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The Ownership and Market of Human Tissue

The sale of human tissue[1] shares many characteristics with standard market exchanges, and the participants in such transactions have interests that fit into the rubric of property rights. The purpose of this essay is to analyze how property interests in human tissue are treated in American law and contemporary Halakhah.

American Law

Human Tissue: Property Interest or Privacy Interest?

Recent decades have seen the emergence of a medical process known as in vitro fertilization (IVF), a form of reproductive technology that enhances an infertile couple's ability to procreate. In IVF, eggs are surgically retrieved from a woman's ovaries and fertilized in a laboratory with the sperm of her husband or a donor. Subsequently, this preembryo, or extra-corporeal embryo, is implanted into the uterine wall to bring about pregnancy. The implantation of too many preembryos may create multiple births, and couples therefore often consider cryopreservation, a procedure that freezes the unused

1 As used here, the term "human tissue" includes any organs, tissues, fluids, cells, or genetic material within the human body, except for waste products such as urine and feces.

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preembryos for future use.

IVF and cryopreservation pose questions with respect to ownership and disposition of these preembryos. Is a frozen preembryo to be viewed as property? Can preembryos be legally discarded? If they are discarded and a couple advances a subsequent claim for the frozen preembryos, do the parents have a cause of action against the clinic that physically destroyed the preembryos?

The case of *Del Zio v. Presbyterian Medical Center*[2] resulted from the first known attempt to perform IVF. To bypass Mrs. Del Zio's damaged fallopian tubes, the Del Zios agreed to participate in an experimental procedure in which the husband's sperm and the wife's egg were mixed. A physician at the medical center, upon becoming aware of the existence of the created preembryos, ordered them destroyed without consulting the Del Zios or their physician. The Del Zios sued for conversion[3] and emotional distress due to the loss of this reproductive material. The court's instructions to the jury were that a determination for either the emotional distress claim or the conversion claim was sufficient to award damages. Consequently, although the jury awarded damages based upon the infliction of emotional distress, the judge surmised that the jury may actually have concluded that damages for the conversion claim were included in the damages awarded for emotional stress. It is thus unsurprising that some legal commentators viewed this decision as recognition of frozen preembryos as property.[4]

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2 *Del Zio v. Presbyterian Medical Center*, 74 Civ. 3588 (S.D. N.Y. Nov. 14, 1978).

3 Conversion is defined as "[a]n unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights;" *Black's Law Dictionary* 300 (5th ed., 1979).

4 Kathryn Lorin, "Alternative Means of Reproduction: Virgin Territory for Legislation," 44 *La. L. Rev.* (1984), 1641, 1670; Michelle F. Sublett, "Frozen Preembryos: What are They and How Should the Law Treat Them?," 38 *Cleveland St. L. Rev.* (1990), 585, 598-9; John Robertson, "Reproductive

A second case involving the ownership of a cryopreserved egg is *York v. Jones*.[5] The couple in this case underwent three IVF procedures at a clinic in Virginia. After the third failure, one of the preembryos was frozen for future use. Subsequently, the couple decided to undergo treatment at a different clinic in California. Despite repeated requests from the Yorks, the Virginia clinic refused to transfer the preembryo, and the couple therefore sued in court. Although the parties had signed a cryopreservation agreement that precluded the clinic from retaining the preembryos, the clinic argued that the agreement did not allow transfer of the preembryo to another clinic. The court disagreed and noted that the pre-freeze agreement had established a bailor-bailee relationship, which imposed upon the bailee an obligation to return the bailment – that is, the preembryo – should the Yorks desire to use the preembryo to initiate pregnancy at another facility. By construing the agreement as a bailment contract, the court, following in the footsteps of *Del Zio*, clearly recognized the Yorks' property interest in the frozen preembryo.[6]

In short, *Del Zio v. Presbyterian Medical Center* and *York v. Jones* construe preembryos as property; however, the holdings fail to elucidate what this classification means. It certainly seems overly simplistic to equate body parts with tangible property or physical possessions.[7]

Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Preembryos," 76 *Va. L. Rev.* (1990), 437, 459, 515-17; Judith Fischer, "Misappropriation of Human Eggs and Preembryos and the Tort of Conversion: A Relational View," 32 *Loyola of Los Angeles Review* (1999), 381, 394. Cf. Deborah Walther, "'Ownership' of the Fertilized Ovum in Vitro," 26 *Fam. L. Q.* (1992-1993), 235, 240.

5 *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

6 Ibid., 424, 427. In the event of divorce, the agreement provided that the ownership of the preembryos would be determined in a "property settlement."

7 There are certain similarities, such as theft and larceny laws, which are applicable to their misappropriation. See ibid., 489; John Robertson, "Assisted Reproductive Technology and the Family," 47 *Hastings L. J.* (1996), 911, 919.

In *Moore v. Regents of the University of California*,[8] the California Supreme Court did not directly address IVF or cryopreservation. Nonetheless, this case has potential implications for classifying preembryos as property. The court found that the plaintiff failed to have a cause of action for conversion against the physicians who used cells that had been removed from his spleen to create a cell line for commercialization without his knowledge or consent. The *Moore* court held that to support a cause of action for conversion, one must possess title to the property and expect to retain possession of it.[9] Since Moore did not expect to retain possession of his spleen after removal, he did not have an ownership right in this body part. Numerous commentators interpret the *Moore* holding as establishing that excised human cells can never be classified as property and that research participants, such as Moore, possess no property rights in their tissue or the commercial products developed there from.[10] Furthermore, society's need for biomedical research and the development of new medical products outweighs the interests of research participants, which would likely cause the biotechnology sector to flounder.[11]

However, as Professor Radhika Rao aptly notes:

> *Moore* is capable of at least three different constructions, all of which can be reconciled with the idea that spleens might sometimes constitute property. First, it is possible that the court's refusal to recognize Moore's conversion claim stems from the intuition that body parts can-

8 *Moore v. Regents of the University of California*, 793 P. 2d 479 (Cal. 1990), cert. denied, 499 U.S. 936 (1991).
9 Ibid., 488-9.
10 Lynne Thomas, "Abandoned Frozen Preembryos and Texas Law of Abandoned Personal Property: Should There be a Connection?," 29 *St. Mary's L. J.* (1997-1998), 255, 281-4; Fischer, supra n.4, 404-9; E. Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Washington D.C., 2007), 19-40.
11 *Moore*, supra n.8, 495-6.

