Indiana Journal of Global Legal Studies

Volume 27 | Issue 2 Article 10

Summer 8-1-2020

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Colleen Naumovich
Indiana University Maurer School of Law, cnaumovi@iu.edu

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COLLEEN NAUMOVICH*

INTRODUCTION

Medical tourism, as defined by scholar I. Glenn Cohen, is "the travel of residents of one country to another country for treatment."[1] Transplant tourism, a type of medical tourism, is traveling abroad to purchase an organ for transplant.[2] Although organ sale is currently illegal in every country except Iran, many countries—such as India, the Philippines, Pakistan, Bangladesh, and Egypt—have thriving black markets for these goods.[3] Organ transplants are often the only effective means of treating end state organ failure,[4] and the demand for transplants is especially high in developed and middle-income countries.[5] Shortages of available donors and organs, however, have caused an increased demand with a limited supply.[6] The Global Observatory on Donation and Transplantation estimates that in 2013,

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*J.D. Candidate, 2020, Indiana University Maurer School of Law—Bloomington, IN; B.A. in Political Science, 2017, Saint Mary's College—Notre Dame, IN. I would like to thank Dr. Jody Madeira for her guidance in writing this note.
I would also like to thank my parents, Jim and Carolyn Naumovich, for their unwavering support throughout my academic career.

1. I. Glenn Cohen, *Transplant Tourism: The Ethics and Regulation of International Markets for Organs*, 41 J.L. MED. & ETHICS 269, 269 (2013) [hereinafter *Transplant Tourism*].

2. *Id.*

3. I. GLENN COHEN, PATIENTS WITH PASSPORTS: MEDICAL TOURISM, LAW, AND ETHICS 263-64 (2015) [hereinafter PATIENTS WITH PASSPORTS].

4. *Human Organ Transplantation*, WORLD HEALTH ORG., https://www.who.int/transplantation/organ/en/ (last visited Nov. 1, 2018).

5. Ranee Khooshie Lal Panjabi, *The Sum of a Human's Parts: Global Organ Trafficking in the Twenty-First Century*, 28 PACE ENVTL. L. REV. 1, 10 (2010).

6. *See id.* at 15.

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there were 118,000 organs transplanted globally, meeting only 10 percent or less of global needs.[7] This gap in supply and demand has created a black market for underground organ sales[8] where poor and vulnerable individuals sell their organs to brokers, who then resell these organs at higher costs.[9] In 2011, the World Health Organization estimated that global illicit organ sales produced between $600 million and $1.2 billion annually.[10] The market that has emerged is harmful to sellers in many aspects, and sellers are often taken advantage of by brokers' manipulative tactics.

This paper will explore the problems associated with black market organ sales and analyze its effects on sellers[11] (i.e., the people selling their organs) and the tourists (i.e., the people who travel abroad for transplantation). Part I will give an overview of how transplant tourism operates, focusing specifically on kidney sales. Part II will address ethical arguments for why transplant tourism is harmful to sellers. Part III will address the international response to this phenomenon and the various international protocols in place. Finally, Part IV will propose regulatory solutions that are aimed at protecting sellers. Since a thriving black market already exists, regulation–instead of outright prohibition–is the best solution for protecting sellers' well-being who are currently unprotected in the market.

PART I: KIDNEY SALES IN PRACTICE

A. Sellers

Cohen breaks down transplant tourism into the three basic players: the sellers, the recipients, and the brokers.[12] The sellers are often extremely poor and are selling their kidneys to escape bonded labor, to pay off debts, or to provide a better life for their children.[13] The brokers, those individuals who facilitate the deal, are often affiliated with

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7. United Nations Office on Drugs and Crime, *Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal* 10 (2015), https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf.

8. *See* Khooshie Lal Panjabi, *supra* note 5, at 15.

9. PATIENTS WITH PASSPORTS, *supra* note 3, at 264.

10. Jeremy Haken, *Transnational Crime in the Developing World*, GLOBAL FIN. INTEGRITY 22 (Feb. 2011), https://www.gfintegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf.

11. PATIENTS WITH PASSPORTS, *supra* note 3, at 264 (noting "those who sell their kidneys [are] 'sellers' not 'donors.'").

12. *Id.*

13. *Id.* at 313.

organized crime and frequently rely on misinformation and threats to induce individuals to agree to sell their kidneys.[14]

A comprehensive study of kidney sellers in the Philippines revealed that sellers had little to no formal education, were extremely poor, [15] and were often motivated by social pressure and guilt.[16] Recruiters and brokers were often neighbors or friends and told the seller that the recipient was in dire need and would die without the transplant.[17] Brokers often persuaded individuals into agreeing to sell their organs because of the guilt the brokers placed on them if they refused to help a member of the community.[18] However, most sellers were motivated by economic necessity and agreed to sell their kidneys for a prospect of a better future.

A separate study of sellers in Bangladesh conducted by Moniruzzaman revealed a similar pattern of poor sellers being driven by economic necessity into selling their kidneys.[19] Classified ads in local newspapers helped recruit sellers and put them in contact with brokers.[20] The brokers often emphasized that they were seeking an organ *donation*, which they characterized as a noble act.[21] The brokers also promised to pay all costs, including compensating the seller, and assured the seller that the operation was completely safe.[22] Brokers also frequently told sellers the story of the "sleeping kidney": removing one kidney "awakens" the other kidney, and a person can live a healthy life with only one kidney.[23] The situation is presented as a win-win because the seller keeps their awakened kidney while giving the recipient the kidney that they no longer need.[24] Brokers also convince sellers by presenting the transplant as an opportunity for a fun trip.[25] Most of the transplants for Bangladeshi sellers occur in India, so brokers will lure sellers into the transplant by presenting it as an opportunity to travel abroad, sightsee, eat out, shop, and see Indian movies.[26] These are often

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14. *Id.*
15. Sallie Yea, *Trafficking in Part(s): The Commercial Kidney Market in a Manila Slum, Philippines*, 10 GLOBAL SOC. POL'Y 358, 363 (2010).
16. *Id.* at 367.
17. *Id.* at 367-68.
18. *Id.* at 367.
19. Monir Moniruzzaman, *"Living Cadavers" in Bangladesh: Bioviolence in the Human Organ Bazaar*, 26 MED. ANTHROPOLOGY Q. 69, 69 (2012).
20. *See id.* at 70.
21. *Id.* at 75.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 77.
26. *Id.*

false promises that never materialize and are used to trick sellers into the procedure.

