea is a thin membrane that covers the lens of the eye. Being clear, it allows light to enter the lens. In some cases of defective vision, the cornea becomes clouded and interferes with the passage of light through the lens, thus often causing blindness. In a corneal transplant the cornea of a cadaver is used to replace the patient's defective one.

In a classic responsum on corneal transplants, Rabbi I.Y. Unterman permits them for people who are blind. He maintains that the prohibition of deriving benefit from the dead, of desecrating the dead, and the requirement of burial are all waived because there is before us the matter of *pikuach nefesh*, saving a life. Rabbi Unterman asserts that a blind person is constantly confronted by life-threatening situations; he may fall down a flight of stairs or into a pit or be hit by a car and die. To restore his sight to him is tantamount to saving him from death. On this basis alone, Rabbi Unterman holds that corneal transplants should be permitted.[10] His reasoning is based on the first major decision on this topic by Rabbi Ezekiel Landau two centuries ago.[11]

Rabbi Landau was confronted by the following case: A person died during the surgical removal of a kidney stone. The question

9. The *Tosafot Yom Tov, Shabbat,* chapter 10, *mishnah* 5 writes that the requirement of burial is even for *ke-zait min hamet.* The *Minhat Chinyuch mitzvah* 537 states that there may even be a requirement to bury less than a *ke-zayit.* This point of view is based on a statement in the Talmud *Yerushalmi, Nazir* chapter 7 *halacha* 1, *"tik'be-renu — kullo ve-loh mik-zato."* This is also the view of Ramban, *Torath ha-Adam,* page 43a. However, *Mishneh le-Melech* at the end of *Hilchot Avel* avers that there is no requirement of burial once the head and the trunk are buried. Rabbi Isaac Liebes, *Noam* volume 14 has a lengthy discussion on this matter.

10. Rabbi I. Yehudah Unterman. *Shevet mi-Yehudah, Jerusalem 1955, pp. 313-322.*

11. *Rabbi Ezekiel Landau. Nodah bi-Yehudah,* part 2, *Yoreh De'ah,* no. 210.

then was posed whether an autopsy could be made to ascertain the exact nature of the malady, so that in the future, others similarly afflicted might be saved. Is there a violation of the prohibition against desecrating the dead in a situation where lives may be saved in the future? Rabbi Landau responded that an autopsy could be performed in such a case only if there is a *choleh lefoneinu*, a patient with the same condition presently awaiting surgery. When there is indeed such a patient before us, it becomes a question of *pikuach nefesh*, an endangered life, and an autopsy should then be permitted.[12] The reasoning is that although the corpse is violated, by saving a life the autopsy enhances the dignity of the deceased and is accordingly permissible.[13] Rabbi Landau maintains that if not for the fact that a post-mortem examination of a murder victim would not be conclusive, the rabbis in the Talmudic discussion cited previously would have required it in an effort to preserve the life of the condemned murderer. However, the criterion of *choleh lefoneinu* had to be met before *nivul hamet* would be permitted by Rabbi Landau.[14]

12. It must be pointed out that the two cases are not completely analagous. Rabbi Landau does not discuss the problem of burial because he understood the case to be that the entire body is interred after the autopsy. This is not the case in the transplantation process where, by definition, the grafted organ is not buried with the deceased.

13. It must be understood that this responsum contains within it two speakers. The original question was asked of Rabbi Leib Fisheles, a rabbi from London. He responded that the autopsy is permitted. He based his decision on the *Gemara* in *Hullin* 11b that maintains that an autopsy is theoretically allowed to save a murderer from the death sentence. Rabbi Landau agrees with that logic. However, he has a different interpretation of the *Gemara*. He learns that *nivul hamet* of the victim would be permitted because it is *le-kavodo shel met* to have his slaying avenged. This same logic must enter into his acquiescence of Rabbi Fisheles' proof. Moreover, Rabbi Landau's proviso that there be a *choleh lefoneinu* is based on that same passage where the murderer's imminent death is "before us."

14. Rabbi Landau explains the need for a *choleh le-foneinu*. He argues that if we were to suspend laws in anticipation of some future need for a person who is not yet endangered, then no prohibition would be meaningful. For example, cooking on the Sabbath could then be justified on the grounds that perhaps someone will take ill and be in the need of hot food. For a law to be suspended, a clear connection must be discernible between the act and the elimination of an existing danger.