> not be property so long as they are contained within a living human being. If so, the court could have recognized Moore's ownership of his spleen at the point that it was detached from his body without thereby rendering his whole person a form of property. A second possible reading is that, even if the spleen was initially Moore's property, it had been essentially abandoned by its "owner," for whom the diseased organ bore little value, and hence became capable of appropriation by another. Finally, the court implicitly may have held that body parts once removed from a person return to the public commons available to all and become a form of community property.[12]

In other words, although a spleen may not be the property of it donor, it may become the property of the medical researchers.

Thirteen years later, in *Greenberg v. Miami Children's Hospital*,[13] the court held that not only is human tissue not the donor's property, genes are also the property of the researchers who isolated them and the hospital that was granted a patent for the isolation. Despite the differences between the *Greenberg* holding and the *Moore* holding, the common denominator is the absence of the criteria for establishing what characterizes property in regard to human tissue.

Thorough analysis of property as it relates to human tissue must include the examination of the decision in *Davis v. Davis*,[14] which involved a dispute between a woman, who desired to use the couple's frozen preembryos to have a child, and

12 Radhika Rao, "Property, Privacy, and the Human Body," 80 *B. U. L. Rev.* (2000), 360, 374-5.

13 *Greenberg v. Miami Children's Hospital*, 264 F. Supp. 2d 985 (S.D. Florida, 2003).

14 *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. 1992), cert. denied, 507 U.S. 911 (1993).

her husband, who opposed her use of the preembryos. Consequently, each sought custody of the preembryos in court. Although the wife initially wanted the preembryos implanted in herself, during litigation, she changed her mind and wanted to donate them to a childless couple. Unlike in *York*, the Davises had no executed written agreement providing for disposition of the preembryos in the event of a dispute or divorce. The court concluded that the frozen preembryos are neither persons nor property, but rather occupy a middle ground entitling them to "special respect" because of their potential for human life:

> It follows that any interest [of the biological parents] in the preembryos in this case is not a true property interest. However, they do not have an interest in the nature of ownership to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.[15]

> The *Davis* court stressed that the progenitors' interest was "not a true property interest," but rather entailed engaging in "decision-making authority" limited to policy considerations.[16] As Professor John Robertson observes:

15 Ibid., 597.

16 After arguing that the decisional authority regarding the disposition of the preembryo resides with the gamete providers, the court sought to determine how to deal with disputes between the parties. In the absence of any existing prior agreement, if either party's intention is not ascertainable or if there is a dispute about preembryo disposition, then the court must weigh the "relative interests" of a party wishing to use or deny the other the use of the preembryos. The *Davis* court took the position that the husband's right to avoid being a father outweighs the wife's interest in donating the preembryos to another couple where unwanted parenthood would place a possible financial and psychological burden upon Mr. Davis. Consequently, the court awarded custody of the preembryos to the husband on the ground that "the party wishing to avoid procreation should prevail." See ibid., 604.

> [A] property interest in gametes must exist, regardless of whether an action for conversion will lie. The term "property" merely designates the locus of dispositional control over the object or matter in question. The scope of that control is a separate matter and will depend upon what bundle of dispositional rights exist with regard to that object.[17]

For Robertson, preembryos are not to be equated with tangible objects, and, as the court stated in *Davis*, human tissue is not "a true property interest." But ownership is not the same as sole dominion over property. Instead, property is best thought of as a "bundle of rights" possessed by individuals vis-à-vis objects, including, inter alia, the right to possess one's property, the right to use it, the right to exclude others from us, and the right to transfer ownership by gift or sale.[18] The application of the property designation to preembryos is solely to describe who has the right to make decisions about preembryo disposition,[19] and the logical candidate is the gamete provider. If we afford preembryos "special respect," this does not mean that the gamete providers are bereft of decision making regarding their preembryos. On the contrary, disposition of preembryos accorded special respect can be governed by contracts.

Hecht v. *Superior Court*[20] involved a dispute over custody of sperm deposited in a sperm bank by the deceased partner

17 John Robertson, "Posthumous Reproduction," 69 *Ind. L. J.* (1994), 1027, 1038.

18 Wesley Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," 26 *Yale L. J.* (1917), 710, 742.

19 Robertson, supra n.4, 454-5, 455 n.48; Stephen Munzer, *A Theory of Property* (Cambridge, 1990), 16-17, 56. Rather than focusing on dispositional authority, Munzer argues that people do not own their bodies, but rather have limited property rights in them. Since the law proscribes consumption or destruction of one's body, this indicates that people own their bodies in the fashion that we own a desk or a chair. See ibid. 41-43.

20 *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. Dist. Ct. App. 1993).

of the plaintiff. In addressing the issue whether the ownership of the sperm could be transferred from one person to another via the execution of a will, the *Hecht* court, invoking both *York* and *Davis*, classified the sperm as "property" for the limited purpose of probating a will. A few years later, in *Kass v. Kass*,[21] which involved a dispute between a divorced couple over frozen preembryos, the court again focused upon the dispositional authority of the gamete providers and enforced preembryo contracts.

Endorsing the idea that a preembryo is deserving of "special respect," in *AZ v. BZ*,[22] the court applied the *Davis* court's logic of balancing procreational interests in preembryo disposition disputes. The court recognized the wife's trauma in enduring multiple IVF procedures, but stressed that a balance must be struck between her right to procreate and her husband's right not to procreate. The fact that the wife was capable of undergoing IVF again or adopting, and therefore was not limited to using the preembryos under dispute, weighed heavily against her in the balancing process. Regarding the husband, the court realized that this was a situation of unwanted parenthood accompanied by financial burdens. Consequently, the court declined to authorize the preembryo transfer to the wife. In both *Davis v. Davis* and *AZ v. BZ*, since the issue of resolving disputes relating to preembryos is one of decision-making authority, the special respect and dispositional authority need not be mutually exclusive. Thus, for both courts, there is no reason why decisions of disposition cannot be made without a high degree of respect for the frozen preembryo.

The cases cited above represent the ongoing debate among legal commentators regarding whether the issue of property rights to human tissue, such as preembryos, ought to

21 *Kass v. Kass*, 696 N.E. 2d 174,179 (N.Y. 1998).

