Some very good student answers to the essay question

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.

Program 1: Charities

In the Charities program, the hard question of law is whether a non-profit's making a $50,000 charitable donation to a charity chosen by a kidney transplant donor (X) is "valuable consideration" within the meaning of NOTA §301. If it is, then Healthy World and its donors are likely to face criminal liability.

Deciding whether consideration is "valuable" invites us to use the full spectrum of our formalist and normative reasoning frameworks. From a textualist perspective, we look first to the ordinary meaning of "valuable." Our inner Scalia -- especially appropriate here as we are interpreting a statute, rather than the common law -- would say that we use valuable in everyday language to describe thing of real worth or import, and it is difficult to see how a $50,000 donation is not "valuable" in this sense. It is especially so because if it is to succeed as a incentive to get people to donate organs who would not otherwise have done so, those people must, ipso facto, value the $50,000 donation. The textualist answer is probably that the donation is a violation.

From an intentionalist perspective, we turn to the purposes of the legislature in enacting the statute. The bill banning valuable consideration for organ transplants was designed to prevent for-profit marketing, and at least superficially, Healthy World is a charity, not a for-profit organization, and the consideration would be going to other charities. The payment of consideration to a third-party charity also avoids the problem of disproportionately incentivizing the poor to donate, since they would receive the same benefit as a rich person: a gift in their name to an organization they care about, rather than financial gain. Some members of Congress thought that when financial profit was far from the core rationale for giving that there was no need to even state exclusions to the rule, since it would be obvious that those transactions were outside the scope of the law. But as Senator A pointed out, something is "valuable" is if has value, and charitable giving can have value. Like Senator C says, to exclude the contribution might be to pretend that it doesn't involve valuable consideration when it evidently does. Although it is unclear which Senators lay in the middle ground of pivotal votes, and therefore the ones whose intentions might carry greatest weight, the intentionalist argument probably weighs in favor of a violation also, given that specific carve-outs were enacted for paired donations but no other charitable or selfless transfers.
Meanwhile, the purposivist would look to the intentions of a rational legislature as agents of the people to determine the meaning of valuable. The rational legislature would have passed such a bill in order to prevent radical inequality in medicine, whereby the very rich could buy organs at will from the very poor. Corollary harms to be avoided might have included human trafficking, smuggling, and slavery. None of those harms are likely to result from a charitable donation model: incentivizing with a gift to charity appeals to the better angels of donors' personalities. On these grounds, the charitable program is less likely to be a violation.

From an ex-ante instrumentalist policy perspective, we would try to maximize the good going forward, and the charitable donation model can be extremely appealing. It is economically efficient, and if before a judge like Posner, that would be a strong argument in its favor. the health care system saves $75,000 on each patient (dialysis having cost $400,000, but the surgery costing $275,000 plus a $50,000 donation). Everyone wins in this Pareto optimal situation: donees get the organs they have been waiting for, donors are fully compensated for the volunteerism by both the knowledge that they have done a good thing and by the tangible gift given to a charity of their choice, and the medical system saves money by avoiding expensive dialysis.

From an ex-post perspective, we may look at the question via Dworkin's lens of rights: what is the citizen entitled to have in a civil society. This question elevates the question of principle over any arguments of policy. Here, a fundamental principle may be that citizens have the right to use their own bodies as they wish (limited, of course, by Nozickian side-constraints: they cannot use them to abuse one another). If a citizen can choose to train to be a firefighter or a skydiver or a tattooed circus performer, may he not also risk the use of his body for an altruistic end? If we accept that there is a fundamental right to self-determination, and a citizen can pierce his lips and stretch his earlobes to his heart's content, the state may have no inherent right to prevent him from disposing of his insides, either, so long as doing so does not violate another fundamental principle. On these grounds, the charitable incentive should stand.

Program 2: Kidney Club

For the Kidney Club, the hard question will be whether a mutual membership pledge to donate a kidney if called upon in exchange for a guaranteed kidney if needed constitutes "valuable consideration" within the meaning of NOTA §301, or if such a system instead constitutes a "paired donation" of organs which would be excluded from penalty within the meaning of the statute.

As above, we will begin with the formalist approach to the hard questions. Textually, Senator A's initial reading of the bill -- a bargained-for exchange of a promise for a promise -- suggests that a court could read, on its face, value in the club pledge. But Scalia would urge us to look at the whole of the text. Excluded from valuable consideration are "reasonable payments... expenses... [and] lost wages," all of which suggest that Congress means, in this case, money. Money is not on the table in the Kidney Club, and so there is probably no violation on the first question. As to whether the pledge is a "paired donation," the textualist would again probably say yes: two donors are plainly being paired by a non-profit.