Rabbi Unterman extends the above reasoning to the other two violations of *issur hana'ah* and *bitul mitzvat kevurah*. However, his thesis would seem to apply only to a person blind in *both* eyes, since a person with unilateral blindness cannot be considered in mortal danger *(pikuach nefesh)*; accordingly, a corneal transplant should not be permitted for him. Rabbi Unterman counters with the following solution:

When the cornea is transplanted onto the eye of the recipient, it ceases to be dead but is transformed into a living organ. Hence, all of the restrictions against deriving benefit from the dead and not burying the dead cease to be problems since no dead organs are involved. Furthermore, writes Rabbi Unterman, the violation of desecration of the dead *(nivul)* where there is no *pikuach nefashot*, as in the case of blindness in one eye, does not apply. Since the eyes of a dead person are always to be closed, the incision needed to remove the eye is not considered *nivul*, a mutilation. Only a *visible* incision into the body or the removal of externally visible or internal organs constitutes true desecration. Once the eye is removed from the socket, the eyelids are closed.

Among the *Poskim* there are many who take exception to Rabbi Unterman's line of reasoning.[15] Rabbi Isaac Glickman shows that the *issur hana'ah* comes about because the deceased is given automatic and immediate posession *(kinyan)* of his body and the clothes he is wearing. He cites the Talmudic statement that when a robe is spread over a corpse, the deceased automatically acquires it.[16] Thus, regardless of the fact that an organ may be revived through the transplant, he argues that the *issur hana'ah* remains in place.

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15. Rabbi Isaac Glickman objects to the premise that the prohibition against deriving benefit from the dead is a result of the lost life-force of the limbs and organs of the body and so, when they are revived subsequent to the transplant surgery, the prohibition is then removed. Rabbi Isaac Glickman, *Noam*, volume 4, Jerusalem, 1961, pp. 206-217.

16. *Yevamoth* 66b. Rashi comments that the burial shrouds of the dead are *assurim be-hana'ah*, as is *hekdesh*. Therefore, even if the deceased expressed his desire while alive, it is meaningless, for there is a new *kinyan*, right of acquisition given the dead which is in no way associated with his possession during life.

Rabbi Glickman considers a further element in this discussion. The Jerusalem Talmud says that there was an old Jewish custom of burying the dead in limestone or tar, so that the flesh would decompose more quickly. The idea is that the sooner the body of the deceased decomposed, the sooner he was saved from the pain of judgment.[17] Also, the atonement of a dead person is complete only when the body has fully decomposed.[18] When organs are grafted from the dead, the deceased's atonement is delayed until the recipient is dead and buried. This causes great pain to the soul of the donor. Rabbi Glickman therefore posits that even in the event of *pikuach nefesh*, using cadaver organs is prohibited. However, if a person gives permission for his organs to be used,[19] he has the right to waive his atonement for the good of another human being. But he concludes that the prospective donor must be apprised of the great evil he causes his own soul, and only if he does not relent may his organs be used.

Other objections to Rabbi Unterman's approach are raised by Rabbi Shmuel Heubner.[20] He asserts that the prohibition against deriving benefit from the dead cannot be changed even if the organ is brought "back to life." Once a person has died, the *issur hana'ah* is unalterable and irrevocable.[21] Moreover, the contention

17. *Jerusalem Talmud, Moed Katan*, chapter 1, *halacha* 5. *Korban ha-Eidah* explains that with the total decomposition of the flesh the punishment of *chibbut ha-kever* is eliminated.
18. The Talmud in *Sanhedrin* 46b postulates that the purpose of burial is in order for atonement to be realized. Rashi explains that the agony experienced by the body is in part expiation for the sins committed during a person's lifetime.
19. Most of the *Poskim* agree that use of cadaver organs is dependent on permission from the donor before his death. This is based on the view posited by Rabbi Ya'akov Ettlinger *(Binyan Zion*, no. 170) who maintains that even in the event of *pikuach nefesh*, desecration of the dead is forbidden. He cites the decision of the *Shulchan Aruch (Choshen Mishpat* 359:4) that appropriation of another's property for purposes of saving a life is justifiable only when full restitution is possible. Since no restitution can be made for the physical desecration of a corpse, it is forbidden. However, asserts Rabbi Ettlinger, when permission is given by the deceased prior to his death to allow dissection of his body, he thereby waives any dishonor to his body, and it is thus permitted.
20. Rabbi Shmuel Heubner. *Hadarom*, volume 13, New York, 5721, pp. 54-64.
21. He cites Rashi, *Avodah Zarah* 46b who writes that although a change in a

that a blind person is in constant mortal danger is incorrect, avers Rabbi Heubner. Observation shows that blind people are able to avert danger by using seeing-eye dogs and canes. His conclusion is that under no circumstances are corneal transplants permissible.