22 *AZ v. BZ*, Mass. Law. Weekly No. 15-008-96, slip op. (Mass. Prob. & Family Ct., March 25, 1996).

be framed in terms of property,[23] special respect,[24] or control.[25]

In bold contrast to the aforementioned approaches, another position maintains that the human body is subject to privacy rights. The right to refuse medical treatment and the right to abortion have been grounded in the constitutional right to privacy.[26] Similarly, whereas property can be separated from "the owner" and be sold on the market, privacy is integrated into the body and defines one's personal identity. Thus, for example, a right to individual and familial privacy may be violated by publication of genetic information without the person's consent.[27]

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23 For arguments that human tissue possesses characteristics that satisfy some of the criteria for establishing rights in tangible property, see Roy Hardiman, "Comment, Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue," 34 *U.C.L.A. L. Rev.* (1986), 207, 218; Patricia Martin and Martin Lagod, "The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of States, Rights and Research Policy," 5 *High Tech. L. J.* (1990), 257, 261; Alise Panitch, "Note: The Davis Dilemma: How to Prevent Battles over Frozen Preembryos," 41 *Case W. Res. L. Rev.* (1991), 543, 553; Philip Prygoski, "The Implications of *Davis v. Davis* for Reproductive Rights Analysis," 61 *Tenn. L. Rev.* (1994), 609, 609 n.2; Helen S. Shapo, "Frozen Preembryos and the Right to Change One's Mind," 12 *Duke J. Comp. & Int'l L.* (2002), 75, 76 n.3.

For others who argue that the body should not be treated as property, see Rao, supra n.12, 365; Stephen Munzer, "An Uneasy Case Against Property Rights in Body Parts," 11 *Soc. Philosophy and Policy Rev.* (1994), 259; idem., supra n.19; Leon Kass, *Toward a More Natural Science* (1985), 283.

24 See Robertson, supra n.4, 450 n.37; Kristine Luongo, "Comment: The Big Chill: *Davis v. Davis* and the Protection of Potential Life," 29 *New Eng. L. Rev.* (1995), 1011, 1023.

25 For arguments for a property-based notion of control over one's body parts, see Mary Danforth, "Current Topic in Law and Policy: Cells, Sales, and Royalties: The Patient's Right to a Portion of the Profits," 6 *Yale Law & Policy Review* (1988), 179, 191-5; Bonnie Steinbock, "Sperm as Property," 6 *Stanford L. & Policy Rev.* (1995), 57, 66; Julia Mahoney, "The Market for Human Tissues," 86 *Virginia Law Rev.* (2000), 164, 201.

26 *In re Quinlan*, 355 A. 2d 647, 663 (N.J. 1976); *Cruzan v. Missouri*, 497 U.S. 261 (1990); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 928 (1992).

27 Rao, supra n.12.

Commodification

There is more at stake in the biomedical research of human tissues than simply saving life or avoiding death. Vexing ethical and policy questions are raised in the professional literature, including an individual's right or ability to commidify his body – that is, to transform it into a commodity. Invoking the legal status of property with regard to the body or its uses and parts is problematic because it threatens many values, including the right to privacy and respect for the sanctity of human life. To characterize human tissue as property implies that it can be sold and bought on the market; the right to commodify one's body is derived from a property right in one's body. As Elizabeth Anderson writes:

> To say that something is properly regarded as a commodity is to claim that the norms of the market are appropriate for regulating its production, exchange and enjoyment. To the extent that moral principles or ethical ideals preclude the application of market norms to a good, we may say that the good is not a (proper) commodity.[28]

Conceptualizing property in terms of tangible objects and arguing that reproductive and genetic materials should have the same legal status as a table or doorknob is repugnant in the eyes of many. Commodifying excised human materials threatens our human dignity.[29] As one commentator noted, "the body is one of the last places of sanctuary from a commodified world."[30] On the other hand, if property is viewed as

28 Elizabeth Anderson, "Is Women's Labor a Commodity?," 19 *Philosophy and Public Affairs* (1990): 71-72.

29 Margaret Jane Radin, "Property and Personhood," 34 *Stanford L. Rev.* (1982), 957, 1014-15; idem., "Market-Inalienability," 100 *Harvard L. Rev.* (1987), 1849, 1852, 1885.

30 Elizabeth Blue, "Redefining Stewardship over Body Parts," 21 *Journal of Law and Health* (2007-2008): 75, 86.

a question of control,[31] the greater the degree of freedom and autonomy over one's assets, the greater respect is accorded to the individual. Analogously, people who exercise some measure of control over their human materials enhance, rather than diminish, their human dignity. The notion that the human body is intimately bound up with the exercise of dispositional authority resonates in the words of Harvard law professor and former Solicitor-General Charles Fried:

> Moral personality consists, as Kant said, of the capacity to choose freely and rationally... Now, a claim to respect for physical and intellectual integrity implies a claim to the conditions under which a sense may develop of oneself as a free, rational, and efficacious moral being...[32]

The underlying Kantian idea is that an individual's control over one's persona, including one's body and its parts, is essential to freedom or autonomy.

In sum, there is a difference of opinion regarding whether or not marketing human issue entails commodification.

Halakhah

Human Body and Tissue: Property Interest or Dispositional Authority?

What is the Halakhah's perspective on a Jew's ownership of his body? R. Shlomo Yosef Zevin approaches this question by analyzing the agreement made between Shylock and Antonio in Shakespeare's *The Merchant of Venice*, in which Antonio's debt would be paid off with a pound of flesh (apparently an acceptable form of paying damages upon reneging on

31 See supra n. 25.

32 Charles Fried, "Right and Wrong" (Cambridge, 1978), 123, 142. See also Leon Kass, "Organs for Sale? Propriety, Property and the Price of Progress," 107 *Public Interest* (1992): 72.

a contract according to Venetian law). R. Zevin argues that since God owns everything, including our bodies, one is proscribed from inflicting physical harm upon his own body or that of others (*havalah*). [33] Consequently, the Venetian agreement would be unenforceable.[34]

The notion that one's body does not belong to him resonates in many realms of *Hoshen Mishpat*, including the collection of an outstanding monetary debt from a borrower.[35] One of the possible avenues for collecting an outstanding debt is coercing an individual to hire himself to engage in work in order to pay off his debt. On the one hand, the purpose of the coercion is for the debtor to engage in work in order for the creditor to recover his monies. But is such coercion tantamount to deprivation of personal freedom, bordering on enslavement? Does the creditor have a legal right to demand of a borrower to find gainful employment in order to satisfy the debt? Some opinions, such as *Rosh*, *Tur*, and *Shulhan Arukh*, contend that such coercion is prohibited.[36] In the words of *Rosh* and *Sema*, "We are the servants of God and not the servants of other servants."[37]

R. Ephraim Navon (*Mahaneh Ephraim*) argues, however, that if a debtor undertakes a duty to work in order to satisfy his debt, the commitment should not be construed as a form of enslavement as a result of his loss of autonomy. While the debtor agrees to satisfy his debt by engaging in work, whether the employment will be personally performed by him or by third

33 *Shemot* 19:5; *Devarim* 10:14; *Berakhot* 35a.