Intentionally speaking, the organ-for-organ pledge may not be "valuable consideration," because such an exchange is not motivated by financial profit, which is
what Congress sought to avoid. Some Senators did foresee non-monetary consideration, though, and obtained the paired-donation carve-out, and on the paired intentions we find more complication than we did textually. Congress meant to protect paired donations between two or more incompatible pairs of donors/donees. Here, however, what is being paired is a single donor and a single donee. Strictly speaking, this is different than the legislative intent.

A purposivist would, as above, still look to the underlying reasons for barring consideration. If the purpose is to prevent a marketplace of organs whereby people are subject to abuse or exploitation, we are still on safe ground. And regarding "paired donations," we are probably safe as well: a reasonable legislature would have created such an exception to allow people who want to receive and to donate organs, but cannot find a match between themselves, to widen the field among similarly-situated donors and donees. This program does the same thing.

Although this model appears to come closer to passing a formalist test, the area is gray, and we remain authorized to conduct a normative analysis. The strongest reason to be concerned about the Kidney Club on policy grounds is that there is likely to be a market failure in the model. Although there is a superficial policy appeal -- the savings to the medical establishment and to patients are most significant here, as the costs of treatment go from $400,000 to $275,000 with only minimal (administrative and executory) costs in the middle -- we should be worried about the effect of the Prisoner's Dilemma. If all members of the club follow through on their commitment, giving up organs to one another as needed, then the solution is both efficient and moral. However, the only thing binding members to their promise is the promise itself: is the KC Oath a sufficient commitment device? Quite possibly not; the only penalty for breaking the pledge is expulsion from the Kidney Club. There is no evidence that the Kidney Club would be the only way to get a transplant, and so while people are very likely to join the club, in the thought that they might benefit if they come to need a kidney, the punishment for leaving the club is minimal. If the pledge succeeds, they will create an efficiency community of binding mutual promises and Golden Rule community of mutual doing- unto-others, but the chance of their being free riders -- present only to get organs and unwilling to give -- is high. If so, there is no Rawlsian fair play, and the scheme must fail.

There is also an adverse selection problem with either Kidney Club: those who join may be likelier to need kidneys than those who don't, whether through personal medical history or family background, rather than just an abundance of caution.

Program 3: Kidney Club Gold

For Kidney Club Gold, some of the hard questions of law transfer from above, but also include whether the payment of $5,000 for undergoing blood tests, agreeing to enter the test results in a database, and agreeing to donate an organ if asked constitutes "acquiring or transferring a human organ " within the meaning of NOTA §301 AND, similarly, whether a member's privately-agreed valuable compensation with a substitute donor is "acquiring or transferring a human organ" within the meaning of the statute.

Textually, there is a narrow path to tread here that would allow Kidney Club Gold to operate. Both the $5,000 and the private barter payments would be "valuable consideration" in any context. But the statute bars this only for "knowingly acquiring, receiving, or otherwise transferring any human organ." The payments offered here are,
respectively, for prospectively agreeing to donate rather than actually donating, and for excusing oneself from the donation process. In short, the person receiving the organ is not the one paying. The most dangerous word is probably "transfer," but a strict textualist court might suggest that if Congress wanted to bar this, Congress should write a law that explicitly does so.

Intentionally and purposively, however, it seems clear that the person doing the paying is not the concern: the intent was to bar financial profiteering from organ transplantation (which the barter system does, as well as the $5,000), and the purpose was to bar organ markets, which the barter system does in an end-run. This program would therefore be disallowed.

Once again, we are in a gray area and normative reasoning is permitted. While our formalist conscience might allow this on some grounds, both our realist doubts and natural law imagination kick hard against the Kidney Club. (As must anyone who has read The Hunger Games: a substitute-tribute system is a dangerous avenue.) The barter system is particularly offensive, as it in effect allows a pledge-breaker to excuse his actions (and, conceivably, even to profit from his own wrong: having been paid the $5,000, what is to stop him from finding a poor soul, desperate for money, who joined the club just for the $5,000 bounty and now will give his kidney up for $1,000?). Although you might support KC Gold on utilitarian grounds -- what better way than to find the most efficient solution than to create a smooth, anonymous marketplace -- the declining marginal utility of money makes it very easy for rich men to join the club in case they need a kidney, while being happy to pay as much as necessary to the less fortunate members in case they are called upon to give. The smoothness of the marketplace is a ploy, intended to make regulators think of the Coase Theorem and how a frictionless market is the most efficient. But it cannot be so when it runs up against our principles in such a hard way. You might make a case on utilitarian grounds, but money and utility are not the same thing. In this case Rawls's concept of justice as fairness is undermined by the exit clause: there is no fair play possible in a world that allows the selling of one's social obligations to the lowest bidder.