Rabbi Meir Steinberg deals with the question of bequeathing eyes to an eye bank.[22] In analyzing Rabbi Unterman's position, he raises the point that life is not returned to the cornea when it is transplanted; it merely facilitates sight in the recipient within his own ocular system.[23] Another objection raised by Rabbi Steinberg is that although only the cornea is actually needed, nonetheless the entire eye is removed. These problems notwithstanding, he permits corneal transplants with the proviso that after the cornea is removed, the eyes must be buried. He also permits the donation of eyes to an eye bank if the donor stipulates that they are earmarked for an individual suffering from bilateral blindness.[24]

Rabbi Yekutiel Greenwald approaches the problem from a different vantage point. He writes that if we were dealing only with the corneas, it would not be problematic. The Tosafists hold that skin is not included in the prohibition against deriving benefit from the dead.[25] Rabbi Greenwald maintains that the cornea is skin and not flesh. Although most *Rishonim* maintain that there is no difference between flesh and skin in the prohibition, he writes that we may rely on the minority opinion of the Tosafists when confronted by the possibility of restoring a person's vision.[26] However, since standard procedure calls for the removal of the

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forbidden foodstuff removes the prohibition, *shinui*, a change in an *issur hana'ah* remains prohibited. He explains that even though a change occurs benefit is still derived from the original item.

22. Rabbi Meir Steinberg. *Noam*, volume 3, Jerusalem, 1960, pp. 87-96.
23. According to this line of reasoning, there should be no problem of violating the *issur hana'ah;* if the cornea serves no tangible purpose, no benefit is then derived from the cornea.
24. Because in this situation there is *pikuach nefesh.*
25. Rabbi Yekutiel Y. Greenwald. *Kol Bo Al Aveilut*, volume 1, pp. 45-48.
26. *Niddah* 55a, s.v. *she'mah ya'aseh.* However, the majority of *Rishonim* maintain that *or hamet* is included in the prohibition of deriving benefit from the dead. See Rambam, *Mishneh Torah, Hilchot Avel*, chapter 14:21 and Rashba, Me'iri and Ran in their respective commentaries on *Niddah, loc. cit.*

entire eye for a corneal transplant, it renders his argument moot.

Rabbi Yechiel Weinberg analyzes Rabbi Unterman's opinion and refutes it point by point. Yet his final decision is that a person who is totally blind is in mortal danger of "falling into a river or stumbling into a fire." In addition, the fact that many rabbis of great stature allow the procedure plus the existence of a minority view that the skin of the dead is not *ossur be-hana'ah*, gives Rabbi Weinberg the backing to allow corneal transplants.[27]

Rabbi Michael E. Fuhrshleger permits corneal transplants even in cases of unilateral blindness.[28] In discussing the story of Elisha's resurrection of the son of the Shunamite woman, the Talmud asks, "Was the boy capable of conveying *tum'ah*, ritual impurity?" The answer given was, "Only a corpse is *me'tameh*, not a live person."[29] The formulation articulated here is that even after the cessation of the original life-force, when the body is reanimated, the corpse is once again considered a living organism. The same holds true for the cornea. Once it becomes "alive" again in the body of the recipient, the prohibitions associated with the dead as well as with *tum'ah* are removed.[30]

Rabbi B.Z. Abba Shaul finds it difficult to permit transplants that use organs from Jewish cadavers, but does allow the use of gentile cadavers for this purpose.[31] Rabbi Moshe Feinstein also permits the use of non-Jewish cadaver organs.[32]

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27. Rabbi Yechiel Y. Weinberg, *S'ridei Esh, Yorah De'ah*, volume 2, no. 120, *Mossad ha-Rav Kook*, Jerusalem, 1962.
28. Rabbi Michael E. Fuhrshleger. *Torath Michael*, no. 56. *Machon ha-Talmud*, Jerusalem, 1967.
29. *Niddah* 70b.
30. In an interesting aside, he rebuts an argument of one who objects to corneal transplants on the ground that the eyes of the blind cannot be considered endangered organs because they are already insensible. Rabbi Fuhrshleger quotes the Tosafists who ask, "How was Elijah, who was a priest, permitted to resurrect the son of the widow — in the process he defiled himself?" They answer that for *pikuach nefesh*, in order to save a life, the *issur tumah* is pushed aside *(Bava Mezia* 1146). We see that bringing life back is also in the category of *pikuach nefesh*, with the same holding true for restoring sight to the blind. Rabbi Fuhrshleger maintains that this rationale applies even for unilateral blindness.
31. Cited in *Yabbi'ah Omer*, volume 3, *Yoreh De'ah* no. 20.
32. Rabbi Moshe Feinstein. *Iggerot Moshe, Yoreh De'ah* volume 1, no. 229.

