HEALTH LAW
Mr. Martin
Spring 2016 Student ID No._____

FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted equally and you should spend equal amounts of time on each question. Please write legibly and leave a margin on the left-hand side of the page. Use only your student identification number to identify your blue book or blue books. If you use more than one blue book, make sure that your student ID number is on each one and number the blue books ("1 of 2," "2 of 2", etc.)

Because one student has permission to write this examination on a deferred basis, you must turn in this white examination paper along with your blue book or blue books.

QUESTION ONE

You represent Thomas and Jill Henderson, a couple embroiled in a dispute with their health insurance plan over coverage of infertility treatments. The Hendersons have been having trouble getting pregnant. Thomas has a low sperm count and motility, while Jill has irregular ovulation. They have undergone infertility treatment successfully in the past and have one child. They again sought further treatment in order to have a second child. A simple insemination procedure failed. The health and disability group benefit plan of Thomas's employer, Clarion, paid their health benefits for this procedure.

They were then advised to try a more complex and expensive procedure, called Protocol I, which involved treating Thomas' sperm to improve its motility. Drug therapy was prescribed for Jill to induce ovulation. Semen was then taken from Thomas, and put through an albumin gradient to improve its mobility. The semen was then reduced to a small pellet size and injected directly into the uterine cavity at the time of ovulation.

The Hendersons underwent Protocol I and submitted a bill to Clarion, which refused to pay it. Clarion cited a provision in its plan, Article VI, section 6.7, which provided:

> If a covered individual incurs outpatient expenses relating to injury or illness, those expenses charged, including but not limited to, office calls and for diagnostic services such as laboratory, x-ray, electrocardiography, therapy or injections, are covered expenses under the provisions of [the plan].

Under section 2.24 of the plan, "illness" was defined as "any sickness occurring to a covered individual which does not arise out of or in the course of employment for wage or profit." Clarion denied the Henderson's claim

on the grounds that the medical services were not performed because of any illness of Jill, as required under section 6.7. No provisions in the plan specifically excluded fertilization treatments like Protocol I.

What arguments can you make on behalf of the Hendersons that their situation is an "illness"? What arguments can you make for the insurance company that it is not?

QUESTION TWO

"Peer review," in the world of medicine, refers to a formalized, rigorous, and candid process for evaluation of a physician's performance by a designated group of the physician's professional peers. Hospitals are required by a federal law, the Peer Review Improvement Act of 1982, to have a peer review committee (sometimes called by another name), the purpose of which is to promote the quality of health care.

Although Congress did not provide for confidentiality in peer review, physicians and hospitals have persuaded the legislatures of nearly all American states that, in order to be effective, peer review requires (1) confidentiality, and (2) immunity from civil discovery. Otherwise, they say, the desirable level of candor will not be achievable and physicians will refuse to serve as peer reviewers. Especially, the hospitals and physicians have argued, peer review data must be shielded from discovery by plaintiffs, in medical malpractice actions. American jurisdictions, accepting this rationalization, have accordingly enacted legislation which creates a statutory evidentiary privilege in favor of peer review. Typical is the statute in West Dakota:

> The proceedings and records of a peer review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any malpractice or other civil action

> against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee.

Diana DeBride, M.D., was a surgeon with staff privileges at St. Simeon Stylites Hospital located in West Dakota. During a laparoscopic procedure Dr. DeBride inadvertently punctured the iliac artery of a patient, creating a life-threatening emergency. After reviewing the case, the Peer Review Committee of the hospital recommended that Dr. DeBride's staff privileges be terminated. The hospital administration accordingly terminated her.[1]

Dr. DeBride sued St. Simeon Stylites Hospital and its (all-male) Peer Review Committee under federal and state anti-discrimination laws. Dr. DeBride's complaint alleges that the iliac artery puncture was a known possible complication of the operation, and was a pretext for the real reason for her termination. The real reason, says the complaint, was hostility towards women in medicine and in particular towards female surgeons. Furthermore, says the complaint, the Peer Review Committee has historically discriminated against female surgeons by treating them more harshly and disciplining them more severely than similarly situated male surgeons.

Dr. DeBride sought discovery under F.R.Civ.P. Rule 34 of the following documents:

> (1) The Peer Review Committee's complete file on her case including an audiotape of the Committee's meeting on the case at which, she has been told, members of the Committee made disparaging remarks about women as surgeons; and

[1] Pursuant to another federal law, this unfavorable action is recorded in a national physician data bank. As a result, Dr. DeBride will have difficulty finding another position in any hospital in the United States.

(2) All Peer Review Committee records related to all reviews of surgeons for any reason during the previous twenty years, records which (she alleges) will substantiate her allegations of gender discrimination.

Citing the West Dakota statute that is quoted above, the defendants sought a protective order under F.R.Civ.P. Rule 26(c)(1), demanding that discovery not be had and claiming that the Peer Review Committee records were privileged against discovery. Dr. DeBride countered with a motion to compel production under Rule 37(a)(2)(B). Both motions, properly certified, are now before the judge in the case. How should the judge rule? Why?