What to implement?

Although already largely discussed above for each of the options above, in conclusion, on normative grounds the $50,000 donation program is both defensible and maintainable. Although Program 2 has a certain appeal, it falls apart for lack of enforced fair play. Only the charitable program succeeds on normative grounds; it is not the most economically efficient (there is a $50,000 cost to each transaction), but it does survive scrutiny on utility maximization, reasonable efficiency, and rights grounds. Both ex-ante and ex-post approaches point to the first program, provided of course that the textualist barriers can be overcome by a judge looking to fit and value, not just the words as words.

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Part I. Do the three proposals cause Healthy World (HW) to acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation?
The term valuable is both ambiguous (it can mean full of morals or full of money) and vague (it is not really clear where the line is between valuable and not valuable). Paired donation is also vague in terms of time (is it only a paried donation if all four parties agree at the same time, or can they make future promises and later fulfill them. Paired donation probably means the second one, since it is hard to imagine that logistically four people would happen to make a promise to donate and receive organs simultaneously, or that the statute meant to limit paired donations to such rare circumstances.

1. Charity
   -It is possible that this proposal will violate the NOTA act since, the donors are given the right to direct a sum of money to an organization of their choosing. This may be considered "valuable consideration" within the meaning of the statute, since under the broadest definition of "valuable consideration", that used in contracts law, a promise can be considered. Contracts law also supports the idea that such consideration would be valuable, since contracts law assumes that all exchanges in which anything is traded for anything is an exchange of value. It is also likely that contracts law will be used in the interpretation of this statute, since the legal instrument that governs any exchange will be a contract. this is a textualist argument.
   -It is possible that the donor is not getting valuable consideration within the meaning of the act, since the penuiary value is not going to the donor, but rather to the charity. This is an intentionalist and purposivist argument supported by Senate committees and floor debates whicht state that the prohibition on recieving valuable consideration for donataed organs was to prevent the marketing of organs and to prevent donations motivated by financial profit. That would show that valuable consideration is being overinclusive, since it is including charity donations which are not motived by finanacial profit and do not involve marketing. However, It is in my opinion better to be safe than sorry, given the millions of dollars of fines our organization could face.

2. Kidney Club
   -Possible liability, since it is an exchange of an organ for an organ, under contracts definition. As explained above, the legal instrument which will facilitate the exchange of the organs is a contract, so it is likely that contract law definitions will apply, which means that the exchange of anything for anything will be considered an exchange of valuable consideration. Exchanging an organ for the future promise of an organ would involve valuable consideration under this definition. It may also in practical terms involve lower health insurance premiums if the helath insuarnace companies backing HW know that members will be covered in the event of kidney failure, they may charge those poeple lower premiums.
   -Probably not liability, since it probably falls within definition of paired donation. As discussed above "paired donation" probably includes the exchange of a promise to donate for either an organ donation or a promise to donate, and the promises need not come from the same people, such that the Kidney Club proposal likely fallls within the paired donation exception to the exchange of valuable consideration prohibition.
   -There is an outside chance that the Kidney Club is not a paired donation, since the members do not know who they are donating to when they make the promise. But the intended recipient being know is not likely a requirement of a paried donation, since it is
not stated as a requirement in either the statute or the extensive congressional record, and it can be argued that the recipient is sufficiently definite, since the donor knows the recipient will be another member of the club.

3. Kidney Club Gold

- Probably liability, since there is a payment to join in exchange for a probable future donation. Under the broad contracts definition of valuable consideration, there is an exchange of $5000 worth of consideration for the promise of a future donation. Any objection that the exchange is merely for a promise, not an organ is thin, since the paired donation scenario has shown that the statute probably conceives of a promise to donate an organ as indistinguishable. Money is the quintessential valuable consideration.