34 Shlomo Yosef Zevin, *Le-Or Ha-Halakhah* (Tel Aviv, 5717), 318.

35 The sources for our discussion have been culled from Menachem Elon, *Freedom of the Debtor's Person in Jewish Law* (Hebrew) (Jerusalem, 1964).

36 *Teshuvot ha-Rosh* 78:2; *Tur, Hoshen Mishpat* 97:28-30; *Shulhan Arukh* , *Hoshen Mishpat* 333:3.

37 *Teshuvot ha-Rosh*, ibid.; *Sema, Hoshen Mishpat* 97:29. Similarly, a Jew neither owns a non-Jewish slave nor acquires from a non-Jew rights to excise parts of a body of a non-Jewish slave; see *Gittin* 19a, 21b; Rashi, ad loc., s.v. *lo efshar*; *Yevamot* 46a.

parties remains his choice.[38] Other legists permit such coercion regardless of whether such a stipulation has been made.[39] If the parties stipulate to such an arrangement and the agreement complies with laws of obligations, *Perishah* would validate it.[40]

Another possible means of debt collection is imprisonment. Rambam rejects this approach as illegal, enjoining the creditor to refrain from entering the debtor's premises to collect a debt.[41] *Rosh* affirms Rambam's view and argues that the Torah does not generally deprive a person of his personal freedom. Even if the borrower and creditor explicitly stipulated that imprisonment would result upon failure to satisfy the debt, such a condition is null and void, as it relates to one's persona (*tenay she-ba-guf*).[42] Similarly, Rashba writes, "A man's body is not to be enslaved... for imprisonment... Rather, he is indebted to his creditor and his assets are a surety..."[43] This view was endorsed by *Tur, Shulhan Arukh*, and others.[44]

Nevertheless, numerous decisors validate imprisonment in situations in which a borrower fails to pay his debts.[45] One of the rationales offered is that such a person violates the *mitzvah* of paying one's debts.[46] As such, Halakhah sanctions imprisonment as a form of coercion to effectuate a debtor's

38 *Machaneh Ephraim, Hilkhot Sekhirut Po'elim* 2.

39 *Teshuvot Maharam mi-Rotenburg* (Cremona edition) 146. Rif and R. Yehuda Barzilai, cited by Maharam, argue that although an individual cannot be coerced to find employment, he is nonetheless obligated to work.

40 *Perishah, Hoshen Mishpat* 99:19.

41 *Mishnah Torah, Hilkhot Malveh Ve-Loveh* 2:1; *Teshuvot ha-Rambam* (Blau ed.) 410.

42 *Teshuvot ha-Rosh* 68:10.

43 *Teshuvot ha-Rashba* 1: 1069.

44 *Tur, Hoshen Mishpat* 97: 28; *Shulhan Arukh , Hoshen Mishpat* 97:15; *Maggid Mishnah, Hilkhot Malveh Ve-Loveh* 25:14; *Leket Yosher, Yoreh Deah* 79-80.

45 *Teshuvot ha-Rivash* 484; *Teshuvot Maharashdam, Hoshen Mishpat* 390; *Teshuvot Ranah* 58; *Yam Shel Shlomo, Bava Kamma* 8:65; *Bah, Hoshen Mishpat* 97:28; *Teshuvot ha-Ridvaz* 1:60; *Sema, Hoshen Mishpat* 107:10. For additional concurring opinions, see Elon, supra n.35, 164-237.

46 *Ketuvot* 86a; *Pesahim* 91a; Rashi, ad loc.; *Teshuvot ha-Rivash*, ibid.

compliance. While endorsing the *Shulhan Arukh's* opposition to imprisonment for a debtor who cannot pay, *Rema* rules that a debtor who has the financial ability to pay and is simply attempting to conceal his assets (such as through fraudulent conveyance) may be incarcerated.[47]

Thus, the question of whether one may deprive a debtor of his personal freedom through imprisonment or coercion to engage in gainful employment is the subject of debate.[48] R. Zevin aptly observes that some decisors maintain that even though the human body belongs to God, Halakhah allows an individual to be deprived of his personal freedom by another individual, such as an employer, or an institution, such as a prison.[49]

Offering a contrasting perspective, R. Shaul Yisraeli contends that man actually retains co-partnership over his body with God. Although *havalah*, self-inflicted harm or assault of another person, is clearly forbidden,[50] implying that an individual is not the owner of his own body, R. Yisraeli defines ownership differently. Despite God's ownership rights, so to speak, there is broadly speaking, "a bundle of rights" that may be exercised by man, within certain halakhic parameters to be sure, with respect to one's bodily tissue: principally, the right to possess it, to exclude others from removing it, and donate and/or sell it to another individual.[51]

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47 Rema, *Hoshen Mishpat* 97:15.

48 This diversity of opinion regarding whether denying an individual a degree of his freedom is a form of enslavement informs the issue of whether a husband can be obligated to engage in work in order to pay *mezonot isha* (spousal support), as well as the question of whether a *po'el*, an employee who works by the hour, has the right to withdraw from his work without liability for losses incurred.

49 After examining this debate, R. Zalman N. Goldberg concludes that such a view is difficult to comprehend. See Zalman N. Goldberg, "Acts of Acquisitions in the Sale of Kidneys" (Hebrew), 30 *Tehumin* (5770): 108,112.