In addition to these subtler forms of coercion, Moniruzzaman's research also revealed instances of physical coercion and threats when a seller wanted to renege. Once the seller agreed to the operation, the broker would provide him with a fake passport and forged legal documents to indicate that the seller is related to the recipient.[27] Once the sellers crossed the border into India–the country in which the operation would take place–the broker would seize the passports, so the sellers could not return to Bangladesh prior to the operations.[28] One of the interviewees said he changed his mind, no longer wanted the operation, and asked for his passport back to return to Bangladesh.[29] The broker then hired two local thugs to beat him and threaten him into undergoing the operation.[30]

Furthermore, sellers are often promised more money for their kidney than they actually receive. For example, in Moniruzzaman's study, twenty-seven of the thirty-three interviewees did not receive the full amount promised.[31] The study also showed that brokers initially offered very little for the seller's kidney.[32] Brokers deceived sellers by saying that the low value of their kidneys was due to an already high supply of their blood type.[33] The only way sellers received more was if they negotiated a higher price, yet the sellers still received less than the newly negotiated price.[34] In one instance, a seller and his wife were physically abused and threatened with jail for disputing the compensation received.[35]

A study conducted by Goyal about kidney sellers in India showed that sellers were promised a mean amount of $1,410, but actually received an average amount of $1,070.[36] Ali Anwar Naqvi's study from Pakistan found that sellers were promised an average amount of $1,737, but no seller in the sample actually received this amount, as the average amount received was $1,377.[37] When many sellers want to sell

27. Often, transplant laws require that the donor is related to the recipient. *Id.*
28. *Id.*
29. *Id.* at 78.
30. *Id.*
31. *Id.* at 79.
32. *Id.* at 76.
33. *Id.*
34. *Id.*
35. *Id.* at 83.
36. Madhav Goyal et al., *Economic and Health Consequences of Selling a Kidney in India*, 288 JAMA 1589, 1591 (2002).
37. Syed Ali Anwar Naqvi et al., *A Socioeconomic Survey of Kidney Vendors in Pakistan*, 20 TRANSPLANT INT'L 934, 936 (2007).

kidneys for economic reasons, receiving less than promised can be detrimental. Since organ sale is already illegal, these sellers who received less than promised had no legal recourse to recover.[38]

Finally, most sellers interviewed in these studies indicated that they are now worse off than before the transplant–both in terms of health[39] and finances.[40] In a study of sellers in the Philippines, all but one reported feeling less energized, weaker, more easily fatigued, and frequently had spells of anger and depression after the operation–all symptoms they had never previously experienced.[41] These physical consequences were especially cumbersome because these sellers also had jobs requiring physical strength, like construction and shipyard work.[42] Ali Anwar Naqvi's study of Pakistani sellers found that only 1.2 percent of interviewees indicated their health was as good as before the surgery, 62 percent felt physically weak and unable to work the long hours they had been able to prior to the surgery, and 36.8 percent felt ill and in poor health after the surgery.[43] In Goyal's study of Indian sellers, 50 percent of sellers complained of persistent pain at the site of the removal and 33 percent complained of long-term back pain.[44] In addition, 79 percent indicated they would not recommend selling a kidney to someone who was considering it. [45] Furthermore, some sellers were also promised post-operative care at no cost to them, yet only a few actually received it.[46] Those who actually received post-operative care indicated that the care was of poor quality, and they were often just given medication without being seen by a doctor.[47] Those who were not promised post-operative care bore the cost of medical checkups, so many sellers never received post-operative medical care because they could not afford it.[48]

The sellers' financial situations did not fare any better, as declining physical health negatively affected their financial situations after surgery. Goyal's study found that sellers' average annual income after the operation decreased by thirty three percent, a greater percentage fell below the poverty line, and 74 percent of sellers who sold their

38. *See, e.g.*, Yea, *supra* note 15, at 369.
39. *See, e.g., id.*
40. *See, e.g.*, Goyal et al., *supra* note 36.
41. Yea, *supra* note 15, at 369.
42. *See id.* at 370.
43. Naqvi et al., *supra* note 37, at 936.
44. Goyal et al., *supra* note 36, at 1591.
45. *Id.*
46. Yea, *supra* note 15, at 369.
47. *Id.*
48. *See id. But see, e.g.*, Moniruzzaman, *supra* note 19, at 85.

kidneys to pay off debt still owed money.[49] Similarly, Moniruzzaman's study found that only two of the thirty-seven interviewees benefitted economically from the sale of their kidneys.[50] The rest had not escaped poverty, with 78 percent reporting that their economic status had deteriorated after surgery.[51] In addition, many sellers lost their jobs or were not able to work as many hours as before due to their postoperative weakness.[52] One interviewee stated:

> I lost my kidney as well as my job. Now I cannot engage in heavy lifting jobs such as rickshaw pulling, cultivating land, or heavy industrial lifting; what kind of life is this? If I had the strength in my body, I could work anything and could easily earn that little sum I received from selling.[53]