In an exhaustive discussion of the matter, Rabbi Ovadiah Yosef concludes that corneal transplants are considered *sheloh kederech hana'ah*, not the normal way of deriving benefit from the dead, and it is therefore permissible to use Jewish donors.[33] Regarding burial, he maintains that since the cornea is returned to its original function, there is no requirement of burial, especially since Rambam is of the opinion that it is only a rabbinic requirement to bury the dead.[34] Dealing with the problem of desecration of the dead, he cites Rabbi Saul Nathanson who posits that *nivul hamet* is only prohibited when it is done wantonly with the intention of desecrating, but when there is a pressing reason or goal to achieve by the apparent *nivul*, it is allowed.[35] To restore vision to an individual blind in even one eye certainly cannot be considered wanton desecration, writes Rabbi Yosef; rather it is *kavod haberioth*, a humanitarian undertaking. However, using gentile organs is preferable. He adds that the donor must express his willingness to have his eyes used. Furthermore, a Jewish doctor may not remove eyes from a Jewish cadaver when gentile cadavers are available.

At the other end of the spectrum, Rabbi Eliezer Waldenberg takes the most stringent position.[36] He asserts that it is forbidden for a person to donate any of his organs after death for the purpose of transplantation. There is no mitzvah involved in doing so because the dead are free of all obligations, even saving another's life. Secondly, it is imperative that the body of the deceased be returned in its *entirety* to its "place of origin in accordance with G-d's decree."[37] Moreover, he writes that were a person to donate his eyes after death, at the time of Resurrection he would be revivified without eyes.[38] Rabbi Waldenberg is also

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33. Rabbi Ovadiah Yosef. *Yabbi'ah Omer*, volume 3, nos. 21 and 22.
34. *Mishneh Torah, Hilchot Avel*, chapter 14:1.
35. Rabbi S. Saul Nathanson. *Sho'el u-Meshiv*, part 1, volume 1 no. 231.
36. Rabbi Eliezer Waldenberg. *Ziz Eliezer, volume 13, Yoreh De'ah*, no. 91. For a discussion of why unilateral blindness should be considered *pikuach nefesh*, see *Torath Michael*, no. 56.
37. He alludes to the fact that there are metaphysical reasons that are beyond human comprehension that preclude donation of organs after death.
38. He argues for this point not based on any early sources; rather, it is his own

fearful that in their haste to retrieve the eyes while still "warm and fresh," there is the strong possibility that the doctors will remove the eyes before the patient is actually dead and the procedure will hasten or bring about his death.[39]

Rabbi Waldenberg's final point is that "the paths of the Torah are pleasant" and must be applicable to all Jews equally. And since it is inconceivable to him that we would remove the eyes of the leader of the generation or those of a great Torah scholar for the purpose of transplantation, then it must be as absurd a notion for the common man as well. He asks rhetorically of those rabbis who allow transplants, "Which one of them would be willing to donate one of his organs after death?"[40] However, in a recently published responsum, Rabbi Wadenberg does permit the use of corneas from an eye bank even in the case of unilateral blindness.[41]

## Kidney Transplants

The *halachic* principles relating to corneal transplants are equally applicable to cadaver kidney transplants. All authorities agree that renal disease constitutes an immediate threat to the life of the patient and is considered *pikuach nefesh.*

The problems presented by live donor kidney transplants are far more complex than those of cadaver transplants. Foremost is

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intuitive feeling. He does cite the same notion from the work *Yismach Le'vav* whose author he identifies as a Moroccan rabbi.

It should be noted, however, that if an individual loses a limb, by sickness or accident, or if G-d forbid a person was cremated by the Nazis ימח שמם, he certainly rises fully at the time of Resurrection. It is only a person who willingly allows a limb to be detached from his body that is punished at the time of Resurrection.