50 *Bava Kama* 91b; Tosafot, ad loc., s.v. *ela hai*; *Shulhan Arukh*, *Hoshen Mishpat* 424:1.

51 See *Le-Or Ha-Halakhah*, 330-5; *Amud ha-Yemini* 16:16-32. R. Zevin

How, then, would Halakhah approach a dispute between a couple regarding preembryo disposition? What would happen if a happily married Jewish couple agreed to participate in an IVF program and there is no evidence that they signed a preembryo agreement? If the couple, now divorced, dispute who has authority over disposition of the preembryos – the wife yearning for implantation and the husband objecting to implantation, arguing that the financial burden of unwanted fatherhood should not be mandated without his consent – with whom would the Halakhah side?

Understanding the halakhic nature of marriage is crucial background to this question. *Kiddushin*, the act of halakhic engagement, itself may be said to be a consensual agreement,[52] as it establishes a personal status of *mekudeshet* (a woman designated for a particular man and prohibited to all others), and thereby creates various obligations, such as certain prohibited sexual relations.[53] Subsequently, the act of *nissuin*, marriage, creates a framework of monetary obligations, such as spousal support. At the same time, a marriage may be viewed as a partnership between spouses.[54]

In R. Yisraeli's view, a Jewish couple's participation in an IVF program is a form of partnership together to sire

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concurs that a person exercises decisional authority, even though he cannot be said to own his body; see *Le-Or Ha-Halakhah*, 327.

52 *Shulhan Arukh*, *Even ha-Ezer* 26, 37, 38-39, 43-44.

53 "The woman becomes prohibited to all others in the same manner as *hekdesh* (consecrated objects);" see *Kiddushin* 2b.

54 For authorities who view marriage as an economic partnership, see *Teshuvot Maharashdam*, *Hoshen Mishpat* 206; *Pesakim u-Ketavim*, vol. 9, *Hoshen Mishpat* 33; *Teshuvot Havalim ba-Ne'imim*, vol. 5, *Even Ha-Ezer* 34; File No. 9061-21-1, Netanya Regional Rabbinical Court, Ploni v. Plonit, June 26, 2006;File No. 14850-1, Ashdod Regional Rabbinical Court, Plonit v. Ploni, September 19, 2010; File No. 347562-1,Tel Aviv-Yaffo Regional Rabbinical Court, Ploni v. Plonit, September 13, 2011; Shlomo Daichovsky, "Liquidating the Partnership and Dividing the Assets of the Spouse" (Hebrew), 16-17 *Shenaton Ha-Mishpat Ha-Ivri* (5750-5751): 501, 508; idem., " The *Halakhot* of Marital Partnership: Is it the Law of the Monarchy?" (Hebrew), 18 *Tehumin* (5758) 18; *Piskei Din Rabbanayim* 11:116.

a child.[55] In contrast to a commercial partnership, which is formed based upon pooling assets in a common purse through a written operating agreement, verbal commitment, or each partner undertaking to be the agent of the other,[56] the partnership of the progenitors is created by the commingling of the sperm and the egg.[57] Once that partnership has been created, neither partner may dissolve it prior to the expiration date or prior to attaining its objectives as provided in their agreement.

R. Yisraeli argues that a joint effort to sire a child is no different than any other partnership arrangement. Should there arise unforeseen circumstances (*ones*), such as disability or sickness, that make it impossible for one partner to continue to work, such circumstances are grounds for partnership dissolution.[58] Similarly, the unanticipated event of a couple becoming divorced should allow the husband to terminate the partnership agreement for preembryo implantation.[59]

Although he accepts the partnership model, R. Ariel disagrees with R. Yisraeli's conclusion.[60] R. Ariel compares the agreement between the husband and wife in this case to a sale between a seller and buyer, which is "*taluy be-da'at sheneihem*,"

55 *Teshuvot Havot Binyamin* 3: 108, reprinted in Avraham Steinberg (ed.), *Encyclopedia Hilkhatit Refu'it* (1994), vol. 4, 37-44.

56 *Shulhan Arukh , Hoshen Mishpat* 176:2, 5; *Teshuvot ha-Rivash* 71; *Sefer ha-Levush, Hoshen Mishpat* 176:1; *Ra'avad, Hilkhot Sheluhin Ve-Shutafim* 4:2.

57 See supra n. 55.

58 According to one view, a partner is construed as an employee; see *Teshuvot Rabi* 219; *Tur, Hoshen Mishpat* 176:4; Shakh, *Hoshen Mishpat* 176:8. Consequently, a progenitors' agreement regarding preembryo disposition, which is akin to a labor contract, is either consummated by a *kinyan* (a symbolic act of undertaking an obligation) or through the onset of work – that is, the commingling of the sperm and the egg. See *Bava Metzia* 76a, 83a; Rema, *Hoshen Mishpat* 333:2. Similarly, a partner, like an employee, may terminate the partnership due to *ones* (an unforeseen circumstance). See *Bava Metzia* 77b; *Shulhan Arukh, Hoshen Mishpat* 333:5.

59 See *Havot Binyamin*, supra n. 55; Dovid Lau, *Teshuvot Ateret Shlomo*, vol. 2, 151.

60 Yoezer Ariel, "The Cessation of the IVF Process Upon Spousal Demand," (Hebrew) 77-78 *Assia* (5761),102.

dependent on the intent of both.[61] In general, once a sale has been consummated, the buyer has no grounds to rescind the sale if he subsequently discovers a defect in the item.[62] The sale would be voided only provided that two conditions are fulfilled – the buyer would not have agreed to the sale had he known that the defect would appear in a reasonable time after the purchase and the seller included among the terms of the sale that the transaction was contingent on the usefulness of the item. In the absence of both conditions, the sale is final even if a defect is found.[63]

Analogously, R. Ariel argues, the unforeseen event of divorce (*ones*) should not serve as grounds for failing to follow through with the partnership. Although the husband opposes continued participation in the IVF program, his wife does not agree with him, and her desire is given equal halakhic weight. Thus, in the absence of a provision in the preembryo disposition agreement addressing contingency situations such as divorce, implantation should proceed as initially agreed upon by the gamete providers.[64]

In effect, R. Ariel views this partnership agreement as an agreement between two parties who undertake certain obligations.[65] Whereas, the argument of *ones* may be advanced regarding a unilateral agreement, a sales agreement which is a bi-lateral agreement such an argument cannot be raised.[66] Consequently, neither partner (progenitor) is empowered to retract from the agreed-upon arrangement unless both conditions of a standard sale's agreement have been obtained.

