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978-0-521-49338-3 - Organ Donation and the Divine Lien in Talmudic Law

Madeline Kochen

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ORGAN DONATION AND THE DIVINE LIEN IN TALMUDIC LAW

This book offers a new theory of property and distributive justice derived from Talmudic law, illustrated by a case study involving the sale of organs for transplant. Although organ donation obviously did not exist in late antiquity, this book posits a new way, drawn from the Talmud, to conceive of this modern means of giving to others. Our common understanding of organ transfer (transplant) as either gift or sale is trapped in a dichotomy that is conceptually and philosophically limiting. Drawing on Maussian gift theory, this book suggests a different legal and cultural meaning for this property transfer. It introduces the concept of the “divine lien,” representing an obligation to others in need that is built into the very definition of property ownership. Rather than a gift or sale, organ transfer is shown to exemplify an owner’s voluntary recognition and fulfillment of this latent property obligation.

Madeline Kochen is a public interest lawyer and former professor at the University of Michigan Law School. She has a B.A. *magna cum laude* in Judaic Studies and a law degree from Yeshiva University, as well as an interdisciplinary Ph.D. in Religion and Political Philosophy from Harvard University. After a stint at the Legal Aid Society, Kochen worked as an attorney for the New York Civil Liberties Union, where she eventually founded and directed the NYCLU Reproductive Rights Project. In addition to Michigan, Kochen has taught at Harvard and at Stanford Law, where she was an assistant dean. Her fellowships include the Harvard Center for Ethics and the Professions, the Frankel Center for Advanced Judaic Studies, and the Revson Fellowship at Columbia University. Her publications have appeared in *Aramaic in Postbiblical Judaism and Early Christianity*, *The Encyclopedia of the Bible and Its Reception*, the *New York Law Journal*, and the *Jewish Law Association Studies*.

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*For my grandfather, Jacob Isaac Kraminer, z”l (1900–1993),
who was born in the Ukrainian town of Sokal on the banks
of the River Bug, ate only hard-boiled eggs when he traveled,
and kvelled over my learning even though I was a girl.*

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Preface

A popular (mis)conception regarding the Jewish tradition dating to ancient times assumes that, for the Jew, anything and everything is for sale. Thus, in William Shakespeare's *The Merchant of Venice*, the Jewish character Shylock appears fully prepared to enforce a contract by which he is entitled to obtain a pound of flesh in payment for an outstanding monetary debt. Outside intervention is required in order to avoid this outcome. The Shylock character, a symbol for the venal Jew, exemplifies an invidious stereotype that has persisted for generations.

It is possible to probe this idea on a theoretical level.¹ The moral and legal principles presented within the voluminous Jewish textual tradition provide a basis upon which to assess the contention (or accusation) that, for the Jew, there is nothing wrong with regarding everything as for sale and money as paramount. The legal tradition articulates normative principles that dictate the degree to which people can or cannot consider themselves free to act for purely monetary purposes, as well as ideas concerning property and social relations that delineate the individual's prerogatives and responsibilities with respect to property.

The "pound of flesh" contract at issue in *The Merchant of Venice* (not surprisingly) is not to be found in this rich legal tradition;² nevertheless, it is interesting to analyze how a case involving something resembling the sale of a human body part would fare. The contemporary scenario of organ transfer,³

¹ Of course, how people behave, or have behaved, is a different matter entirely. See, e.g., Derek Penslar, *Shylock's Children: Economics and Jewish Identity in Modern Europe*, Berkeley: University of California Press (2001).

² But see Shlomo Zevin, "Mishpat Shylock" [Hebrew: The Case of Shylock], in *Le'or Hahalacha*, Jerusalem: Beyt Hillel (1946), pp. 311–335, which analyzes precisely this hypothetical question of whether the contract at issue in *The Merchant of Venice* would be enforceable under Jewish law. He decides it would not be, based on the principle that humans do not own their bodies.

³ Rather than the phrase "organ donation," which assumes answers to the very questions explored here, the phrase "organ transfer" will generally be used in this book.

