

Greene Fund for Equity Studies

**AN EQUITABLE DISTRIBUTION OF
HUMAN ORGANS FOR TRANSPLANTATION**

Future Market: The Sale of Human Body Parts

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system of pension payments, a reduced tax rate, or insurance premiums, ranging from loss of working capacity insurance to comprehensive medical insurance for donors. The donor would be granted preferential rights vis-à-vis employment, and an allowance would be given to his/her family after the donor's death. Offering financial incentives would save lives.

II. *Fundamental Assumptions*

The model is based on a number of fundamental assumptions which are listed below.

A. *Life and Death*

In virtually every country in the world there is a familiar anomaly: on the one hand, modern medicine is able to work wonders and save lives, thus increasing the waiting-list for organ transplants, while on the other hand, the number of organs available for transplant, despite attempts to encourage organ donation, does not meet demand. The situation of patients waiting for kidney transplants is particularly grave.

Despite successful attempts and significant financial investment globally to augment the number of organs for transplant, the need over the last 10 years for organs has increased sevenfold, and the gap between supply and demand is ever increasing. This leads one to the unavoidable conclusion that a different approach has to be found. When people are dying every day, discussing ethical principles will not keep them alive.

B. *Money*

We all work in order to earn money. There is no doubt that a higher salary improves quality of work and that money improves quality of life. Money is the stimulus with the greatest power in today's world. There is no doubt that offering financial incentives in a respectable, open, and recognized manner would increase the number of people willing to donate organs for transplant, whether by those who are alive

or from those who are dead. This does not necessarily imply direct payment, but it might involve various arrangements with regard to insurance or tax breaks.

Money determines quality of life and quality of medical treatment. Despite huge investments in medical care designed to provide medical treatment at the highest level possible to everyone who needs it, private medicine throughout the Western world is on the increase. For many decades, private medicine in Israel was considered undesirable and as impairing equality and justice.

It is no secret that money and budgets determine the fate of a person's life. A government decision to increase the defence budget and to purchase more arms means saving life. A budget decision to open or close hospitals has a direct influence not only on quality of life, but also upon life itself. Selectivity in how to spend the health budget may also save lives.

According to a 1997 report based on data from the medical insurance groups and the state comptroller,¹ the direct cost of medical treatment for a patient receiving dialysis in Israel amounts to some \$45,000 to \$50,000 per year. This does not include welfare allowances paid by the state to the patient and his family, which significantly increases the total annual cost.²

Would it not be just to permit the fair purchase of a kidney? It is important to take into consideration society's attitude when it requires volunteers for special and dangerous work, such as the border police. Does society not offer those prepared to risk their lives various incentives, such as higher salaries? Are we not tainted with hypocrisy?

C. Right to Privacy

A further assumption is based upon a fundamental value in modern culture, in general, and in the modern Western legal system, in particular: the individual's right to privacy.

1 State Comptroller Report No. 47 P. 225 & No. 51B [On April 2002 the direct cost was 230,000 NIS]

2 Th. De Charro & A. De Wit "Costs of Transplantation; Procurement, Preservation & Allocation of Vascularized Organs" in Collins, Dubernerd, Land, and Persijn, ed. *Procurement, Preservation & Allocation of Vascularized Organs* (Kluwer Academic Publishers, 1997) 233.

This right of privacy gives a person the authority to make fateful decisions about his/her body which are honored by society and the legal authorities, enabling a person in his/her lifetime to give instructions on how he/she is to be treated in the event of a grave terminal illness, whether life-saving/life-prolongation measures be given or withheld. All these subjects have been approved and enforced by the courts in Israel and throughout the world.

Within the context of the right to privacy, a woman's right to her body has been recognized and formulated, including her exclusive right to an abortion without state intervention: in the USA, in the first trimester and in Israel, subject to obtaining appropriate committee approval, while the husband's right to intervene, even if he is the father of the fetus, has been overruled!³

Given that an individual has a right to privacy and to make decisions pertaining to his/her body, what moral authority does society have to prevent him/her from selling or donating an organ for transplant? The law recognizes this in otherrelated spheres, such as in blood donation, which ensures the donor's right to receive blood in the event of a medical need for a year, and in surrogate mother arrangements and various adoption proceedings, where there is an exchange of money for a whole person – a child – instead of just an organ.⁴ It is all a question of adaptation and appropriate terms.⁵

The previous assumption infers the further assumption that human organs are recognized by law as transferable property and that a person has the right to trade in them and, thereby, profit, an assumption to which we are party and which is recognized today by the majority of legal systems in the world.