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61 *Teshuvot Sho'el U-Meshiv, Mahadura Kama* 1:145, 197, 199; *Teshuvot Noda Be-Yehuda, Mahadura Kama, Yoreh Deah* 69, *Mahadura Tanina, Even ha-Ezer* 130; *Teshuvot Maharsham* 3:82 and 5:5.

62 *Shulhan Arukh, Hoshen Mishpat* 176:1; Rema, ad loc.

63 Tosafot, *Bava Kama* 110b; *Tosafot ha-Rosh, Ketuvot* 47b; *Netivot ha-Mishpat, Hoshen Mishpat* 230:1.

64 For the effectiveness of a provision addressing *ones* instances, see Sema, *Hoshen Mishpat* 310:12; Shakh, *Hoshen Mishpat* 334:1.

65 Taz, *Hoshen Mishpat* 176:1; *Teshuvot Maharbil* 2: 37-38.

66 *Tosafot, Ketubot 47b, s.v. shelo.*

Although R. Yisraeli and R. Ariel disagree regarding whether a husband can oppose implantation in the case of divorce, both decisors invoke the commercial partnership paradigm to address how to deal with inter-spousal disputes regarding their human reproductive materials. Although the halakhic norms of commercial partnership focus on "the world of commodities," these *Posekim* show no reluctance in applying *Hoshen Mishpat* concepts to "the world of the human body". Both realms focus on individuals who utilize their authority to make decisions –whether to execute business arrangements and or what to do with their reproductive materials.

Commodification and Privacy Interest

To address the issue of commodification, we will focus upon the propriety of a Jew donating his kidney to a fellow Jew. If kidney transplantation is permitted, ought one be compensated for his donation? We have articulated this question elsewhere:

> The permissibility of a kidney transplant provides us with one of the many illustrations of the overarching and paramount significance of *pikuah nefesh*, i.e. the preservation of human life. *Pikuah nefesh* suspends all biblical prohibitions excluding idolatry, homicide, and certain sexual offenses...Here, we are dealing with the preservation of human life being effectuated by a surgical procedure which involves the sacrifice of a human organ. In effect, the procedure entails "*havalah*," i.e. wounding, which usually is prohibited whether it is self-inflicted or inflicted by others... Given that halakhic strictures are suspended for the purposes of preservation of human life, is the proscription against *havalah* equally set aside in the cases of kidney

transplants?[67]

In our analysis elsewhere, we offered three different approaches:

The permissibility or non-permissibility of transplants hinges upon determining the degree of risk associated with a nephrectomy as defined my medical assessment. As we have seen, whether risk will be determined simply based upon the arbiter's perception, state of medical technology, or societal willingness to accept the risk is subject to debate. Assuming that the procedure is "halakhically risk-free," then *pikuah nefesh* will override *havalah*.

On the other hand, other contemporary authorities assert that *pikuah nefesh* cannot suspend the proscription against *havalah*. Self-injury is proscribed and the prohibition against battery is construed as a stricture ancillary to the prohibition of homicide (*avizrayhu*). The situation is therefore defined as one of "*nefashot*" or "*safek nefashot*," a precarious or possibly precarious situation, which mandates the avoidance of jeopardizing one's life. Accordingly, a transplant will not be allowed. Alternatively, one can contend that this question is to be resolve through the prism of "*havalah*." Is wounding for the sake of rescuing human life permitted? Should the wounding be administered in a contentious matter (*derekh nitzahon*) or in a disrespectful fashion (*derekh bizayon*), then such action constitutes *havalah* and is prohibited. Consequently, if an individual is willing to sustain an injury in order to save the life of another, i.e. an action of respect, then this act is sanctioned as a case of privileged battery. Hence, a donor may undergo a transplantation procedure.[68]

Thus, according to one opinion, renal transplantation constitutes *havala* or *safek sakana* and is therefore prohibited.

67 See my, "Renal Transplantation: Living Donors and Markets for Body Parts –Halakha in Concert with Halakhic Policy or Public Policy?" 40 *Tradition* (2007): 14, 15.

68 Ibid., 17-21.

Others, however, contend either that *pikuah nefesh* suspends the prohibition against *havalah* or that *havalah* in a respectful fashion is permissible.[69]

According to the latter approach, we place a supreme value upon the *mitzvah* of preservation of life and it becomes the sole deciding factor. Even if the donor's motivation is commercial gain, it is an irrelevant consideration.[70] At first glance, such a conclusion appears problematic, as in general, one may not receive compensation for the performance of a *mitzvah*.[71] One rationale offered for this ruling one is unable to receive compensation for performing an action that entails the performance of a divine obligation, rather than a decision to benefit another person.[72] If, however, one is performing the *mitzvah* through his gainful employment (such as a physician)[73] or if societal needs dictate that compensation should be forthcoming in order to promote the saving of human life, remuneration is permissible.[74] Thus, even though a kidney is an essential body party and non-regenerative, many authorities permit the sale of a kidney, considering it no different than the sale of hair and blood, which are regenerative.[75]

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69 Ibid.,

70 *Nishmat Avraham*, *Yoreh Deah* 349:3-4, in the name of R. Shlomo Z. Auerbach.

71 *Bekhorot* 4:6; *Shulhan Arukh*, *Yoreh De'ah* 336:2.

72 Rambam, *Perush Ha-Mishnah*, *Nedarim* 4:2; Shakh, *Yoreh De'ah* 221:22, 246:5.

73 Sema, *Hoshen Mishpat* 264:19; *Shulhan Arukh*, *Yoreh Deah* 336:2.

74 *Shulhan Arukh*, *Hoshen Mishpat* 246:5; *Tiferet Yisrael*, *Nedarim* 4:2; *Teshuvot Mahari Bruna* 114; *Iggerot Moshe*, *Hoshen Mishpat* 1:103; Levi Y. Halperin, *Teshuvot Ma'aseh Hoshev*, vol. 4, 62-67; Mordechai Halperin, "Removal of Organs from a Live Donor: Halakhic Perspectives" (Hebrew) 45-46 *Assia* (5749), 34. Pursuant to Tosafot, *Pesahim* 65a, s.v. *ha-mekhabed*, R. Shabtai Rappoport argues that compensation is sanctioned provided that the primary motivation of the transplant is to save a life rather than to receive remuneration. See Shabtai Rappoport, "Sale of Organs: From Living Donor for Transplant – Motivation and Decision Making," in Alfredo Rabello (ed.), *An Equitable Distribution of Human Organs for Transplantation* (Jerusalem, 2003), 97, 107.