- Probably liability, since there is negotiation and payment between parties over who will donate. The ability to induce another member to donate in one's stead in exchange for money (a scholarship probably counts as valuable consideration, since it consists of a payment of money to a third party to relieve a debt owing or about to be incurred), functions as a marketplace for kidneys. Parties are negotiating over the relative values they place on their own kidney versus the kidney of another person. The market is limited to compatible donors within the club, but that does not make it any less a market and the exchange of money between potential donors is still an exchange of valuable consideration for an organ. To make matters worse, purchasing a promise to donate from another donor relieves the purchaser of their future obligation to donate, thus the purchaser is not only buying a substitute but buying their freedom from their original promise, by being relieved of their future obligation, they truly are buying someone else's kidney, and the fact that it is going to someone else is no excuse (how many people suffering from acute renal failure are running around negotiating deals for themselves, it will more likely be done by a family member of their behalf, and the payment of money itself can be the crime, not just the receipt of the organ paid for.) Possibly not liability, since it is still a paired donation, just with an extra dimension of compensation, but this is thin for the reason stated above in parenthesis.

- In a way it is too bad that the Gold club will create NOTA liability. Since there is money the poor may be disproportionately affected, but the system is set up so that all donors, including poor ones are always compensated, and the availability of a kidney is never affected by one's wealth. Wealth only affects who will give the kidney not who will receive it. This contradicts many of the critics of the creation of a kidney market or exchanging valuable consideration for a kidney, since nobody can be priced out of the market. The safety net, ability to buy out of a donation, ability to receive extra money for a donation, and the security of knowing you are probably covered in the event of kidney failure could go a long way toward combating the overall problem of not enough kidney donors for the present need. As above, the fact that there will always be a kidney for a donee, contingent on matches, not wealth, will mean that poor folks are just as protected as rich folks. The penalty payment of $5000 if a potential donor backs out could also be a needed enforcement mechanism if donors get nervous about surgery at the last minute.

Part II. What are the normative reasons for implementing the Kidney Club? What are the normative reasons not to?

As stated above, the only program that will not likely invoke liability is the kidney club.
1. WTA/WTP NOTA’s prohibition on valuable exchange makes a traditional CBA difficult to do, but that is more of a moot point in this case than it might first appear. The cost of any donation will always be covered by the medical insurers would are benefitting from not having to put their clients on dialysis. That source of revenue is not likely to go away, especially since the vast majority of americans have health insurance. The donees will always have at least $400,000 WTA since that is the cost of long-term dialysis and the alternative is death. Since the operational costs will always be covered, the only party we have to think about is the donors. The donors WTA in this case is a promise of a future kidney. We are not sure what the probabilities of renal failure are for potential club members, but once we have that number we would discount the cost of long-term dialysis by the probability of kidney failure, to find an approximate WTA for the donors, since they are trading their kidney for a kidney in the event of renal failure. There is also only a chance that any particular donor will have to give up a kidney, but given the shortfall of donors in the first place, that is a relatively high probability.

Donors may not see the exchange as equal, because of the endowment effect they will likely put more value on their own kidney than on someone else’s.

2. Utility For some donors the piece of mind that club membership brings will more than compensate for the risk of a future donation. But the utility measure is equally hard to generalize in this situation as WTA/WTP.

3. Fairness

4. Inclusiveness of Club It is fortunate that the club has no monetary requirement for membership. This will address one of the key concerns of commentators in this field, since the poor will have equal access to the care.

5. Exclusiveness of club It is unfortunate that the Club will only admit healthy people with functioning kidneys, since that means that it will not do any good (benefit any members) until later when a member suffers renal failure. It will not do anything immediately to address the shortfall of donors. As mentioned it may be difficult to convince healthy people to take on a potential sacrifice for a potential benefit down the road.

6. Community The promise will make a Golden Rule community and possibly a fidelity and loving community, but it will depend upon the individuals commitment to their oath as that and the fear of future renal failure are the only things holding them to that oath.

Determining whether a program is likely to lead to criminal liability under NOTA requires statutory interpretation of NOTA. In a formalistic sense, the question is whether "a specific program intended to increase kidney donations from living donors" (X) is a program facilitating the "acquisition, reception, or transfer of 'valuable consideration' for a human organ" (Y) within the meaning of NOTA. Although many hard questions of law remain, the statute limits the scope of those questions by providing a certain level of generality; it explicitly allows "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". 
This means that in interpreting "valuable consideration", we do not consider everything that could possibly be valuable, but only that given directly to get the rights to the organ. This raises numerous hard questions of law related to what exactly "valuable consideration" means. It also raises hard questions of law about what it means to acquire, receive, or transfer an organ; is the facilitation of organ acquisition banned by the statute? Although the statute established a rule, no trading "valuable consideration" for an organ, the rule is expressed as a standard, "valuable consideration". This term has both ambiguity and degree vagueness. There is ambiguity because "consideration" can mean multiple things; it can mean consideration in the sense of contract law, or it can mean thoughtful consideration. The statute is necessarily degree-vague because "valuable" is a spectrum and not clearly defined- value is an individual measure, not a common experience. These ambiguities authorize the use of normative reasoning in interpreting the statute.

