Organ Donation: Mitzvah or Murder?

Rabbi Gershon Albert – Beth Jacob Congregation of Oakland

# Living Organ Donations – Risk vs. Reward

1. Vayikra / Leviticus – Chapter 19 Verse 16

|  |  |
| --- | --- |
| Do not deal basely with your countrymen. Do not profit by the blood of your fellow: I am the LORD. | לֹא־תֵלֵךְ רָכִיל בְּעַמֶּיךָ לֹא תַעֲמֹד עַל־דַּם רֵעֶךָ אֲנִי ה'׃ |

1. Talmud Bavli – Masechet Sanhedrin 73a

|  |  |
| --- | --- |
| Concerning **the** matter **itself,** it is taught in a *baraita*: **From where** is it derived **that one who sees another drowning in a river, or being dragged away by** a wild **animal, or being attacked by bandits, is obligated to save him? The verse states: “You shall not stand idly by the blood of another”** ([Leviticus 19:16](/Leviticus.19.16)). The Gemara asks about this derivation: **But is this** really **derived from here?** It is **derived from there,** i.e., from a different verse, as it is taught: ‘But **from where** is it derived that one must help his neighbor who may suffer **the loss of his body** or his health? **The verse states: “And you shall restore it [*vahashevato*] to him [*lo*]”** ([Deuteronomy 22:2](/Deuteronomy.22.2)), which can also be read as: And you shall restore him [*vehashevato*] to him, i.e., saving his body.  The Gemara answers: **If** this *halakha* were derived only **from there, I would say** that **this matter** applies only **to** saving the person in danger **by himself,** i.e., that he himself must come to his neighbor’s rescue if he can, as is the *halakha* with regard to returning a lost item. **But to trouble himself and hire workers** for this purpose, one might **say** that he is **not** obligated. Therefore, the verse “Do not stand by the blood of another” **teaches us** that he must even hire workers, and he transgresses a prohibition if he does not do so. | גופא מניין לרואה את חברו שהוא טובע בנהר או חיה גוררתו או לסטין באין עליו שהוא חייב להצילו ת"ל לא תעמוד על דם רעך והא מהכא נפקא מהתם נפקא אבדת גופו מניין ת"ל והשבותו לו  אי מהתם הוה אמינא ה"מ בנפשיה אבל מיטרח ומיגר אגורי אימא לא קמ"ל |

1. Talmud Bavli – Masechet Bava Metzia 62a

|  |  |
| --- | --- |
| **And Rabbi Yoḥanan, what does he do with this** verse: **“And your brother shall live with you”?** The Gemara answers: **He requires** the verse **for that which is taught** in a *baraita*: If **two** people **were walking on** a desolate **path and** there was **a jug [*kiton*] of water in the possession of one of them,** and the situation was such that **if both drink** from the jug, both will **die,** as there is not enough water, **but if** only **one of them drinks, he will reach a settled area,** there is a dispute as to the *halakha*. **Ben Petora taught:** It is **preferable that both of them drink and die, and let neither one of them see the death of the other.** This was the accepted opinion **until Rabbi Akiva came and taught** that the verse states: **“And your brother shall live with you,”** indicating that **your life takes precedence over the life of the other.** | ורבי יוחנן האי וחי אחיך עמך מאי עביד ליה מבעי ליה לכדתניא שנים שהיו מהלכין בדרך וביד אחד מהן קיתון של מים אם שותין שניהם מתים ואם שותה אחד מהן מגיע לישוב דרש בן פטורא מוטב שישתו שניהם וימותו ואל יראה אחד מהם במיתתו של חבירו עד שבא ר' עקיבא ולימד וחי אחיך עמך חייך קודמים לחיי חבירך |

