INMATE ORGAN DONATION: UTAH'S UNIQUE APPROACH TO INCREASING THE POOL OF ORGAN DONORS AND ALLOWING PRISONERS TO GIVE BACK

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"After how much we have taken from society . . . it's unacceptable that society is denied the opportunity to receive something so valuable from us in return."
Shannon Ross, inmate at the Stanley Correctional Institution[1]

I. INTRODUCTION

As of the writing of this Note, there are 122,427 people in need of a lifesaving organ transplant, with an additional person added to the national transplant waiting list every ten minutes.[2] Every day, an

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1. Sally Satel, *A Kidney for a Kidney*, SLATE (Apr. 15, 2013, 1:29 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2013/04/let_prisoners_donate_organs_it_could_be_fair_ethical_and_just.html. Shannon Ross is serving a seventeen-year sentence for reckless homicide at the Stanley Correctional Institution in Wisconsin for shooting eighteen-year-old Maximillian Thompkins in 2003 in retaliation for Thompkins robbing him. *Id.*; Jim Stingl, *Behind Bars and Willing to Donate Organs*, MILWAUKEE WIS. J. SENTINEL (Apr. 19, 2014), http://www.jsonline.com/news/wisconsin/ behind-bars-and-willing-to-donate-organs-b99250962z1-255885251.html. Ross now campaigns for the opportunity for inmates to be organ donors but is prevented from being a donor himself by the Wisconsin Department of Corrections, which has a policy disallowing the donation of organs from inmates to strangers. Stingl, *supra*. Ross says that his request to be an organ donor is in part for atonement: "I guess I was just thinking of ways that I could somehow start being of use to people instead of what I had been." *Id.*

2. U.S. Dep't of Health & Human Servs., ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, http://optn.transplant.hrsa.gov/ (last visited Sept. 20, 2015) [hereinafter ORGAN PROCUREMENT & TRANSPLANTATION NETWORK].

average of twenty-two people die on this list waiting for a vital organ.[3] Fortunately, a single healthy donor is capable of providing up to twenty-four different organs and tissues[4] and can be the salvation for up to eight people in need of vital organs.[5] However, despite these capabilities, the gap between those who need organs and those who have elected to donate them continues to expand.[6]

Numerous proposals have been made in an attempt to close this gap, some more radical than others. For instance, it has been proposed that commercial markets should be created, incentivizing the "donation" of organs and turning the system into one based on profit instead of pure altruism.[7] Other proposed solutions include compensating donors with non-monetary benefits,[8] requiring donation requests in hospitals,[9]

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3. *Id.*

4. Brooke Adams, *Utah Could Join States Allowing Prisoners to Donate Organs*, SALT LAKE TRIB. (Oct. 18, 2012, 9:12 AM), http://www.sltrib.com/sltrib/home3/55085039-200/inmates-death-organ-organs.html.csp.

5. ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, *supra* note 2.

6. *Id.* The number of people waiting for an organ transplant continues to grow with the donation rate remaining stagnant. *Id.* This variance is in part due to fewer people dying from head injuries, as the majority of posthumous organ donors in the past were head trauma victims. Gretchen Reynolds, *Will Any Organ Do?*, N.Y. TIMES (July 10, 2005), http://www.nytimes.com/2005/07/10/magazine/10ORGANS.html?pagewanted=all. The widespread use of seatbelts is largely behind this reduction in the number of head injury-related fatalities. *Id.*

7. Phyllis Coleman, *"Brother, Can You Spare a Liver?" Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 14–18 (1996). However, this incentive is prohibited by law in every state at this time, as federal law prohibits organ donors from receiving valuable compensation for their organs. *Id.* at 14–15; *see also infra* note 72 and accompanying text. Essentially, this proposal would change the system of organ *donation* into a system of organ *sales*—a complete overturn of the system. There are a variety of criticisms and concerns stemming from this proposal, including the fear of exploiting the poor, the immorality of the practice, overall ineffectiveness, and the unethical consequence of physicians essentially aiding donors in harming themselves. Gary S. Becker & Julio J. Elias, *Cash for Kidneys: The Case for a Market for Organs*, WALL ST. J. (Jan. 18, 2014. 4:58 PM), http://www.wsj.com/articles/SB10001424052702304149404579322560004817176; Marcia Clark & William Travis Clark, *Selling Your Organs: Should It Be Legal? Do You Own Yourself?*, FORBES (June 13, 2013, 4:32 PM), http://www.forbes.com/sites/marciaclark/2013/06/13/selling-your-organs-should-it-be-legal-do-you-own-yourself/.

While prohibited in every state, there are countries that have adopted this proposal. Iran, for instance, permits kidneys to be sold by living donors. Becker & Elias, *supra*. As a result, the waiting time to receive an organ in Iran has virtually disappeared. *Id.* Australia and Singapore have also instituted a similar, albeit less radical, approach, allowing for limited compensation for time lost from work. *Id.*

8. For instance, one proposed solution is to give donors and their family members priority on the waiting list should they subsequently find themselves in need of an organ transplant. Coleman, *supra* note 7, at 17.

changing the definition of death so more people will be eligible to donate posthumously,[10] and presuming consent unless an individual explicitly states that he or she does not want to be an organ donor.[11] Considering the growing number of inmates in the United States,[12] it is unsurprising that people have turned to the incarcerated population as another possible avenue for increasing organ donations. However, as with other proposals, this solution also comes with its drawbacks and objections, as will be discussed throughout this Note.

In Utah, with the passing of a new law,[13] the state is seeking to give its incarcerated population the chance to help minimize the gap between those waiting for transplants and those willing to provide them by allowing inmates to become posthumous organ donors. The law allows both general population inmates to sign up to become organ donors if they die while in the prison system as well as, by implication, the death row inmate population if they die while in custody or as a result of the carrying out of their death sentence.[14] This law is the first of its kind and signals a departure from the previous policy in Utah.[15]

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9. *Id.* at 17–18. In fact, most states already require hospitals to request donation from potential donors and relatives, as does the federal government for institutions receiving Medicare and Medicaid funds. *Id.* at 18.

10. Mark F. Anderson, *The Prisoner as Organ Donor*, 50 SYRACUSE L. REV. 951, 954 (2000).

11. Coleman, *supra* note 7, at 18–19. The presumed consent proposal "creates a rebuttable presumption that everyone wants to be an organ donor." *Id.* at 18. Thus, everyone is considered an organ donor unless they explicitly opt out of the system. *Id.* Notably, hospitals in the United States have a limited "right to presume consent when no family member can be found and no declaration has been made." Clark & Clark, *supra* note 7. Unsurprisingly, there are a number of constitutional objections to this practice, primarily a potential due process violation. Coleman, *supra* note 7, at 19; *see also infra* text accompanying notes 73–76. Even if constitutional violations were not a concern, the success of this proposal is uncertain. Spain and Belgium have both adopted this practice with promising success, but other countries have not seen a dramatic increase in the number of organ transplants. Clark & Clark, *supra* note 7.

12. Since the 1980s, the federal prison population alone has increased by approximately 5900 inmates a year, from 25,000 in 1980 to over 219,000 in 2013. NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 1 (2014), http://fas.org/sgp/crs/misc/R42937.pdf. Having increased nearly every year for decades, as of December 31, 2014, there are approximately 1,574,700 inmates in both federal and state prisons. E. ANN CARSON, U.S. DEP'T OF JUSTICE, NCJ 247282, PRISONERS IN 2013, at 1 (2014), http://www.bjs.gov/content/pub/ pdf/p13.pdf.