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with the possibility of payment of a market price, provides just such a nonhypothetical setting for examining this question under Jewish law.⁴ One might be tempted to argue that this is not a fair test, for it hardly seems likely that the well-developed legal/religious system of Jewish law would permit something that is condemned by most people as immoral and is legally banned worldwide. As it turns out, while relatively little has been written on this particular question (which is interesting in and of itself), much of what has been written seems to suggest that there is essentially nothing wrong with the sale of human organs (for purposes of transplantation) according to Jewish law.⁵

Along with this counterintuitive proposition, there is a puzzling empirical fact relating to Jews and organ transfer. If there is any generalization that one can accurately state regarding this tradition, it is that it places paramount importance on the value of human life, so much so that it permits the transgression of all but three prohibitions⁶ if necessary to save a human life.⁷ One might, therefore, expect a very high rate of organ transfer among Jews; that is what I had assumed when I began working on this topic. As it turns out, quite the opposite is true.

While I was working on this book, my mother died very suddenly of a stroke. She had signed her organ donor card, and I experienced the process of organ transfer firsthand, from the perspective of the donor family. What I found out, to my surprise, was (1) that Jews generally donated fewer organs than any other demographic group in the New York area, (2) that in Israel the rates of donation

⁴ I do not use the term “Jewish law” in a traditional religious sense (with a presumption of teleological or evolutionary development or causality); nor do I mean to imply the existence of a hypostasized, unitary entity. Rather, I use it in a generic sense to refer to the contents of a body of legal literature that was produced by Jews (often males and rabbis) that spans nearly two thousand years and great geographical distances. These texts embody many variegated approaches. I make no assertions as to how the disparate parts relate to one another. In contrast to “Jewish law,” I use the term “Talmudic law” to refer to the legal contents of Talmudic, or “rabbinic,” literature attributed to the Tannaim and Amoraim, circa 200–600 C.E.

⁵ See, e.g., Zalman Nechemiah Goldberg, *Kinyanim Bemechirat Kelayot* [Hebrew: Acquisitions in the Sale of Organs], in *Ateret Shelomo*, Jerusalem: Machon Madaei Technologi Lehalacha (5757/1997), pp. 49–55; Shlomo Goren, “*Mechirat Kelayot Lehashtalah al pi Hahalacha*” [Hebrew: The Sale of Organs for Transplant According to Jewish Law], in *Torat Harefuah: Mechkarim Hilchati'im Benosei Refuah*, Jerusalem: Ha-idra Rabah (5761/2001), pp. 127–148; Israel Meir Lau, “The Sale of Organs for Transplantation,” in Daniel B. Sinclair (ed.), *Jewish Law Association Studies*, volume 15, Binghamton: Global Academic Publishing (2005), pp. 285–305 (translated from the Hebrew in *Tehumin* 18 [5758/1998], 125–136.); Yitzchak Zilberstein, “*Mechirat Kalya Leph'ar'on Chovot*” [Hebrew: Sale of Organs for the Payment of Debts], *Yated Ne'eman, Musaf* (Dec 30, 1994/27 Tevet 5755), p. 7.

⁶ These three exceptional prohibitions entail (1) idolatry, (2) certain prohibited sexual acts, and (3) murder of another person. See Babylonian Talmud (“B.T.”) Sanhedrin 74a.

⁷ The saving of the life of another is the greatest act one can perform; it is described as being tantamount to saving the entire world (B.T. Sanhedrin 37a).

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were among the lowest in the world, and (3) that Israel is renowned for its high rate of participation in the worldwide black market in human organs.⁸

One can speculate as to why Jews might not donate in greater numbers. A possible explanation is the common intuition that, given the prohibition against maiming the human body (alive or dead), it might not be permitted under Jewish law. Yet, in view of the tradition's stress on the importance of saving human life, and its structural tendency to generate (a sense of) obligation for others, this hardly seems a likely or sufficient explanation.

