Law, Language and Values §A-E & §F-J // Fall, 2015 // Prof. Ronald Garet

Part One: Essay Question and Short Answer Questions

Two and a half hours

Recommended time: 90 minutes for Essay Question, 45 minutes for Short Answer Questions

If you follow that recommendation, you will have 15 minutes of spare time

Open Book

Please read the following information (pages 1-3), which applies to the Essay Question (pages 4-5) and to the Short Answer questions (pages 6-7).

Background information about kidney transplantation

The life of a patient suffering from kidney failure can be saved by transplanting a kidney from a compatible kidney donor. Immunosuppressive drugs overcome the need for a close tissue match to avoid organ rejection, but donor and donee must still share the same blood type and some other factors. Donor A and Donee B are said to be “compatible” when A and B share blood type and other factors to a sufficient degree that A can donate a kidney to B, and B’s body will not reject the kidney. If A and B do not share blood type and other factors, they are said to be “incompatible.” Because humans are born with two kidneys but need only one to live a healthy full life, donation from a living donor is feasible. A well-managed kidney donation with good medical follow-up creates only a very small chance of serious harm to the donor.¹ While a donee can undergo kidney dialysis while awaiting a transplant, both quality of life and life expectancy are better with a kidney transplant than with prolonged dialysis.² Moreover, kidney transplants are less expensive than continued dialysis.

Shortage of kidneys available for transplantation

In the United States today, there are twice as many patients suffering from kidney failure and awaiting a kidney transplant as there are compatible donors. The annual shortfall is about 20,000 compatible kidneys. Because there is no feasible way to make up this shortfall by increasing the harvest of kidneys from cadavers, and because transplantation from a living donor produces better health outcomes for the donee, policymakers seek ways to increase the number of living kidney donors.

¹ The risk of death within ninety days of surgery is six per 20,000 kidney donors, as compared to one per 20,000 in a matched nondonor cohort. Studies find no long-term increased risk of mortality among kidney donors.
² Dialysis is a regularly repeated treatment that removes waste products to keep them from building up in the body and maintains safe levels of certain chemicals in the blood.
Some commentators advocate creation of a free or regulated market in transplantable kidneys, in which kidneys could be bought and sold at the market-clearing price or at a price set by the government. There is general agreement that such a market would expand the supply of transplantable kidneys to some extent. Nevertheless, as discussed below, such a market is forbidden by law. So commentators and policymakers are searching for other ways to increase the availability of transplantable live-donor kidneys.

Because kidney dialysis is expensive and health outcomes from transplantation are superior, the market-clearing price for a compatible kidney would be approximately $300,000. Because Medicare and Medicaid pay for dialysis, the federal government saves about $275,000 per patient who gets a kidney transplant as compared to the patient’s receiving dialysis. (That is, keeping a patient on dialysis costs about $400,000, and a transplant involving a donated kidney costs about $125,000, including the cost of removal, transplantation, and medical care to both donor and donee.) Health insurance companies realize comparable savings when their insured patients receive a kidney transplant as compared to the patient’s receiving dialysis, and some part of these savings is passed along to the insured in the form of lower premiums.

The National Organ Transplant Act (enacted in 1984)

Section 301 of the National Organ Transplant Act (NOTA), entitled Prohibition of organ purchases, imposes criminal penalties of up to $1,000,000 on any person, corporation, or organization that “knowingly acquire[s], receive[s], or otherwise transfer[s] any human organ for valuable consideration for use in human transplantation...” Human kidneys are human organs within the meaning of NOTA. NOTA does not define the term “valuable consideration,” but NOTA does state that “[t]he term ‘valuable consideration’ does not include reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.”

NOTA also provides that a “paired donation” of organs is not prohibited. In a paired donation, a non-profit organization matches two or more incompatible donor/recipient pairs where each living donor is compatible with another living donor’s intended recipient. To illustrate, suppose A wants to donate a kidney to B, but cannot due to incompatibility. C wants to donate a kidney to D, but cannot due to incompatibility. A and D, however, are compatible, and so are B and C. In the paired
donation, A, B, C and D enter into an agreement in which A donates a kidney to D in exchange for C’s donating a kidney to B.

The Senate Committee report recommending adoption of NOTA stated that the statute would “prohibit buying and selling of human organs for transplantation, and is directed at preventing the for-profit marketing of kidneys and other organs.” In the House of Representatives, during a committee hearing on the bill, Rep. Henry Waxman stated that “the burdens of a for-profit market in kidneys would fall disproportionately on the poor. When enacted, NOTA will prevent unscrupulous organ brokers from treating a person as a container of spare parts.” In the hearings and floor debates on the bill, some members of Congress said that they did not think that it was necessary for the statute to specify that paired donation is not prohibited, since such exchanges are not motivated by desire for financial profit. Other members disagreed, as in the following except from the Senate hearing on the bill.