13. UTAH CODE ANN. § 64-13-44 (West 2013).

14. *See id.* Although the law does not explicitly state that the population on death row is included in the law, it does not distinguish between the two populations in its language, and it has thus been understood to apply to inmates on death row as well. *See, e.g.*, Arthur L. Caplan, *Organs Donated by Prisoners? No, No, No!*, MEDSCAPE (June 25, 2013), http://www.medscape.com/viewarticle/805478 ("[I]t suggests that before prisoners are executed, they could say that they want to be organ donors."); *Utah First to Explicitly Allow*

This Note will explore the contours of the Utah law, analyzing its benefits and drawbacks, responding to criticism, and addressing both the ethical and practical barriers facing the implementation of the law. Part II of this Note describes the governing law surrounding organ donation generally and summarizes the prior and present law relevant to using the incarcerated population as a solution to medical shortages. In Part III, the Utah law is introduced along with its procedural background and reception. Part IV addresses the many concerns with implementing this law and includes proposals for improvement. Part V offers a brief conclusion and a summary of suggestions for states looking to follow Utah's lead and draft a similar law. Ultimately, this Note proposes that similar laws be adopted across the states, with the slight modifications proposed in Parts IV and V.

II. GOVERNING AND PRIOR LAW

In the United States, organ donation is principally governed by the National Organ Transplant Act of 1984[16] and various versions of the Uniform Anatomical Gift Act ("UAGA").[17] The National Organ Transplant Act was passed "to provide for the establishment of . . . the Organ Procurement and Transplantation Network, to authorize financial assistance for organ procurement organizations, and for other

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Organ Donation by Prisoners, PRISON LEGAL NEWS (Jan. 13, 2015), https://www.prisonlegal news.org/news/2015/jan/13/utah-first-explicitly-allow-organ-donation-prisoners/ [hereinafter *Utah First*] (providing that the law "does not discriminate between general population prisoners and those on death row").

15. Before the passage of the law, it was Utah corrections' policy that death row inmates could not be organ donors. Adams, *supra* note 4.

16. Pub. L. No. 98-507, 98 Stat. 2339 (1984).

17. Shu S. Lin, Lauren Rich, Jay D. Pal & Robert M. Sade, *Prisoners on Death Row Should Be Accepted as Organ Donors*, 93 ANNALS OF THORACIC SURGERY 1773, 1774 (2012), http://www.annalsthoracicsurgery.org/article/S0003-4975(12)00517-6/pdf. The UAGA was promulgated by the National Conference of Commissions on Uniform State Laws "to further improve the system for allocating organs to transplant recipients." *Anatomical Gift Act (2006) Summary*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/ActSummary.aspx ?title=Anatomical%20Gift%20Act%20%282006%29 (last visited Feb. 22, 2015). The UAGA was originally promulgated in 1968 and was adopted uniformly by every state. *Id.* However, in 1987, the UAGA was revised with only twenty-six states adopting the revised version. *Id.* The most recent version, revised in 2006, was an attempt to create uniformity by resolving inconsistencies, thus creating a more efficient system. *Id.* The 2006 UAGA deals exclusively with posthumous gifts, outlining who is eligible to make a posthumous gift and under what circumstances. *Id.* Every state as well as the District of Columbia has enacted some form of the UAGA. Marjorie A. Shields, Annotation, *Validity and Application of Uniform Anatomical Gift Act*, 6 A.L.R. 6th 365, § 2 (2005).

purposes."[18] Among these "other purposes," it serves "to encourage cadaveric organ donation for organ transplants and to promote fair distribution of donor organs."[19] Significantly, neither the UAGA nor the National Organ Transplant Act explicitly prohibits organ donation by inmates generally or by inmates on death row.[20]

Generally, prison officials are charged with deciding whether inmates can volunteer to be organ donors.[21] However, there are laws governing the subject which vary from state to state.[22]

While the Utah law is certainly the first of its kind, it is not unique in allowing inmates to help reduce medical shortages. In fact, the practice of looking to the incarcerated population as a solution for medical shortages is well established.[23] Beginning in the 1950s in response to blood shortages, states began passing laws providing inmates with incentives to donate blood.[24] These laws were passed in a number of states, beginning with Massachusetts[25] before expanding to other states, such as Virginia[26] and Alabama.[27] While the Virginia statute is still in effect, most of these laws have been repealed—not due to any ethical concerns

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18. 98 Stat. 2339. The Organ Procurement and Transplantation Network also maintains a national registry to match donors with patients awaiting transplants. 42 U.S.C. § 274(b)(2) (2012).

19. E. Bernadette McKinney, William J. Winslade & T. Howard Stone, *Offender Organ Transplants: Law, Ethics, Economics, and Health Policy*, 9 HOUS. J. HEALTH L. & POL'Y 39, 57 (2008).

20. Lin, Rich, Pal & Sade*, supra* note 17, at 1774.

21. Rorie Sherman, *Dr. Death; Officials Question a Search for Organ Donors*, 16 NAT'L L.J. 1 (1993); *OPTN/UNOS Perspective on Organ Recovery from Condemned Prisoners*, UNITED NETWORK FOR ORGAN SHARING TRANSPLANT LIVING, http://www.transplantliving.org/community/newsroom/2013/11/optn-unos-perspectives-on-organ-recovery-from-condemned-prisoners/ (last visited Sept. 18, 2015) [hereinafter *OPTN/UNOS Perspective*] ("Ultimately the correctional authority must decide whether to allow any inmate to be evaluated for donation."). Further, even if permitted by prison authorities, the respective organ procurement organization or transplant center still has the discretion to not accept the organs. *OPTN/UNOS Perspective*, *supra*.

22. Adams, *supra* note 4; *see infra* notes 35–43.

23. Anderson, *supra* note 10, at 971.

24. *Id.*

25. *Id.* at 971–72. In Massachusetts, the program gave five days' credit for each pint of blood donated, later increasing the limit to ten days' credit per pint, with a limit on the number of donations that could be made. *Id.*

26. VA. CODE ANN. § 53.1-191 (2013) (providing that "any prisoner . . . [could receive] a credit toward his confinement if he . . . gives a blood donation to another prisoner" and that "a prisoner may receive credit for donating blood . . . to blood banks" under certain circumstances). While there is pending legislation to change the technical language of this statute, it is still in effect in Virginia. S.B. 1164, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

27. ALA. CODE § 14-9-3 (2011) (repealed 2015) (providing that "[e]very prisoner confined in the Alabama prison system who donates . . . blood to the American Red Cross shall be entitled to a deduction of [thirty] days from the term of his sentence").

or dissatisfaction with the practice but due to "a desire to standardize sentences and ensure that prisoners serve a substantial portion of their assigned sentences."[28] The Utah law follows this precedent of recognizing the "potential medical benefit" of the incarcerated population.[29]

From this practice arose the proposition to allow inmates to donate organs to help shorten the ever-expanding transplant waiting list. There are several reasons why people have looked to the inmate population as a source for organs for transplantation. For one, inmates are eligible *recipients* for organ transplants. Under the United Network for Organ Sharing ("UNOS")[30] allocation system, "absent any societal imperative, one's status as a prisoner should not preclude them from consideration for a transplant."[31] Indeed, under federal law, organ transplant eligibility is to be determined by medical criteria—not "a candidate's societal worth and contributions (or conversely societal debt and crimes)."[32] Additionally, the state is responsible for paying the high costs associated with an inmate receiving an organ transplant.[33] This alleged incongruity has led some to call for inmates to be eligible organ donors.[34]

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28. Anderson, *supra* note 10, at 972.