QUESTION THREE

Informed consent has developed out of strong judicial deference toward individual autonomy, reflecting a belief that an individual has a right to be free from nonconsensual interference with his or her person, and a basic moral principle that it is wrong to force another to act against his or her will. This principle was articulated in the medical context by Justice Cardozo in Schloendorf v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914): "Every human being of adult years and sound mind has a right to determine what shall be done with his own body * * *". Informed consent doctrine has guided medical decision-making by setting boundaries for the doctor-patient relationship and is one of the forces altering the attitudes of a new generation of doctors toward their patients. It has provided the starting point for federal regulations on human experimentation, and is now reflected in consent forms that health care institutions require all patients to sign upon admission and before various procedures are performed.

Informed consent has been an unnatural graft onto medical practice. As Jay Katz wrote in The Silent World of Doctor and Patient (1984), "***disclosure and consent, except in the most rudimentary fashion, are obligations alien to medical thinking and practice." The function of disclosure historically was to get patients to agree to what the doctors wanted. In ancient Greece, patients' participation in decision-making was considered undesirable, since the doctor's primary task was to inspire confidence. Medieval medical writing likewise viewed conversations between doctors and patients as an opportunity for the former to offer comfort and hope, but emphasized the need for the doctor to be manipulative and even deceitful. Authority needed to be coupled with obedience to create a patient's faith in the cure. By the Enlightenment, the view had emerged that patients had a capacity to listen to the doctor, but that deception was still needed to facilitate patient management. By the nineteenth century, the profession was split over such issues as disclosure of a terminal prognosis, although the majority of doctors still argued against disclosure. The beginnings of the twentieth century showed no progress in the evolution of the doctor-patient relationship toward collaboration.

The judicial development of informed consent into a distinct doctrine can be roughly divided into three periods, according to Katz. During the first period, up to the mid-twentieth century, courts built upon the law of battery and required little more than disclosure by doctors of their proposed treatment. The second period saw an emerging judicial feeling that doctors should disclose the alternatives to a proposed treatment and their risks, as well as of risks of the proposed treatment itself. The third period, from 1972 to the present, has seen legislative retrenchment and judicial inertia.

You represent Croziere Hospital, a small nonprofit hospital in northeast Washington, D.C. The Chief of Surgery, Dr. Leaf, has just come into your office seeking your advice on a patient problem. A patient, Mrs. Jan Lee, was admitted to the hospital yesterday through the emergency room in the final stages of labor. She gave birth just an hour ago to a baby boy, healthy in all respects except that his right foot is a club foot. The staff surgeon can easily correct this anomaly now so that the child will be able to walk normally. Without surgery now, the risks of failure are progressively greater.

Mrs. Lee and her husband are Asian immigrants recently arrived in the United States. Dr. Leaf knows from past experience in the military in Asia that Asians from the Lee's area of Asia believe that birth defects are an expression of divine anger, punishing the parents for past misdeeds. The Lees are therefore likely to consider any attempts to correct their son's defect to be an insult to their gods. Dr. Leaf is afraid that if he talks with the Lees, they will refuse the surgery and leave the hospital immediately. They have not yet seen their son and are not aware of the club foot. Dr. Leaf would like to operate on the boy without their permission immediately, given what he sees as the clear benefits of an operation now.

What do you advise him to do, in light of informed consent doctrine and its privileges and exceptions?

QUESTION FOUR

The national Childhood Vaccine Injury Act, 42 U.S.C. §§300aa-1-34, represents an effort to provide compensation to those harmed by childhood vaccines outside the framework of traditional tort law. Congress passed the law after hearing testimony (1) describing the critical need for vaccines to

protect children from disease, (2) pointing out that vaccines inevitably harm a very small number of the many millions of people who are vaccinated, and (3) expressing dissatisfaction with traditional tort law as a way of compensating those few victims. Injured persons (potential tort plaintiffs) complained about the tort law system's uncertain recoveries, the high cost of litigation, and delays in obtaining compensation. They argued that government had, for all practical purposes, made vaccination obligatory, and thus it had a responsibility to ensure that those injured by vaccines were compensated. Vaccine manufacturers (potential tort defendants) complained about litigation expenses and large recoveries, which caused insurance premiums and vaccine prices to rise, and which ultimately threatened the stability of the vaccine supply.

The Vaccine Act responds to these complaints by creating a remedial system that tries more quickly to deliver compensation to victims, while also reducing insurance and litigation costs for manufacturers. The Act establishes a special claims procedure involving the Court of Federal Claims and special masters (a system sometimes called the "Vaccine Court"). A person injured by a vaccine may file a petition with the Vaccine Court to obtain compensation from a fund financed by a tax on vaccines. He or she need not prove fault. Nor, to prove causation, need he or she show more than that he or she received the vaccine and then suffered certain symptoms within a defined period of time. The Act specifies amounts of compensation for certain kinds of harm (e.g., ($250,000 for death, up to $250,000 for pain and suffering). And, it specifies other types of harm for which compensation may be awarded (e.g., medical expenses, loss of earnings).