In this article, I wish to present a possible model through which society in general, and the legal system in particular, can and, in my opinion, must legislate, so that anyone so wishing will be able to sell

3 Nancy E. Field "Evolving Conceptualization of Property; A Proposal to Decommmercialize the Value of Fetal Tissue," (1989) 99 Yale Law Journal 169. R. Hardiman, "Toward the Right of Commerciality; Recognizing Property Rights in the Commercial Value of Human Tissue," (1986) 34 UCLA L.Rev 207.

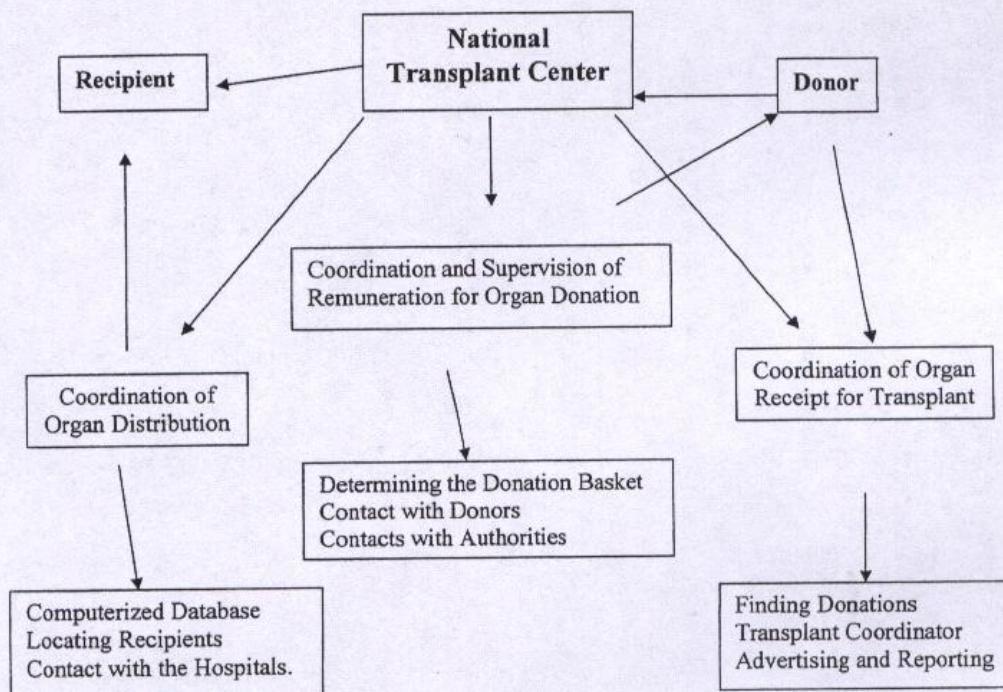
4 According to the Israeli regulations on adoption, one must pay \$20,000 US to a registered non-profit organization in order to adopt a child from abroad. Most of the money is for "services rendered abroad," the meaning of which is quite clear.

5 G. S. Crespi, "Overcoming the Legal Obstacles to the Creation of a Future Market in Bodily Organs" (1994) 55 Ohio State Law Journal 2.

or purchase, or receive or give financial remuneration for, organs for transplant, particularly those organs that can save lives.

The time has come to openly and courageously recognize the need to provide fair financial remuneration to procure organs for transplant.

CONSIDERATION FOR A DONATION – PROPOSED MODEL



III. Guiding Principles for Action

The proposed model should operate according to a list of guiding principles, such that adhering to them will ensure a high ethical and moral standard and at the same time save lives.

- A. The first principle is that the purchase of organs be carried out by a single official body authorized to do so: in Israel, the National Transplant Center. In larger countries it is possible that there will be exclusive regional centers. There will not be any trade or direct contact between a voluntary buyer and a voluntary seller. The donor of the organs will have contact only with the official organization.