1. Aruch HaShulchan – Choshen Mishpat 426:4 (Rabbi Yechiel Michel Epstein 1829-1908)

*(Talmud Yerushalmi Terumot 8:4 quotes a story of Rav Issi being captured, and Reish Lakish stating that he would go to free him and “either kill or be killed” if necessary)*

|  |
| --- |
| הפוסקים הביאו בשם ירושלמי דחייב אדם להכניס א"ע לספק סכנה כדי להציל חבירו והראשונים השמיטו זה מפני שבש"ס שלנו מוכח שאינו חייב להכניס א"ע ומיהו הכל לפי הענין ויש לשקול הענין בפלס ולא לשמור א"ע יותר מדאי ובזה נאמר ושם אראנו בישע אלהים זהו ששם אורחותיו וכל המקיים נפש מישראל כאלו קיים עולם מלא ועי' יו"ד סי' רנ"ב: |

1. Mishnah – Masechet Bava Kamma (Chapter 8 Mishnah 6)

|  |  |
| --- | --- |
| If a man injures himself, even though he has no right to do so, is not liable. | הַחוֹבֵל בְּעַצְמוֹ, אַף עַל פִּי שֶׁאֵינוֹ רַשַּׁאי, פָּטוּר. אֲחֵרִים שֶׁחָבְלוּ בּוֹ, חַיָּבִין. |

*Rashi: this is due to the prohibition of* Bal Tashchit (not wasting / ruining).

1. Rabbi Jason Weiner – Jewish Guide to Practical Medical Decision-Making

|  |  |  |  |
| --- | --- | --- | --- |
| **Amount of Risk to Life** | *Minimal* | *Significant* | *Very High* |
| **Level of Permissibility** | Encouraged or even obligated | Permissible, pious act, but not obligatory | Forbidden |
| **Example of Donation** | Blood, bone marrow, kidney | Liver, lung lobe |  |

* Debated issues: can one halachically require self-inflicted pain (when minimal risk) to surely save a life?
* Bone Marrow: can be forced once the preparation has begun, since there is certainly life danger to the recipient if cancelled last minute.

# Dead Donors

1. Devarim / Deuteronomy – Chapter 21 Verses 22-23

|  |  |
| --- | --- |
| If a man is guilty of a capital offense and is put to death, and you impale him on a stake,  you must not let his corpse remain on the stake overnight, but must bury him the same day. For an impaled body is an affront to God: you shall not defile the land that the LORD your God is giving you to possess. | וְכִי־יִהְיֶה בְאִישׁ חֵטְא מִשְׁפַּט־מָוֶת וְהוּמָת וְתָלִיתָ אֹתוֹ עַל־עֵץ׃  לֹא־תָלִין נִבְלָתוֹ עַל־הָעֵץ כִּי־קָבוֹר תִּקְבְּרֶנּוּ בַּיּוֹם הַהוּא כִּי־קִלְלַת אֱלֹהִים תָּלוּי וְלֹא תְטַמֵּא אֶת־אַדְמָתְךָ אֲשֶׁר יְהוָה אֱלֹהֶיךָ נֹתֵן לְךָ נַחֲלָה׃ |

1. Talmud Bavli – Masechet Sanhedrin 47a

|  |  |
| --- | --- |
| **Come** and **hear** a proof from the mishna: If **one left** his deceased relative unburied **overnight for the sake of his honor,** e.g., in order **to bring him a coffin or shrouds, he does not transgress** the prohibition of “his body shall not remain all night.” **What, is it not** referring to **the honor of the deceased?** The Gemara answers: **No,** it is referring **to the honor of the living** relatives of the deceased.  The Gemara asks: **But** can it be that **due to the honor of the living, they allow the deceased to remain** unburied **overnight?** The Gemara answers: **Yes,** as **when the Merciful One states: “His body shall not remain all night upon the tree,** but you shall bury him that day” ([Deuteronomy 21:23](/Deuteronomy.21.23)), it teaches that the prohibition applies only to cases **similar to** that **of** a person whose body is **hung** after his death, **who suffers degradation** when his corpse is left hanging overnight. **But here, since** the deceased **does not suffer degradation** when the funeral is delayed, as the delay is in order that the burial will be performed with greater dignity, there is **no** violation of the prohibition, and he may be left unburied overnight. | ת"ש הלינו לכבודו להביא לו ארון ותכריכין אינו עובר עליו מאי לאו לכבודו של מת לא לכבודו של חי  ומשום כבודו של חי מבית ליה למת אין כי אמר רחמנא ([דברים כא, כג](/Deuteronomy.21.23)) לא תלין נבלתו על העץ דומיא דתלוי דאית ביה בזיון אבל הכא כיון דלית ביה בזיון לא |