In addition to declining health and financial situations, sellers also experienced social isolation and shame after the procedure.[54] Moniruzzaman found that sellers usually did not disclose the transplant to others because selling a body part is highly stigmatized in Bangladesh.[55] Many sellers expressed fear of not being able to return their whole body to God in the afterlife, as selling a body part violates the some cultural and religious beliefs of bodily integrity and human dignity.[56] As a result, sellers were extremely self-conscious about their scars and often made up stories about an accident to try to explain both their scars and their absence during the procedure.[57] Some sellers never married for fear of the truth about their transplant being revealed or being unable to explain their scar.[58] Those that are found out are referred to as "the kidney man" and are highly stigmatized in the community as weak.[59] Moniruzzaman found that 79 percent of sellers reported feeling socially isolated as a result of the transplant[60] and 85

49. Goyal et al., *supra* note 36.
50. Moniruzzaman, *supra* note 19, at 79.
51. *Id.* at 80-81.
52. *See id.* at 81.
53. *Id.* at 79.
54. D. A. Budiani-Saberi & F. L. Delmonico, *Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities*, 8 AM. J. TRANSPLANTATION 925, 928 (2008); *see, e.g.*, Moniruzzaman, *supra* note 19, at 80.
55. Moniruzzaman, *supra* note 19, at 80.
56. *Id.*
57. *See id.* at 78.
58. *See id.*
59. *Id.*
60. *Id.* at 80.

percent spoke against the organ market, with many saying they would not sell their kidney if they had a second chance.[61] Additionally, Budiani-Saberi and Delmonico's study of sellers in Egypt found that 91 percent felt social isolation after the donation, 85 percent did not want to be publicly known as an organ vendor, and 94 percent regretted the decision.[62]

Cohen's study of sellers in Chennai, India showed that most sellers were women because of the gendered belief that loss of a kidney negatively affects men more than women.[63] However, the scar from the operation served as a constant reminder to these women of where they had been and a reminder of persistent debt.[64] Scheper-Hughes's essay also revealed similar patterns of sellers being treated as social outcasts.[65] Her study found that female sellers from Moldova were often alienated from their families, excommunicated from their churches, excluded from marriage, and called prostitutes.[66] These examples illustrate the shame and resultant social isolation that sellers feel after the operation, adding to the overall negative consequences of selling their kidneys.

B. Brokers

There are few studies that reveal insight into the brokers in the international kidney market, given that much of what they do is illegal.[67] However, the information that does exist illustrates that they are diverse and range in sophistication and character.[68] For example, Scheper-Hughes's studies have shown that brokers range from armed and dangerous "kidney hunters" in Istanbul and Moldova, to sophisticated medical tourism bureaus in Tel Aviv, Israel, to medical intermediaries posing as charitable organizations or patient advocacy organizations.[69] In the United States, Rabbi Levy-Izhak Rosenbaum ran a brokerage enterprise in Brooklyn where he would buy kidneys from

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61. *Id.* at 86.

62. Budianai-Saberi & Delmonico, *supra* note 54.

63. Lawrence Cohen, *Where it Hurts: Indian Material for an Ethics of Organ Transplantation*, 128 DAEDALUS 135, 140 (1999).

64. *See id.* at 141-42.

65. *See* Nancy Scheper-Hughes, *Keeping an Eye on the Global Traffic in Human Organs*, 361 LANCET 1645, 1646-47 (2003).

66. *Id.* at 1647.

67. PATIENTS WITH PASSPORTS, *supra* note 3, at 281.

68. *See id.*

69. Nancy Scheper-Hughes, *Rotten Trade: Millennial Capitalism, Human Values and Global Justice in Organ Trafficking*, 2 J. HUM. RTS. 197, 214 (2003).

poor Israelis.[70] He became the first person ever convicted under the US federal statute banning organ sales.[71] Rosenbaum's lawyers tried to portray him as a Good Samaritan, performing a "lifesaving service for desperately ill people who had been languishing on official transplant-waiting lists."[72]

Scheper-Hughes also described criminal networks of loosely organized companies, such as a famous one run by well-known crime boss Ilan Peri.[73] Peri established shady transplant outlets in some world-renowned medical centers in countries including Turkey, Russia, Georgia, Germany, South Africa, the Philippines, China, Kosovo, Azerbaijan, Colombia, and the United

States.[74] He would convince patients in Israel, or Jewish patients with ties to Israel, to travel to an undisclosed country to receive a "fresh" kidney that was trafficked from a living donor elsewhere.[75] In Israel, religious organizations, patients' rights groups, and humanitarian organizations would target new immigrants and migrant workers to sell their kidneys.[76] Scheper-Hughes's work gives some insight into the workings of organ brokers–illustrating the deceptive nature of the organ market. Many brokers pose as religious or humanitarian groups proclaiming to do laudatory work. Some are organized crime groups, and others are sellers' neighbors or community members. All of the brokers have a common theme, however: preying on vulnerable populations.

C. Recipients

Similar to organ brokers, there are also few studies done about the recipients of transplant tourists, since they have also broken the law.[77] However, the studies that have been conducted revealed that most recipients traveled back to their country of origin for the transplant procedure.[78] Gill's study of transplant tourists who returned to UCLA

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70. *See* Nancy Scheper-Hughes, *The Body of Terrorist: Blood Libels, Bio-Piracy, and the Spoils of War at the Israeli Forensic Institute*, 78 SOC. RES. 849, 850 (2011).

71. Associated Press, *Guilty Plea to Kidney-Selling Charges*, N.Y. TIMES (Oct. 27, 2011), https://www.nytimes.com/2011/10/28/nyregion/guilty-plea-to-kidney-selling-charges.html.

72. *Id.*

73. Scheper-Hughes, *supra* note 70, at 849.

74. *Id.*

75. *Id.* at 849-50.

