Sample answer to the 2015 LL&V Essay Question

I. Overview of how the class did on the essay question

As with the exercises we did together during the semester, and as indicated on the sample answers to those exercises, scores were based on your analytical work. The essays fell roughly into three groups.

- **Essays that restated information supplied in the fact pattern and stated general course themes and concepts without using those concepts to do the work called for in the prompts.** Those essays got low scores. Usually it is apparent that the author of the essay understands course concepts, but the essay applies an ill-conceived game plan (summarize the course). Example: it is true that Senators A and B understood the concept of “valuable” (or “valuable consideration”) differently, and it is true that intentionalism makes use of information about legislative intent supplied in the legislative history; but pointing out these true things gets little work done. Essays in this group do not resemble the sample answers that were posted throughout the semester.

- **Essays that respond to the prompts and put course concepts to use in applying the law to the facts, but do so in ways that would benefit from more critical inquiry.** These essays got scores in the middle of the curve. Example: in responding to the question whether the Kidney Club Gold program violates NOTA, some essays pointed out that KC Gold enables Coasean bargaining between the randomly selected donor and possible substitute donors, because KC Gold minimizes transaction costs by creating the negotiation chat rooms; hence bargaining will realize mutual gain through trade and allocate the burdens of kidney donation efficiently. This is correct, and the analysis gets some credit for applying economic analysis to the facts. But what, if anything, about NOTA makes efficiency analysis relevant? If the purpose or general intent of NOTA were efficient allocation of the burdens of kidney donation, why did NOTA prohibit market transactions in organs? A better essay asks whether efficiency analysis is relevant to KC Gold’s NOTA liability, rather than just assuming that it is or is not relevant.

- **Essays that respond to the prompts and use course concepts to expose difficulties (hard issues) and offer reasons why a proposed solution to a hard issue is a good one.** These essays scored in the top third of the curve. Example: Is program two (KC) an instance of “paired donation” hence not prohibited by NOTA? This is a typical problem in statutory application and interpretation, so we can put our tools to good use. A good analysis might begin by identifying similarities and differences between KC and standard instances of paired donation that fell clearly within Congress’s particular intentions. But what makes certain similarities and differences important? A good analysis goes on to explain how KC satisfies some of the reasons why NOTA allows paired donation (no financial inducements; poor people not treated as organ producers for the market;
program enables people to “donate” their organ in exchange for another “donated” organ) but also fails to satisfy other reasons (the “donation” is more suspect, if not really less altruistic, because it is not motivated by the desire to save or improve the life of a particular loved one; standard instances of paired donation help transfer organs to existing patients suffering kidney failure, but KC does nothing to help that large pool of patients).

II. Sample answer

Note to students: I’ve included the prompts, but you weren’t expected to include them in your answers. Key parts of the sample answer (the bones, so to speak) are bold-faced. Below each part of the answer, in a box, I offer some comments about how the class performed on that question. Responding to a prompt, the sample answer advises Healthy World about whether each of the three programs is likely to result in criminal liability for HW or for program participants. But scores did not depend on particular answers; for example, your score did not depend on whether you said that HW would or should be liable under NOTA for the Kidney Club program.

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(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.

1. Charities.

Does a non-profit organization’s substantial donation to a charity of kidney donor’s choice, to encourage kidney donation by live donors, [X], count as “knowingly acquiring, receiving, or otherwise transferring [a kidney] for valuable consideration” [Y] within the meaning of NOTA? Because NOTA provides that “reasonable payments” don’t count as “valuable consideration,” the issue can also be framed: Does a non-profit organization’s substantial donation to a charity of kidney donor’s choice, to encourage kidney donation by live donors, [X], count as a “reasonable payment associated with the removal [etc.] of [a kidney]” within the meaning of NOTA? Framed normatively: Should a non-profit organization be subject to criminal liability for encouraging live kidney donations by making a substantial donation to a charity of the kidney donor’s choice?

Most essays did fine work spotting and framing the issues. Many essays noticed a level of generality problem: should the question be stated at a low level of generality ($50,000
NOTA distinguishes “donation of the organ,” which it permits (and even encourages by exempting reasonable payments that make organ donation possible), from “organ purchases… for valuable consideration,” which it prohibits. All three HW programs raise hard issues because the programs exert pressure on the distinction between organ purchases (prohibited) and organ donations (permitted).