39. In virtually all of his writings on medical questions that involve the necessity of determining the patient's death, Rabbi Waldenberg exhibits a wariness and distrust of doctors' ethics in establishing the true time of expiration.
40. He explains that his rejection of the notion of organ donations, in addition to logical considerations, is a result of a feeling that comes from deep within the Jewish soul which is the soul's awareness that just as the soul will return to her original abode in Heaven, so, too, must the body return to its source on earth. Furthermore, one should not pretend to be wiser than G-d and attempt to bring back to life that which has already died.
41. Rabbi E. Waldenberg. *Ziz Eliezer* volume 14, *Yoreh De'ah,* no. 84, Jerusalem 1981.

the problem that although a person can live and function normally with one healthy kidney, there is always the possibility that the donor may lose his life from the major surgery involved. Is the donor permitted to expose himself to the hazards of the surgical removal of his kidney for the sake of another individual?

The Jerusalem Talmud is quoted as saying that one is obligated to save another's life from certain death even in the face of danger to his own life.[42] The commentaries explain the logic of this thesis: Without intervention, the victim will surely die, *vadai met,* while the intervener is only a *safek met,* his death is only a possibility.[43]

The major *Poskin* and the *Shulchan Aruch* omit the principle set down by the *Yerushalmi.* An explanation offered for the omission is that the Babylonian Talmud argues and maintains that one is not obligated to jeopardize his life to save another.[44]

This position is reflected in the ruling of Radbaz, who writes that it is not obligatory to lose a limb in order to save a person's life.[45] If one does so, he performs a supererogatory act and is considered to be a *chassid,* a righteous individual. But one who puts his life in jeopardy to save another is a *chassid shoteh,* a foolhardy individual.

Rabbi Eliezer Waldenberg, after citing the ruling of the Radbaz, asserts that in a situation where a person will be in danger, he is forbidden from donating an organ. In a case that presents no danger, a person is permitted, although not obligated, to donate his organs. He notes that after consulting many doctors,

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42. *Bet Yosef, Tur Choshen Mishpat* 426:1, note 2, brings the *Hagahot Maimoniyot* who quotes the *Yerushalmi* but does not point out its source. Rabbi Zvi Y. Berlin in his *Ha'amek She'elah, she'ilta* 129, note 4, identifies the *Yerushalmi* in question as the statement of Resh Lakish in *Terumoth,* chapter 8, *halacha* 4. "Rav Ami was in a precarious situation. Rav Yonatan said, 'Forget about him; all hope is lost.' Resh Lakish said, 'I will rescue him and in the process I will kill or be killed.' "
43. *S'ma,* in the name of the *Bet Yosef, Choshen Mishpat* 426:1, note 2.
44. *Pitchei Teshuvah, loc. cit.,* in the name of the *Agudath Ezov.* The actual *Gemara* in question is *Niddah* 61a. See *Ziz Eliezer* vol. 10, no. 25, chapter 7 who analyzes the thesis of the *Agudath Ezov.*
45. *Teshuvoth Radbaz,* volume 3, no. 627.

he found their opinion to be that removal of a kidney from a healthy person is a life-threatening procedure. He does leave open the possibility, however, that when a group of reliable doctors decides in an individual case that no life-threatening danger exists, then and only then is the person permitted to donate his kidney.[46] In a later responsum he adds that since there is the possibility that the transplanted kidney may be rejected, there can certainly be no obligation to donate one's kidney. Only when a life will surely be saved can there be any obligation to put oneself in jeopardy.[47]

In a different twist, Rabbi Moshe Meiselman questions the permissibility of a person's *receiving* a kidney transplant. Is the patient himself permitted to undergo transplant surgery? He answers that if the prognosis for the patient's life expectancy is not enhanced by the transplant and he can live as long using dialysis, he cannot undergo the transplant procedure. This remains the halacha even if the patient wants to forego the higher life expectancy in order to spare himself the extreme unpleasantness of dialysis therapy. If, however, a new kidney would prolong the patient's life longer than if he were to continue with dialysis therapy, he is permitted to have a kidney transplant.[48]

## Heart Transplants

In essence, the problem of heart transplants poses no theoretical problems different from those of cadaver kidney transplants. However, peripheral problems do arise.