76. *Id.* at 850.

77. PATIENTS WITH PASSPORTS, *supra* note 3, at 277.

78. *See* Jagbir Gill et al., *Transplant Tourism in the United States: A Single-Center Experience*, 3 CLINICAL J. AM. SOC. NEPHROLOGY 1820, 1825 (2008).

Medical Center in California for follow-up care revealed that most of the tourists were Asian.[79] Prasad's study of tourists who sought follow-up care in Canada also showed that individuals born in Southern and Eastern Asia were most likely to be transplant tourists.[80]

The studies also revealed that transplant tourism caused health problems for the tourists. Canales' study of tourists who returned to the University of Minnesota Medical Center for post-transplant care found that there was inadequate communication between the transplant site and the follow-up institution concerning induction therapy and immunosuppressive and post-transplant treatment.[81] In three instances, patients were sent back to the United States in the middle of a crisis relating to wound infection, seizure, or acute rejection when such information about post-transplant care would have been extremely helpful.[82] Gill's study also showed that, compared to a matched cohort of transplant recipients who had their transplants done at UCLA, tourist patients had a higher incidence of acute rejection, a lower level of graft survival, and a higher incidence of hospitalization due to infections.[83] Prasad's study also showed that 52 percent of transplant tourists had suffered from serious post-operative infections, and two patients died from fungal infections related to sepsis.[84] The high rate of infections for tourists may have been attributed to poor immunosuppressive monitoring, poor post-transplant hygiene, or delayed recognition.[85] The study also found that most patients were very ill and required intensive medical treatment upon arriving in Canada.[86] Furthermore, many of the tourists underwent lengthy travel too soon after the operation and either had no medical documentation or the documentation was transcribed in a language unfamiliar to healthcare personnel when the tourist returned to Canada.[87]

Most of the tourists opted for transplant tourism instead of waiting on an organ donation list in their home country,[88] yet the studies reveal

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79. *Id.*

80. *See* G.V. Ramesh Prasad et al., *Outcomes of Commercial Renal Transplantation: A Canadian Experience*, 82 TRANSPLANTATION 1130, 1132 (2006).

81. Muna T. Canales et al., *Transplant Tourism: Outcomes of United States Residents Who Undergo Kidney Transplantation Overseas*, 82 TRANSPLANTATION 1658, 1660 (2006).

82. *Id.*

83. Gill et al., *supra* note 78, at 1822-23.

84. Prasad et al., *supra* note 80, at 1131.

85. *Id.* at 1134.

86. *Id.*

87. *Id.*

88. *See* Jagbir Gill et al., *Opportunities to Deter Transplant Tourism Exist Before Referral for Transplantation and During the Workup and Management of Transplant Candidates*, 79 KIDNEY INT'L 1026, 1028 (2011).

that many of them experienced medical complications as a result of the transplant done abroad. Although the available information about recipients is limited, the common theme seems to be that they would rather go abroad for immediate treatment instead of waiting. Since most recipients opt for transplant tourism after seeking transplant options locally, transplant physicians may be able to deter potential recipients from traveling abroad by explaining the risks associated with medical tourism and reviewing all of the available options for transplantation at home.[89]

PART II: COERCION, EXPLOITATION, AND UNDUE INDUCEMENT

Cohen offers a variety of arguments that illustrate transplant tourism's bioethical concerns.[90] The arguments of coercion, exploitation, and undue inducement relate specifically to how transplant tourism negatively affects the seller.[91] Cohen defines coercion as "the claim that poor sellers are improperly forced into selling their organs by brokers or recipients who have no right to propose this, because the sellers have no reasonable economic alternative."[92] Coercion can take the form of physical threats or more subtle forms,[93] both of which can be present in illegal kidney sales. As seen in the case studies, brokers have sometimes resorted to physical violence to procure a seller's kidney.[94] However, most of the coercion that occurs is much more subtle and focuses on the seller's lack of reasonable alternatives.[95] The sellers are often very poor and resort to selling their kidneys in order to support their families or to escape bonded labor.[96] Sometimes women will sell their kidneys because they feel that they need to contribute to the household, and their husbands cannot risk the negative effects associated with the transplant.[97] With few other economic alternatives, individuals may feel that selling a kidney is their best option. In other instances, sellers may have been coerced by social pressure and guilt because the recruiters

89. *See id.*

90. *See generally* PATIENTS WITH PASSPORTS, *supra* note 3, at 282 (discussing whether we should prohibit or restrict transplant tourism); *see generally* I. Glenn Cohen, *Regulating the Organ Market: Normative Foundations for Market Regulation*, 77 L. & CONTEMP. PROBS. 71, 73-80 (2014) [hereinafter *Regulating the Organ Market*] (discussing normative concerns of moving to a market system).

91. PATIENTS WITH PASSPORTS, *supra* note 3, at 287.

92. *Regulating the Organ Market*, *supra* note 90, at 75.

93. *Id.* at 75-76.

94. *See, e.g.*, Moniruzzaman, *supra* note 19, at 78.

95. *See Regulating the Organ Market*, *supra* note 90, at 76.

96. *See* PATIENTS WITH PASSPORTS, *supra* note 3, at 313.

97. *See* Cohen, *supra* note 63, at 138.

and brokers were the sellers' neighbor or friend.[98] Coercion, therefore, can take many forms, but it undeniably affects these illegal transactions.