To appropriately interpret the statute, one must consider both the "fit" and "judgment" of the statute; the scope of the statute must match the purpose of the statute to some degree. Although there will likely be overly inclusive elements and underinclusive elements, the interaction of fit and judgment illuminates the application. The justification behind the statute seems to be rooted to some degree in the idea that "all men are created equal"; finances should not determine whether or not you can obtain an organ transplant. This is an issue of distributive fairness made more poignant by the fact the fairness deals with matters of life and death. To analyze whether the following programs are appropriate, we must consider whether the moral purpose of honoring each individual's human dignity independent of wealth is satisfied. (Note: This does not mean we forget the language of the statute. Rather, we determine whether a program falls within or outside the scope of the NOTA by interpreting the language of the NOTA using normative analysis authorized by the ambiguous language.).

Program 1: Charities

Strongest reason for: Much like Judge Fernandez in Becker, here I am overtaken by emotion at the thought of thousands of people with diminished quality of life, forced to experience the literal and metaphorical draining experience of dialysis regularly. There is a moral judgment to be made here about the value of human dignity.

Against: A money donation may be "valuable consideration" because the ordinary definition of valuable consideration includes anything subjectively of value to the receiver.

Although this program has initial appeal as supporting altruistic action by donors, in reality the donation to a charity can be construed as "valuable consideration". Here we must ask whether a donation to a charity in exchange for kidney donation qualifies as "transfer of valuable consideration for a human organ" within the meaning of NOTA. We must also ask whether the transfer will operate as an incentive, which it seems intended to do, because incentivizing organ transfer through "valuable consideration" seems to violate the purpose of the statute. My formalist conscience wants to stop here and assert that any action that can incentivize kidney donation is valuable consideration. By using ordinary language (Scalia) or dictionary definitions (O'Connor), we can determine the donation clearly has value or it would not cause people to donate kidneys and it clearly is consideration because it cannot be obtained without the donation of a kidney. however, stopping here would rob the statute of deeper meaning and principle.
Here because "valuable consideration" is ambiguous, we are able to tell a story about the donee's low quality of life and need for the kidney. We are able to suggest that individuals have a natural right to their bodies—they may choose what to do with it. Further, this statute seems to promote social benefit because there is donation all around, nobody profits individually—happiness from donation is not measured in an economic calculation. It is possible to analyze this program using economics, but it is not very useful to reduce this issue to a matter of social benefit because utility maximization is an empty goal. Utility can be maximized while inequality persists. Although that is not the case here because there is a separation of the private sphere (market for kidneys) from the public sphere (kidney donation and charities, public goods) that allows us to redistribute with the consent of the donor without compensating the donor. Thus, incentivizing donation through charity is likely distinct for the purposes of this statute from buying an organ.

Program 2: Kidney Club
For: This is fair because participants come to the program freely and have equal bargaining power because they all offer to promise their kidneys in return for a kidney. This also supports libertarian ideas of humans as individuals that can choose whether they want to act within certain moral constraints; people can freely choose to donate their kidney and hope for the same in return. This also is in line with establishing a special community bound by promises as a commitment device; this is appropriate because it is a community that is joined in an exercise of free will.

Against: Joining the community changes the moral relationship between members and may impose a duty upon other members to offer a kidney, which violates the libertarian ideals of complete right to one's own body. The duty of fair play is also violated because there will not necessarily be a match for every member, so some offer a kidney without receiving one in their time of need.