*Is there a requirement of prior consent? Zachin Le’Adam Shelo BeFanav*

# Removal of “Life-Sustaining” Organs (Lungs, and Heart Transplants)

1. Shulchan Aruch and Rama – Yoreh De’ah 339:1

|  |  |
| --- | --- |
| One in a dying condition is considered alive in all ways. We may not tie up his jaws, nor may we anoint him with oil, nor wash him, nor stop off his organs of the extremities, nor may we remove the pillow from under him, nor may we place him on sand, clay-ground or earth, nor may we place on his stomach a dish, a shovel, a flask of water or a globule of salt, nor may we summon the towns on his behalf, nor may we hire pipers and lamenting women, nor may we close his eyes before his soul departs. And whosoever closes [the dying person's] eyes before death is regarded as one who sheds blood. One may not rend garments, nor bare the shoulder in mourning, nor make a lamentation for him, nor bring a coffin into the house in his presence before he dies, nor may we begin the recital of *Ẓidduk Haddin* before his soul departs.  **Rama:** There are those who say that we may not dig a grave for him, even if the digger is not with him at the home, until after he died. It is forbidden to dig any grave to be left open until the next day when the deceased won’t be buried on that day, since there is danger in the matter.  It is similarly forbidden to cause the dying to die quickly, such as someone who is a Goses for a long time and cannot separate, it is forbidden to remove the pillow or mattress from underneath him…  However, if there is something that causes the hindrance of the departing of the soul, such as a loud knocking noise near the house, like a wood-chopper, or salt on his tongue, and these are stopping the departing of the soul, then it is permitted to remove them, since there is no action from these things, rather one is just