Some very good student answers to the short answer questions

The class did well on the first of the three short answer questions. The kind of work it called for was similar to the work called for on the essay question. The second and third short answer questions were harder than the first short answer question, and scores were distributed across a wider range. See explanatory boxes, below, on why the second and third short answer questions were difficult.

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).

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6603

The provision relates to Section 301 in that B may have "knowingly..." given her human organ for "valuable consideration" through the paired donation system. It is unclear whether this was "valuable consideration" based on the text. It is arguably so, because it involves a potential purpose behind NOTA in preventing economically disadvantaged individuals from bearing the burden to donate. Josefina is poor, and she donated her kidney to someone that is more well off than she is, aided by Healthy Care. Moreover, she received "valuable consideration" because she saw her brother receive a kidney as did B and D, under Senator A's "ordinary meaning" approach. The fact that they are siblings validates consideration for Senator A, because it further allows others to assume just how much Josefina wanted her brother to have a kidney donation.

However, it is arguably not because Healthy World is a non-profit and thus seems to gain nothing directly from this situation, limiting the problem of "unscrupulousness." Furthermore, Josefina's "valuable consideration" was for her purely emotional and cultural value in seeing her brother receive his donation from A. In regards to the purpose behind NOTA, the "burden" of donating is also arguably not "economical." That is, she was not burdened in the same sense that a poor person, when offered money, is more likely to donate than a person who is financially stable. In fact, her primary motivation seems to have been out of love and familial duty, rather than for the desire for profit. Josefina faces a different kind of "burden," one that is based on traditional, familial, and cultural grounds, one that is not covered by NOTA, if we assume the dialogue between the senators was authoritative. In addition, if we are to measure "valuable consideration," as including metaphysical and intangible things as did Senator A, it is unclear whether Josefina has truly "gained" anything, because she now faces discrimination and social prosecution back at home. Did she really benefit as the words, "for-profit" and "gain" seem to imply? Under Senator A's approach, this would be a very difficult question of fact for the jury.

The is brings a hard question of law. We are not sure whether the status of Josefina meets the qualifications under section 301, and if it does, whether it overrules the paired donation exemption within the same statute.

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"Like love I Say...Like love we can't compel or fly...like love we often weep." -Auden
Implicit in NOTA is a recognition that we should, whenever possible, take care of our fellow human. As Auden reminds us, and as NOTA recognizes, the law cannot ethically compel its citizens to help one another, but it can open doors that allow them to help one another more easily. Like laws that regulate blood transfusions or bone marrow transplants, NOTA seeks to, through the "paired donation" exception to valuable consideration, allow humanity's most compassionate and humble individuals, like Josefina, a chance to carry out a life-changing sacrifice to save the life of another, and in Josefina's case, a loved one. While the law suggests that the largest problem is the shortfall of viable kidney donors in the United States, we should not put on blinders that prevent us from seeing that what is also a United States problem could, and is, a global problem. In that sense, Josefina's testimony taps into the underlying foundation of NOTA that encourages us, as citizens of a global community, to find ways to help those who are suffering not just within our country, but in the world. NOTA honors Josefina's wish to save a life, because she cannot give a kidney to Ricardo, to bestow that gift upon someone she has never met. Josefina is an incredibly courageous individual. Her unselfish desire to help her brother Ricardo, and her inspiring wish not to realize any increased social statuts in her community in Santa Maria, epitomizes a case where NOTA allowed (not compelled) an individual, acting out of love, to save someone's life. Her testimony taps into that deep foundation of NOTA.

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Textual feature

Josefina's testimony relates to whether the kidney qualified as "valuable consideration" within the meaning of the NOTA. It is clear that she trades her organ in order to obtain an organ for her brother; this is inseparable from the language of "receiv[ing]... any human organ for valuable consideration". The only question that remains is what "valuable consideration" means. She clearly values her kidney because she has expressed that she must hide the surgery as she is not whole and it will be harder for her to marry now. As the kidney was valuable to her beyond merely functional purposes, it may qualify as "valuable consideration". However, the interpretation of "valuable consideration" in this case will matter because there is no financial or social value to the kidney.

Purpose

The purpose of the statute was to allow each individual to have equal worth and disallow the use of outside value to determine whether an individual could obtain a kidney. The testimony relates to the purpose because it it proves that there was a sacrifice of value; J essentially purchased the kidney by giving up more than just a kidney in return. However, the additional "things" J gave up are not necessarily within the scope of "valuable consideration" in NOTA because they are not recognized as outside value in society in the same way money is. The purpose of the statute was to prevent the rich from getting kidneys when the poor could not; here that purpose is clearly not violated because this was J obtained a kidney for her brother. There is also the issue that because of cultural norms, as evidenced by her testimony that she was selected because she was oldest, J was subjected to the transplant to save her brother and did not have her natural right to liberty. Further, because of cultural differences, J's valuation of her kidney is different; there is a difference in the kidney she offered and the kidney A offered. This
raises questions of whether "valuable consideration" should be interpreted in the specific context of each trade.