Exploitation focuses on the fact that the transaction is either harming the seller or that the buyer took unfair advantage of the seller's poverty in negotiating the transaction in the first place.[99] The case studies reveal that sellers are predominately worse off after the transplant than before.[100] Furthermore, brokers take advantage of sellers' vulnerable economic positions, evinced by how little sellers are paid and the lack of healthcare they receive after the operation.[101] Scheper-Hughes argues that even a fair market price for body parts "exploits the desperation of the poor, turning their suffering into an opportunity."[102]

Exploitation also nullifies the seller's potential for informed consent.[103] Brokers exploit sellers' lack of education and understanding when getting them to agree to the transplant. For example, brokers in Bangladesh tell the sleeping kidney story to coerce the seller into the transplant.[104] Furthermore, many of the female sellers in India did not even know what a kidney was or its function within the body; they were just told that a person has two and can live with one.[105] Sellers are also often promised more money than they actually receive,[106] post-operative care at no cost to them,[107] and assurance that the operation is completely safe,[108] all of which turn out to be lies. All of these factors play into a seller's decision to donate a kidney. When sellers agree to the transplant under these false pretenses, their consent is anything but informed. In addition, Goodwin argues that even when sellers give consent, that consent is substantively meaningless given their "economic desperation and an opportunity to alleviate poverty."[109] Therefore, exploitation plays a multifaceted role in organ sales and transplant tourism.

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98. *See* Yea, *supra* note 15, at 367.
99. *See Regulating the Organ Market*, *supra* note 90, at 78.
100. *See, e.g.*, Yea, *supra* note 15, at 369; Goyal et al., *supra* note 36.
101. MICHELLE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 12 (2006). *But see* PATIENTS WITH PASSPORTS, *supra* note 3, at 294-95 (arguing that it is hard to ascertain what a fair, non-exploitive price would be for a kidney since there is not an unpressurized market for it).
102. Nancy Scheper-Hughes, *The Global Traffic in Human Organs*, 41 CURRENT ANTHROPOLOGY 191, 197 (2000).
103. *See* GOODWIN, *supra* note 101, at 294-95.
104. Moniruzzaman, *supra* note 19, at 83.
105. Cohen, *supra* note 63, at 138.
106. *See* Moniruzzaman, *supra* note 19, at 78.
107. *See* Yea, *supra* note 15, at 369.
108. *See, e.g.*, Moniruzzaman, *supra* note 16, at 75.
109. GOODWIN, *supra* note 101, at 185.

In addition, Budiani-Saberi argues that although most countries' transplant laws require donor consent, lack of oversight in the donor consent process allows trafficked organs to pass through legal channels undetected.[110] For example, the Transplantation of Human Organs Act of 1994 in India requires unrelated donors to file an affidavit stating that the organ is being donated because of "affection or attachment," but does not define those terms or explain how to satisfy these requirements.[111] Victims of trafficking in India have been told to lie about their relationship to the recipient or the payments they will receive, or brokers would send proxy donors to make statements on the donor's behalf.[112] In Egypt, unrelated donors must have an interview with the Minister of Health and declare that they will receive no material benefit for their donation.[113] The Minister of Health, however, has provided clearance for statements without truly assessing the situation, which allows illegal organ sales while deeming them legal.[114] Furthermore, transplant centers have begun videotaping consent agreements and having witnesses present to limit their liability.[115] These steps do not negate the fact that many of these individuals cannot freely give consent due to coercion, deception, or exploitation of their financial situation.[116] Budiani-Saberia argues that addressing these loopholes in the consent process can help identify potential victims before the organ is removed.[117]

Undue inducement is similar to coercion, but while coercion argues that sellers are paid too little, undue inducement posits that the seller was offered too good of a deal to pass up, making the seller's decision not entirely voluntary.[118] Another undue inducement premise could be that an offer for money blinds sellers so that they underestimate the risks of the transplant and overestimate the benefits of money.[119] Again, the case studies have shown that sellers are often worse off after the

110. Debra Budiani-Saberi & Seán Columb, *A Human Rights Approach to Human Trafficking for Organ Removal*, 16 MED. HEALTH CARE PHIL. 897, 905 (2013).

111. The Transplantation of Human Organs Act, 1994, No. 42, Acts of Parliament 1994 (India); *id.*

112. Budiani-Saberi & Columb, *supra* note 110, at 906.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 905.

118. *Regulating the Organ Market*, *supra* note 90, at 78.

119. *See* Angela Ballantyne, *Fair Compensation or Undue Inducement?*, YALE INTERDISCIPLINARY CENTER FOR BIOETHICS, https://bioethics.yale.edu/research/irb-case-studies/irb-case-payments-subjects-who-are-substance-abusers/fair-compensation-or (last visited Nov. 7, 2018).

transplant,[120] and many regret their decision.[121] Therefore, offering compensation in circumstances when the seller's economic position is almost certain to be taken advantage of by the brokers is indisputably an undue influence.

These bioethical arguments provide a framework in which to view and assess the problems associated with transplant tourism. With these ethical concerns in mind, the remainder of this paper will address the ways the international community has responded as well as other potential solutions that countries could enact.

PART III: INTERNATIONAL RESPONSE

In response to the growing underground black market for organ sales, the World Health Organization (WHO) developed its first version of the Guiding Principles on Human Cell, Tissue, and Organ Transplantation in 1991 to offer guidelines as to when organ transplantation is safe, ethical, and legal.[122] The guidelines are designed for both living and deceased donors, encouraging an increase in the supply of organs, but prohibiting the sale or giving - or receiving - material gain in exchange for an organ.[123] The Guiding Principles influenced countries to pass their own legislation concerning organ sales and to use the Guiding Principles as a legal framework.[124] For instance, in response to the widespread kidney market within the country, and based on the standards set forth in the Guiding Principles, India passed the Human Organ Transplantation Act of 1994.[125]

In 2003, WHO re-examined the issue of transplant tourism and issued the World Health Assembly Resolution WHA57.18.[126] The resolution urged countries to "take measures to protect the poorest and vulnerable groups from 'transplant tourism' and the sale of tissues and organs, including attention to the wider problem of international trafficking in human tissues and organs."[127] Furthermore, it called for countries to cooperate in the creation of guidelines in order to

120. *See, e.g.*, Goyal et al., *supra* note 36; Yea, *supra* note 15, at 369.