29. Brandi L. Kellam, Comment, *A Life for a Life: Why Death Row Inmates Should Be Allowed to Donate Their Organs Following Execution*, 81 UMKC L. REV. 461, 464 (2012).

30. UNOS is the non-profit organization that manages the organ transplant system. *About*, UNITED NETWORK FOR ORGAN SHARING, http://www.unos.org/about/ (last visited Sept. 4, 2015). In this capacity, UNOS manages the national transplant waiting list and develops policies "that make the best use of the limited supply of organs and give all patients a fair chance at receiving the organs they need, regardless of age, sex, ethnicity, religion, lifestyle or financial/*social status*." *Id.* (emphasis added).

31. U.S. Dep't of Health & Human Servs., *OPTN/UNOS Ethics Committee Position Statement Regarding Convicted Criminals and Transplant Evaluation*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, http://optn.transplant.hrsa.gov/resources/ethics/convicted-criminals-and-transplant-evaluation/ (last visited Sept. 18, 2015).

32. Andrew M. Cameron et al., *Should a Prisoner Be Placed on the Organ Transplant Waiting List?*, 10 AM. MED. ASS'N J. ETHICS 88, 89 (2008). This nondiscriminatory practice finds its basis in constitutional law. The Supreme Court has held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citation omitted).

33. In Rhode Island, an inmate received a liver transplant—a procedure that can cost nearly a million dollars—with the state covering forty percent of the cost. *Prison Organ Transplants, Donations Create Controversy*, PRISON LEGAL NEWS (Apr. 2014), https://www prisonlegalnews.org/news/2014/apr/15/prisoner-organ-transplants-donations-create-controversy/ [hereinafter *Prison Organ Transplants*]. Likewise, in California, an inmate received a heart transplant costing a million dollars. *Id.*

34. *E.g.*, Marissa Mararac, *Condemned Organs Should Be Up for Grabs*, DAILY EVERGREEN (Nov. 18, 2013, 6:00 AM), http://www.dailyevergreen.com/opinion/columns/article_27a12e74-4fd8-11e3-be73-0019bb30f31a.html?TNNoMobile (arguing that "[m]any states make the irresponsible decision to allow death-row inmates to receive organ donations, while not allowing inmates to donate their own organs").

Arizona,[35] California,[36] Florida,[37] Georgia,[38] Kansas,[39] Missouri,[40] New Jersey,[41] Oklahoma,[42] and South Carolina[43] have all considered promoting or currently promote donation from inmates after death. Of these states, most have only ever proposed such bills, never actually getting them signed into law. Although both New Jersey and Florida have similar statutes addressing the issue, neither approaches the subject as uniquely as Utah.[44]

Individual jails and prisons have also taken the initiative to institute programs, absent any direction from the legislature. For instance, the Texas Criminal Justice Department "allows offenders in the general prison population to donate organs . . . after death if they complete a

35. The proposed bill in Arizona—which never made it out of committee—would allow death row inmates to choose to die by the harvesting of vital organs for posthumous organ donation as opposed to lethal injection, thus making the harvesting of organs the actual method of execution. Coleman, *supra* note 7, at 29. Critics of this method are quick to point out that this would have serious implications for the role of physicians in capital punishment procedure. *Id.* at 30; *see also infra* note 177 and accompanying text.

36. California considered but failed to pass a policy similar to the Utah law. The California proposal would have "require[d] an inmate, upon admittance to a state prison, to complete a form through which the inmate would give or deny his or her consent to be an organ and tissue donor upon death." Assemb. B. 2440, 2009–10 Leg., Reg. Sess. (Cal. 2010).

37. FLA. ADMIN. CODE ANN. r. 33-602.112(1)(a)(5) (2015) (providing that "[u]pon the death of an inmate . . . [t]he institution shall immediately notify . . . [a]ny authorized organ donor organization which has received prior approval from the deceased for removal and donation of organs").

38. In 1996, a law was proposed in Georgia that would have allowed an inmate on death row to choose death by guillotine as the method of execution rather than death by electrocution to allow for posthumous organ donation. Kellam, *supra* note 29, at 469.

39. In 1987, Kansas Representative Martha Jenkins proposed reinstituting capital punishment to allow for inmates to donate their organs after execution. *Id.*

40. *See infra* note 91.

41. N.J. ADMIN. CODE § 10A:16-9.1 (2015) (providing that "[i]nmates shall be permitted to register to be organ/tissue donors upon their death").

42. *See infra* note 171.

43. South Carolina established a program within its Department of Corrections "to educate prisoners about the need for organ and tissue donors, the procedures required to become a registered organ donor, and . . . the procedures for determining the person's tissue type and the medical procedures a donor must undergo to donate bone marrow." S.C. CODE ANN. § 24-1-285(A) (2007). The South Carolina statute also allows for voluntary living organ or tissue donations under certain circumstances and with various limitations. *Id.* § 24-1-285(B).

44. While both Florida and New Jersey allow for posthumous organ donation, neither policy actively involves the state in the inmate's registration. Additionally, while Florida allows for posthumous organ donation, the Florida law does not explicitly allow inmates to register while in the prison system. These statutes also do not leave the door open for posthumous organ donation from death row inmates as the Utah law does. *See supra* note 14 and accompanying text.

donor form."[45] Additionally, believed to be the first program of its kind, Maricopa County, Arizona began a program in 2007 within its jail system—one of the largest in the country—allowing inmates with a desire to be organ donors to register.[46] After entering the jail system, "those who opt in are given access to the state donor registry site, and then the criminal justice system process continues as usual."[47] The program was met with overwhelming success—six years into the program, over fourteen thousand inmates became registered organ donors through the jail system.[48]

Although not commonly enshrined in statute, there is precedent for inmates serving as organ donors while incarcerated, both general population inmates and death row inmates. For instance, in Utah on January 17, 1977, Gary Gilmore's eyes, liver, and kidneys were voluntarily harvested for either transplant or study after his execution by firing squad.[49] Additionally, in Alabama in 1996, David Larry Nelson's

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45. Brandi Grissom, *Death Row Unlikely to Be Source for Organ Donations*, TEX. TRIB. (Sept. 10, 2012), http://www.texastribune.org/2012/09/10/death-organ-donation-fraught-ethical-dilemmas/. Texas also permits live organ donations among inmates under certain circumstances. *Id.* However, despite recently adopting a single-drug method of execution that could possibly allow death row inmates to become viable organ donors, *see infra* notes 167–73 and accompanying text, the Texas Criminal Justice Department does not intend to allow death row inmates to donate their organs. Grissom, *supra*.

46. Kate Bennion, *Kidneys from Felons? Prisoner Organ Donation Spurs Debate*, DESERET NEWS (Apr. 24, 2013, 11:05 AM), http://www.deseretnews.com/article/865578852/Kidneys-from-felons-Prisoner-organdonation-spurs-debate.html?pg=all. The program, aptly named "I Do," was introduced by Maricopa County Sheriff Joe Arpaio in an effort to "give[] the inmates a chance to do something good with their lives while increasing awareness for the need for organ donations." Bob McClay, *Hundreds of Inmates Line Up to Become Organ Donors*, KTAR NEWS (June 14, 2007, 5:08 AM), http://ktar.com/6/512953/Hundreds-of-Inmates-Line-Up-to-Become-Organ-Donors.