While a person can donate one of his kidneys and still live, no person can live without his heart. Therefore, in order to actualize a heart transplant, the donor must be dead. In addition, unlike other cadaver transplants, the heart must be removed immediately after death if any chance of success can be expected. We are thus forced to address ourselves to the question of the time of *halachic* death,

46. *Ziz Eliezer*, volume 9, no. 45.
47. *Ibid.*, volume 10, no. 25, chapter 7. For further discussion of this point, see Rabbi Yitzchak J. Weiss. *Minchat Yitzchak*, volume 6, no. 103 and Rabbi Isaac Liebes. *Noam*, volume 14, pp. 28-111, Jerusalem, 1971.
48. Rabbi Moshe Meiselman. *Halacha and Medicine*, volume 2, pp. 114-121, Jerusalem, 1981.

which is the earliest time the heart of the deceased may be removed.

Conceptually, death is defined as the separation of the soul from the body. Indeed, the Talmud often refers to death as *yetziat neshamah*, "departure of the soul."[49] Understandably, there is no methodology to enable the empirical observation of this phenomenon. Observable criteria using reliable indicators are needed to determine that the soul has indeed left the body, i.e., death has occurred.

The primary source for the establishment of criteria of death in Jewish law is the Talmudic discussion that assumes death has taken place upon the cessation of all respiration.[50] The case in point concerns an individual trapped under the rubble of a fallen building on the Sabbath. Since desecration of the Sabbath is waived for the preservation of human life, the debris of the fallen building may be cleared away in order to save the person trapped beneath it, even if his survival is doubtful. However, once the expiration of the trapped victim is assured with certainty, no further suspension of the Sabbath laws is sanctioned. How is such a conclusion reached? Of the two opinions offered, the first is that when the victim's nose is uncovered and no sign of respiration is found, the person is pronounced dead. The second opinion is that once the chest has been uncovered, examined, and no trace of any heartbeat is found, death may be assumed. The Talmud explains that the second opinion does not disagree that cessation of breathing is a crucial determinant of death. *Rather it maintains that cessation of heartbeat can also* be considered a determining factor in determining time of death.

Rambam[51] and the *Shulchan Aruch*[52] both cite the first opinion as the halachic norm. But this by no means excludes cardiac activity as an effective tool in the detection of life. The

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49. This concept is found in the verse "...all in whose nostrils is the breath of the spirit of life" (Genesis 7:22).
50. *Yoma* 85a.
51. *Mishneh Torah, Hilchot Shabbat*, chapter 2, *halacha* 19.
52. *Orach Chayim* 329:4.

renowned authority, Rabbi Zvi Ashkenazi *(Chacham Zvi),* notes that in some cases no heartbeat will be perceptible even though the person is still alive. A weak beat may be present but inaudible since the ribcage and layers of muscle intervene, thereby muting the vibrations. Respiration is more readily detectable; hence the reliance on respiration as the definitive indicator. However, it is most clear, maintains Rabbi Ashkenazi, there there can be no respiration unless there is life in the heart, for respiration's source is from the heart and for its benefit.[53] Rabbi Moshe Sofer accords with this view, adding that cessation of respiration is a definitive sign of death only if the body lies as inanimate as stone and there is no pulse whatsoever.[54] Rabbi Sofer maintains that death occurs only upon cessation of both cardiac and respiratory functions. All other vital signs are not considered halachic criteria for determining death.[55]

A person who is moribund, *goses,* is considered by the law *ke-chai le-chol davar,* as a fully living person.[56] Accordingly, nothing may be done to curtail the life of a *goses* in any way; even moving a part of his body is absolutely forbidden. This is one of the greatest obstacles to heart transplants.

In a diatribe against many doctors, Rabbi Eliezer Waldenberg prohibits heart transplants under all circumstances. He says that doctors summarily declare a patient dead although he is still alive. They do this only because they want to remove the heart quickly for the purpose of transplantation. This, he declares, is unadulterated murder, even though the patient would die shortly.[57]

Moreover, even if a heart could be made available in a halachically permissible fashion, a transplant would still be

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53. Rabbi Zvi Ashkenazi. *Teshuvoth Chacham Zvi,* no. 77.
54. Rabbi Moshe Sofer. *Teshuvoth Chatam Sofer, Yoreh De'ah* no. 338.
55. However, see *Ramo Orach Chayim,* 330:5 who says that we are incompetent in ascertaining with exactitude when all respiration has ceased. There exists the possibility that the person has actually fainted and spontaneous repiration will resume.
56. Tractate *Semachot,* chapter 1, *halacha* 1. Also see *Shulchan Aruch, Yoreh De'ah* 339:1.
57. *Ziz Eliezer,* volume 13, no. 91, section 7.