removing the hindrance. | **מחבר:** הַגּוֹסֵס, הֲרֵי הוּא כְּחַי לְכָל דְּבָרָיו. אֵין קוֹשְׁרִין לְחָיָיו, וְאֵין סָכִין אוֹתוֹ, וְאֵין מְדִיחִין אוֹתוֹ, וְאֵין פּוֹקְקִין אֶת נְקָבָיו, וְאֵין שׁוֹמְטִין הַכַּר מִתַּחְתָּיו, וְאֵין נוֹתְנִין אוֹתוֹ עַל גַּבֵּי חוֹל, וְלֹא עַל גַּבֵּי חַרְסִית וְלֹא עַל גַּבֵּי אֲדָמָה, וְאֵין נוֹתְנִין עַל כְּרֵסוֹ, לֹא קְעָרָה, וְלֹא מַגְרֵפָה, וְלֹא צְלוֹחִית שֶׁל מַיִם, וְלֹא גַּרְגִּיר שֶׁל מֶלַח, וְאֵין מַשְׁמִיעִין עָלָיו עֲיָרוֹת, וְאֵין שׂוֹכְרִין חֲלִילִין וּמְקוֹנְנוֹת, וְאֵין מְעַמְּצִין עֵינָיו עַד שֶׁתֵּצֵא נַפְשׁוֹ. וְכָל הַמְּעַמֵּץ עִם יְצִיאַת הַנֶּפֶשׁ, הֲרֵי זֶה שׁוֹפֵךְ דָּמִים. וְאֵין קוֹרְעִין, וְלֹא חוֹלְצִין, וְלֹא מַסְפִּידִין עָלָיו, וְלֹא מַכְנִיסִין עִמּוֹ אָרוֹן לַבַּיִת, עַד שֶׁיָּמוּת. וְאֵין פּוֹתְחִין עָלָיו בְּצִדּוּק הדִּין, עַד שֶׁתֵּצֵא נַפְשׁוֹ.  **הַגָּה**: וְיֵשׁ אוֹמְרִים דְּאֵין חוֹצְבִין לוֹ קֶבֶר אַף עַל פִּי שֶׁאֵינוֹ עִמּוֹ בַּבַּיִת, עַד אַחַר שֶׁיָּמוּת (ריב''ש סִימָן קי''ד). אָסוּר לַחֲצֹב שׁוּם קֶבֶר לִהְיוֹת פָּתוּחַ עַד לְמָחָר שֶׁלֹּא יִקְבְּרוּ בּוֹ הַמֵּת בְּאוֹתוֹ הַיּוֹם, וְיֵשׁ סַכָּנָה בַּדָּבָר (רַבֵּנוּ יְרוּחָם בְּשֵׁם הר''י הֶחָסִיד זַ''ל). וְכֵן אָסוּר לִגְרֹם לַמֵּת שֶׁיָּמוּת מְהֵרָה, כְּגוֹן מִי שֶׁהוּא גּוֹסֵס זְמַן אָרֹךְ וְלֹא יוּכַל לְהִפָּרֵד, אָסוּר לְהִשָּׁמֵט הַכַּר וְהַכֶּסֶת מִתַּחְתָּיו, מִכֹּחַ שֶׁאוֹמְרִין שֶׁיֵּשׁ נוֹצוֹת מִקְצָת עוֹפוֹת שֶׁגּוֹרְמִים זֶה וְכֵן לֹא יְזִיזֶנּוּ מִמְּקוֹמוֹ. וְכֵן אָסוּר לָשׂוּם מַפְתְּחוֹת ב''ה תַּחַת רֹאשׁוֹ, כְּדֵי שֶׁיִּפָּרֵד. אֲבָל אִם יֵשׁ שָׁם דָּבָר שֶׁגּוֹרֵם עִכּוּב יְצִיאַת הַנֶּפֶשׁ, כְּגוֹן שֶׁיֵּשׁ סָמוּךְ לְאוֹתוֹ בַּיִת קוֹל דּוֹפֵק, כְּגוֹן חוֹטֵב עֵצִים, אוֹ שֶׁיֵּשׁ מֶלַח עַל לְשׁוֹנוֹ וְאֵלּוּ מְעַכְּבִים יְצִיאַת הַנֶּפֶשׁ, מֻתָּר לַהֲסִירוֹ מִשָּׁם, דְּאֵין בָּזֶה מַעֲשֶׂה כְּלָל, אֶלָּא שֶׁמֵּסִיר הַמּוֹנֵעַ (הַכֹּל בְּהַגָּהַת אַלְפָסִי פֶּרֶק אֵלּוּ מְגַלְּחִין). |