An important federal purpose of the Act is to free manufacturers from the specter of large, uncertain tort liabilities, and thereby keep vaccine prices

fairly low and keep manufactures in the market. Vaccine manufacturers presented Congress with evidence that their tort insurance and litigation costs had begun to dwarf their vaccine production revenue. *See* Congressional hearings discussing difficulty of obtaining insurance: expected liability costs hundreds of times annual vaccine sales revenue, expected insurance premium increase of 50 to 300 percent. They argued that, as a result, some manufacturers had discontinued vaccine production, leaving only a handful of producers, while others had raised their vaccine prices significantly, e.g. increases in DPT vaccine from 10 cents to three dollars per dose, and polio vaccine from 35 cents to a dollar and a half per dose.

Evidence in the hearing record indicated that compensation-related price increases or manufacturer withdrawal would cause serious harm. Vaccines benefit those who are vaccinated, and they have public benefits as well—when parents vaccinate their own children, they also help stop the spread of a disease that can injure others. And, even though vaccines themselves cause a small number of serious injuries or deaths, their widespread use dramatically reduces fatalities. For example, the DPT vaccine itself may cause 150 or so annual incidents of serious neurological damage and the polio vaccine may itself cause about five annual incidents of paralysis. But, before widespread vaccination, whooping cough, for example, killed about 7,500 (mostly) children in a single year, diphtheria killed about 15,000 and polio injured, paralyzed, or killed about 57,000. Thus, despite the price to be paid in vaccine-caused injuries, widespread vaccination—(about 13.5 million annual diphtheria and whooping cough [DPT] vaccine doses, about 18 million polio doses per year)—has virtually wiped out these devastating diseases.

The upshot is that, because vaccines benefit so many (and harm so few), even small vaccine price increases, if followed by even a small decline in vaccinations, can cause more public harm through added disease than the sum-total of all harm vaccines themselves cause through side-effects. In Japan, two deaths from DPT side effects led to withdrawal of the vaccine, which was followed by a whooping cough epidemic that killed forty-one children. For this kind of reason, the argument goes, Congress was importantly motivated not only by the desire effectively to compensate side-effect victims, but also by the desire to keep vaccine prices fairly low by reducing compensation costs.

At the same time the Act modifies, but does not eliminate, the traditional tort system, which Congress understood to provide important incentives for the safe manufacture and distribution of vaccines. The Act requires that a person injured directly by a vaccine *first* bring a Vaccine Court proceeding. Then, it gives that person the choice either to accept the Court's award and abandon his tort rights (which the Act transfers to the federal government), or to reject the judgment and retain his tort rights.

The Act additionally helps manufacturers by providing certain federal modifications of state tort law. For example, it forbids the award of compensation for injuries that flow from "unavoidable side effects," it frees the manufacturer from liability for not providing direct warnings to an injured person (or his representative), it imposes a presumption that compliance with Food and Drug Administration requirements means the manufacturer provided proper directions and warnings, it limits punitive damage awards, and it requires that the trial of any tort suit take place in three phases (liability; general damages; punitive damages).

The upshot is a new remedial system that interacts in a complicated way with traditional tort lawsuits.

Commentators have suggested that Congress's pioneering effort in the Vaccine Act creates a new format for medical liability to injured consumers. Consider how this liability format would work, and evaluate its desirable and undesirable features, if it were adopted in the following situations:

(1) Claims of medical negligence against hospitals, physicians, and other providers. The existing medical negligence regime results in (a) some people being overcompensated, many people being undercompensated, and many deserving people receiving no compensation at all (because the plaintiff is unable to prove negligence, or because the defendant is uninsured or otherwise unable to pay a judgment), and (b) far too much money being diverted from the pool of funds available for patient compensation to insurance companies and lawyers.

(2) Claims of product liability against allegedly defective health care products and devices.

Consider also how this scheme for compensating consumers injured by their health care providers, or by defective health care products and devices, should be funded. The Vaccine Act is funded by a tax on vaccines. Is there another funding source from which this alternative compensation scheme could be funded?

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Part A and Part B of this question will be weighted equally.

Part A

Evaluate the following situation, described by a psychiatrist. "I have had a number of acutely depressed patients who refused tricyclinic antidepressants—drugs that are splendid examples of effectiveness and nonintrusiveness. Some of these patients were confined, others were not. In most of these cases, I succeeded in tricking patients into taking the medicine over an extended period by telling them the pills were antihistamines to combat an allergy (which some of them actually had). Later, when they were their old selves again, I confessed. They all thanked me profusely for rescuing them, except for one person who complained about an infringement of his autonomy, and muttered something about 'personhood'". If one or

another of these persons later sued the psychiatrist, on what theory could he or she obtain damages, and how would they be calculated?