121. PATIENTS WITH PASSPORTS, *supra* note 3, at 313.

122. World Health Org. [WHO], *WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation*, WHA63.22 (2010), http://www.who.int/ transplantation/Guiding _PrinciplesTransplantation_WHA63.22en [hereinafter *WHO Guiding Principles*].

123. *Id.*

124. Budiani-Saberi & Columb, *supra* note 110, 902.

125. *Id.*

126. World Health Org. [WHO], *Human Organ and Tissue Transplantation*, WHA57.18 (May 22, 2004) http://www.who.int/transplantation/en/A57_R18-en.pdf.

127. *Id.*

harmonize global practices in organ transplantation.[128] In response to current trends in transplantation, WHO promulgated the 2010 updated WHO Guiding Principles.[129]

Although WHO Guiding Principles provided a framework and some legal standards, they lacked clear definitions of what constituted the prohibited practices. Transplant professionals began to recognize the need for definitions of organ trafficking and related terms.[130] As a result, in 2008, the International Transplantation Society and the International Society of Nephrology organized a summit to address the issue of organ trafficking and developed the Declaration of Istanbul on Organ Trafficking and Transplant Tourism.[131] The Declaration provides definitions and principles to guide organ transplantation and prevent organ trade.[132] It differentiates between organ trafficking, transplant commercialism, and transplant tourism.[133] The Declaration's definition of organ trafficking parallels the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children's (Trafficking Protocol) definition of trafficking.[134] The Declaration defines organ trafficking as:

> Organ trafficking is the recruitment, transport, transfer, harboring or receipt of living or deceased persons or their organs by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation.[135]

The Declaration defines transplant commercialism as the practice of treating organs as a commodity—including buying and selling organs

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128. *Id.*

129. *WHO Guiding Principles*, *supra* note 122.

130. Budiani-Saberi & Columb, *supra* note 110, at 902.

131. *The Declaration of Istanbul on Organ Trafficking and Transplant Tourism* (2008), http://multivu.prnewswire.com/mnr/transplantationsociety/33914/docs/33914-Declaration_of_IstanbulLancet.pdf. [hereinafter *The Declaration*]; *id.*

132. *Id.*

133. *See id.* at 2.

134. *See* G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, art. 3 (Nov. 15, 2000) [hereinafter Trafficking Protocol].

135. *The Declaration*, *supra* note 131, at 2.

for material gain.[136] Finally, transplant tourism is traveling across jurisdictional borders for transplant purposes that involves organ trafficking and/or transplant commercialism, or as when "the resources (organs, professionals and transplant centers) devoted to providing transplants to patients from outside a country undermine the country's ability to provide transplant services for its own population."[137] These definitions, along with the principles and proposals referenced in the Declaration, provide countries some guidance in developing strategies to combat exploitative transplant practices.

The Council of Europe Convention on Action against Trafficking in Human Beings specifically mentions organ sales and established a group of experts charged with monitoring the implementation of this convention.[138] Furthermore, the Convention encourages states to adopt legislation that would make it a criminal offense to use the services of a victim of trafficking.[139] Therefore, an individual who received a trafficked organ could be held criminally liable, but the individual who sold the organ would not. On the contrary, Israel's Organ Transplant Law holds both the individual who sold the organ and the individual who received the organ responsible.[140] In addition, the Trafficking Protocol, which was the first international legal document that provided a definition of organ trafficking, calls for State parties to criminalize the trafficking of persons for the removal of organs.[141]

The United Nations Office of Drugs and Crimes (UNODC) has also taken to the issue by creating a toolkit that provides steps and guidelines to detect and prevent organ trafficking.[142] UNODC acknowledged that organ trafficking remains a largely hidden crime that is difficult to detect and understand.[143] In an effort to better understand the phenomenon of organ trafficking, UNODC organized an expert group meeting that resulted in the toolkit.[144] The toolkit provides information about the context in which organ trafficking occurs, guidance for a legislative framework, and relevant international responses to the issue.[145]

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136. *Id.*
137. *Id.*
138. Eur. Consult. Ass., *Convention on Action against Trafficking in Human Beings*, C.E.T.S. No. 197, arts. 4, 36 (2005).
139. *Id.* art. 19.
140. Organ Transplant Law, 5768-2008, SH No. 2144 p. 394 (Isr.).
141. Trafficking Protocol, *supra* note 134, at art. 5.
142. United Nations Office on Drugs and Crime, *supra* note 7, at 6.
143. *Id.*
144. *Id.*
145. *Id.*

The toolkit also calls for greater collaboration between health organizations and the criminal justice system to detect and combat organ trafficking.[146] Furthermore, it recommends training and educational programs for police and border patrol agents so that they can better identify potential and actual victims and the perpetrators.[147] In addition, the toolkit addresses the importance of victim protection and assistance.[148] The UNODC acknowledges that many victims are reluctant to come forward or cooperate with investigations out of fear of retaliation by the trafficker (i.e. the broker) or for fear of being considered a criminal.[149] Therefore, adequate protection and assistance for victims is essential to help with investigations and to hold traffickers accountable.[150] Furthermore, the toolkit recommends that States have non-criminalization or non-punishment clauses that are applicable to victims.[151] This will help protect victims and ensure that they will cooperate in prosecution against the traffickers.[152]

