Hank Greely, Director, Center for Law and the Biosciences

This post is a response to the excellent comment that Professor Alex Capron of USC (one of the founders of the “legal” (as opposed to “non-legal,” not, I think, “illegal”) side of bioethics) made to my original post on this topic. It just got too long to be a comment – and arguably, too long to be a blog post! Before reading it, make sure you read his post below.

Alex,

It’s always a pleasure to get your thoughts and an especially interesting pleasure when they do not agree with mine. This discussion does remind me of the limits of the blog format. I keep thinking that I should be able to write nice, short comments on interesting new events, in the range of 500 words (or less). And, when I try to be short, I still end up around 1500 words (or more). And then, if anyone has noticed the post enough to comment on it, I will spend another 1500 words (or more) in further discussion. So much for short.

The intellectual and policy war over compensation for donated organs has raged for forty years. (And, of course, as you note, and I know, in spite of some loose language in the original post, NOTA only bans compensation, not the procedures themselves.) I am not a true believer on either side (and so risk getting shot at by
both). I do not like the Ninth Circuit decision in Flynn because of a general belief in compensation for organs or an overriding preference for markets. I think this decision was good legal interpretation of the question before the court and has, I suspect, good policy implications, both short term and long term. Those conclusions can be split up into four arguments. I think the arguments are pretty good, but I don’t consider any of them overwhelming – reasonable people, like you, can reasonably disagree.

First, I think it is a sensible legal interpretation of the language. Bone marrow is clearly an organ covered by the Act; equally clearly, blood is not an organ under the statute. This makes it difficult to say that taking cells out of the blood can involve the uncompensable donation of organs. Any whole unit of blood will include some cells from covered organs. These are likely to be mainly from the bone marrow, but cells from kidneys, hearts, livers, and other organs no doubt slide off into the blood from time to time. It would be complicated to apply the Act to the cells in this case without causing some odd results in whole blood units. It would require a complicated interpretation of the Act to make the criminal penalties hinge on whether payment for that unit was permissible or not depending on something else, such as whether the intent (however that gets defined) was or was not to get cells from the covered organs.

Second, in the context of this issue, I think the policy reasons you set out as being behind that adoption of the statute are not particularly useful as guides to statutory interpretation. Remember, the question is whether cells, usually found in the bone marrow, are “bone marrow” or are “blood,” when they are extracted from the blood. The three policy considerations you cite – the effect of payment on the amount of organ donation, the exploitation of the poor, and the commodification of the human body – exist, at least potentially, for both the organs covered by NOTA, such as bone marrow, and for organs not covered by NOTA, such as blood. It is, of course, not clear whether Congress “really” saw (whatever that would mean) a difference in the application of those policy arguments to covered and not-covered organs or whether it was swayed by various other issues concerning the non-covered organs, such as the renewable nature of the non-covered organs or the existence of, for example, a major blood industry whose interests were affected by the legislation. If we were to believe that Congress did think those policy issues applied differently to covered organs and non-covered organs and were to ask “with respect to those policy issues, are these cells more like blood or more like bone marrow,” it seems to me the answer is probably “more like blood.”

Third, as a matter of policy, although I understand and respect the three policy arguments behind the NOTA criminalization, I do not, personally, find them very powerful, in general or in the context of stem cells extracted from blood. Although I do think they are powerful enough to provide a “rational relationship” for purposes of equal protection, they do not tempt me to stretch the application of the statute to cover these cells. Neither would they lead me to vote for an amendment expressly including these cells in NOTA’s prohibition of compensation.
The question of the effects of payment on the number of donated organs is question, not an answer. And it is, in fact, an empirical question, for which we do not have good data. I don’t know what the answer would be, but I suspect it would vary from organ to organ and from incentive system to incentive system. I would note that the experience of researchers trying to get human egg donations without compensation versus the experience of IVF clinics trying to get egg donations with compensation is some evidence that the Congressional concern is not always right, although in a different context and with consequences in the IVF egg “donation” business I don’t like.

I do share the concern about exploitation, although there the degree of risk and discomfort involved bears importantly on my level of concern (with living donors, of course, though, if we construe risk and discomfort broadly to include the emotional consequences for survivors, also for cadaveric donations). If all poor but no rich people were found to have something that they could sell without any harm, and in fair process at a fair price, I don’t think I’d consider that a bad thing. (Though the “harm,” “fair process,” and “fair price” would all require careful monitoring.) As peripheral blood stem cell extraction through apheresis appears to involve little risk, pain, or discomfort—certainly compared with surgical removal from living donors of solid organs for transplantation, I am not immediately inclined to worry much about it. I admit that I do not know much about the regimen involved and the risks and discomforts of the use of G-CSF on donors. Evidence for serious risk or discomfort for the donor in the apheresis process could influence my view.

In your comment you make an interesting, and quite different, argument about exploitation – that the donors of the stem cells (or the middlemen involved in the transaction) may use the nature and timing of the process to exploit the intended recipients. This does seem to me an appropriate concern, but surely not one without a variety of possible solutions, ranging from the timing of the apheresis to some form of price control, through insurance or otherwise.

And, finally, I have never been particularly convinced by the commodification argument. I understand it, I can understand why reasonable people are moved by it and believe it, but, in itself, it doesn’t move me. “I” am not my bone marrow. And, to the extent I identify my identity with any part of my body, I identify myself with my brain, the functioning of the product of which, my mind, I sell regularly to make my living.

My fourth reason for liking the Ninth Circuit decision is less direct, but I do think it opens some (narrow) room for useful experimentation. In this, I start from the proposition that our organ donation system has not succeeded. To say it has “failed” is too strong – it has achieved many important things, both in medicine and in ethics – but it has not produced enough organs to prevent thousands of otherwise preventable deaths each year in the United States. We have been discussing, and discussing, and discussing alternative donation systems for decades, but we haven’t done much beyond discuss them, in large part because of the barrier to experimentation that NOTA has imposed.
Now, at least with hematopoietic stem cells extracted by apheresis, we can experiment with, and observe the results of, other schemes, adding to our knowledge of what the costs and benefits of such compensation schemes are. We have some evidence from blood, sperm, eggs, and hair. It would be nice to get another example, and possibly one that was more closely controlled and monitored. I would support efforts to create guidelines for compensation schemes for these cells and would applaud efforts to evaluate the results of such schemes. That is not the most legally relevant reason to applaud the Ninth Circuit decision, but it does count for something – for me.

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