Part B

Consider the case of Mark Mills. Mr. Mills, a 42-year-old businessman, learned, in the course of having a failing kidney removed, that he had pancreatic cancer. It was treated surgically, but pathology tests revealed that the cancer might have spread, raising a question as to whether he should have follow-up chemotherapy treatment. The principal treating physician, Dr. Melvin Avedon, explained to the patient and his wife that the prognosis for treatment of metastasized pancreatic cancer was not good; but Avedon and the other doctors treating Mr. Mills refrained from disclosing exactly how bleak the mortality statistics were: a five-year survival rate of only 5-10%. Their primary motivation, apparently, was to avoid destroying the patient's hope, considered an important element in maintaining a positive therapeutic environment. Having not received information about how unlikely it was that the chemotherapy would be availing, Mills opted for this treatment and incurred all of the discomfort, inconvenience, expense, and other burdens entailed in such an aggressive, last-ditch type of therapy. Toward the end of his life, Mr. Mills learned how grim the survival statistics actually were, but continued with the chemotherapy treatment for a few weeks anyway. After Mr. Mills died, his family brought an informed consent suit, claiming that if the decedent had been properly informed at the outset as to the low probability of successful treatment, he would have declined the chemotherapy. He would, therefore, have enjoyed his remaining days more fully, with less pain, and would have been better able to get his personal and financial affairs in order before his death. In essence, the suit charged that the physician had the duty to inform Mills of the actual

statistics bearing upon the likelihood that the proposed treatment would be of substantial benefit to him.

The California Supreme Court considered carefully the public and judicial policy implications of the issue and declined to rule that physicians necessarily have a duty to supply information this detailed in circumstances where a good faith reason can be asserted for informing the patient only in more general and non-specific terms. Instead, the court held that the question of how detailed the information disclosure should be is a question of fact for the jury, which must take into account the specifics of the patient's physical and psychological condition.

Comment on the Mills family's lawsuit and its result in the California Supreme Court. (The Court affirmed a jury verdict for defendants.)

QUESTION TWO

David Johns appeals a decision of the District Court dismissing his lawsuit for failure to state a claim upon which relief can be granted.

Johns was convicted of kidnapping, rape, and sodomy. His conviction and sentence were affirmed in a unanimous opinion by the State Supreme Court. After his initial conviction in trial court, Johns commenced this action against Dr. Jon Taft for malpractice in supplying certain information to the police which ultimately led to Johns's arrest.

While committing a rape, Johns was bitten by his victim on his penis. This bite temporarily disabled Johns, allowing his victim to escape. Johns sought medical care for his injury at the emergency room of a local hospital. Sometime after his initial visit, Johns called the hospital complaining of pain and infection, and asking for a prescription. His emergency room physician was not present when Johns made his telephone call. Dr. Taft accepted the call on behalf of an associate who was John's emergency room physician.

Dr. Taft took the necessary information and called in a prescription as Johns had requested. Dr. Taft had no further contact with Johns beyond his act in calling in the requested prescription.

Later, Dr. Taft overheard some hospital employees talking about a request for information made by the police department. The police were looking for a suspected rapist who had injuries similar to those for which Johns had been receiving treatment. Dr. Taft consulted hospital authorities, had someone consult with legal counsel for the State Medical Association, and talked to Johns's emergency room physician about whether he was ethically permitted to report Johns's call to the police. Dr. Taft was informed by all concerned that they saw no objection to cooperating with the police department's request for information. Dr. Taft reported the telephone call, and Johns was subsequently questioned by the police and arrested.

Doctor Taft was not asked to testify at Johns's criminal trial, where the victim and other witnesses were able to conclusively identify Johns as the rapist.

Johns filed a civil action against Dr. Taft just a few days before the decision in the appeal of his conviction was promulgated. Johns alleges three separate theories: First, liability on the part of Dr. Taft for breach of the doctor-patient testimonial privilege; Second, liability for breach of the implied protection from disclosure of criminal conduct in a contract for medical services; Third, liability arising out of the doctor's alleged violation of the medical licensing statute which considers a breach of confidence to be unprofessional conduct.

Johns presents a unique issue of first impression: whether a cause of action in tort lies for the alleged breach of the physician-patient confidential

relationship under the facts of this case. How should the state Supreme Court decide? Why?

QUESTION THREE

Conversion therapy is psychological treatment or spiritual counseling designed to change a person's sexual orientation from homosexual or bisexual to heterosexual. Such treatments are controversial. Medical, scientific, and government organizations in the United States and Britain have expressed concern over conversion therapy and consider it potentially harmful.

The American Psychiatric Association opposes psychiatric treatment "based upon the assumption that homosexuality *per se* is mental disorder or based upon the *a priori* assumption that a patient should change his/her homosexual orientation" and describes attempts to change sexual orientation by practitioners as unethical. It also states that debates over the integration of gay and lesbian people have obscured science "by calling into question the motives and even the character of individuals on both sides of the issue" and that the advancement of conversion therapy may cause social harm by disseminating unscientific views about sexual orientation. United States Surgeon General David Satcher in 2001 issued a report stating that "there is no valid scientific evidence that sexual orientation can be changed".

The highest-profile advocates of conversion therapy today tend to be fundamentalist Christian groups and other organizations which use a religious justification for the therapy rather than speaking of homosexuality as "a disorder". The main organization advocating secular forms of conversion therapy is the National Association for Research & Therapy of Homosexuality (NARTH), which often partners with religious groups.