This program raises issues about fairness and community. This program seems appropriate on its face because people enter of their own free will without any financial incentive. However, we must ask whether receiving the promise of a kidney in the event one is needed qualifies as "valuable consideration" for the purposes of NOTA. Entry into the club is an exercise of freedom that allows the people to create a Golden Rule community; this suggests that the promise of a kidney is not "valuable consideration", but rather part of a commitment device completed by a verbal oath. This is questionable, however, because there is no means to enforce the promise. At the moment of donation, a donor can always choose not to donate because they have a right to their own body. Yet, the entire premise of building a community is that the promise itself is binding morally. Here, looking to the purpose of the statute may illuminate. The statute attempts to protect the equality of all humans by establishing certain rules that make obtaining a transplant fair, as in not contingent on wealth. Rawls' fairness principle is satisfied because people that join the club join of their own free will and choose to abide by the rules they establish as equals. There is no inequality in bargaining power because each person brings the same thing to the table—a healthy kidney. However, there is still the question of whether this satisfies the duty of fair play because there is always a possibility that one person who joined and offered the kidney will be unable to find a healthy transplant. This necessarily means that the advantage (healthy kidney) cannot be fairly distributed to the people who made the advantage possible, clearly violating the
rule of fair play. Thus, is it reasonable to assert that everyone must abstain from kidney transplants? Here the answer is clearly no. Part of the promise made is that the kidney is contingent upon there being a valid match. Therefore, the duty of fair play is explicitly discharged by the promises the individuals made freely and as equals.

Program 3: Gold Club

For: This introduces bargaining which allows for efficient outcomes based on the Coase theorem. Also this is related to Program 2, so refer to the paragraph above for the establishment of community/promises.

Against: Efficiency is meaningless here because the principle of the statute (equality of personhood) is not captured by economic analysis.

Because the statute explicitly refers to "valuable consideration" and the proposed program involves financial incentives to join, this is clearly an appropriate place to apply normative economic analysis. Here the hard question is whether establishing a market for kidney donors and paying people to join the market qualifies as "valuable consideration" within the meaning of NOTA. On one hand, there is not valuable consideration because the program itself merely creates a market and players in the market and bargaining over donation. However, within the market is the selected donor paying another member to take his role as donor; the selected donor pays the other member for his kidney donation. There are other issues as well, such as whether this policy violates our natural rights to our bodies by imposing a punishment on people who choose not to donate after joining (requiring the return of 5,000). To answer these questions, we must address the economic analysis of this policy. While both efficiency and utility maximization analysis is available, utility maximization is more appropriate here because we are dealing with soft values- the worth of not having to donate a kidney. As there are low transaction costs, this is an appropriate place to apply the Coase Theorem. The property right to "not having to donate a kidney" is randomly assigned. Then, members in a chat room can bargain over the value of that property right. Then, there will either be a transaction or the randomly selected donor will donate. This ensures that the person that values not donating more does not have to donate and utility is maximize. However, here my natural law imagination is stimulated because something feels intrinsically wrong about letting people bargain over who donates. It arises from the understanding that people have different values for money because of relative wealth and that, even in a world where everybody was equally wealthy, preferences change over time. Therefore, I realize, much like Dworkin, that utility maximization here lacks meaning because there is no principle that is satisfied or furthered. While it is possible to assert that the principle is bettering human quality of life through mutually beneficial organ transplants, that rings hollow because the mutuality of the benefit rests on the utility maximization analysis.

It is unlikely either policy 1 or 2 would lead to liability because both policies do not involve compensating the donor. However, policy 3 is more likely to lead to liability because potential donors are compensated upfront with 5,000. Although this payment goes to individuals who donate and individuals who do not end up donating, if you decline to donate you must repay the 5,000. That suggests that there is an element of "valuable consideration" for being a donor.
You should implement the second program because it is least likely to result in liability. In that situation, there is no transfer of wealth and economics is left out of the game. Rather, there is a community established that is freely joined and exited. Each person is treated as an equal because each person has a kidney. There is not the problem of changes in preferences because there is always the option of declining to donate when asked. This is the best program because it uses voluntarily made promises to establish moral relationships that are stronger than requests for kidney donations, but do not violate the “valuable consideration” element. Although it is possible to frame the program as providing a kidney in exchange for the valuable consideration of a kidney if you ever need one, that is a stretch because the promise is not tangible or certain (there may be no kidneys, your match may decline to donate). Also, this satisfies the purpose of the statute by encouraging donation without allowing the wealthy to have greater access; money is irrelevant because what matters to join is kidneys.

(Note: My realist doubts suggest that regardless of the program if it furthers the policy of getting more kidney transplants without too severely inhibiting justice that the program will be allowed. I also feel it is important to support the dignity of human life by encouraging organ donations in any means that is not an explicit economic transaction, impinging on human rights, or oppressing the poor.)