Finally, the Council of Europe Convention against Trafficking in Human Organs was the first international criminal law[153] that addressed organ trafficking.[154] The Convention indicated that parties should establish as a criminal offense under their domestic laws the removal of organs from a donor without the free, informed, and specific consent of the donor and where the donor or another third party has been offered or received financial gain in exchange for the removal of organs.[155] Furthermore, it calls for parties to make the use of illicitly removed organs for transplantation,[156] the transplant of organs outside of the domestic framework of the country,[157] the illicit solicitation and recruitment of an organ donor or recipient,[158] and the preparation, preservation, storage, transportation, transfer, receipt, import, or export of illicitly removed organs a criminal offense.[159]

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146. *Id.* at 52.
147. *Id.*
148. *Id.* at 53.
149. *Id.*
150. *See id.*
151. *Id.* at 54.
152. *Id.*
153. Budiani-Saberi & Columb, *supra* note 110, at 903-04.
154. Eur. Consult. Ass., *Convention against Trafficking in Human Organs*, C.E.T.S. No. 216, pmbl. (2015).
155. *Id.* art. 4, at 2.
156. *Id.* art. 5, at 3.
157. *Id.* art. 6, at 3.
158. *Id.* art. 7, at 3.
159. *Id.* art. 8, at 4.

PART IV: CONCRETE SOLUTIONS

Although there has been a substantial international response to organ trafficking and transplant tourism, many countries have still not added organ trafficking into their human trafficking laws, resulting in inadequate resources being committed to victims.[160] Furthermore, although the international responses have provided helpful guidelines to countries in formulating legislation, they are still just guidelines that are not legally binding. Therefore, countries must implement regulations and practices that they believe would best address the problem.

Transplant tourism usually involves three countries—the buyer's country, the seller's country, and the country where the operation occurs[161]—which makes finding solutions more difficult when faced with the task of regulating three countries and jurisdictions. While many proposals exist for solutions that stem from the buyer's home country,[162] focusing on solutions aimed at the seller's home country would be the most beneficial in protecting the most vulnerable party: the sellers. The next question to settle in determining solutions is whether regulation would be more effective than outright prohibition.

A. Regulation Over Prohibition

The Declaration of Istanbul on Organ Trafficking and Transplant Tourism[163] "defines and condemns transplant commercialism, organ trafficking, and transplant tourism."[164] One of the principles of the Declaration is, "[o]rgan trafficking and transplant tourism violate the principles of equity, justice, and respect for human dignity and should be prohibited."[165] The World Health Organization's Guiding Principles

160. Budiani-Saberi & Columb, *supra* note 110, 904.

161. *See, e.g.*, PATIENTS WITH PASSPORTS, *supra* note 3, at 305-12; *Transplant Tourism*, *supra* note 1, at 279-82.

162. *See, e.g.*, I. G. Cohen, *Can the Government Ban Organ Sale? Recent Court Challenges and the Future of US Law on Selling Human Organs and Other Tissue*, 12 AM. J. TRANSPLANTATION 1983, 1984 (2012) (discussing the possibility of making the National Organ Transplant Act of 1984, which prohibits the sale of organs in the United States, apply extraterritorially); Francis L. Delmonico, *The Hazards of Transplant Tourism*, 4 CLINICAL J. AM. SOC. NEPHROLOGY 249, 249 (2009) (explaining the approach taken by Israel of limiting insurer reimbursement for transplant tourism).

163. *The Declaration*, *supra* note 131.

164. F. Ambagtsheer & W. Weimar, *A Criminological Perspective: Why Prohibition of Organ Trade Is Not Effective and How the Declaration of Istanbul Can Move Forward*, 12 AM. J. TRANSPLANTATION 571, 571 (2012).

165. *The Declaration*, *supra* note 131, at Principle No. 6.

on Human Cell, Tissue, and Organ Transplantation[166] similarly calls for banning organ sales.[167] The Declaration of Istanbul and the WHO Guiding Principles—along with most of countries' responses—focus on prohibiting organ trafficking and commercialism but neglect to mention enforcement mechanisms.[168] Rather, the stance of WHO and the Declaration convey that "prohibition will take away the problem and decrease illegal activity."[169] But studies on demand-driven activities[170] reveal that prohibition often "generates black markets, drives up prices, provides illegal incomes, displaces crime to other regions and drives trade underground leading to higher crime rates and victimization."[171] Organ trafficking is extremely difficult to detect, resulting in very few prosecutions,[172] and enforcement of organ trafficking is often not a priority for local, national, or international law enforcement.[173] As Scheper-Hughes notes, when police do crack down on traffickers in one area, the traffickers just move their operations elsewhere.[174] She describes organ trafficking as an "invisible, perhaps even a protected crime."[175]

Therefore, although prohibition may sound noble in theory, it is difficult to enforce in practice. Prohibition also compounds the issues of coercion, exploitation, and undue inducement because it leaves no recourse for sellers who are harmed, so brokers are free to act with impunity. Therefore, decriminalization of organ sales—subject to careful regulation—provides a better solution than outright prohibition because it can account for protecting all parties, especially sellers.

