

## Selling Human Organs

### A talk with Professor Glenn Cohen

#### I. Organ Donation Disparity

##### A. Disparity statistics

1. As of 2022, more than 106,000 Americans are on the organ donor transplant list, with over 60,000 awaiting kidneys.
2. 17 people die each day awaiting organ transplant.

##### B. Factors accounting for disparity:

1. Relative decline in homicides.
2. Decrease in car accidents.
3. Longer life expectancy as a result of improved medical technology.
4. Poor health habits and diseases, such as diabetes, are also contributing to increasing demand of organ transplants.

##### C. Organs come from a combination of live and cadaveric donors.

1. The vast majority of organ donations come from recently deceased persons. In addition to organs, deceased donors can also donate tissue material from their corneas, veins, heart valves, ligaments, and tendons.
2. Living donors can donate a kidney, a segment of the liver, the lobe of a lung, a portion of the pancreas, or a portion of the intestine.
  - a. Most commonly donated organ from live donors is kidney.
  - b. For kidneys, live donors are preferred because survival rates from live donor transplant are higher.

#### II. Legal Framework

##### A. The National Organ Transplant Act (NOTA) of 1984 regulates organ transplantation in the U.S.

1. 42 U.S. Code §274e(a) prohibits the sale or purchase of organs in the country.
  - a. It provides that no person shall “knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration.”<sup>3</sup>
  - b. The statute does not define “valuable consideration.”
2. NOTA was amended in 2007 to clarify that “valuable consideration” does not include “human organ paired donation.”

##### B. Extraterritoriality

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<sup>1</sup> U.S. Department of Health & Human Services, Organ Donation Statistics: <https://www.organdonor.gov/statistics-stories/statistics.html>

<sup>2</sup> U.S. Department of Health & Human Services, Organ Procurement & Transplantation Network, Need continues to grow: <https://optn.transplant.hrsa.gov/need-continues-to-grow/>

<sup>3</sup> 42 U.S. Code §274e(a): <https://www.law.cornell.edu/uscode/text/42/274e>

1. NOTA does not have extraterritorial jurisdiction. The law does not govern transactions occurring abroad.
  2. A U.S. citizen in a foreign country who buys or sells organs would not be breaking NOTA, although they may violate laws in those jurisdictions.
- C. Penalties for violation
1. 42 U.S. Code §274e(b) provides for fines up to \$50,000, up to five years in prison, or both.
  2. The first federal conviction for the illegal sale of organs was of Levy-Izhak Rosenbaum in 2011.<sup>4</sup>
    - a. Prosecutors alleged that he purchased organs from vulnerable people in Israel for as little as \$10,000 and selling them to patients for more than \$100,000.
    - b. He pleaded guilty to brokering 3 illegal kidney transplants in exchange for payments of \$120,000 or more. He was sentenced to 2.5 years in prison in 2012.
  3. There have been few prosecutions under NOTA in large part because the law itself and the level of infrastructure necessary for organ transplantation serve as effective deterrents.
- D. Kidney donations
1. Paired donation
    - a. Human organ paired donation or paired kidney exchange occurs when two pairs of donors and intended recipients are matches for each other.
    - b. E.g. when Living Donor 1 is not a biological match to the intended recipient, Patient 1, but is a match to Patient 2 who in turn has Living Donor 2 who is match to Patient 1.
  2. Kidney transplant chains
    - a. Donation of kidneys as a form of paying it forward. Donation continues down a chain until a donor matches with the intended recipient.
    - b. How typical chains work:
      - i. Usually the first person in the chain donates altruistically.
      - ii. Someone who is not a match for the recipient will then donate, continuing the chain.
    - c. Issues
      - i. Problematic if someone defects within the chain.
      - ii. No remedy to compel an individual to donate.
    - d. Typically facilitated by organizations like the National Kidney Registry.
      - i. Allows individual to register to donate or receive

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<sup>4</sup> Department of Justice Press Release, Brooklyn Man Pleads Guilty in First Ever Federal Conviction for Brokering Illegal Kidney Transplants for Profit, October 27, 2011: [https://www.justice.gov/archive/usao/nj/Press/files/Rosenbaum,\\_Levy\\_Izhak\\_Plea\\_News\\_Release.html](https://www.justice.gov/archive/usao/nj/Press/files/Rosenbaum,_Levy_Izhak_Plea_News_Release.html)

- ii. Creates paired exchanges.

### III. Rationales For Creating an Organ Market

#### A. Corruption

1. The corruption argument goes that if the organ sales are permitted, it devalues human beings by treating their body parts as equivalent to money.
2. A criticism of the rationale is that the sale of blood, sperm, and eggs are legal and the justification for that distinction is unclear based on the corruption argument.