47. Bennion, *supra* note 46.

48. *Id.* Robert Fullerton and Patrick Beers, inmates who elected to be organ donors through the "I Do" program, say: "We might as well do the best we can do. We're not all bad. We're just in here for stupid mess ups." McClay, *supra* note 46. Austin Flowers, another inmate from the program, says: "I think this is a great thing because our organs are pretty important considering the risks we take with our lives everyday." *Id.* Flowers continues: "I'm willing to donate any organ possible . . . [to] help somebody that's hurting and help a family in need . . . ." *Id.*

49. Adams, *supra* note 4. However, bullet wounds from his execution by firing squad damaged some of his organs, proving them unusable. Julie Carr Smyth & Amanda Lee Myers, *Condemned Man's Wish Raises Ethical Questions*, ASSOCIATED PRESS (Nov. 14, 2013), http://bigstory.ap.org/article/ohio-child-killers-organ-donation-wish-perplexes. His corneas, however, were salvaged and successfully transplanted. Bennion, *supra* note 46. Kay Wells received his cornea transplant on January 17, 1977—two hours after Gilmore's execution. *Id.*

execution was halted so he could donate a kidney to his sick brother.[50] There is also precedent for inmates not on death row volunteering to donate organs. For instance, the life sentences of two Mississippi sisters were suspended on the condition that the younger sister donate a kidney to the older sister.[51]

However, there is also precedent in denying such requests from inmates—most notably the denial of Christian Longo's request to donate his organs after his execution.[52] Longo has campaigned for inmate organ donation for years despite his own request being denied, once even writing an editorial in the *New York Times* on the issue.[53] Additionally, Ronald Phillips—convicted for raping and killing a child—requested that his heart be donated to his sister, his kidney to his mother, and any other usable organs to others in need after his execution.[54] However, the Ohio Department of Rehabilitation and Correction denied his request.[55]

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50. Smyth & Myers, *supra* note 49. Unfortunately, Nelson's brother was too ill for surgery and died without receiving the transplant. *Id.*

51. Anna Stolley Persky, *Life from Death Row: Inmates Want to Donate Organs, but State Disagrees*, A.B.A. J. (Apr. 1, 2012), http://www.abajournal.com/magazine/article/life_from_death_row_inmates_want_to_donate_organs_but_state_disagrees. However, the transplant never occurred, as both women were too overweight for the transplant to be performed. *Id.* Interestingly, the sisters' life sentences were for an eleven-dollar armed robbery, and the motivation for allowing the early release appears to have been the financial burden of the older sister's dialysis on the state. Arthur Caplan, *The Use of Prisoners as Sources of Organs—An Ethically Dubious Practice*, 11 AM. J. BIOETHICS 1, 1 (2011).

52. Longo is a death row inmate in Oregon whose request to donate his organs was denied by prison officials in the Oregon Department of Corrections. *Prison Organ Transplants*, *supra* note 33. The Oregon Department of Corrections evaluates organ donation on a case-by-case basis. *Id.* Spokeswoman Jennifer Black says: "[I]t's not just a blanket 'yes.' All offenders can give part of their body away to somebody else. It has to be for the right reasons and the right person and all that." *Id.*

53. *Id.* In his March 5, 2011 editorial, Longo tells readers: "I have asked to end my remaining appeals, and then donate my organs after my execution to those who need them. But my request has been rejected by the prison authorities." Christian Longo, Opinion, *Giving Life After Death Row*, N.Y. TIMES (Mar. 5, 2011), http://www.nytimes.com/2011/03/06/opinion/06longo.html. He further explains: "If I donated all of my organs today, I could clear nearly [one] percent of my state's organ waiting list. I am [thirty-seven] years old and healthy; throwing my organs away after I am executed is nothing but a waste." *Id.* Longo also founded Gifts of Anatomical Value from Everyone, an organization advocating for inmate organ donation. *Prison Organ Transplants*, *supra* note 33. "The goal of [the organization] is to move prisons nationwide to implement such changes that give any willing, capable inmate the opportunity to save a life either while alive, through a kidney or bone marrow donation, or whole body donations after death, whether naturally or by execution." *Why Are Healthy Willing Prisoners Are* [sic] *Denied the Opportunity to Be Organ Donors by Prison Administration?*, GAVE LIFE, http://www.gavelife.org/from-willing-prisoners/ (last visited Sept. 18, 2015).

54. Mararac, *supra* note 34.

55. *Id.*

Likewise, Joseph Green Brown, a Florida death row inmate, was denied his request to donate a kidney to his brother while on death row.[56] Evidently, there is a flux both in practice and in law.

III. THE UTAH LAW

The bill, H.B. 26, was signed into law by Utah Governor Gary R. Herbert on March 28, 2013 after passing unopposed in both the House and the Senate.[57] Representative Steve Eliason advocated for the law, inspired by the 2010 death of Ronnie Lee Gardner, a convicted murderer who wanted to donate his organs but was not permitted to do so.[58] Eliason maintains that the opportunity provided by the law is "a way for someone who is trying to pay their dues to society to get one last shot on their way out," in addition to helping provide organs for those in need.[59]

The law provides for inmates to voluntarily donate their organs after death.[60] Specifically, the Utah Department of Corrections is *required* to "make available to each inmate a document of gift form that allows an inmate to indicate the inmate's desire to make an anatomical gift if the inmate dies while in the custody of the department" and to "maintain a record of the document of gift that an inmate provides to the department."[61] Following these actions, the Utah Department of Corrections "may, upon request, release to an organ procurement organization . . . the names and addresses of all inmates who complete and sign the document of gift form indicating they intend to make an anatomical gift."[62] The law also provides that the making of an anatomical gift by an inmate under the law must comply with the UAGA.[63]

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56. Sherman, *supra* note 21. His brother ultimately died from kidney failure. *Id.* Interestingly, before his execution took place, Brown was exonerated and released. *Id.*

57. Legislative History of *H.B. 26 Inmate Medical Donation Act (Eliason, S.)*, UTAH ST. LEGISLATURE, http://le.utah.gov/~2013/status/hbillsta/HB0026.htm (last visited Sept. 18, 2015). The law was first presented for consideration in the 2012 session. Adams, *supra* note 4. Although the bill passed in the House, time did not permit its passage in the Senate until the next session. *Id.*

58. *Utah First*, *supra* note 14.

59. Adams, *supra* note 4. Steven Gehrke, the public information officer for the Utah Department of Corrections, also reiterated this view, providing that the law is a means for inmates to "give back to society" and to "repay their debts." Andrew Adams & Linda Williams, *Inmates Donating Organs: Bill Would Formalize the Process*, KSL (Jan. 31, 2013), http://www.ksl.com/?sid=23914638.

60. UTAH CODE ANN. § 64-13-44 (West 2013).

61. *Id.* § 64-13-44(2)(a), (c).

62. *Id.* § 64-13-44(3).

63. *Id.* § 64-13-44(4); *see also supra* note 17.

On its signing, Utah became the first state to explicitly permit general population prisoners to sign up to become posthumous organ donors while incarcerated,[64] uniquely requiring the prison itself to play a role in the process. While most states only allow organs to be donated from inmates who die in the custody of the prison in rare circumstances and on a case-by-case basis,[65] there is no federal prohibition against prisoners becoming posthumous donors in this way.[66] Additionally, as critics of the law have been quick to point out, the law also leaves open the possibility for inmates on death row to become organ donors.[67] With the exception of the possibility left open by the Utah law, no state explicitly allows for executed inmates to donate their organs.[68]

Despite not being signed into law until March 2013, the Utah Department of Corrections began distributing organ donation cards for inmates to voluntarily fill out in 2011 after discussing the proposed bill with Eliason.[69] Although the Utah Department of Corrections took the initiative to distribute organ donation cards to inmates without a law requiring it to do so, the Utah law "enshrined [the practice] in statute so the policy isn't subject to the whims of changing administrations."[70] Despite this seemingly positive reception from the Utah Department of Corrections, the new law has not been particularly well received, with scores of people critiquing the law and predicting disastrous consequences from its implementation, as discussed in Part IV.