Senator A: If the statute does not specifically exempt paired donation, such donation will be illegal. The statute prohibits exchanges for “valuable consideration,” and at common law, consideration means a bargained-for exchange, as of a promise for a promise, or a promise for performance. If I promise to donate my kidney to your sister in exchange for your promise to donate your kidney to my sister, the agreement involves consideration.

Senator B: It involves consideration all right, but not “valuable” consideration. The statute will only prohibit donations for “valuable” consideration, that is, for financial or pecuniary gain. So it will just confuse matters for the bill to specify that paired donation is not prohibited.

Senator A: I’m not sure I agree with your assumption about what the word “valuable” means. Since we’re not defining it in the statute, a court might see it as a technical concept in the common law of contracts, or instead try to give the word its ordinary language meaning. Something is “valuable” if it has value, and certainly there is value in my getting a kidney for my sick sister. Don’t our values include giving up something to take care of our loved ones?

Senator C: I’m a little unclear what we’re saying when we include language in the statute specifically permitting paired donation. Are we just making it clear that paired donation is another way of giving an organ gift, so it doesn’t involve valuable consideration? Or are we saying that although paired donation really involves an exchange under an agreement involving valuable consideration, it is nonetheless exempt? Are we pretending that it doesn’t involve valuable consideration when it evidently does?
Essay Question

You are legal counsel to Healthy World, a non-profit organization that promotes better health. Healthy World is considering launching several programs to increase the number of live donor kidneys available for transplantation. Healthy World proposes to fund all of its expenses in implementing these programs, including the cost of inducements, from donations it expects to receive from health insurance companies. (As noted above, health insurance companies stand to save $275,000 per patient who gets a suitable kidney transplant, compared to the cost of dialysis for that patient.)

Program 1: Charities. Healthy World will encourage kidney donation by making a donation to charities designated by kidney donors. For each kidney donation, Healthy World would make a $50,000 charitable donation to the charity of the donor’s choice.

Program 2: Kidney Club. Healthy World will encourage kidney donation by creating an organ-sharing membership organization to be called Kidney Club (KC). Anyone who is healthy and has two fully functioning kidneys is eligible to apply for membership. To become a KC member, an applicant must (a) undergo blood and other tests to determine with whom she or he is compatible, (b) agree to have the test results entered into a confidential database managed by KC, and (c) agree to donate a kidney if KC asks him or her to donate a kidney to a compatible KC member. (At the New Members Ceremony, new KC members stand and recite together the KC Oath: “I solemnly swear [or affirm] that I will faithfully discharge my duty to my fellow members of Kidney Club.”) In exchange, KC will agree (1) to provide a member with a kidney when and if he or she needs it, so long as there is a compatible member donor, and (2) to pay all expenses related to blood and other compatibility tests as well as all costs incurred by participants if they actually donate a kidney (including the cost of kidney removal, transportation, implantation, processing, preservation, quality control, and storage, and the expenses of travel, housing, and lost wages incurred by the member donor in connection with the donation of the kidney). If a member needs a kidney and there are two or more members who could safely donate a compatible kidney, KC will choose the donor randomly from among the safe, compatible donors. If the randomly chosen member donor refuses to donate his or her kidney, she or he will be expelled from KC.

Program 3: Kidney Club Gold. This program will offer KC applicants an optional Gold Membership. Those who elect Gold Membership are subject to most of the responsibilities and rights of regular KC members, but differ in just two ways. First, KC pays each Gold Member $5,000 immediately after he or she qualifies for membership by meeting the (a), (b), and (c) requirements. Second, when called upon to donate a kidney
to a donee member, a Gold Member may negotiate with other Gold Members, all of whom are equally compatible with donee. KC will facilitate these negotiations and assure anonymity (e.g. by setting up a chat room in which members do not use their real names). A result of such negotiations might be that the member selected randomly to be the kidney donor would reach an agreement with another member, also fully compatible with donee, who would take his or her place as donor. The randomly selected donor might pay money to the substitute donor, or provide a scholarship to the substitute donor or to a person designated by the substitute donor, in return for the substitute’s donating a kidney instead of the randomly selected donor. When the substitute has donated his or her kidney, he or she has fulfilled his or her pledge (see obligation (c), described above) to donate a kidney to a member. The randomly selected donor who has successfully recruited a KC member substitute has also met his or her KC obligation (c). If the randomly selected donor neither donates his or her kidney nor reaches agreement with a substitute donor, he or she will be expelled from KC and required to repay the $5,000 he or she received plus interest at market rates.