A bill, S. Bill 928, affecting conversion therapy, was introduced on April 25, 2017, in the United States Senate. A copy of S. 928 is annexed to this examination. Please read it.

Parts A, B, and C of this question will be weighted equally.

Part A

Explain in your own words what this bill, if it becomes law, will do.

Part B

Despite disapproval by the American Psychiatric Association and other organizations representing mental health professionals, there are therapists in the United States who offer conversion therapy. There are also informed adults who seek conversion therapy. As a matter of public policy, do you think that S. 928 is a good proposal or a bad proposal? Explain your answer.

Part C

If S. 928 becomes law, it will be the supreme law of the land subject only to a finding that the law is unconstitutional after a court challenge (which will surely occur). Briefly identify and explain the constitutional objections which will be raised against this law, if it becomes law.

QUESTION FOUR

The national Childhood Vaccine Injury Act, 42 U.S.C. §§300aa-1-34, represents an effort to provide compensation to those harmed by childhood vaccines outside the framework of traditional tort law. Congress passed the law after hearing testimony (1) describing the critical need for vaccines to protect children from disease, (2) pointing out that vaccines inevitably harm a very small number of the many millions of people who are vaccinated, and (3) expressing dissatisfaction with traditional tort law as a way of

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IN THE SENATE OF THE UNITED STATES

APRIL 25, 2017

Mrs. MURRAY (for herself, Mr. BOOKER, Ms. BALDWIN, Mr. BLUMENTHAL, Mr. BROWN, Ms. CANTWELL, Ms. DUCKWORTH, Mr. MARKEY, Ms. WARREN, Mrs. GILLIBRAND, Ms. HIRONO, Mr. SANDERS, Mr. WHITEHOUSE, Ms. HASSAN, Mr. WYDEN, Mr. MERKLEY, Mr. SCHATZ, Mr. MURPHY, Mr. LEAHY, Mr. CASEY, Mr. FRANKEN, Ms. HARRIS, and Mr. DURBIN) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To prohibit, as an unfair or deceptive act or practice, commercial sexual orientation conversion therapy, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Therapeutic Fraud Prevention Act of 2017".

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) Being lesbian, gay, bisexual, transgender, or gender nonconforming is not a disorder, disease, illness, deficiency, or shortcoming.

(2) The national community of professionals in education, social work, health, mental health, and counseling has determined that there is no scientifically valid evidence that supports the practice of attempting to prevent a person from being lesbian, gay, bisexual, transgender, or gender nonconforming.

(3) Such professionals have determined that there is no evidence that conversion therapy is effective or that an individual's sexual orientation or gender identity can be changed by conversion therapy.

(4) Such professionals have also determined that the potential risks of conversion therapy are not only that it is ineffective, but also that it is substantially dangerous to an individual's mental and physical health, and has been shown to contribute to depression, self-harm, low self-esteem,

family rejection, and suicide.

(5) It is in the interest of the Nation to prevent lesbian, gay, bisexual, transgender, and gender nonconforming people and their families from being defrauded by persons seeking to profit by offering this harmful and wholly ineffective therapy.

SEC. 3. DEFINITIONS.

In this Act:

(1) CONVERSION THERAPY.—The term "conversion therapy"—

(A) means any practice or treatment by any person that seeks to change another individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender, if such person receives monetary compensation in exchange for such practices or treatments; and

(B) does not include any practice or treatment; which does not seek to change sexual orientation or gender identity, that—

(i) provides assistance to an individual undergoing a gender transition; or

(ii) provides acceptance, support, and understanding of a client or facilitation of a client's coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices.

(2) GENDER IDENTITY.—The term "gender identity" means the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth.

(3) PERSON.—The term "person" means any individual, partnership, corporation, cooperative, association, or any other entity.

(4) SEXUAL ORIENTATION.—The term "sexual orientation" means homosexuality, heterosexuality, or bisexuality.

SEC. 4. UNFAIR OR DECEPTIVE ACTS AND PRACTICES RELATED TO CONVERSION THERAPY.

(a) UNLAWFUL CONDUCT.—It shall be unlawful for any person—

(1) to provide conversion therapy to any individual if such person receives compensation in exchange for such services;

(2) to advertise for the provision of conversion therapy and claim in such advertising—

(A) to change another individual's sexual orientation or gender identity;

(B) to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender; or

(C) that such efforts are harmless or without risk to individuals receiving such therapy; or

(3) to knowingly assist or facilitate the provision of conversion therapy to an individual if such person receives compensation from any source in connection with providing conversion therapy.

(b) ENFORCEMENT BY FEDERAL TRADE COMMISSION.—

(1) VIOLATION OF RULE.—A violation of subsection (a) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(2) POWERS OF COMMISSION.—

(A) IN GENERAL.—The Federal Trade Commission shall enforce this section in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act.