forbidden. He makes the point that in many cases the person slated for the "new" heart can continue to live, often for many years, albeit in great distress, without the transplant surgery. To allow an operation which fails two out of three times is unconscionable. And even though a terminal patient may undergo dangerous surgery if there *exists a fair chance for* recovery, Rabbi Waldenberg concludes that with heart transplants the percentages of success are too low to warrant the forfeiture of the few years the patient may have with his natural heart. Also, heart transplants cannot as yet be considered sound medical practice and therefore are not included in the biblical allowance *ve-rapoh ye'rapeh*, "the doctor may heal."[58]

Rabbi I.Y. Unterman takes a rather unique approach to the problem.[59] He says that when the "old" heart of the recipient is removed, he automatically loses his *chezkat chayim*, his status of being presumed alive. While even the most seriously ill patient never loses his *chezkat chayim*, once the heart is removed a person is automatically considered to be dead. Therefore, the recipient is prohibited from allowing himself to be "killed" by undergoing the transplant surgery.

Rabbi Unterman bases his statement on the famous case of the chicken that was slaughtered and found to have no heart. Two renowned authorities, Rabbi Zvi Ashkenazi and Rabbi Yonatan Eibschutz, disagreed as to the ruling. The former held that the chicken was kosher, because without a normal heart there is no possibility of living and, since the chicken did live, there must have been a heart but it must have been snatched away by a cat after the chicken was slaughtered and opened. Rabbi Ashkenazi also cited the *Zohar* that says that without a heart life cannot exist for even a moment.[60]

Rabbi Eibschutz ruled the chicken unkosher. He said that the physicians in Prague claimed that there might have been an organ that did not appear to be a heart but was indeed a malformed heart

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58. *Ibid.*, volume 10, no. 25, chapter 5, section 5.
59. Rabbi I.Y. Unterman. *Noam*, volume 13, pp. 1-9, Jerusalem, 1970.
60. Rabbi Zvi Ashkenazi. *Loc. cit.*

that functioned, keeping the chicken alive. Thus, without a normal heart the chicken was rendered *treifah,* unkosher.[61]

In any event, concludes Rabbi Unterman, we see from both sages that the heart is essential to life and when the heart is removed the person automatically loses his *chezkat chayim.* This is why he argues heart transplants cannot be sanctioned.[62]

It is interesting that Rabbi Unterman does not extend his ruling to open-heart surgery. Open-heart surgery involves the stopping of the heart in order to provide a stationary field for surgery, while the functions of the heart are taken over by a heart-lung machine.

Rabbi Menachem Kasher argues with Rabbi Unterman's basic premise.[63] The mere fact that people have survived heart transplants shows that when the heart is removed, life can continue. Rabbi Kasher maintains that when the heart is removed the status of the patient is a median state between life and death. He has "left the state of the living but has not yet died." However, Rabbi Kasher concludes that even when an artificial heart is developed, which would obviate the problem of "murdering" a prospective heart donor, and the percentage of successful heart transplants rises, no blanket license can be given to permit this type of surgery. It will depend on the gravity of the illness and hope for survival in each individual case. It will call for the consultation of three religious, expert physicians and an expert rabbi who will have to make the final determination.

Rabbi Chaim D. Regensberg takes the most lenient stance and feels that "the time has come to allow heart transplants."[64] He differentiates between two types of terminal patients. First, there is the *goses* who, although he will die shortly, is totally alive; one

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61. Rabbi Yonatan Eibshutz. *Kereti u-Peleiti,* 40:4.
62. He maintains this view notwithstanding the rabbinic opinions permitting extremely risky surgery when there is only a slight chance of success.
    Rabbi Yaakov Reischer. *Shevut Ya'akov,* part 3, no. 75.
    Rabbi Chaim Ozer Grodzinski. *Teshuvoth Achi'ezer, Yoreh De'ah,* no. 16.
63. Rabbi Menachem Kasher. *Noam,* volume 13, pp. 10-20, Jerusalem, 1970.
64. Rabbi Chaim D. Regensberg. *Halachah and Medicine,* volume 2, pp. 3-8, Jerusalem, 1981.

who kills him is guilty of murder. The second type is one who is so far gone that even the slightest movement of his body will kill him. If one does touch him or close his eyes, and he expires as a result, that individual is guilty only of murder *mi-d'rabbanan*, a rabbinical injunction, and has not transgressed the biblical *issur*. Furthermore, Rabbi Regensberg feels that with "brain death" a person is halachically dead, although there is respiration and the heart is still beating.[65] If a prospective donor has reached this state of "death," Rabbi Regensberg would allow removal of his heart, although he cautions that we cannot trust the doctors in this matter, nor is the encephalogram sufficiently definitive in indicating when brain function ceases altogether. Moreover, he concludes that since heart transplants have not been very successful statistically, a Jewish doctor should not perform the transplant, nor should a *Rav* take upon himself the responsibility of advising any patient to undergo this type of surgery.