Further puzzling is the fact that there is other evidence that suggests that, at least under some circumstances, Jews will donate, even at an unusually high rate. For example, in 2002, a man named Samuel Berger, who was in dire need of a new kidney, advertised in various Jewish newspapers in New York in search of a donor. The enticement to prospective donors was not money, but the opportunity to do the greatest *mitzvah*⁹ there is – saving a human life. An astounding number of strangers – twenty-eight in all – responded to his ad and offered to donate their kidneys (*gratis*). This was an overwhelming response rate, which is what made the story newsworthy.¹⁰

The Berger story does seem to provide a clue – that willingness to donate might have something to do with community building and social bonding. In fact, that incident places in stark relief my final encounter with the way in which organ transfer is institutionalized in contemporary society. My mother did, in fact, donate her liver, to a person who would have died in a few days without it. About a month after the surgery, I called my contact person at the New York Organ Donor Network and made what I thought was a rather simple request – to visit the person (still hospitalized) who had received my mother's liver. The question elicited a lengthy silence on the other end of the line. I was

⁸ One report of an investigation into the international organ trade noted that “To those who monitor organ trafficking, it was no surprise that Israel should emerge as the focal point of a syndicate. Organ transfer rates in Israel are among the lowest in the developed world, about one-third the rate in Western Europe, in large part because of what Health Ministry officials and doctors describe as a widespread impression that Jewish religious law prohibits transplants as a ‘desecration of the body.’ In reality, religious law is far more nuanced. But influential Orthodox rabbis have been reluctant to make public statements that would encourage either live donors or the harvesting of organs from the deceased.” Larry Rohter, “Tracking the Sale of a Kidney on a Path of Poverty and Hope,” *New York Times* (May 23, 2004), pp. A1, A8. See also Dominick, Tao, “Worldwide Market Fuels Illegal Traffic in Organs,” *New York Times* (July 29, 2009), p. A26 (Forty-four people arrested in FBI sting includes an Orthodox Jewish business man from Brooklyn, who is accused of trying to sell a human kidney for \$160,000.)

⁹ The word “*mitzvah*” is translated colloquially as a good deed. More accurately, it connotes the fulfillment of a Jewish legal obligation (whether mandatory or voluntary). For more on the definition of the word *mitzvah* see p. 15 n. 44.

¹⁰ For a similar, more recent case, see <http://m.ynet.co.il/Article.aspx?id=4406117>.

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finally told, in a tone of amazement, that no one had ever asked that question before. The wasted opportunity for human contact surrounding this event, the very element that might be likely to foster organ transfer, was striking.

So what is the “Jewish” approach to organ transfer,¹¹ and what, if anything, does it offer that might contribute to contemporary debates and problems surrounding this issue? The relevant legal texts can clarify the answer to this question. It is most interesting to read them against the backdrop of the empirical and anecdotal evidence described above. The apparent lack of a prohibition against organ sales, coupled with the paucity of organ transfers by Jews, could be perceived as an uncomfortable echo of the selfishness and venality represented by Shylock. Yet, there is other evidence that seems to indicate something very different. The Samuel Berger incident hints not only at the underappreciated importance of sociality in this context, but also at the possible effectiveness of a tradition that, at least in theory, aims to cultivate a sense of obligation to sustain the lives and well-being of (some?) others.

That which is suggested by the anecdotal evidence finds resonance in the traditional texts. This book will show that Jewish law can serve as a model for a new approach to addressing the dire need for organs for transplant. It is more complicated (but perhaps more practical and realistic) than the perceived narrow, dichotomous choice: to either rely on “pure” altruistic gift giving or to allow the market to help solve the problem by introducing money as an incentive. For, the question of the permissibility of “organ sales” under Jewish law is not at all straightforward. It calls for an exploration of questions of obligation, reward, incentive, property ownership, and self-ownership, an inquiry that proves illuminating as to the Jewish legal perspective on organ transfer and for the contemporary debate over the “commodification” aspect of this issue. What comes to the fore is the importance, in this realm, of social bonding (the absence of which is one of the very problems resulting from excessive commercialization and commodification) and the idea of tapping into a third possibility: envisioning and encouraging a gift that is both free and obligatory (if not simply obligatory), and the possibility of some form of compensation. This study develops this theory and offers it as a different perspective on the ethical dilemma presented by the shortage of organs for transplant.

¹¹ The phrasing of this question is somewhat rhetorical. I do not mean to suggest that there is one “Jewish” response to organ transfer (or to anything else), or that it necessarily relates to the narratives recounted here.

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