## When is the moment of death?

1. Mishnah – Masechet Yoma (Chapter 8 Mishnah 6-7)

|  |  |
| --- | --- |
| … Every danger to human life suspends the [laws of the] Sabbath. If debris [of a collapsing building] falls on someone and it is doubtful whether he is there or whether he is not there, or if it is doubtful whether he is an Isrealite or a gentile, one must probe the heap of the debris for his sake [even on the Sabbath]. If one finds him alive, one should remove the debris, but if he is dead, one leaves him there [until after the Sabbath]. | ...וכל ספק נפשות דוחה את השבת: מי שנפלה עליו מפולת ספק הוא שם ספק אינו שם ספק חי ספק מת ספק עובד כוכבים ספק ישראל מפקחין עליו את הגל מצאוהו חי מפקחין עליו ואם מת יניחוהו: |

1. Talmud Bavli – Masechet Yoma 85a

|  |  |
| --- | --- |
| Our Rabbis taught: How far does one search? Until [one reaches] his nose. Some say: Up to his heart. If one searches and finds those above to be dead, one must not assume those below are surely dead. Once it happened that those above were dead and those below were found to be alive.  Are we to say that these Tannaim dispute the same as the following Tannaim? **For it was taught**: From where does the formation of the embryo commence? From its head, as it is said: Thou art he that took me [gozi] out of my mother's womb, and it is also said: Cut off [gozi] thy hair and cast it away. **Abba Sha’ul said**: From the navel which sends its roots into every direction!  You may even say that [the first view is in agreement with] Abba Sha’ul, inasmuch as Abba Sha’ul holds his view only touching the first formation, because ‘everything develops from its core [middle]’, but regarding the saving of life he would agree that life manifests itself through the nose especially, as it is written: In whose nostrils was the breath of the spirit of life. Rav Papa said: The dispute arises only as to from below upwards, but if from above downwards, one had searched up to the nose, one need not search any further, as it is said: ‘In whose nostrils was the breath of life’. | תנו רבנן עד היכן הוא בודק עד חוטמו ויש אומרים עד לבו בדק ומצא עליונים מתים לא יאמר כבר מתו התחתונים מעשה היה ומצאו עליונים מתים ותחתונים חיים  נימא הני תנאי כי הני תנאי דתניא מהיכן הולד נוצר מראשו שנאמר ([תהלים עא, ו](/Psalms.71.6)) ממעי אמי אתה גוזי ואומר ([ירמיהו ז, כט](/Jeremiah.7.29)) גזי נזרך והשליכי אבא שאול אומר מטיבורו ומשלח שרשיו אילך ואילך  אפילו תימא אבא שאול עד כאן לא קא אמר אבא שאול התם אלא לענין יצירה דכל מידי ממציעתיה מיתצר אבל לענין פקוח נפש אפי' אבא שאול מודי דעיקר חיותא באפיה הוא דכתיב ([בראשית ז, כב](/Genesis.7.22)) כל אשר נשמת רוח חיים באפיו  אמר רב פפא מחלוקת ממטה למעלה אבל ממעלה למטה כיון דבדק ליה עד חוטמו שוב אינו צריך דכתיב כל אשר נשמת רוח חיים באפיו |

1. Rashi (ibid.)

|  |  |
| --- | --- |
| **Until his nose** – And if there is no life in his nose – that he is not exhaling breath – then he is surely dead and one should leave him [until after Shabbat]. | עד חוטמו - ואם אין חיות בחוטמו שאינו מוציא רוח ודאי מת ויניחוהו: |

1. Chacham Tzvi: She’elah 75 (R. Tzvi Ashkenazi: 1656-1718 – Amsterdam)

|  |
| --- |
| Behold Rashi Z’L agreed that the soul is located in the heart, but sometimes even though the soul is still in the heart the heartbeat is not noticed outside of the chest due to the [person’s] weakness… since the heartbeat is weak on the inside. However, [when this is the case] the breath leaving the heart by way of the lungs is recognizable as long as the heart is still living. It is very clear that there is only breath when there is still life-force in the heart… |

1. Chatam Sofer: Chelek Yoreh De’ah 338 (R. Moshe Schreiber: 1762-1839 – Pozsony, Modern day Slovakia)

|  |
| --- |
| Moshe received the determined time as a “Law to Moshe from Sinai” or [the Sages] relied upon the verse: “In whose nostrils has the breath of life” – for all depends on the breath of the nose… But after [the body] is like a still stone and there is no heartbeat and afterwards the breath stops, we can only rely upon our holy Torah that he is dead and one cannot leave him over |