B. Truth And Reconciliation Programs

One possible solution is a form of a truth and reconciliation program,[176] where organ sale is still prohibited, but sellers could come

166. *WHO Guiding Principles*, *supra* note 122.
167. *Id.* Principle No. 5, at 5.
168. Ambagtsheer & Weimar, *supra* note 164.
169. *Id.* at 573.
170. Organ trafficking can be seen as a demand-driven activity because the root cause of the crime is the shortage of organs available for transplants from donors. *See id.* at 572.
171. *Id.*
172. *Id.*
173. *Id.*
174. Scheper-Hughes, *supra* note 69, at 851.
175. *Id.*
176. Truth and reconciliation programs were first introduced in South Africa to deal with apartheid. Victims of human rights abuses could be compensated and perpetrators could come forward without being prosecuted. *See Truth and Reconciliation Commission*, SOUTH AFRICAN HISTORY ONLINE, https://www.sahistory.org.za/article/truth-and-reconciliation-commission-trc-0 (last updated Nov. 23, 2018).

forward and report abuses without being prosecuted. By not legalizing the sale of organs, this program would not actively legitimize or condone organ sales. It would still make the sale of organs illegal, imposing criminal punishments on brokers and traffickers and providing the deterrent of illegality, but it would allow sellers to come forward to report abuses with impunity. For example, if sellers received less money than promised, they could report this, and the legal system could hold the brokers accountable by paying the sellers fairly. In addition, this process would allow brokers to be prosecuted for abuses they may have committed against the sellers, like physical coercion and threats. This process would benefit sellers by giving them a way to have their grievances heard without facing punishment for breaking the law. It would also benefit society by holding brokers responsible and getting them off the streets to prevent them from taking advantage of others in the future. Similar to the idea behind low-level drug prosecutions, governments would be more interested in prosecuting the more culpable party of the exchange: the broker. This system would allow law enforcement to locate the brokers and prosecute them instead of the sellers.

Applying this system may be difficult. Determining which situations would constitute an abuse that allows a seller to come forward without being prosecuted would be complicated. Would getting paid ten dollars less than promised constitute an egregious enough abuse to allow the seller to escape punishment as well? What about fifty dollars? One hundred dollars? If a seller reported an abuse that was deemed not serious enough to trigger judicial intervention, could the seller still be prosecuted for bringing it to the court's attention? Governments would need to implement clear guidelines that explain the circumstances in which sellers would have protections. Governments could also adopt the United Nation's Office of Drug and Crime proposal of only imposing criminal sanctions on the broker and not on the seller.[177]

Furthermore, a seller may still be hesitant to bring forward a report of abuse even if they would not be prosecuted out of fear of broker retaliation. Brokers—who are often associated with organized crime[178]—could threaten to harm the seller or their family if the seller tried to bring a claim of broker abuse. Even absent explicit threats, sellers may still fear that brokers will retaliate if the seller goes forward with their claims. Therefore, encouraging sellers to come forward with claims and providing them with adequate resources to ensure their protection would also need to be a feature of this type of reform.

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177. United Nations Office on Drugs and Crime, *supra* note 7, at 54.
178. *See* PATIENT WITH PASSPORTS, *supra* note 3, at 313.

C. Judicial Supervision

Although the truth and reconciliation program system has its benefits, the problems with applying it suggest that making organ sales—subject to regulations—may provide a better solution. One possible regulation is a legal prescreening process, where courts approve the buyer, the seller, and the terms of their agreement.[179] The court could also review organ sale contracts, which would only be enforceable if the parties were not coerced and were of sound mind,[180] the money is put into escrow until after the transplant takes place,[181] the contract is voidable at the seller's election,[182] and there is no specific performance for breach.[183] The court could also ensure that the contracted price for the organ is fair.[184] Beard and Leitzel also suggest that cooling off periods—time between when the decision is made to sell an organ and before the transplant takes place—would also be helpful, given that regret may be a worry for compensated undirected donors.[185]

These types of regulations target the issues that negatively affect sellers in the current system. Although proving that no coercion has taken place may be difficult, a court could still analyze the entirety of the situation and be in a position to serve as a watchful eye against coercion. Putting the money in escrow until the transplant occurs protects both the seller and the buyer. If a court-supervised, neutral third party secures the payment due upon the completion of the transplant, the seller does not have to worry that they will not receive the money promised. Furthermore, the buyer will be protected because they will not lose money if the seller reneges.

The court's approval of the organ sale price also protects against exploitation and undue inducement. The court can ensure the seller is not getting paid too little for their services.[186] The court could also require signed informed consent forms that detail the medical risks and implications of the transplant, providing translation services–if needed–to ensure the seller understands the agreement. This type of regulation will help ensure that the seller is not being completely blinded by a

179. *Regulating the Organ Market*, *supra* note 89, at 82.
180. *Id.* at 83.
181. *Id.*
182. *Id.* at 84.
183. *Id.*
184. Determining what constitutes a fair price could be difficult at the onset, but once a market begins to emerge, it should be easier to gauge appropriate prices.
185. T. Randolph Beard & Jim Leitzel, *Designing a Compensated-Kidney Donation System*, 77 L. & CONTEMP. PROBS. 253, 283 (2014).

monetary offer without considering the risks. If the contract can be voided at the seller's request and lacks a specific performance option, then the seller preserves the right to change their mind. Furthermore, the judicial screening process could also ensure that sellers receive proper post-operative medical treatment by requiring that such care is included in the terms of the agreement. If sellers are denied the promised medical care, they could sue for violation of the terms of the agreement and receive the proper care. Significantly, this judicial screening process gives sellers a legal forum to have their grievances heard.

CONCLUSION

The current state of transplant tourism presents many problems that need to be addressed. The seller's vulnerable status makes them susceptible targets for coercion, exploitation, and undue inducement. They often receive less money than originally promised, receive little to no healthcare after the operation, and are economically and physically worse off after the transplant. While outright prohibition would protect against these harms in theory, a black market persists despite the fact that selling an organ is illegal in every country except Iran. Continuing with prohibition will not solve these issues but compound them. Sellers have no legal recourse when they are taken advantage of in these situations, since selling an organ is illegal in their country. Therefore, the focus should be on decriminalizing the sale of organs and making it subject to close regulation. A system of regulation will help protect sellers, as they would have a judicial body overseeing the process to ensure it is fair and equitable. The sellers will also have a forum to air grievances if something goes wrong. In sum, an outright ban makes sellers worse off and often makes them victims of coercion, exploitation, and undue inducement. A system of regulations would best counter these concerns and protect the parties involved.