If program one triggers NOTA charges against HW, HW would have a strong argument that encouraging organ donation by making a substantial donation to a charity of kidney donor’s choice is not “acquiring, receiving, or otherwise transferring” a kidney. The kidney donee (not HW) is the one who “receives” the kidney. The kidney donor “transfers” the kidney, perhaps. But HW isn’t doing any of the prohibited acts. This argument is at least as strong as Scalia’s argument, dissenting in Smith, that defendant who exchanges a firearm for drugs does not “use the firearm” within the meaning of the sentence enhancement statute. On the other hand, the prosecution can argue that in order to prevent the mischief (organ purchases) NOTA must penalize not only the individuals whose bodies are at both ends of the transplant purchase (or at least the buyer; NOTA doesn’t explicitly impose criminal liability on the person who sells her own organ) but also market facilitators such as those Rep. Waxman described as “unscrupulous organ brokers.” If there are equally good arguments on both sides of the question whether making a charitable contribution to encourage kidney donations counts as “transferring” a kidney, then the rule of lenity applies and favors criminal defendant HW.

Even if HW is “transferring” a kidney, HW argues that it is not a transfer for “valuable consideration” because making a substantial contribution to a charity chosen by the kidney donor is a “reasonable payment associated with the removal” of a kidney within the meaning of NOTA. Whether a payment is reasonable presents a value or “should” question. HW plausibly argues that substantial contributions to a charity of the kidney donor’s choice are reasonable because they encourage donation (which saves lives and reduces overall costs) without bringing about the evil (treating kidneys and their donors as commodities) that the statute means to prevent. The prosecution might concede that such contributions are reasonable in this sense, but insist that the “reasonable payments” to which NOTA refers are ones much more directly related to the surgical or medical aspects or to compensating the organ donor for costs directly related to the surgical or medical aspects of giving an organ.

HW argues that even if “transferring” a kidney should be read broadly and “reasonable payments” should be read narrowly, its substantial donations to a charity of the kidney donor’s choice are not “for valuable consideration” within the meaning of NOTA. This claim is plausible for HW but much weaker for the kidney donor. If the
third party’s contribution to a charity that the kidney donor selects is a motivating factor in the kidney donor’s decision to go ahead with the kidney donation, and assuming that “transfer” can include “organ donate,” then the kidney donor can’t plausibly say, “I didn’t donate my kidney for the third party contribution to charity.” But the kidney donor still might plausibly say, “I donated my kidney in part for the third party contribution to charity, but that third party contribution does not count as ‘valuable consideration’ within the meaning of NOTA.”

This issue – whether a substantial third-party contribution to a charity of the organ donor’s choice, for the purpose of encouraging such donations, counts as “valuable consideration” within the meaning of NOTA – is difficult for three reasons. First, “valuable consideration” is ambiguous between the contract-law concept of consideration and some narrower concept that requires financial profit. (This ambiguity is visible in the disagreement between Senator A and Senator B in the Senate hearing.) Second, “valuable consideration” is criterially vague (what are the criteria for value; e.g., does anything that anyone values count as valuable, or must the value be of a certain kind) and degree vague (where do we draw the line between token or minimal value and sufficient value to bring about the evils that NOTA is meant to prevent)? Third, even if the statute had been worded a little differently, and even if the legislators were clearer in their own minds about what they meant by “valuable consideration,” programs such as HW’s raise difficult questions because they put pressure on NOTA’s normative design. NOTA is motivated by a policy (foster organ transplants by encouraging organ donation) but qualified by a principle (do not commoditize the human body). But HW programs such as program one are in a gray area; they have features that are gift-like in some respects but trade-like in other respects.

Remember to give reasons for your conclusions. If you say “The phrase ‘valuable consideration’ is ambiguous and vague,” offer reasons and evidence to support this conclusion. Some essays treated ambiguity and vagueness as interchangeable labels for unclear statutory language. But our reading on The meaning of words in legal rules (pp. 107-117, for class #5) distinguishes these concepts.

The prosecution can argue that such third-party charitable donations count as “valuable consideration” under NOTA because money is offered as an inducement to donate, and the transaction is not otherwise within either the statutory exclusion of “reasonable payments” or “paired donation.” If Congress had meant to exempt charitable donation inducements, it would have provided this explicitly. (The prosecution can also argue that in the absence of safeguards, a potential organ donor might receive a kickback from the charity or have some other covert stake in it.) But HW’s position is stronger because it better serves the statute’s point or purpose of relying on organ donations rather than organ sales/purchases to supply needed organs. Just as the paired donor does not
cease being a donor (gift-giver) just because the gift is reciprocated, and just as any organ
donor (paired or otherwise) is still a donor (gift-giver) if her reasonable expenses are
paid, so a kidney donor is still a donor if she is motivated in part by the desire to do good
not only to the organ donee but also to those in need who are assisted by charities.
NOTA is interested in effective altruism, not pure altruism or utter self-sacrifice.