Advise Healthy World about these three programs. Specifically:

(1) Consider each program and advise Healthy World whether that program is likely to result in criminal liability under NOTA for Healthy World or for program participants. State any hard questions of law that might be presented if Healthy World or program participants were charged with criminal liability under NOTA, and for each such hard question of law, state the strongest reasons on both sides. Be sure to identify any strong normative reasons, and explain why and how they might affect the outcome.

(2) For any program(s) that are unlikely or least likely to result in NOTA liability, advise Healthy World which one(s) it should implement. For this purpose, consider which programs are normatively best and why.

Go on to the Short Answer Questions on pages 6-7.
Healthy World later implemented a fourth program to increase the availability of kidneys. This program, called “Kidneys without Borders” (KWB), is a cross-border version of paired donation (see description of paired donation at the bottom of p. 2 above, and the legislative history at p. 3 above). KWB matches a donor (A) - recipient (B) pair in the United States to a donor (C) – recipient (D) pair in another country. As in all paired donation programs, C provides to B the compatible kidney that A cannot give, and A provides to D the compatible kidney that C cannot give. The two special features of KWB are: (1) C and D live in a much poorer country than the United States, and C and D are too poor to afford kidney transplantation or extended dialysis; and (2) KWB flies C to the United States where the C-B transplant takes place, and also ships A’s kidney to the other country where the A-D transplant takes place. Healthy World pays for the travel and shipping costs, and also pays for any of D’s post-transplant medical expenses (such as immunosuppressive drugs) not provided by D’s own health insurance.

The United States has charged Healthy World with violating NOTA when Healthy World’s KWB program facilitated a cross-border paired donation. Charges have been brought only against Healthy World, not against the kidney donors and donees. The case is being tried to a jury in federal district court Los Angeles, California, where the C-B transplant took place. You are law clerk to the judge presiding at trial.

Prosecution and defense agree with the following account of the basic facts. A and B are U.S. citizens who live in Los Angeles. They are siblings. Both A and B have jobs and health insurance. B needed a kidney due to kidney failure. A wanted to donate a kidney to B, but could not due to incompatibility. Healthy World matched A and B to C and D, who live in the relatively impoverished nation Santa Maria. Healthy World flew C to Los Angeles, where her kidney was removed and transplanted into B. A’s kidney was removed in Los Angeles and shipped to Santa Maria, where it was transplanted into D. C planned to return to Santa Maria, but remains temporarily in Los Angeles during the trial, where she has testified.

The following is an excerpt from the trial testimony of Josefina Nunez, who is C, the donor from Santa Maria. (The testimony is as the jury heard it from the official court translator).

Josefina: My brother Ricardo was very sick with kidney failure. We had no money to pay for dialysis. I wanted to donate one of my kidneys to him, but could not. I am not compatible with him, and even if I were we could not pay for transplant surgery. So both
Ricardo and I are grateful for the Kidneys Without Borders program. I am feeling fine after donating my kidney to B here in Los Angeles, and Ricardo is recovering back home in Santa Maria, now that he has a good kidney from A.

**Question:** Ricardo has other sisters and brothers. Why are you the one who gave up a kidney?

**Josefina:** I am the oldest sister. In my family, taking care of the other children is my responsibility. That is how we were raised. It is my duty to save Ricardo’s life. I feel that very strongly. Also, it would be sinful of me to put my needs ahead of his.

**Question:** Your family must be very proud of you. Will your family or church hold a celebration for you when you return home?

**Josefina:** No, we do not want anyone to know. I am not whole anymore, and I have a scar. My family and I will hide this from others if we can. It will be harder now for me to find someone who will marry me.

*Your judge says to you: “Josefina’s testimony expresses some cultural norms and value judgments that may or may not be widely shared in our country. Fortunately, we have a somewhat multicultural jury.” In that context, your judge asks you three questions, below. Please answer all three questions. Read all three questions before you begin to answer any of them. The maximum length of each answer is 2,400 characters including spaces. If you are hand-writing your answers, 2,400 characters including spaces is approximately 400 words. If you are taking your test on a computer, please open a new window to answer each of these three questions. You will see a character count in the corner of your screen.*

**First question.** Assume that Josefina is telling the truth and that the jury believes her testimony. What element(s), feature(s), or purpose(s) of NOTA does her testimony relate to, and how? *(400 words maximum).*

**Second question.** The jury will decide whether Josefina’s testimony supports Healthy World or the prosecution. Should the jury make a value judgment when it makes that decision? If so, what should I say to the jury to point it toward the kind of normative reasoning that NOTA wants the jury to carry out? *(400 words maximum).*

**Third question.** No juror is from Santa Maria, but three are fluent in Spanish. Should I instruct them to rely exclusively on the official English translation of Josefina’s testimony, so they are operating with just the same information as the other jurors? Explain why I should or shouldn’t give that instruction. *(400 words maximum).*

*End of Short Answer Questions // End of Part One*