- B. Distribution of organs to those who need them will continue according to the currently existing criteria, i.e., without regard to the financial circumstances of the recipient, but according to the criteria already established in each country.
- C. Funds for the purchase of organs will come from the national budget and/or the budget of the said official authority and will be covered mostly or totally by the savings achieved in the health budget, in particular, and in social resources, in general. The potential reduction in disability pension payments and in the number of persons requiring welfare services should also be taken into account as a means of saving money.⁶
- D. It should be stipulated that remuneration will be paid automatically to each donor, regardless of personal status or wealth. Anyone wishing to donate an organ for no charge can give his/her fee to a charity of his/her choosing. It is important that everyone receives payment in order for remuneration for organs to become an accepted reality.
- E. The proposed model will deal both with living donors, where contact was made with the donor while still living, or following death where contact was made with some member of the family, whereby there will be a special incentive to encourage families of the deceased to donate organs.
- F. Preference should be given to making a donation for payment in kind rather than for a cash payment. Where a cash payment is made, it should not be so large as to be liable to be considered 'cajolement.'
- G. There should be a statutory provision to the effect that the donor bears no personal 'product' liability for the organ toward the recipient and the authority that examined the donor and approved the donation.
- H. It is important that donors receive emotional support and counseling, whether from the clergy, psychologists, or even public relations personnel.
- I. Financial remuneration should be offered under several acceptable formats, each having a common denominator: the protection of the health of the donor and his/her family. Outstanding remuneration

6 A.A. Barnett & David Kaserman, "The Shortage of Organs for Transplantation; Exploring the Alternatives," (1993) 9 Issues in L. & Med. 117, at 123.

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- may be tailored to the donor as the authority in charge of coordinating receipt of the donated organs sees fit.
- J. There shall be no specific contract for sale of an organ, and the donor may retract at any stage. However, if the donor received compensation in advance, he/she will be required to return it.
 - K. A statutory provision shall make clear, in order to avoid doubt, that any remuneration received by the seller-donor shall be exempt from any lien or attachment and shall not be transferable to a trustee in bankruptcy, but shall be for the use of the donor and his/her family only. Such legal status in effect corresponds to the law currently existing in Israel regarding compensation for personal injury damages, which belong to the injured party and are not included among his/her assets for the purpose of covering his/her debts in bankruptcy proceedings.⁷
 - L. Designating a specific donation (i.e., sale for a specific person) is likely to raise problems and therefore should be limited to first-degree family only. It should be prohibited in respect to third parties. Allocation of organs will be carried out according to the current criteria, including donations for specified individuals.
 - M. It is important to grant the authority responsible for coordinating the collection and allocation of organs the power to refuse a tendered organ at its discretion. It is important to prevent a situation whereby one ethnic group or social stratum becomes the main donor body. It is desirable to generate sale and acceptance of organs from the widest possible social spectrum.

IV. *The Content of Consideration for Donation*

The seller of an organ for transplant should be held in almost the same regard as a soldier who gives his/her life in battle. He/she should continue to be called a donor, regardless of remuneration. The content of possible kinds of remuneration is outlined below. This list is incomplete and is likely to differ from country to country.

⁷ *Supra* n. 5. C.A. 38/68, *Yedidya Revuan v. The Official Receiver*, 22 (2) P.D. 141; Bankruptcy Ordinance (New Version), sec. 72; Tort Law Ordinance (New Version), sec. 21.

A. Arrangements through the National Insurance Institute (NII)

1. A body with considerable power and great importance, the NII may be used immediately to grant remuneration to donors pursuant to the model.
2. It is possible for an automatic monthly pension to be paid to the donor.
3. The amount of the pension would be set according to the type of organ donated and could be offset against any additional income, including other pensions from the NII (today, the recipient of disability pension loses his/her retirement pension, for there are no multiple pensions from the NII).
4. In the case of the deceased, the widow(er) or children could be offered a double survivors' pension or dependents' pension.
5. A one-time payment upon performance of organ donation is possible.
6. The donor could be granted the same status and rights as those of a disabled person, therefore making him/her eligible for rehabilitation and vocational (re)training offered by the NII.

B. Legal Arrangements

1. Several legal arrangements could be set up immediately to obtain organ donation for remuneration, which in effect would enable granting indirect remuneration under the law as it exists today.
2. The first possibility would be to adapt the Case Law of the District Court of Jerusalem to recognize someone who donates an organ to a person injured in an accident as a compensatory damage benefactor who, as such, is entitled to his/her expenses, damages, and savings by mitigating the damages of the injured party from the tortfeasor or insurance company, so that the donor of a kidney to a sibling injured in a road accident could lodge a claim directly against the insurance company.⁸
3. The Succession Law could be amended immediately to enable every person while still alive to commit him/herself to donate

8 C.C. (Jm.) 782/95 *Naftaly Ayub v. The Israel Phoenix Ins. Co.* 1997.

his/her organs following his/her death for remuneration to his/her family and/or estate. It would be stipulated that this instruction would be separate from the estate and/or will.