(B) PRIVILEGES AND IMMUNITIES.—Any person who violates subsection (a) shall be subject to the penalties, and entitled to the privileges and immunities, provided in the Federal Trade Commission Act (15 U.S.C. 41 et seq.).

(3) REGULATIONS.—The Federal Trade Commission may promulgate, in accordance with section 553 of title 5, United States Code, such regulations as the Commission considers appropriate to carry out this section.

(c) ENFORCEMENT BY STATES.—

(1) IN GENERAL.—If the attorney general of a State has reason to believe that an interest of the residents of the State has been or is being threatened or adversely affected by a practice that violates subsection (a), the attorney general of the State may, as parens patriae, bring a civil action on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

(2) RIGHTS OF FEDERAL TRADE COMMISSION.—

(A) NOTICE TO FEDERAL TRADE COMMISSION.—

(i) IN GENERAL.—Except as provided in clause (iii), the attorney general of a State, before initiating a civil action under paragraph (1), shall provide written notification to the Federal Trade Commission that the attorney general intends to bring such civil action.

(ii) CONTENTS.—The notification required under clause (i) shall include a copy of the complaint to be filed to initiate the civil action.

(iii) EXCEPTION.—If it is not feasible for the attorney general of a State to provide the notification required under clause (i) before initiating a civil action under paragraph (1), the attorney general shall notify the Commission immediately upon instituting the civil action.

(B) INTERVENTION BY FEDERAL TRADE COMMISSION.—The Commission may—

(i) intervene in any civil action brought by the attorney general of a State under paragraph (1); and

(ii) upon intervening—

(I) be heard on all matters arising in the civil action; and

(II) file petitions for appeal of a decision in the civil action.

(3) INVESTIGATORY POWERS.—Nothing in this subsection may be construed to prevent the attorney general of a State from exercising the powers conferred on the attorney general by the laws of the State to conduct investigations, to administer oaths or affirmations, or to compel the attendance of witnesses or the production of documentary or other evidence.

(4) PREEMPTIVE ACTION BY FEDERAL TRADE COMMISSION.—If the Federal Trade Commission institutes a civil action or an administrative action with respect to a violation of subsection (a), the attorney general of a State may not, during the pendency of such action, bring a civil action under paragraph (1) against any defendant named in the complaint of the Commission for the violation with respect to which the Commission instituted such action.

(5) VENUE; SERVICE OF PROCESS.—

(A) VENUE.—Any action brought under paragraph (1) may be brought in—

(i) the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code; or

(ii) another court of competent jurisdiction.

(B) SERVICE OF PROCESS.—In an action brought under paragraph (1), process may be served in any district in which—

(i) the defendant is an inhabitant, may be found, or transacts business; or

(ii) venue is proper under section 1391 of title 28, United States Code.

(6) ACTIONS BY OTHER STATE OFFICIALS.—

(A) IN GENERAL.—In addition to a civil action brought by an attorney general under paragraph (1), any other officer of a State who is authorized by the State to do so may bring a civil action under paragraph (1), subject to the same requirements and limitations that apply under this subsection to civil actions brought by attorneys general.

(B) SAVINGS PROVISION.—Nothing in this subsection may be construed to prohibit an authorized official of a State from initiating or continuing any proceeding in a court of the

State for a violation of any civil or criminal law of the State.

SEC. 5. SEVERABILITY.

If any provision of this Act, or the application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, and its application to any person or circumstance shall not be affected thereby.

LAW OF HEALTH CARE
Mr. Martin
Fall 2018 Student ID No._____

FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted in accordance with the amount of time suggested for each question. Please write legibly and leave a margin on the left-hand side of the page. Use only your student identification number to identify your blue book or blue books. If you use more than one blue book, make sure that your student ID number is on each one and number the blue books ("1 of 2," "2 of 2", etc.).

Because one student is to take this examination on a deferred basis (on account of a conflict with another exam), you must turn in this white examination paper along with your blue book or blue books. This is a temporary measure for examination security only, and this examination paper will be returned to you upon request once security is no longer required.

ALL BLUE BOOKS, INCLUDING SCRAP BLUE BOOKS, MUST BE RETURNED AT THE END OF THE EXAMINATION. LABEL ANY SCRAP BLUE BOOK WITH THE WORD, "SCRAP."

QUESTION ONE
(suggested time: thirty minutes)

A trial court is called upon to decide whether plaintiff has stated a claim for damages in alleging that her former physician revealed her identity to a daughter whom she had given up for adoption.

In 1989, according to the complaint, plaintiff, then known as Ramona Lovechild, gave birth to a daughter in a hospital in Oregon. She was unmarried at the time and her physician, Dr. Harry E. Mackey, registered her in the hospital as "Mrs. Jean Smith." The next day, Ramona consented to the child's adoption by Leslie and Shirley Eager, who named her Leslie Dawn. The hospital's medical records concerning the birth were sealed and marked to show that they were not public. Ramona subsequently married and raised a family. Only Ramona's mother and husband and Dr. Mackey knew about the daughter she had given up for adoption.