#### B. Crowding out

1. Crowding out theory is based on the idea that allowing the sale of organs will decrease the supply. Individuals who would have donated will be incentivized to sell. Allowing an organ market would taint the altruism of donating organs, discourage would-be donors, and result in overall decrease in total supply.
2. A variation of the crowding out theory is that an organ market would crowd out the supply of good quality organs. Individuals will be incentivized to fake their health status and condition of their organs in order to be eligible for the sale of organs.

#### C. Exploitation, coercion, and undue inducement

1. Coercion theory as applied to the organ market is that the organ seller has no acceptable choice but to comply with the buyer's offer to purchase the organ, because they have no reasonable economic alternative, and that broker does not have a right to make that offer to the seller.
2. Under the exploitation rationale, organs sales will exploit the seller either because the seller is harmed by the transaction or the buyer induced the seller to sell at a certain price taking advantage of seller's poverty.
3. Undue influence is the idea that a seller may be offered too high of a price for his organ such that his autonomy is overwhelmed.

#### D. Justified paternalism

1. Theory that a government has both a right and an obligation to protect individuals from making mistakes about future needs and decisions – that sellers will harm themselves by selling organs for short-sighted reasons that are ultimately not in their best interest.

#### E. One could argue that a donation system based on altruism may be the most problematic based on some of these theories.

1. Donors may face intense moral pressure to donate a kidney, especially if they know someone who desperately needs one.
2. The moral pressure placed on that individual could be considered exploitative or coercive.

### IV. Alternative Systems of Organ Exchange

- A. In order to determine whether any of the above rationales hold any weight in the real world, jurisdictions should be able to design and implement programs to monitor organ sales to test market feasibility.
- B. For each rationale posited against creating a market for organs, certain regulatory safeguards can be constructed to address it:
  - 1. Potential sellers may be required to undergo psychological and economic evaluation before the transaction is allowed.
  - 2. Sellers may be required to appear at a judicial hearing.
  - 3. Institute price floors or ceilings.
  - 4. Set a fixed sales price.
  - 5. Specified waiting periods before actual transplant takes place.
  - 6. A series of loopbacks where an individual has multiple opportunities to change their mind.
- C. Iran
  - 1. Iran has legalized the sale of organs.
  - 2. The government is a monopsonistic buyer - the only buyer of organs.
    - a. Individuals may not sell organs directly to other buyers or through brokers.
    - b. In the Iranian system, there is no room for middlemen or brokers.
  - 3. The Dialysis and Transplant Patients Association matches sellers and recipients.
  - 4. Sellers receive payment from the government and typically free health insurance. They may also receive payment from the recipient of the organ or a charity.
  - 5. All transplant teams are part of university hospitals, and the government pays for all transplant related expenses.
  - 6. To prevent transplant tourism, non-Iranians are prohibited from receiving an organ from Iranian living and unrelated sellers.
- D. Distribution and fairness
  - 1. One of the biggest concerns with organ transplant networks is that organs will not be going to those with the most urgent needs.
  - 2. To combat this, the United Network for Organ Sharing, the nonprofit organization that administers the Organ Procurement and Transplantation Network in the U.S., employs scored-based system to allocate organs.
    - a. Kidney transplant candidates are given an Estimate Post Transplant Survival (EPTS) score.
    - b. Factors include age, length of time on dialysis, receipt of previous transplants, and current diagnosis of diabetes.
- E. Hybrid programs
  - 1. Under a hybrid model proposal, nonmonetary incentives would be provided for organ donation.
  - 2. Alternatives to providing cash compensations:

- a. College scholarships for donors and their family members,
  - b. Free health care, and/or
  - c. Burial benefits.
3. In *Flynn v. Holder*, the Ninth Circuit ruled that bone marrow donations via “apheresis” do not fall under NOTA.<sup>5</sup>
- a. Moremarrowdonors.org, a nonprofit, created a noncash incentives program for bone marrow donors. Payment would be in the form of a scholarship, housing allowance, or charitable gift.
  - b. Bone marrow donation and transplantation via apheresis involves drawing blood and then separating the blood stem cells. When NOTA was enacted in 1984, the common method of bone marrow transplantation was aspiration, which required inserting a needle into a bone and extracting the marrow.
  - c. The Ninth Circuit made a distinction between apheresis and aspiration methods of bone marrow transplantations and found that apheresis did not involve a transfer of a human organ or “subpart thereof” and thus payment for this method of donation did not violate NOTA.
- F. Pooling
1. LifeSharers is a nonprofit organization in the U.S. in which members pool donations.
  2. Members of the organization commit to donating their organs at death and in exchange have priority if ever in need of an organ.
  3. Members sign an agreement agreeing to the arrangement. Direct organ donation is legal. However, if a member received a transplant and then later decided to renege on his donation, the agreement would not be enforceable.

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<sup>5</sup> *Flynn v. Holder*, 684 F. 3d 852 (9th Cir. 2012):  
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