4. A new law⁹ was enacted in Israel in 1998 that promulgates the 'rescue' principle also towards a person to whom there is no duty. A similar legal principle exists in many countries of the world. This law could be used, with necessary amendments, to put the proposed model into operation.

C. Arrangements Pursuant to the System of Taxation

1. All remuneration a person gets for his/her organs would be exempt from taxation (as is the case today regarding compensation for personal injury).
2. Exemption from tax on work income for a period of one year or other stipulated period could be offered to the donor.
3. A lower tax rate could be offered for an extended period of time.
4. Exemption from municipal taxes (as is the case today for disabled soldiers) or other indirect taxes, such as v.a.t., customs, etc.
5. An exemption from certain customs duties, perhaps only for personal items, as well as an exemption from or credit against value added tax.
6. Especially popular in Israel is exemption from purchase tax at the time of purchasing a vehicle for personal use.

D. Arrangements Pursuant to the Health System

1. Anyone donating an organ should be guaranteed that he/she and his/her close family will be first to receive organs should they need them.¹⁰
2. National health insurance without payment for his/her entire

9 "Thou Shalt Not Ignore Your Brother's Blood" Law (a.k.a. "The Good Samaritan Law"), 1998, S.H. 245.

10 David E. Jefferies, "The Body as Commodity, The Use of Markets to Cure the Organ Deficit," (1998) 5 Ind. J. Global Legal Stud. 621.

life could be offered to the donor, and possibly to his/her family as well.

3. The national health authority commits itself to bearing the entire medical cost arising from donation of an organ (in cases where there are any complications or the need for medication as a result of organ donation).
4. The organ donor will be deemed 'a valued friend' of the health system and will receive service and care accordingly.
5. Incentives should be given to hospitals to assist in finding donors.

E. *Insurance Arrangements*¹¹

1. An offer could be made to families of the deceased to donate their organs for a one-time payment as a life insurance alternative, i.e., it would be possible to regard the organ donor after the fact as if he/she had had life insurance.
2. An organ donor could receive for his/her entire life insurance against loss of ability to work.
3. At a minimum the donor should be reimbursed for the increase in life insurance premiums and premiums incurred due to the loss of capacity to work as a result of donation of an organ.
4. Special life insurance could be offered to an organ donor.
5. A special pension arrangement could be offered to an organ donor whereby payment to the fund would be made by the authority receiving the organ and guaranteed by the state.

F. *Social Arrangements*

1. Give preference to a donor seeking work in the public sector.
2. Give preference to a donor who participates in public tenders.
3. Grant public works to a donor in his/her profession/vocation without a tender.

¹¹ A.S. Daar, Th. Gutmann, & W. Land, "Reimbursement, Rewarded Gifting, Financial Incentives and Commercialism in Living Organ Donation" in Collins, Dubernerd, Land, and Persijn, ed., *Procurement, Preservation and Allocation of Vascularized Organs* (Kluwer Academic Publishers, 1997) 301.

4. Rehabilitation services and vocational (re)training by state authorities without payment and with no time limit.
5. Refund of burial and other expenses incurred by the family during the illness of the now deceased organ donor.
6. Generous scholarships to family members of the deceased organ donor or to family members of a living donor.
7. A modest one-time payment to a living donor or his/her family, using state bonds or a bank savings plan.
8. Wiping out debts could be considered by the state authorities and even in the private sector, while making arrangements for subrogation.

V. Conclusion

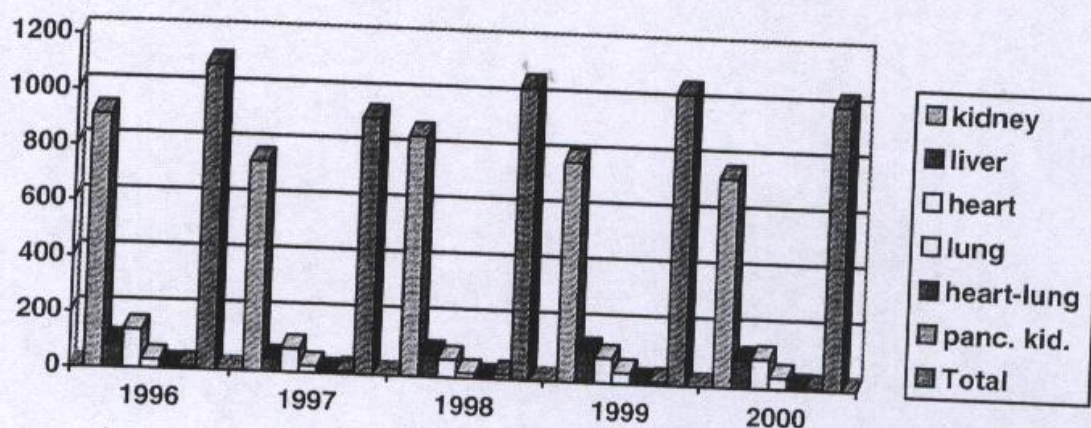
There is no doubt that the suggestions and proposals outlined above will generate heated discussion. There are ethical issues at stake whenever financial remuneration for human organs for transplant is a consideration, but the outlined model tries to reduce moral ambiguity to a minimum.¹²