But the $50,000 that HW contributes to the charity of donor’s choice comes
from the health insurance companies that stand to save $275,000 per patient who
gets a kidney transplant as compared to the cost of dialysis. Does this source of the
funds make a difference for NOTA purposes? Suppose that a health insurance
company contributed the $50,000 directly to a charity of an organ donor’s choosing,
instead of through the intermediary of HW. Suppose that the insurance company only
made the $50,000 contribution in cases where its own insured patient was going to
receive the organ whose donation was induced in part by the contribution. Then the
insurance company’s motivation could plausibly be described as profit (it saves $225,000
whenever its $50,000 offer is accepted), and its conduct could plausibly be described as
“knowingly acquiring, receiving, or transferring a kidney for valuable consideration”
within the meaning of NOTA. But by serving as an intermediary, HW attenuates the
connection between the source of the funds and any actual donee’s receipt of an organ. If
HW makes the contribution to a charity of the kidney donor’s choice, whether or not that
kidney ultimately gets transplanted into a donee who is insured by one of the companies
that funds program one, then the program arguably remains sufficiently gift-focused to
escape criminal liability under NOTA.

Though the question – whether the source of its funding renders any HW program
so funded illegal under NOTA – is a hard question of law, I think it more likely that
liability will turn on program particulars. For example, NOTA allows a non-profit
organization to facilitate paired donation, presumably because paired donation makes
generous self-giving to save a loved-one’s life more practical and a third party is often
needed to facilitate the arrangement. The funds needed by the third party facilitator have
to come from somewhere. Moreover, NOTA’s “reasonable payments” standard says that
certain payments typical in organ transplants are excluded from the statute’s prohibition.
This standard is framed as a set of things for which money can be spent, not as a set of
sources from which the money can come. Such an approach is justified because NOTA
is best seen as both promoting organ donation (e.g., by permitting paired donation) and
constraining “gift of life” relationships so that they are not dehumanizing (e.g., do not
cause people to treat their own organs and the organs of others as mere commodities
rather than aspects of our human embodiment). So if X offers to help connect and fund
donor C and donee B so they can realize their goals of being organ donor and organ
donee, the reasonableness of any payments is much more a function of their effect on the
meaning and worth of what B and C are doing, than a function of X’s source of funding.
In conclusion: under the best view of NOTA, HW will not and should not be criminally liable for program one. Also, neither the kidney donor nor the kidney donee should be criminally liable for participating in program one. Whether HW would need to turn to some other funding source in order to assure program one’s legality – and, to put the same question another way, whether the insurance companies are violating NOTA by using charitable donations as an indirect way to increase their profits – presents a closer question.

While my sample answer treats the funding-source problem in connection with its analysis of program one, another good approach would be to state and analyze this issue in more general terms. E.g., does HW’s funding of its programs from donations by health insurance companies [X] count as “knowingly… transfer[ing]” a kidney “for valuable consideration” [the two quoted phrases = Y] within the meaning of NOTA?


Is an organ-sharing membership organization, in which a member agrees to donate a kidney if called upon to do so in exchange for the right to receive a kidney from a compatible member donor [X], an instance of “paired donation” [Y] within the meaning of NOTA? If so, then such an organization (Kidney Club = KC) is not prohibited by NOTA. If KC does not count as a “paired donation,” then: Does the exchange of a promise to donate in exchange for the right to receive a compatible organ [X] count as “knowingly acquiring, receiving, or otherwise transferring [a kidney] for valuable consideration” [Y] within the meaning of NOTA?

The prosecution argues that the KC program lacks two features – A’s desire to donate to loved one B (A’s sister in the Senator’s illustration), and A’s inability to do so due to incompatibility – that are necessary for a “paired donation.” Because in “paired donation” A is ready and willing to donate to B, but simply unable to do so, and similarly C is ready and willing to donate to D, but is unable to do so, pairing the two couples does not induce anyone to donate. The substitute donee simply stands in for the intended donee, a specific loved one whom donor wants to help. In KC, by contrast, there is no specific loved one in need, and the occasion for donating to a stranger (or third party) is not incompatibility.

HW argues that these distinctions should make little if any difference. Like A, a member of KC is willing to give the gift of an organ to one in need. Like A, who gets something he or she wants (an organ for B) in exchange for donating his or her organ to D, the KC member gets something he or she wants (the security of knowing that if he or she needs a transplant there will be a compatible and willing kidney donor) in exchange for promising to donate his or her kidney if called upon by KC. Understood at a sufficiently high level of generality, paired donation as a system of mutual organ gifts is a broad enough concept to include KC. We move outside the umbrella of
paired donation if, say, KC provided that in exchange for a promise to donate a kidney to a member who needs a transplant, KC would provide a new house to the donor.