IV. CRITICISMS, CONCERNS, AND APPLICATION TO THE UTAH LAW

There are objections both to the Utah law specifically and to the general practice of allowing inmates to become organ donors. However, many of these objections are unsupported or can be eliminated with some minor modifications to the law. Thus, while many of these concerns are indeed valid, they do not limit the law's effectiveness and do not outweigh or lessen the positive impact of the law.

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64. *Utah First*, *supra* note 14.
65. *See supra* Part II.
66. Satel, *supra* note 1.
67. *Utah First*, *supra* note 14.
68. *Id.*
69. Adams, *supra* note 4. The donor forms were given to inmates with their prison paperwork as the inmates went through medical and dental screenings on arrival at the prison. *Id.*
70. *Id.*

A. Consent and Coercion

1. The Concern

One of the most commonly cited concerns when it comes to accepting organ donations from anyone incarcerated is the fear of coercion and lack of effective consent.[71] The National Organ Transplant Act provides: "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."[72] This prohibition and requirement of informed consent stems from the long-standing doctrine of self-determination, recognizing a right to refuse unwanted medical treatment and encompassing the concept of bodily integrity.[73]

This doctrine is well established in constitutional law: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . ."[74] From this doctrine, it follows that an individual also possesses the right to refuse medical treatment.[75] This right is grounded in the Due Process Cause of the United States Constitution.[76]

"Prisoners are subject to physically and psychologically stressful conditions that undoubtedly affect the decisions they make."[77] Jeffrey Orlowski, the executive director of the nonprofit Association of Organ Procurement Organizations, worries that it is impossible to ensure that an incarcerated person is making the same decision to be an organ donor as he would make outside the prison system.[78] While incarcerated, "all

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71. *E.g.*, Grissom, *supra* note 45 ("Is an inmate giving free and informed consent, or is he hoping to win favorable treatment?"); Lin, Rich, Pal & Sade, *supra* note 17, at 1774 ("Coercion is inevitable in donation by death row inmates.").

72. National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339 (1984). The Revised UAGA holds similarly. UNIF. ANATOMICAL GIFT ACT § 16(A) (UNIF. LAW COMM'N 2006) ("[A] person that for valuable consideration, knowingly purchases or sells a part for transplantation or therapy . . . commits a felony." (alterations omitted)).

73. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269–70 (1990); Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 57 (1995).

74. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

75. *Cruzan*, 497 U.S. at 270.

76. "[T]he Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." *Id.* at 281.

77. Lin, Rich, Pal & Sade, *supra* note 17, at 1776.

78. JoNel Aleccia, *Killer's Quest: Allow Organ Donation After Execution*, MSNBC (Apr. 21, 2011, 9:33 AM), http://www.nbcnews.com/id/42667886/ns/health-health_care/t/killers-

prisoners lose some component of citizenship rights" and are often "expressly stripped of the right to make personal decisions."[79] This is especially true for condemned inmates.[80] When a prisoner becomes a ward or property of the state, "the state holds the legal authority to consent for the inmate."[81] It is thus argued that, even without an explicit promise or agreement, inmates are likely to have an expectation of some kind of reward for their willingness to register as a donor.[82]

As for accepting organ donations from inmates on death row, the UNOS Ethics Committee has established an absolute opposition to the practice.[83] Anne Paschke, a spokeswoman for UNOS, has called the practice "morally reprehensible," citing the difficulty in ensuring that an incarcerated person gives proper consent "free from any coercion or consideration of personal gain."[84] Indeed, there is always the concern that an incarcerated individual is hoping to win clemency by deciding to become a posthumous organ donor, as opposed to becoming an organ donor for purely altruistic reasons.[85]

Another potential impetus for choosing to be an organ donor while on death row could be to buy more time before a scheduled execution by making a last-minute request to become a posthumous donor.[86] Other enticements besides pure altruism include an attempt to salvage a

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quest-allow-organ-donation-after-execution/#.VPaoTfnF8WI. The National Institutes of Health also holds that it may be impossible for incarcerated individuals to make truly voluntary decisions in the prison environment. Lin, Rich, Pal & Sade, *supra* note 17, at 1776.

79. Lin, Rich, Pal & Sade, *supra* note 17, at 1776.

80. *Id.*

81. *Id.*

82. *Id.* at 1774.

83. *OPTN/UNOS Perspective*, *supra* note 21. UNOS also cites public trust in the organ transplantation system as an additional concern. *Id.* "Public trust in the system of organ transplantation is based on the rights of everyone to make a free and fair choice regarding donation. If that choice is limited for some, due to concerns regarding coercion, public trust may be undermined." *Id.*

84. Smyth & Myers, *supra* note 49.

85. *Id.*

86. *See Should a Death-Row Inmate Be Allowed to Donate Organs?*, NAT'L PUB. RADIO HERE & NOW (Nov. 15, 2013), http://hereandnow.wbur.org/2013/11/15/death-row-organs [hereinafter NAT'L PUB. RADIO] (discussing the practice of death row inmates becoming organ donors with Arthur Caplan, the head of bioethics at New York University's Langone Medical Center). Indeed, this expectation is not unfounded. There is precedent for inmates on death row having their executions postponed by making last-minute requests to become organ donors. After making an "eleventh-hour" request to donate his organs, Ohio Governor John Kasich postponed Ronald Phillips' execution to consider his request less than a day before his scheduled execution. Liz Klimas, *Should an Inmate on Death Row Be Allowed to Donate Organs?*, BLAZE (Nov. 15, 2013), http://www.theblaze.com/stories/2013/11/15/should-an-inmate-on-death-row-be-allowed-to-donate-organs-take-our-poll/.

reputation or to rectify relationships with loved ones prior to execution.[87] Finally, there is also the additional concern of prisoners being able to effectively consent because of the prevalence of mental illness among the prison population.[88]

2. Application to the Utah Law

Much of this criticism stems from the practice of allowing *living* inmates to make live organ donations.[89] However, the Utah law is explicit in its application to only *posthumous* donations from incarcerated persons.[90] Most of these concerns disappear or should considerably lessen in circumstances where organs are only taken from deceased donors. Where inmates are unable to become organ donors until they are deceased, there is little to no reason for a donor to expect a reward or more favorable treatment for donating. Thus, in reference to the Utah law, many of the coercion concerns are not, in fact, relevant.

Looking at the law, it is clear that nothing in the statute suggests that inmates will be rewarded for deciding to be organ donors.[91] However,

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87. Persky, *supra* note 51; *see also* NAT'L PUB. RADIO, *supra* note 86. Indeed, one critic postulates that volunteering to be an organ donor could be a method of manipulating public opinion. Anderson, *supra* note 10, at 957.

88. Sherman, *supra* note 21. As of 2005, fifty-six percent of state prisoners, forty-five percent of federal prisoners, and sixty-four percent of jail inmates suffer from some kind of mental health problem. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (Tina Dorsey ed., 2006), http://www.bjs.gov/content/pub/pdf/mhppji.pdf.