Twenty-nine years later the daughter, now known as Dawn Castaway, wished to establish contact with her biological mother. Unable to gain access to the hospital records or to the confidential court file of her adoption, but able to identify the attending physician, Dawn sought out Dr. Mackey. He agreed to assist. Dr. Mackey gave Dawn a letter which stated that he had registered Ramona at the hospital, that although he could not locate his medical records, he remembered administering diethylstilbestrol ("DES") to her, and that the possible consequences of this medication made it important for Dawn to find her biological mother. The latter statements were untrue and made only to help Dawn to breach the confidentiality of the records concerning her birth and adoption. In 2017, hospital personnel, relying on Dr. Mackey's letter, allowed Dawn to make copies of her mother's medical records, which enabled her to locate the plaintiff, Ramona.

Ramona was not pleased. The unexpected development upset her and caused her emotional distress, worry, sleeplessness, humiliation, embarrassment, and inability to function normally. She sought damages from the estate of Dr. Mackey, who had died, by an action against Dr. Mackey's personal representative.

On what legal theory or theories, if any, can Ramona recover against the estate of Dr. Mackey?

QUESTION TWO
(suggested time: thirty minutes)

If the financial and emotional threat of a malpractice action imposes fear in health-care providers dealing with patients who are near death, the threat of criminal prosecution for homicide imposes real terror. The risk of a criminal prosecution is not entirely hypothetical; from time to time ambitious prosecutors decide to file criminal charges against physicians who permit the termination of life-support systems in patients. The contemplation of a conviction for murder, life imprisonment, and all of the other attendant consequences, can be a powerful deterrent to a physician who may otherwise believe that it is appropriate to let a patient die.

In 2018 the district attorney in Los Gatos County brought murder charges against two physicians who had discontinued ventilation and then removed the feeding tube from a patient in one of the hospitals in the county. Clarence Herbert, the patient, had been first admitted to the hospital with a bowel obstruction in May of 2018. He was treated by Dr. Barber, Chief of Internal Medicine, and Dr. Baker, Chief of Surgery at the hospital. The first operation failed and sometime later the patient underwent an ileostomy, which diverts the gastrointestinal system directly from the small intestine out of the body through a hole in the abdomen.

Mr. Herbert returned to the hospital in July with kidney failure and was properly treated. He returned again on August 26 to have the ileostomy closed. The operation appeared to be successful, but Mr. Herbert went into cardiac arrest in the recovery room and was resuscitated only after so much time had passed that he had slipped into deep, and probably irreversible, coma. Mr. Herbert was kept on a ventilator, as there was a presumption that he would cease breathing and die when he was removed from the ventilator. On August 29, three days after the accident, the physicians, with the agreement of the family, removed the ventilator. Surprisingly, this did not lead to Mr. Herbert's death. The next day, August 30, the physicians, after consultation with the family, agreed to remove the intravenous feeding device that was continuing to keep Mr. Herbert alive. Mr. Herbert died on September 6.

The case apparently was brought to the attention of the district attorney by one of the nurses who disagreed with Dr. Baker's handling of the case. An indictment charging murder was secured against both Drs. Barber and Baker.

You are Dr. Baker's lawyer. How will you defend your client?

QUESTION THREE
(suggested time: one hour)

Should a court order a pregnant woman to submit, against her will and without her consent, to the delivery of her baby by the surgical procedure called Caesarian section? The Georgia Supreme Court answered this question, "Yes," in Jessie Mae Jefferson v. Griffin Spalding County Hospital Authority, 247 Ga. 86, 274 S.E. 2d 457 (1981). As found by the court the facts were these:

Defendant is in the thirty-ninth week of pregnancy. In the past few weeks she has presented herself to Griffin Spalding County Hospital for pre-natal care. The examining physician has found and defendant has been advised that she has a complete placenta previa; that the afterbirth is between the baby and the birth canal; that it is virtually impossible that this condition will correct itself prior to delivery; and that it is a 99% certainty that the child cannot survive natural childbirth (vaginal delivery). The chances of defendant surviving vaginal delivery are no better than 50%.

The examining physician is of the opinion that a delivery by caesarean section prior to labor beginning would have an almost 100% chance of preserving the life of the child, along with that of defendant.

On the basis of religious beliefs, defendant has advised the Hospital that she does not need surgical removal of the child and will not submit to it. Further, she refuses to take any transfusion of blood.

The Hospital is required by its own policies to treat any patient seeking emergency treatment. It seeks authority of the Court to administer medical treatment to defendant to save the life of herself and her unborn child.

The child is, as a matter of fact, viable and fully capable of sustaining life independent of the mother (defendant). The issue is whether this unborn child has any legal right to the protection of the Court.

To abort this child would be a criminal offense in Georgia [citation]. A viable unborn child has the right under the U.S. Constitution to the protection of the State through such statutes prohibiting the arbitrary termination of the life of an unborn fetus. *Roe v. Wade*, [citation].