The best foundation for any decision on the paired donation issue is a plausible account of why gifts are a better matrix for organ supply than purchases/sales. NOTA plausibly regards donor A’s readiness to undergo some pain and a small amount of risk for the sake of sister B as an apt – generous, understandable, decent – expression of love. The law cannot command it but neither should the law forbid it. So we ask: is a KC member’s readiness to undergo pain and a small amount of risk for the sake of a possible stranger a similarly apt expression of love? Does KC in effect turn strangers into brothers and sisters who stand ready to give for one another’s sake? Or does the fact that each KC member gains personal security in exchange for his or her promise make his or her readiness to donate less expressive of worthy love? (Might sister B view A’s joining KC as an apt expression of love for family, much like A’s obtaining life or health insurance, because it relieves a potential burden on the family?)

Whether a KC-type exchange of mutual promises counts as paired donation, hence is exempt under the statute, presents a classic occasion for good legal reasoning. The legal reasoning problem provided a good workout on the exam. Strong essays often noticed that depending on how one sees the point or purpose of exempting paired donations from NOTA liability, KC either should or should not fall within the exemption.

If KC does not count as a generalized form of “paired donation,” it could still be legal under NOTA if it does not involve a transfer for valuable consideration. Most of the expenses that KC pays are specifically listed in NOTA as “reasonable payments” that fall outside the “valuable consideration” category. Blood tests and other compatibility tests, which KC pays for, aren’t specifically listed, but they plausibly fall under the “quality control” heading. But the promise to donate in exchange for a promise to be eligible for an organ donation is different from the excluded reasonable payments. On the other hand, the fact that all of the excluded reasonable payments are (or could be) dollar costs supplies some evidence that the category from which the exclusion is carved out includes only transactions that are or could be dollar costs. But this interpretation of “valuable consideration” raises Senator B’s concern – why specifically exclude paired donation, when it does not involve the kind of market transactions that the statute regards as transfers for valuable consideration?

On the one hand, KC seems close enough to a system of reciprocal gift-giving and far enough from the kinds of market institutions that would commodify the bodies of poor people to escape NOTA liability. On the other hand, because only healthy people qualify to join KC, patients suffering renal failure and undergoing
dialysis – in other words, many of the very people that NOTA aims to help by encouraging organ donation – will not benefit from KC. Still, the absence of a financial profit inducement for potential donors, and the absence of unscrupulous dealings by the broker, suggest that the best outcome is that the KC program does not violate NOTA.

3. **Kidney Club Gold.**

   Does **making a substantial payment to a member after he or she qualifies for membership** [X] count as “knowingly acquiring, receiving, or otherwise transferring [a kidney] for valuable consideration” [Y] **within the meaning of NOTA?** The payment, as a financial inducement, initially looks like a standard instance of valuable consideration. HW might concede this yet argue that the $5,000 consideration is paid for members’ willingness to enter the community of mutual organ sharers, not for acquisition or receipt of an organ. But this is a distinction without a difference, in part because any member who fails to donate when called upon to do so must repay the $5,000. Moreover, KC Gold’s requirement that the $5,000 be repaid with interest makes it especially likely that the poorest members will be the ones who wind up “donating” a kidney, and this undercuts one plausible purpose of NOTA. On the other hand, HW can argue that $5,000 is a “reasonable payment” allowed by NOTA. Though it is not made specifically to cover any of the expenses that the statute lists, the payment could be framed as an approximate average of such expenses. It could be interpreted as a life insurance payment compensating members for the low but still positive risk of death incurred by organ donors due to having organ removal surgery. But to avert NOTA liability, HW should pay actual member donors for actual donation-related expenses (including illness or death caused by organ removal surgery), rather than pay all members. The substantial payment feature of KC Gold is best seen as compensation for the promise to donate, and probably results in NOTA liability for HW and possibly for its members. (The $5,000 can also, but again less plausibly, be viewed as a subsidy for later negotiations between selected donors and prospective substitute donors – something like the cash stake with which one begins a game of Monopoly.)