75 *Nedarim* 9:5; *Nedarim* 65b; *Arakhin* 1:4; *Arakhin* 7b.

The implications of allowing a market of human organs for life-saving or health-enhancing purposes reaffirms our thesis than man's relationship to his body and its components is marked by his dispositional authority, rather than recognition of the human body as a fungible item as akin to negotiable instruments and shares of common stock. Moreover, since most authorities agree that Halakhah does not treat a human organ as a piece of property, the value of the kidney may be based upon the actual value to the kidney donor, which may be beyond its market value.[76]

A person's decisional authority to sell his kidney is comparable to transferring a *shtar hov* (a note of indebtedness) to another person. A lender who holds a *shtar hov* against a debtor may choose to sell this *shtar* to a third party, who may then wish to sell it to someone else. *Netivot ha-Mishpat* suggests that if the original transfer of the *shtar* to a third party was not properly recorded in the *shtar* or a separate document, as called for,[77] the third party does not acquire the *shtar* for purposes of debt collection; he can only sell the nominal value of the worth of the paper of the *shtar*.[78] The third party does not own the *shtar*, but he is entitled to compensation for its paper value.[79]

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76 *Teshuvot Beit Yitzhak, Hoshen Mishpat* 30; *Erekh Shai, Hoshen Mishpat* 386; *Teshuovt Helkat Yo'av* 3:91; *Teshuvot Mekor Hayim* 31. Cf. Shakh, *Hoshen Mishpat* 72:128; *Netivot ha-Mishpat* 148:1, 207:8.

77 *Shulhan Arukh, Hoshen Mishpat* 66:1-2.

78 *Netivot ha-Mishpat* 66:12.

79 Others argue that the *shtar* actually belongs to the borrower; it is transferred to the lender for the purposes of proving that he may collect from the borrower the amount earmarked on the document. Consequently, upon transferring the *shtar* to a third party, the lender is transferring the right to collect the debt, rather than the right to sell the paper value of the *shtar*; see Shakh, *Hoshen Mishpat* 66:8; *Ketzot ha-Hoshen* ad loc. The analogy to our case applies according to this understanding as well. Whether the third party has the right to sell the *shtar* for its paper value or the right to collect the debt it represents, the creditor has decisional authority regarding collecting the debt. Similarly, although a person's organs do not belong to him, he has the authority to sell them as he wishes. See Ya'akov Ariel, *Shut be-Ohela Shel Torah*, 487.

Similarly, one might argue, although a person does not own his kidney, he may nevertheless sell the value of the kidney.

Other authorities disagree with this analysis, arguing that organ donation for financial gain is forbidden. Based on *Tosafot's* view that one is proscribed from committing self-inflicted harm for commercial gain,[80] R. Menashe Klein contends that selling a kidney, which involves battery, is an affront to human dignity.[81] Arriving at the same conclusion from a different perspective, R. Moshe Zorger acknowledges that if the world engages in such a practice and/or the donor requires the compensation for his living, marketing a kidney is permissible,[82] but he concludes that such a practice is "disgusting."[83] Those who argue that the proscription against *havalah* preempts transplantation would ban the marketing of kidneys *le-khathila*. On the other hand, these authorities would uphold the validity of selling kidneys *be-diavad* (ex post facto).[84] Given the prohibited nature of transplantation, how can this be justified? There is a clear distinction between the prohibited act of battery and the two parties' willingness to execute their personal obligations – that is, the transfer of money for undergoing the act of battery. In the words of Professor Silberg, a renowned twentieth century Israeli jurist:

> We see clearly that Jewish law does not establish a causal connection between the commission of an offense and the voiding of a civil contract...

80 Tosafot, *Bava Kama* 91b, s.v. *ela*.

81 *Teshuvot Mishnah Halakhot* 4:245.

82 *Teshuvot va-Yeshev Moshe* 93.

83 Ibid. 94.

84 Similarly, an agreement to have relations with a prostitute in exchange for money is valid ex post facto; see *Bava Kama* 70b; Tosafot, *Bava Kama*, ad loc., s.v. *ilu*; *Teshuvot ha-Rashba* 1: 302; *Teshuvot Shevut Ya'akov* 2:136. Even though the act is prohibited, should the act be consummated, the undertaking of the duty to furnish compensation is enforceable. In the words of R. Yosef S. Nathanson, "this is clear as day;" see *Teshuvot Sho'el U-Meshiv, Mahadura Revi'ah* 3:39.

> The violation of the law or morality is one thing, and the legal validity of the contract is another – to the extent that the fulfilling of the contract itself does not activate the offense... Precisely because Jewish law does not distinguish between law and morality, and that practically every performance of an obligation is at the same time a fulfillment of a religio-moral commandment – such as "the commandment" of repaying a debt of monetary obligation – the non-fulfillment of a contract entered into through a violation of law will only turn out to be an additional offense to supplement the original one committed by the transgressor.[85]

In other words, even though there is a prohibition against the market of organs, since the agreement between the parties complies with the norms of the halakhic laws of obligations, the donor is entitled to payment for his kidney. Thus, despite the fact that these authorities fear that the dignity of the human being is diminished if the body is treated like a commodity, and they ban the sale of human organs accordingly, they nevertheless rule that ex post facto, the sale is valid.[86]

According to this view, after the commission of a prohibited act, money may be taken for a service based on a mutual agreement of the parties. *A fortiori*, compensation is permissible for services relating to the use of our bodies on a daily basis. Medical researchers take a salary, and writers work on commission under contract, frequently producing works of intellectual value. A factory worker commodifies the use of his body by using his brains and by moving his hands, and he

85 Moshe Silberg, *Talmudic Law and the Modern State* (New York, 1973), 82.

86 Although the sale would be halakhically valid, there may be some halakhic public policy considerations that would militate against sanctioning such sales should they materialize.