89. *See, e.g.*, Caplan, *supra* note 14 ("[P]risoners may feel coerced, as if the only way to be paroled or released is to agree to give a kidney."); Ruth Faden, *The Utah Law Allowing Prisoners to Donate Organs Is Fine*, N.Y. TIMES (Apr. 25, 2013), http://www.nytimes.com/roomfordebate/2013/04/25/should-prisoners-be-allowed-to-donate-their-organs/the-utah-law-allowing-prisoners-to-donate-organs-is-fine. Ruth Faden, director of the Johns Hopkins Berman Institute of Bioethics, recognizes the ethical distinctions between accepting organs from living inmates and accepting organs from deceased inmates: "[I]s there anything ethically problematic about . . . allow[ing] prisoners to become posthumous organ donors, even if they die while still incarcerated? The answer is, with the right safeguards, probably not." Faden, *supra*. However, she continues: "All sorts of ethical issues would arise, of course, if prisoners were allowed to become *living* organ donors." *Id.*

90. UTAH CODE ANN. § 64-13-44(2)(a) (West 2013) (providing for the opportunity "to make an anatomical gift *if the inmate dies* while in the custody of the department" (emphasis added)).

91. The Utah law can be contrasted with a proposal made in South Carolina in 2007 to shorten inmates' sentences in exchange for bone marrow or kidney donations. Kevin B. O'Reilly, *Prisoner Organ Donation Proposal Worrisome,* AM. MED. NEWS (Apr. 9, 2007), http://www.amednews.com/article/20070409/profession/304099964/6/; Caplan, *supra* note 51, at 1. The law would have given an inmate sixty days early release for a donation of bone marrow; another proposal would have given up to 180 days good behavior credit for a humanitarian act, including a living kidney donation. Caplan, *supra* note 51, at 1–2. This

it also does not have an outright prohibition on offering an incentive to donate, which could potentially mislead inmates considering posthumous organ donation.[92] That being said, Gehrke guarantees that inmates will not be rewarded for agreeing to donate their organs.[93] The Utah law also stands in stark contrast to proposals that would remove organs from executed prisoners *as part of their sentence*, thus providing no opportunity to consent.[94]

The Utah law could be improved to address some of these concerns by explicitly outlining a number of safeguards to prevent coercion and the potential anticipation of a reward, thus ensuring informed consent to the greatest extent possible. For instance, the law could explicitly state that the decision to become a posthumous organ donor will have no bearing on parole or winning clemency. It could also explicitly state that donors will not receive any favorable treatment by authorities as a result of their decision to donate. Moreover, a provision could be added requiring anonymity of organ donors, such that the inmates are prohibited from disclosing their election to be an organ donor, and such that officials who supervise inmates and administer discipline are not informed of which inmates have signed up to be donors and which inmates have not. To help ensure anonymity, the law could provide that the inmate's decision to be an organ donor will be voided if that inmate intentionally destroys his or her anonymity, thus making it a condition of donation. These safeguards will prevent inmates from signing up to be organ donors for

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proposal was declared "grossly unethical" by the medical community. O'Reilly, *supra*. Not only are there serious ethical concerns with this proposal, but the reduced prison sentences would likely be considered valuable consideration under the National Organ Transplant Act and would thus constitute a violation of the Act. *Id.*

The Utah law can also be contrasted with a proposal by the Missouri legislature regarding the "Life-for-Life" program, which would have allowed for death row inmates to have their death sentences commuted to life without parole if they agreed to donate a kidney or bone marrow. Anderson, *supra* note 10, at 955. For obvious reasons, this proposal was "widely condemned and ultimately failed to get out of committee." *Id.* Unlike the Utah law, which offers no outright incentive to donate, the South Carolina and Missouri proposals essentially make an inmate choose between freedom and his organs. *See id.* The limitation to posthumous donations makes this kind of incentivization impossible under the Utah law.

92. Caplan, *supra* note 14 ("It does not say that [inmates] are supposed to be rewarded or get time off for [donating], but it does not prohibit that kind of incentive . . . .").

93. Adams & Williams, *supra* note 59. Gehrke states: "We make it very clear to an inmate up front that they'll not gain anything. They have no expectations, there will not be any perks." *Id.* "On the other hand," Gehrke continues, "they have no expectations to be punished in any way if they don't want to be an organ donor." *Id.*

94. *See generally* Louis J. Palmer, *Capital Punishment: A Utilitarian Proposal for Recycling Transplantable Organs as Part of a Capital Felon's Death Sentence*, 29 UWLA L. REV. 1, 4 (1998).

reasons other than altruism and will ensure that inmates are fully aware that agreeing to be a posthumous organ donor will have no effect on their treatment prior to death.

Another possible safeguard is the appointment of a prison-appointed panel to consider the authenticity of inmate requests to become posthumous organ donors, thus ensuring that the inmate understands his or her decision and confirming that the decision is a product of pure altruism.[95] While this would help ensure fully informed consent free from coercion, it is also an expensive option.

Specifically with reference to death row inmates, a deadline could be established by which the inmate would be required to make the request to become an organ donor prior to his or her scheduled execution. Accordingly, no eleventh-hour request can be made in an attempt to buy time or stay an execution. Moreover, where there is an established policy on whether inmates can be organ donors, there is no need to stay an execution to consider the issue—the issue has already been decided.

As for the concern regarding the prevalence of mental health issues, "[e]vidence showing that a prisoner's decision is the product of a mental disease does not show that he lacks the capacity to make a rational choice. It is the latter—not the former—that matters."[96] Thus, the pertinent question "is not whether mental illness substantially affects a *decision*, but whether a mental disease, disorder or defect substantially affects the prisoner's *capacity* to appreciate his options and make a rational choice among them."[97] Accordingly, "[i]f the mental disease, disorder or defect does not substantially affect this capacity . . . the prisoner is competent."[98] Following this rationale would require an individual analysis for each inmate who elects to register as an organ donor—it is no reason to declare an outright prohibition on the practice. This is another reason why a prison-appointed panel could be helpful—to engage in the individual analysis necessary to determine capacity, and, in turn, competence. Significantly, while this is a serious concern for inmates considering the high prevalence of mental health problems among prisoners, this concern exists for non-prisoners who elect to be organ donors as well.

Finally, it has been suggested that not giving the option to be a posthumous organ donor is essentially the reverse of coercion, turning

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95. Satel, *supra* note 1.

96. Dennis v. Budge, 378 F.3d 880, 890 (9th Cir. 2004).

97. *Id.* (citing Whitmore v. Arkansas, 495 U.S. 149, 166 (1990); Rees v. Peyton, 384 U.S. 312, 314 (1966)).

98. *Id.* Thus, it is possible for a decision to be "substantially affected by a mental disorder" while still being "the product of a rational thought process." *Id.*

the argument that inmates are unable to give consent free from coercion on its face.[99] "It is hypocritical to argue that organ donation by . . . inmates is morally wrong because the prisoners' autonomy is undermined by a subtle form of coercion, because denying the prisoners' requests to donate is an even greater compromise of their autonomy."[100] At its very core, the law gives inmates an opportunity to decide what they want done with their organs after death, without incentivizing a choice either way.

B. Disease and Organ Quality

1. The Concern

Critics of the Utah law and of allowing inmates to help remedy the organ shortage problem also cite the potential low quality of the organs—and consequently the low yield—because of disease, general health, and age.[101] Thus, critics argue that the low yield does not justify the potential pitfalls of this practice.