   Does **enabling those who have promised to donate to purchase a substitute donor** [X] count as “knowingly acquiring, receiving, or otherwise transferring [a kidney] for valuable consideration” [Y] **within the meaning of NOTA?** Facilitating negotiation and deals by reducing transaction costs (e.g., by setting up a chat room) promotes efficient allocation of organ donation, but if efficient allocation were the goal then NOTA would not prohibit organ purchases. Moreover, wealthier members are likely to avoid becoming kidney donors by making offers that poorer members are willing to accept. This result – turning to the poor to meet the organ shortage – is also likely when payments take the form of scholarships. **This frustrates one of NOTA’s plausible purposes.**
For these reasons, KC Gold is the most likely of the three programs to result in NOTA liability.

(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.

HW should implement Charities because it best meets a pressing need: thousands of patients suffering kidney failure who lack organ donors but whose lives could be saved, or quality of life significantly improved, if more live-donated organs were available. The Charities program brings greater happiness to these suffering patients and their families, while also bringing at least some greater happiness to those served by the charitable donations. Even the organ donors are happier, at least ex ante, because they are able to follow through on their generous desire to be self-giving (though they are not as happy as they might be if HW also paid their organ-donation-related expenses as NOTA allows). The health insurance companies are also happier, because even after they subsidize the $50,000 charitable donations, they are better off overall because kidney transplants are less costly than dialysis. Taxpayers too are happier because government saves on health care costs.

Charities is also a fair program, because the opportunity to make a substantial donation to a charity of one’s choice probably appeals to almost everyone without regard to their wealth, poverty, or other social condition. The fact that sick people unqualified to be organ donors can’t participate is not enough to render the program unfair, since those unqualified to be organ donors don’t voluntarily undertake the pain and risks of being an organ donor (though they might have done so had they been healthy enough). Similarly, if some very wealthy people do not find the $50,000 donation offer appealing because they already can and do make very large charitable contributions, nonetheless nothing about the Charities program deters them from choosing to become kidney donors.

Viewed through an economic lens, Charities is not efficient because some people would have donated anyway without the opportunity to make a charitable gift (their WTA was near zero dollars), and because value is being left on the table (offers greater than $50,000 could in some cases induce transfers that increase the social surplus). But the way in which Charities meets the need – by encouraging people to make choices that are widely seen socially as generous, gift-giving choices – is just as important as the extent to which Charities meets the need.

Both Charities and KC honor the principle of self-ownership: Charities by permitting or even enabling people to be self-giving, and KC by enabling people to exercise their freedom in and through the making of a commitment.
Most essays noted, very plausibly, that KC is consistent with libertarian natural rights (Nozick’s rights as side-constraints) because one of the principal exercises of freedom is in the making of binding commitments. Some essays argued, less plausibly, that the KC promise cannot bind lest it constrain personal liberty. This might be so on some accounts of freedom, but not the libertarian account. A few essays introduced the deductibility of charitable contributions into the libertarian evaluation of Charities, observing that libertarianism has no objection to HW’s offer to make a charitable contribution as an inducement to prospective organ donors, but might object to the use of state power to encourage donations through tax policy. (The fact pattern did not say who gets to deduct the $50,000.)

**Measured by the extent to which it meets the current need, KC is inferior to Charities in one way (no patients currently suffering kidney failure are helped when HW creates the KC program) but superior in another way (it is possible that more prospective donors can get over their resistance to donating by having all of their donation-related expenses paid, and being promised an organ should they need one someday, than by having a charitable contribution made on their behalf).**

Measured by the way in which it meets the need, KC might earn lower marks than Charities on the ethics of character. KC is a little more self-regarding, like purchasing health insurance. On the other hand, purchasing health insurance is socially helpful, since it lowers the total cost of health care (in this instance, by avoiding needless dialysis costs). And though KC does not foster altruism as self-sacrifice, it does offer a commitment device through which members can form themselves into a Golden Rule community (in which they do unto others as they would be done by), and even a loving community (in which they take care of one another as if they were family). Even so, we might have a duty of fair play to abstain from the advantages that KC membership offers, because those who are already unhealthy are not eligible to be members hence not eligible for the advantages of membership.

Roughly speaking, their exchange of mutual promises to provide a kidney when needed makes the members of KC better off when viewed ex ante (as of the time they promise), and in that sense forms an efficiency community. But KC, like other forms of health insurance, gives rise to moral hazard. The prospect of getting a kidney when and if needed makes each member take slightly less care to avoid things that cause kidney disease. (KC’s screening process might suffer from another information problem as well. Prospective members might conceal knowledge of family history or other information revealing their exceptional likelihood to experience kidney disease later in life. This might give rise to adverse selection.) **Thus KC is not perfectly efficient.**
We should also be concerned, on multiple normative grounds, about members who take the KC Oath but do not sincerely intend to donate a kidney if called upon to do so. KC is less fair to the extent that some of its members are prepared to receive an organ if needed but not to give one.