Opponents would say that altruism is a possible solution; that is, only those people who offer to donate their organs free of charge should be recognized as donors. But with all due respect to the latter, they are not sufficient in number, and in the meantime people are dying for lack of organs. Moreover, recent research has discovered that 'altruistic' donation is frequently the by-product of environmental pressure and totally contrary to the donor's wishes. Imagine a situation in which one child alone in a family of six, whose mother urgently requires a kidney transplant, is found to be a compatible donor and can save his/her mother's life. Is his/her consent really given freely?

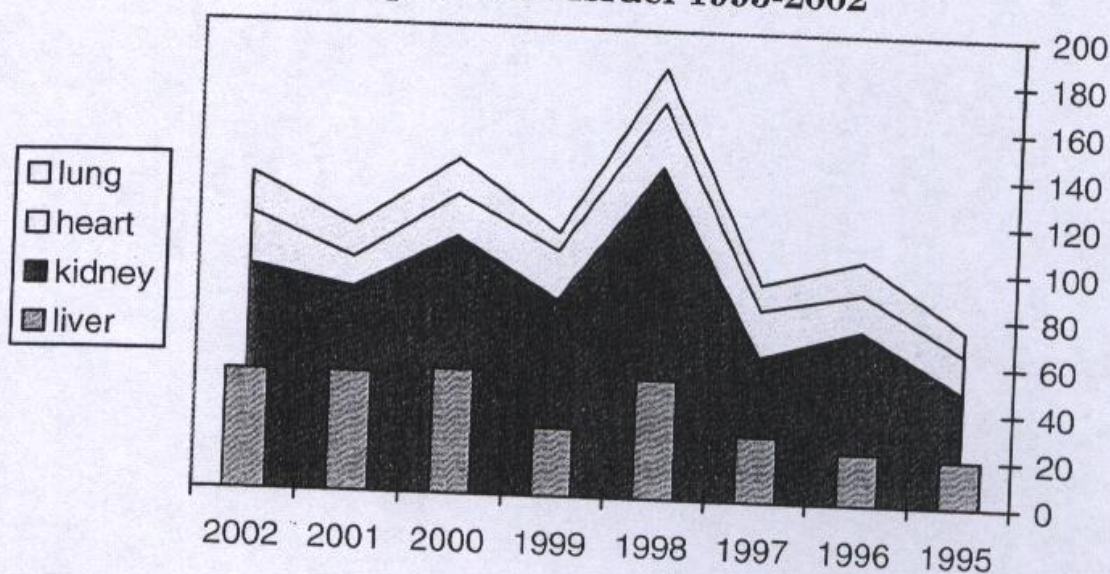
The relative advantage of the proposed model is that it could be put into operation immediately. Since saving lives is what is at stake, does this not make great sense?

12 Janet Radcliffe-Richards, "Nepharious Going On: Kidney Sales and Moral Arguments," (1996) 21 *Journal of Medicine & Philosophy* 375.

Waiting List in Israel 1996-2000



Transplants in Israel 1995-2002



The number of people included in the waiting list is approx. 1000-1100 every year. Dozens Israelis are traveling abroad for commercial transplantation and there are almost 70 live donors every year.

Waiting List for Organ Transplant in the U.S.A.

The UNOS national patient waiting list for organ transplants

Type of Transplant	30 Dec. 2000	31 Mar. 2001	7 June 2002
kidney transplant	47,770	48,474	52,464
liver transplant	16,839	17,376	17,459
pancreas transplant	1,025	1,099	1,311
pancreas islet cell transplant	172	187	294
kidney-pancreas transplant	2,466	2,471	2,536
intestine transplant	151	175	188
heart transplant	4,147	4,271	4,152
heart-lung transplant	207	210	211
lung transplant	3,688	3,720	3,804
Total	74,105	75,614	80,000 !!!