Thus, the consensus of opinion among modern *Poskim* is that although theoretically heart transplants might be permitted, at this point in time it cannot be sanctioned because it is not medically sound. As the procedure is perfected in cardiac transplantation, perhaps a different halachic view will evolve.

Twelve years after the performance of the first human heart transplant, the probability of survival for a prolonged period after such an operation has increased markedly. It should be understood that acceptance of a patient as an active transplant candidate is predicated upon the failure of all other medical and surgical treatment alternatives to provide an outlook for survival of more than a few months.[66] Only such end-stage cardiac diseased patients

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65. The majority of *Poskim* reject the idea that "brain death" is equivalent to decapitation. For a full discussion of this topic see the article by Rabbi J. David Bleich, "Neurological Criteria of Death and Time of Death Statutes," *Jewish Bioethics*, edited by F. Rosner and J.D. Bleich, Sanhedrin Press, New York, 1979. Rabbi M.D. Tendler maintains that "brain death" as defined by the Ad Hoc Committee of the Harvard Medical School is acceptable under Jewish law in declaring a patient dead. *(Practical Medical Halachah*, edited by Rabbi M.D. Tendler and F. Rosner, New York, 1980.) He writes that Rabbi Moshe Feinstein agrees with this view.

66. P.E. Over, E.B. Stinson, B.A. Reitz C.P. Bieber, S.W. Jamieson, and E.

are selected. Statistics from the Department of Cardiovascular Surgery at the Stanford University School of Medicine, which has performed 188 out of the 450 world-wide heart transplants, or 42% of all heart transplants, are more than encouraging. Improvements in matching, immunosuppression, patient selection and early diagnosis and treatment of rejection have all increased survival of patients.

Current probablities for survival after cardiac transplantation for the period of January 1974 until May 1980 show that 65% of all patients undergoing heart transplants may be expected to survive for one year and between 45% and 50% for at least five years. By comparison, the survival of patients who met all criteria as transplantation candidates, but for whom an appropriate donor organ could not be found, was substantially lower. More than 90% died within three months after selection, which emphasizes the severity of illness in those accepted for transplantation.[67] Therefore, it is the feeling of this writer that when these new data will be reviewed by the *Poskim,* in a situation where there is no halachic problem of obtaining a donor, as in severe accident cases or according to those Rabbis who maintain that "brain death" is equivalent to death, a heart transplant would be halachically feasible. This situation is no different that those cases where dispensations for surgery have already been given by major *Poskim.*

May it be the will of Him who heals all flesh and performs wonders, that it shall come to pass, "If thou wilt hearken to the voice of G-d, then all of the diseases I have put upon the Egyptians I will not put upon thee, for I, G-d, am thy healer."[68]

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Shumway. *Cardiac Transplantation: 1980,* "Transplantation Proceedings," volume 13, no. 1, March, 1981.

67. *Ibid.*

68. Exodus 15:26

# Opening Containers On Shabbat: A Halachic Review

*Rabbi Joseph Stern*

Modern technology has afforded twentieth-century society many conveniences which have revolutionized our lifestyle. For observant Jews, the new technology has further concomitants — new situations requiring halachic elucidation. In the area of Sabbath observance, it is often necessary to employ deductive reasoning, to define the *melachot* (forbidden activities) of Shabbat, and then to "work backwards" by examining the individual components of each prohibited category, and then to attempt to generalize.

This article will consist of three segments, an exegesis of halachic opinion and Responsa considering the very contemporary issue of opening cans on Shabbat, a compilation of authoritative opinion regarding the theoretical parameters as well as the practical applications of מלאכת קורע (tearing), and finally a brief discussion of a related issue, assembling (and taking apart) appliances consisting of several parts. Such practical concerns as removing bottle caps, tearing open snack food wrappers, opening packages, opening the mail, use of diapers and pampers, and converting a baby carriage into a stroller will be addressed. The customary disclaimer common to halachic articles should be underscored here. The purpose of this piece is merely to consider issues and to

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