> Because the life of defendant and of the unborn child are, at the moment, inseparable, the Court deems it appropriate to infringe upon the wishes of the mother to the extent it is necessary to give the child an opportunity to live.
>
> Accordingly, the plaintiff hospitals are hereby authorized to administer to defendant all medical procedures deemed necessary by the attending physician to preserve the life of defendant's unborn child.
>
> Because of the unique nature of [this case] … the defendant, Jessie Mae Jefferson, is hereby Ordered to submit to a sonogram (ultrasound) at the Griffin Spalding County Hospital or some other place which may be chosen by her where such procedure can be given. Should said sonogram indicate to the attending physician that the complete placenta privia is still blocking the child's passage into this world, Jessie Mae Jefferson, is Ordered to submit to a Caesarean section and related procedures considered necessary by the attending physician to sustain the life of this child.

You will be interested to know that, in the aftermath of the Court's order, Jessie Mae Jefferson disappeared. A police search for her was unsuccessful. While in hiding, she vaginally delivered a healthy baby and survived.

The case history of Hospital v. Jefferson is instructive. The hospital filed its application for an order of compulsory Caesarean on January 22, 1981, in the Superior Court (i.e. trial court), stating that Mrs. Jefferson was expected to give birth on or about January 26. An emergency hearing was scheduled by the trial court and conducted on January 23, 1981. Mrs. Jefferson was not present although both she and her husband received notice of the hearing. Later in the day January 23 the trial court allowed the

hospital's application for the order of compulsory Caesarian. Still later on the same day Mr. and Mrs. Jefferson filed a motion in the Georgia Supreme Court seeking a stay of the trial court's order. In the evening hours of January 23 the Georgia Supreme Court heard arguments on the motion for stay. At the Georgia Supreme Court Mr. and Mrs. Jefferson were present and were represented by a lawyer. A court-appointed lawyer represented the unborn child. The Georgia Supreme Court denied the motion for stay in a unanimous decision on the same day, January 23.

You can estimate the likelihood that Mr. and Mrs. Jefferson had adequate legal representation.

Hospital v. Jefferson is unique only because it was reported. More cases on similar facts have been decided by trial-level courts but they were not appealed, therefore are not reported. A knowledgeable commentator estimates that there are perhaps fifteen court-ordered compulsory Caesarians, maybe more, in the United States each year. In every case but one about which information came to that commentator's attention the woman was compelled to undergo a Caesarian delivery.

Comment on the legal support for and against the ruling in Hospital v. Jefferson. Your personal opinion is not sought, although you are free to express it. Keep in mind that caselaw support for compulsory major surgery upon a competent adult, without his or her consent and against his or her will, is virtually non-existent in this country.

Note well the Georgia Supreme Court's reliance on Roe v. Wade. Does Roe v. Wade support the Court's decision? Or has the Georgia Supreme Court mis-cited the case?

QUESTION FOUR
(suggested time: one hour)

Conversion therapy is psychological treatment or spiritual counseling designed to change a person's sexual orientation from homosexual or bisexual to heterosexual. Such treatments are controversial. Medical, scientific, and government organizations in the United States and Britain have expressed concern over conversion therapy and consider it potentially harmful.

The American Psychiatric Association opposes psychiatric treatment "based upon the assumption that homosexuality per se is mental disorder or based upon the a priori assumption that a patient should change his/her homosexual orientation" and describes attempts to change sexual orientation by practitioners as unethical. It also states that debates over the integration of gay and lesbian people have obscured science "by calling into question the motives and even the character of individuals on both sides of the issue" and that the advancement of conversion therapy may cause social harm by disseminating unscientific views about sexual orientation. United States Surgeon General David Satcher in 2001 issued a report stating that "there is no valid scientific evidence that sexual orientation can be changed".

The highest-profile advocates of conversion therapy today tend to be fundamentalist Christian groups and other organizations which use a religious justification for the therapy rather than speaking of homosexuality as "a disorder". The main organization advocating secular forms of conversion therapy is the National Association for Research & Therapy of Homosexuality (NARTH), which often partners with religious groups.

A bill, S. Bill 928, affecting conversion therapy, was introduced on April 25, 2017, in the United States Senate. A copy of S. 928 is annexed to this examination. Please read it.

Parts A, B, and C of this question will be weighted equally.

Part A

Explain in your own words what this bill, if it becomes law, will do.

Part B

Despite disapproval by the American Psychiatric Association and other organizations representing mental health professionals, there are therapists in the United States who offer conversion therapy. There are also informed adults who seek conversion therapy. As a matter of public policy, do you think that S. 928 is a good proposal or a bad proposal? Explain your answer.

Part C

If S. 928 becomes law, it will be the supreme law of the land subject only to a possible finding that the law is unconstitutional after a court challenge (which will surely occur). Briefly identify and explain the constitutional objections which will be raised against this law, if it becomes law.

END OF EXAMINATION
REMEMBER, ALL BLUE BOOKS MUST BE TURNED IN.
THIS INCLUDES BLUE BOOKS THAT ARE ENTIRELY UNUSED, AND ALSO BLUE BOOKS USED AS SCRAP.
LABEL ANY SCRAP BLUE BOOK WITH THE WORD, "SCRAP."