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The element of prohibition of "organ purchase" as suggested in the section's name and reinforced by the language of the statute that prohibits exchange of "valuable consideration" for bodily organs. However, the statute aims to prohibit an individual to feel obligated against their wish to donate their kidney, whether it is forced monetarily or otherwise. If Josefina felt forced to trade her kidney, because of the cultural and family forces that result from her being the oldest sister, this pairing facilitated by Kidneys Without Borders may create situations that take advantage of such cultural norms and force donation against a donor's true wishes. She does suggest that she would feel sinful to put her needs ahead of his, and that the family could not pay for transplant surgery. It may be that in her culture men are more valued and therefore her brother's needs have been placed ahead of hers. Also, mentioning her scar and the affects it may have on her future marriage, invokes a deeply troubling situation where this girl seems obligated to perform a duty against her own wishes.

When she indicated that her family could not have paid for transplant, it makes it likely that the organization could take advantage of that fact and create a situation in which valuable consideration is the actual payment for the surgery in Santa Maria, and hence in violation of the statute.

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).

This is a hard question because it asks specifically whether the jury should make a value judgment, and if so, what it is about NOTA that positions the jury to make a value judgment, and how the judge can appropriately frame that work for the jury. One key to this question was our in-class critique of Dworkin. The judge’s natural law imagination positions the judge to give the law an interpretation that both fits the law sources and makes the law the best it can be. But our legal system also vests considerable power in juries; and juries cannot exercise their natural law imagination in Dworkin’s sense because they are not learned in the law and they do not see the law’s “mystery principle” in the same way as a judge. So very good answers, instead of trying to position the jury to do just what a judge would do when deciding a question of law, picked out questions of fact, or questions of interpretation of fact, that NOTA plausibly delegates to juries.

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A value judgment of Josefina's testimony is probably inevitable, and not necessarily a bad thing. Context matters in the law, if justice is to be done, and in hard cases it is appropriate to look to conflicting values and assess which are to be prioritized. Josefina has a story to tell that, like Philip Becker's, bring us close to tears. Without
looking to Josefina's background and motivations, it will be difficult to assess whether the statute has been violated: if the purpose of the statute is to prevent exploitative markets, then it must be fair to look as to whether Josefina and her brother were exploited.

Normatively, NOMA has both policy goals (preventing organ markets from operating in ways that could take advantage of people or disadvantage the less fortunate) and principles (organ transplants should be freely and fairly available, it would be unfair for organs to go only to the rich, there are moral side-constraints to the free market when human lives and parts are at stake). If the jury feels that Josefina's experience has violated those policies or principles, then a violation has occurred. But they cannot do so in a vacuum.

At the same time, If Josefina and her brother were middle-class white residents of Orange County, with the same actual details of what has happened result in charges, or a conviction? For the sake of due process, the jury must be able to come to the same conclusion on the same facts. As Dworkin would say, like cases must be treated alike. A value judgement of her testimony must not give undue weight to her circumstances if doing so would result in an acquittal on grounds of pure sympathy, but conversely, it may not do so to reach a conviction on grounds of theoretical exploitation if her illumination of the situation points to a different motivation for all parties involved. As Anatole France said, "The majestic equality of the law forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." True enough, and reason enough for a wise jury to employ value judgments in assessing normative reasons for a law.

There is a value judgment needed. I would advise the jury to do a value judgment about whether this act was done for the purpose of value or if the outcome simply has value. Inform the jury that the act states that you receive the kidney FOR valuable consideration. The judgment they should make is whether what she had done was for a valuable contribution, or if it was done for other reasons like duty, religious reasons, or other reasons that may be more indirectly or not at all tied to value. You may be careful listing those specifically, because it would presumably point the jury directly to her testimony where she says those things. Maybe looking at sacrifice as well could be relevant. Her sacrifice could be worth looking into to see if it was done was for value if there was an equally great sacrifice to accompany it. If she acted for reasons outside of a desire for pure value, then many of the concerns about a market or ill outcomes will clearly be avoided, and thus the intent of the act will be intact and not violated. It shouldn't incentivize negative market outcomes or take advantage of the poor and should care for the human body and life and helping one another. Further, the value judgment could work similar to the Philip Becker case, though the comparison is a bit loose. In this case, it would be similar in trying to find the mystery principle or mystery value. They need to do some storytelling to put the whole case in perspective. If they are able to do so, they may realize that this wasn't some transaction done FOR value. Instead it was a transaction done for different reasons. It was done to save a life, out of the sacrifice of a dutiful, religious individual. The jury should try and find the mystery principle or the mystery value in the act that happened here and see if it matches up with or against the purposes of the act. I would try and keep everything in reference to the ideas of avoiding negative markets and the externalities that occur there.
Like Margaret Montoya's experiences that were unknown to her law school classmates until she unmasked them during a class discussion about Josefine Chavez, or like Colonel Couch's conscience, unknown to his boss until he revealed his desire to no longer work the Slahi prosecution, each and every member of the jury brings different life experiences, different stories, and different trenzas to the table. The intensely emotional story Josefine has willingly unmasked to them will certainly influence them in the same way it led Montoya's law school classmates to cultivate a deep respect for her life story, and later nominate her to be their section representative. The question is not whether or not the jury should make a value determination. Moved by Josefine's testimony, they will likely make one anyways.