1. Igerot Moshe Yoreh De’ah Volume 2:146 \***1970\*** (R. Moshe Feinstein: 1895-1986 – New York City, NY)

|  |
| --- |
| The Talmud and *poskim* (decisors) never mention that there is a *siman* (sign) of life in the brain, and it is not appropriate to say that our nature has changed, since in the times of our Sages the brain also performed all functions as in our times, and all life of man came from it, though still death was not determined with the stopping of the brain, and so it is clear in our times as well.  It is clear and simple that the nose is not the limb that gives life to the body, and the soul is not dependent on it at all, but rather it is the brain and the heart that give life to man… just that [the nose is] the limb though which the breathing action is conducted… and we have a *siman* of life only through the nose… Once the heartbeat and the navel (rising and descending) are no longer recognizable, then with regards to removing debris on Shabbat it depends on the nose…  Therefore, all the doctors who do this (heart transplants) are murderers, and most times even though the heart was weak the ill person was not yet a *tereifah* (mortally wounded being) and they are deserving of the death penalty (under Jewish law) if we tried capital cases at this time… |

1. Igerot Moshe Yoreh De’ah Volume 3:132 **\*1976\***

|  |
| --- |
| …If they see that he is not breathing, this is a *sign* of death upon which we can rely and not be concerned; see the Chatam Sofer (ibid.) who explained this at length.  …However, this is for people who got ill in the hands of Heaven with an illness, but for those who get into traffic accident or fall out of a window etc. through which these nerve constrictions close to the lungs the person cannot breathe, and after time that they can only breathe with a mechanism, the nerves will expand and they will begin to breathe independently, then even though they cannot breathe and there are no signs of life it is possible that they are still alive, now that you say that there are tests through which qualified doctors can clarify with an injection of a liquid into the body through the veins to see if the connection between the brain and the rest of the body has stopped, that if it (the fluid) does not arrive at the brain then it is clear that the brain is no longer connected whatsoever to the body, and that the brain has already “spoiled” and it is as if the body is decapitated…  only once they see from this test that there is no connection between the brain and the body can they decide that the one who doesn’t breathe is dead. |

*Test = Cerebral Angiography*

1. Medical, Legal and Ethical Issues in the Determination of Death (President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research: Defining Death: 1981)

|  |
| --- |
| An individual who has sustained either (a) irreversible cessation of circulatory and respiratory functions, or (b) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards. |

1. Shu”t Tzitz Eliezer Volume 17:66 (R. Eliezer Yehuda Waldenberg: 1915-2006 – Jerusalem, Israel)

|  |
| --- |
| I have already stated my opinion many times in my response, that [heart and liver transplants] are a matter of murder for the donor who is still alive, and are often considered murder for the recipient as well who dies after a while since they removed his natural heart before donating the new one.  I am aware of that which is said about several great men who after they forbid the matter, later permitted it in several unique scenarios that arose, but it is clear that this was only when the donor was non-Jewish… |

*Rav Shlomo Zalman Auerbach permitted receiving these organ transplants in Chutz La’aretz but not in Israel, based on Dina DeMalchuta Dina when it doesn’t impact Jewish patients and doctors.*

1. Igerot Moshe Yoreh De’ah Volume 4:54 **\*1984\***

|  |
| --- |
| In practice, according to what I heard from my son-in-law Rabbi Moshe Dovid Tendler, that the secular courts accepted only the definition of death which is true according to Halacha as well known as the “Harvard Criteria” (the conditions to establish total and final stopping of brain functions known as brain-death), and that it is exactly as is “his head has been decapitated”… So, even though the heart can still pump for several days, even so any time that the patient does not have the ability to breathe independently he is thought of as dead, as I wrote earlier. |

Other Considerations:

* DCD = Controlled Donation after Cardiac Death (life support removed in a surgical environment before brain death, with other pre-death interventions)
* Organ Donor Cards:
  + Concerns around whether decisions will be made with halachic consultations
    - Halachic Organ Donor Society
* Jewish Donation vs. Donations in broader society

Rabbi Jason Weiner – Summary of Opinions:

|  |  |
| --- | --- |
| **Status of Donor** | **Permissibility** |
| *Live Donor* | Permissible, depending on level of risk |
| *Dying/Brain Dead/DCD* | Generally Forbidden, differences of opinion on brain death |
| *Cadaveric (Donation from Dead Body)* | Permissible according to most opinions |