A recurring argument is that the prevalence of HIV and other communicable diseases in prisons makes the incarcerated population a dangerous pool for organ donations. Substantiating this argument is the Centers for Disease Control and Prevention's identification of prison inmates as "high-risk donors."[102] It is indisputable that, while incarcerated, inmates are at an increased risk for acquiring and transmitting HIV, other sexually transmitted infections, tuberculosis, viral hepatitis, and the like.[103] Indeed, in 2010, 20,093 state and federal

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99. Mark Curriden, *Inmate's Last Wish Is to Donate Kidney: His Quest Opens Debate over Ethics of Harvesting Executed Convicts' Organs*, 82 A.B.A. J. 26 (1996).

100. Lin, Rich, Pal & Sade, *supra* note 17, at 1775.

101. *E.g.*, Caplan, *supra* note 51, at 2 ("[M]any prisoners would not be eligible to serve as donors due to age, ill health, obesity, or communicable disease."); Persky, *supra* note 51 ("Prison rights advocates and ethicists worry [about] . . . spreading diseases, including human immunodeficiency virus, if prisoners—especially death row inmates—are allowed to donate.").

102. Christine A. O'Mahony & John A. Gross, *The Future of Liver Transplantation*, 39 TEX. HEART INST. J. 874, 874 (2012).

103. *HIV Among Incarcerated Populations*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/risk/other/correctional.html (last updated July 22, 2015). The prevalence of HIV among inmates is largely due to the risk factors that are prevalent among the incarcerated, such as injection drug use. *Id.* Further complicating the problem are the deficiencies in the screening processes in prisons. "[B]ecause of costs or other resource limitations, many prison systems do not screen for some serious or potentially serious disorders." McKinney, Winslade & Stone, *supra* note 19, at 43. Additionally, the mounting cost of curatives may suppress thorough screening efforts. *Id.* at 43–44. Moreover, for any number of reasons, an inmate may not admit to any symptoms or to high-risk behavior, thus not allowing for proper diagnosis, monitoring, or treatment. *Id.* at 44. These

prison inmates suffered from HIV or AIDS.[104] In fact, "[i]n 2010, the rate of diagnosed HIV infection among inmates in state and federal prisons was more than five times greater than the rate among people who were not incarcerated."[105] In Utah specifically, as of 2012, forty of the state's 6909 inmates were confirmed to be HIV-positive.[106]

Additionally, general health concerns and old age—especially with regard to death row inmates—have led some to argue that prisoners should not be added to the potential donor pool. On death row, inmates are not maintaining a good diet or getting a healthy amount of exercise.[107] Further, in large part due to the lengthy appeals process for capital punishment cases,[108] by the time the execution takes place, the inmate is usually of a relatively old age, having been on death row for decades in some instances.[109] And after spending such a substantial amount of time incarcerated, death row inmates have had ample opportunity to contract diseases that are so highly prevalent in prisons.[110] Thus, death row inmates present even greater concerns when it comes to the fear of unhealthy and damaged organs being donated for transplantation.[111]

2. Application to the Utah Law

Although the Utah law does not speak to this issue, for a number of reasons, this concern does not bar the law's effectiveness, nor does it endanger those individuals waiting for a transplant who are obviously interested in ensuring that they will be receiving a healthy organ. Eliason provides that "any organs taken from deceased inmates would be put through the same screening process as all donor organs."[112] Thus, any organs from inmates who are HIV-positive or with any dangerous disease or infection will be barred from donation, as would any potential donor

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various factors all account for the higher prevalence of such diseases among the incarcerated.

104. *HIV Among Incarcerated Populations*, *supra* note 103.

105. *Id.*

106. Adams, *supra* note 4.

107. Persky, *supra* note 51.

108. "The average time between sentencing and any execution is 10.6 years." Caplan, *supra* note 51, at 2.

109. *Id.* (noting that prisoners are often over the age of fifty at the time of their execution).

110. *Id.*; *see also supra* notes 103–06 and accompanying text.

111. In China—where ninety percent of organs used in transplantation are taken from executed inmates—there has been evidence of a higher morbidity and mortality rate for those who received donations from executed inmates. Sherman, *supra* note 21.

112. Adams, *supra* note 4.

from outside the prison system.[113] Accordingly, the only difference between organs from prisoners and organs from the general public is that more donors are likely to be rejected from the prison system than from the general public.

As for general health and age concerns, "marginal" donors—those with less than ideal health or of an older age—have donated viable organs without significant adverse effects.[114] Marginal donors found their way into the donor pool largely out of necessity, due to the growing number of people in need of organ transplants.[115] The practice of using marginal donors has been improved by the creation of better antirejection drugs and the development of better surgical techniques.[116] Thanks to these developments, transplant specialists have correspondingly relaxed the standards for what constitutes a viable organ for transplantation.[117] Age is no longer as important a factor as it once was.[118] Organs have been accepted from alcoholics and drug users.[119] Lungs have been accepted from smokers, and hearts and kidneys have been accepted from those with obesity and high blood pressure.[120] In this regard, so-called "marginal" organs are becoming the norm, now used in the majority of organ transplants.[121] While there certainly have been mistakes and serious complications arising from marginal organ donations, the practice has largely been successful. Notably, even with the healthiest organ, transplantation is always a risky and complicated procedure.[122]

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113. *Id.*

114. Lin, Rich, Pal & Sade, *supra* note 17, at 1774 ("[M]arginal donors have yielded perfectly usable organs for transplantation, and donor variables rarely have significant adverse effects on the outcome of transplant recipients.").

115. Reynolds, *supra* note 6.

116. *Id.*

117. *Id.*

118. *Id.* Organs are now regularly accepted from donors in their forties or fifties. *Id.* Moreover, organs have even been accepted from those in their eighties and nineties. *Id.* For instance, an eighty-year-old liver was transplanted at New York University, as was a ninety-three-year-old liver in Canada. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* In fact, such donations are so prevalent that Dr. Goran Klintmalm, a surgeon who oversees transplantation at Baylor University Medical Center, argues that older organs can hardly be called "marginal" anymore as they are quickly becoming the standard. *Id.*

122. *Id.* While not functioning for as long, older kidneys have proven to function just as well as younger ones. *Id.* Similarly, livers do not age at the same rate as their original owners, meaning that seventy-year-old livers can function perfectly well. *Id.* While hearts and lungs are not quite as durable, marginality has been shown to be quite relative. *Id.*

With reference to hepatitis C specifically, surgeons have begun accepting organs from donors with the virus.[123] "Ideally the surgeons implant these infected organs into patients who already harbor hepatitis C."[124] However, as a last resort, these organs from donors with hepatitis C have been transplanted into patients who do not have the virus.[125] Thus, while concerns regarding general health and the prevalence of communicable and infectious diseases are valid, they are certainly not a reason to disqualify the prison population from the opportunity to enter the donor pool.

With reference to HIV specifically, the prevalence of HIV could actually *benefit* individuals waiting for an organ who have the virus. In 2013, the Senate Health, Education, Labor and Pensions Committee passed the HIV Organ Policy Equity Act to enable research on organ donation from deceased HIV-positive donors to HIV-positive recipients.[126] If the research is supportive, the Secretary of Health and Human Services could allow for such transplants, thus increasing the donor pool to encompass HIV-positive individuals.[127] With the high prevalence of HIV in prisons[128] and the new possibility created by the HIV Organ Policy Equity Act, the Utah law could be the salvation for those on the waiting list who are also HIV-positive. The law can widen the pool of organ donors, and HIV-positive individuals can be placed on a shorter waiting list exclusively for those who are HIV-positive.