receives a salary for this service. A teacher talks and uses her brains, mouth, and lungs, and she receives money for doing so. If to "commodify" means merely to accept a fee, the portions of *Hoshen Mishpat* that deal with the undertaking of these obligations would look askance at legitimating these relationships based upon an exchange of money. But such ties are, in fact, recognized, and the labor market – entailing the buying and selling of a person's labor – is not viewed as an affront to human dignity.[87]

Other areas of social endeavor that may be characterized as non-market matters are established through a "commodified understanding." For example, to ascertain a couple's *gemirat da'at* (firm resolve) to consummate a marriage pursuant to the dictates of Halakhah, an object is given by the prospective husband to his prospective wife.[88] Once married, the couple is allowed to engage in conjugal relations and mutually benefit from the pleasures of the other's body. Similarly, undertaking an obligation that entails the use of one's body

87 Nevertheless, since employment based upon an hourly wage is construed as "enslavement" unless the employee requires a job for an income, one should refrain from being in the employ of one individual for more than three years. See Rema, *Hoshen Mishpat* 333:3, 16; Shakh, *Hoshen Mishpat* 333:16-17. Cf. *Ketzot ha-Hoshen* 333:7. Others argue that a labor contract with a term of employment of more than three years is valid provided that the employee resides in his own home rather than living at his employee's domicile. See *Teshuvot Hemdat Shlomo* 7; *Teshuvot Lehem Rav* 81.
To avoid being enslaved to his job, an employee may rescind his contract of service at any time; see *Bava Metzia* 10a; *Bava Kama* 116b; *Shulhan Arukh, Hoshen Mishpat* 333:3. However, should he execute an arrangement of non-rescission with his employer, such an agreement is valid; see *Teshuvot Zera Emet*, vol. 2, *Yoreh De'ah* 97. Similarly, should a *kablan* (contractor) accept a project accompanied by the execution of a *kinyan*, he cannot withdraw from the job; see Rema, *Hoshen Mishpat* 333:1; Shakh, ad loc. 3. Cf. others who argue that even a standard employee cannot rescind his service if a *kinyan* was executed at the time of the commencement of work; see *Hiddushei ha-Ritva, Bava Metzia* 75b; *Teshuvot ha-Ritva* 117. Given that enslavement is frowned upon, some of these views are difficult to understand. See supra nn. 37,42-43.
88 *Kiddushin* 1:1.

parts, such as a partnership or a sale, is executed through the implementation of a *kinyan* (symbolic act of transfer), which may entail the use of an object to attest to the parties' resolve to engage in these matters. Decisors understood these *kinyanim* as modes of ascertaining the parties' intent.

In short, there is nothing wrong *per se* with taking money for the use of one's body, and formal recognition of that fact resonates in our norms of *Hoshen Mishpat.*

In light of the foregoing discussion, can we determine whether Halakhah recognizes a right to privacy regarding one's body and tissue? As we mentioned earlier, the rejection of property in the human body has lead to the invocation of the right to privacy by American legal commentators.[89] Given that man's body belongs to God, does Halakhah recognize a zone of privacy? Clearly, the minority of decisors who oppose renal transplantation as a violation of battery recognize that there is a right to bodily integrity, or what we might call today a right to privacy. Certainly, there exist a plethora of *halakhot* that protect individual privacy, such as the laws barring a lender's entry into a borrower's home to collect a debt, the prohibition of eavesdropping, and the emphasis on domestic privacy (*hezek re'iyah*).[90] Renal transplantation may provide an additional illustration of this same category.

According to the authorities who define *havalah* as an act of wounding administered in a disrespectful fashion, if an individual is willing to sustain injury in order to save a life, the act is permissible. A kidney transplant is excluded from the prohibition not due to the benefit that accrues to the recipient, but rather because of the privileged nature of the act. Consequently, the donor does not enjoy a right to privacy or a right to bodily integrity when the *havalah* occurs for a constructive and beneficial purpose.

For the majority of authorities, however, the permis-

89 See supra text accompanying notes 26-27 and Rao, supra n.12, at n. 15.
90 *Shulhan Arukh, Hoshen Mishpat* 97:16, 154:3, 7; Rema, *Hoshen Mishpat* 154:7; *Halakhot Ketanot* 1: 276; *Piskei Din Rabbaniyim* 14:329.

sibility of a nephrectomy provides us with one of many illustrations of the overarching significance of *pikuah nefesh*, which suspends almost all prohibitions, including wounding. Most authorities rule that undergoing this procedure is a *reshut* (a permissible act) or a *middat hassidut* (an act of piety).[91] It is thus the donor's option whether he wants to retain his bodily integrity or not.[92]

Our presentation demonstrates that for both Halakhah and American law, property concepts merit attention as a flexible and eminently helpful intellectual tool to discuss the ownership and sale of human tissue. From the Jewish legal perspective, at first glance, the issue seems to be unusually lucid; as a religious legal system, Halakhah maintains that our bodies are owned by God. Upon further analysis, as we have shown, the landscape is by no means so neat and the indicators do not all point in one direction. Utilizing property concepts in the context of issues of bioethics and briefly invoking other realms of Halakhah, we encounter the notion that even a religious legal system will impart a degree of latitude, a zone of privacy and autonomy to members of a covenant-faith community.

91 See Warburg, supra n. 67, at text accompanying nn. 7, 15, 16, 20 and 38.

92 Interestingly, Dr. Avraham Steinberg (*Entzyklopedia Hilkhatit Refu'it* 3, col. 104, n.198) explains R. Ovadia Yosef's opinion ("A Responsum Regarding the Permissibility of a Kidney Transplant" (Hebrew), 7 *Dine Israel* (5736): 25; reprinted as *Teshuvot Yabia Omer* 9, *HM* 12) as describing organ donation as a *mitzvah hiyuvit* (obligatory mitzvah). Accordingly, the zone of privacy regarding one's body is trumped by the performance of the *mitzvah*. Thus, the question of whether a right to bodily integrity exists is a subject of debate regarding how one understands the propriety or possible impropriety of undergoing a renal donation. However, Dr. Abraham S. Abraham (*Nishmat Avraham* 4, p. 122) disagrees and explains R. Ovadia Yosef's opinion in line with most other authorities in describing organ donation as a permissible, yet highly praiseworthy activity.