While your inner-Judge Fernandez, deeply moved by the plight of Philip Becker, who so desperately needed the guardianship provided by the Health's, may inspire you to guide the jury's normative reasoning with a deeply moving statement of your own, you should respect the jury, who are likely experiencing similar emotions, and who possess the ultimate authority as the deciders of fact. I would advise you, however, to instruct the jury to "appreciate the totality of the testimony offered, including the particular circumstances of the parties involved in the litigation whose testimony they heard." This will likely be more than enough to guide the jury toward realizing the implicit connection between Josefine's testimony and that of the underlying purpose of NOTA that I discussed in question 1, and the connection between Josefine's Spanish language testimony and the cultural values that I will discuss in question 3.

**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 Josefine'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).

This was a hard question because there are good reasons on both sides. Similarly, there were very good answers that approved the proposed instruction and very good answers that disapproved it.

Although Josefine's Spanish testimony is almost certainly more nuanced than the translation, the jury should be instructed to rely solely on the English translation. The court has an obligation to ensure that the twelve jurors have equal information to weigh amongst themselves: a verdict can only be fair if the deciding parties come work from the same set of evidence. The duty of fair play requires that if there is an advantage that cannot be distributed fairly, then everyone must refrain from taking the advantage. If there is no way to get the Anglophone jurors to understand the subtleties of Spanish, then the rougher translation should carry.

There is, of course, a parallel obligation of the court to find a translator who can do justice to the testimony of witnesses, translating their words as accurately and as
fluently as possible. And while one can ask the jurors to ignore a version of the testimony, they cannot prevent the court from hearing: the officers of the court may have an affirmative obligation to inform the judge if the translation being given is deficient or defective in some way.

As written, Josefina's translated testimony conveys, compellingly, her sense of duty and her disassociation from the sort of compensation that the law was meant to bar. On the face of it, even in translation we see her Montoya-like braids undone, and begin to grasp both the desperation of her situation and the essential goodness of Healthy World's actions in context. The jury should not need to go to the original Spanish: Josefina's plight rings through across the barriers of class, of language, and of privilege.

I have a hard time with this question. On the one hand, having grown up speaking another language, I know that certain information that is necessary to understand Josefina's testimony is so deeply intertwined with her words and the structure of sentences that are certainly lost when translated. When she says things like "Richardo and I are grateful," there certainly seems to be something missing from that translation that might point to presence of a coercion of some sorts, whether financial coercion or just purely the pressure put on her from her family. The phrase "I am not whole anymore" speaks so loudly even when translated. There are hidden meanings intertwined in composition of our sentences, representing our fears, thoughts and motivations. This translation creates a barrier for Josephina to communicate with the court as to those intentions, which reduces the value of her testimony to the jurors. However, allowing those three jurors to take into account her Spanish words would create an unfair situation for other jurors, who may not be able to see those intentions, even after explanation by the Spanish speakers. It may create confusion and lead to unfair verdict. Here, although my heart is torn, I recommend allowing only English translation to be allowed, to protect the basic fairness comes from all jurors having the same information in deciding this matter.

In this case, I would advise you to allow the jury to hear Josefina's testimony without hearing the translations. The benefit that this approach would bring is subtle but tremendous. Words can vary linguistically between dialects, and moreover, the range of emotions that one can express with their native tongue is much greater than that through the lens of an interpreter, an outsider. In Josefina's case, culture plays an integral part in her decision - her love for her family, the pain as she watched her brother dying, with her being unable to help - even her social traditions, which she must hide from when she returns, is relevant to what brought her to cooperate with Healthy World. To fully understand her reasons, we ought to give her a fair chance to express them.

I understand that there is an element of objectivity and impartiality that is required in trials. There is the fear that her Spanish would lead members of the jury to feel more empathy for her than is required because of the human tendency to relate to those that have similar characteristics to ourselves. However, this case involves an extremely hard case of fact, which is the determination of whether Healthy World ought to be liable for allowing Josefina to donate her kidney in exchange for her brother's receipt of a healthy transplant. Culture plays such a great role in the case in understanding
what motivated Josefina. Since the statute is woven with the concern for individuals being pressured to donate their kidneys, this is extremely relevant to our determination. I see it as a constraint if we were to prevent her from speaking her case with the fullness that our situation dictates.

I would however, stress on the Spanish-speaking members of the jury to express what they heard and saw, especially if there were any differences between what is in the English translation. One true benefit comes from the voluntary unmasking of one's cultural "masks." The individual is allowed a better sense of understanding - one never truly understands what he or she is until they see the layers of their personality. Moreover, the "outsiders," or those who do not speak Spanish, will gain intimate perspective with the case. Our belief in the jury system is based on fairness, which implies that testimony be given as is available. We ought to allow the testimony to be considered in its fullest sense.