There is an additional safeguard for inmates on death row. With a scheduled execution date, the inmate can be screened for HIV and other diseases prior to surgery and then be kept in medical isolation, ensuring that the inmate is not infected and does not become infected leading up to the execution.[129] Moreover, screening tests can be repeated with different methods, allowing for a more exhaustive screening and ensuring the

123. *Id.*
124. *Id.*
125. *Id.*
126. Satel, *supra* note 1.
127. *Id.* It is estimated that this expansion of the donor pool could save approximately one thousand HIV-positive patients suffering from liver or kidney failure. *Id.*
128. *See supra* notes 103–06 and accompanying text.
129. Satel, *supra* note 1. In comparison to organs donated after unexpected deaths, such as from those who die from gunshot wounds or in car accidents, there is no rush to obtain test results quickly or to rely on family members for health information. *Id.* Indeed, the ability to conduct "tissue typing and immunologic testing . . . prior to the execution" would "ensur[e] better matches and [would] increas[e] the likelihood of successful transplants." Coleman, *supra* note 7, at 27. "Thus, the rate of disease transmission might actually be *lower* when death row inmates donate because of the possibility of more thorough screening processes." Lin, Rich, Pal & Sade, *supra* note 17, at 1774 (emphasis added).

health and viability of organs.[130] Accordingly, while death row inmates may present more health concerns, they also offer greater safeguards to ensure healthy organs.

Finally, the potential low yield predicted by critics from allowing inmates to become organ donors is no reason to bar the practice. With the expanding gap between individuals on the waiting list and organs being donated, and the life-or-death result of that gap widening, *any* possibility of increasing the number of organs transplanted is worth pursuing and can be lifesaving. Indeed, organ donation is more or less a numbers game. By allowing more people to elect to be organ donors, the law widens the pool of potential donors, wherein the decision as to whether organs are viable for donation can be left to the medical professionals. Accordingly, while there might be a low yield of organs for transplantation resulting from this practice, that does not outweigh the lifesaving benefits of the law.

C. The Death Row Donor

1. The Concern

"Any prisoner is able to do this," said Eliason of the opportunity presented by the law for inmates to become posthumous organ donors.[131] By this, Eliason is referring to how the law does not distinguish between the general prison population and the death row population.[132] With the exception of Utah, no other state currently allows death row inmates to be organ donors, making this opportunity quite exceptional.[133]

A concern that has been raised with regard to receiving organs for transplantation from the death row population, both generally and specifically with reference to the Utah law, is that it has the potential to sway judge and jury to issue more death sentences to increase the number of organ donations, essentially using these men and women eligible for the death penalty "for spare parts."[134] There is also a concern

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130. Lin, Rich, Pal & Sade, *supra* note 17, at 1774.

131. *New Utah Law Allows Organ Donations from Prisoners; Nearly 250 Sign Up*, NBC NEWS (Apr. 13, 2013, 3:42 PM), http://vitals.nbcnews.com/_news/2013/04/13/17674231-new-utah-law-allows-organ-donations-from-prisoners-nearly-250-sign-up.

132. *Id.*

133. Grissom, *supra* note 45.

134. Smyth & Myers, *supra* note 49; *accord* Anderson, *supra* note 10, at 956 ("[C]hoosing to kill one group of people in order to save another is not a morally defensible position."); Klimas, *supra* note 86. Indeed, Dr. Brooks Edward, director of the Mayo Clinic Transplant Center and a transplant cardiologist, worries that a judge or jury could be led to believe

that prosecutors might be more willing to seek the death penalty or that governors might be swayed in deciding whether or not to grant clemency in particular cases because they want to increase the pool of potential organ donors.[135]

There are also a number of practical considerations that opponents point to in support of prohibiting death row inmates from becoming posthumous organ donors. It is incontrovertible that most methods of execution are not consonant with organ donation.[136] The problem with most methods of execution is twofold. First, the execution itself damages organs. Second, there is ordinarily a lengthy time period between the execution itself and the actual declaration of death.[137]

The predominant method of execution is by three-drug lethal injection,[138] used by a majority of the states that have not abolished capital punishment as well as the federal government.[139] The Supreme Court famously upheld the constitutionality of the three-drug lethal injection in 2008 when a challenge was brought against Kentucky's lethal injection protocol.[140] In so holding, the Supreme Court reiterated that it "has never invalidated a [s]tate's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."[141] However, the Supreme Court granted the petition for certiorari in *Warner v. Gross* on January 23, 2015 to consider the applicability of *Baze v. Rees* under a different lethal injection protocol and whether there existed an unreasonable risk of pain and suffering.[142] Due to the

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they were saving innocent people's lives by imposing capital punishment, effectively incentivizing handing down the death penalty. Smyth & Myers, *supra* note 49.

135. Grissom, *supra* note 45.

136. Caplan, *supra* note 51, at 3.

137. *Id.*

138. *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Sept. 23, 2015).

139. Baze v. Rees, 553 U.S. 35, 42–43 (2008) (plurality opinion). The first drug, usually sodium thiopental or the newly introduced pentobarbital, is a sedative that "induces a deep, comalike unconsciousness" with the correct dosage, thus ensuring that the individual does not experience pain with the second and third drugs. *Id.* at 44; *accord* Lin, Rich, Pal & Sade, *supra* note 17, at 1774; *State by State Lethal Injection*, *supra* note 138. The second drug, pancuronium bromide, "is a paralytic agent that inhibits all muscular-skeletal movements," thus stopping respiration and causing muscle paralysis. *Baze*, 553 U.S. at 44. The third drug, potassium chloride, "interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest" and ultimately causes death. *Id.*

140. *Baze*, 553 U.S. at 62.

141. *Id.* at 48.

142. Warner v. Gross, 135 S. Ct. 1173 (2015). Plaintiffs Charles Warner, Richard Glossip, John Grant, and Benjamin Cole were all convicted of murder, sentenced to death, and scheduled for execution on dates ranging from January 15, 2015 to March 5, 2015. Warner v. Gross, 776 F.3d 721, 723–24 (10th Cir. 2015). Despite the challenge to the

unavailability of sodium thiopental,[143] Oklahoma substituted midazolam hydrochloride as the first drug in its lethal injection cocktail,[144] which is injected to render the condemned inmate unconscious.[145] It was the use of this particular drug—midazolam hydrochloride—that was at issue in the case and which generated controversy nationwide following the botched and highly publicized execution of Clayton Lockett.[146] The drug was also blamed for the botched executions of Dennis McGuire in Ohio[147] and

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constitutionality of the lethal injection protocol in Oklahoma, the Tenth Circuit denied the request to stay the four executions on January 12, 2015. *Id.* at 724. The Supreme Court also denied the application for stays of execution on January 15, 2015. Warner v. Gross, 135 S. Ct. 824, 824 (2015). Justice Sotomayor—along with Justice Ginsburg, Justice Breyer, and Justice Kagan—dissented from the denial. *Id.* (Sotomayor, J., dissenting). After certiorari was granted on January 23, 2015, the Supreme Court granted the application for stays of execution on January 28, 2015 pending final disposition of the case. Glossip v. Gross, 135 S. Ct. 1197 (2015). However, the stay came too late for Warner, who was executed on January 15, 2015 after the Supreme Court initially rejected the application for stays in its 5-4 vote. Adam Liptak, *Justices Stay Executions of 3 in Oklahoma, Pending Decision on Lethal Drug Protocol*, N.Y. TIMES (Jan. 28, 2015), http://www.nytimes.com/2015/01/29/us/justices-delay-executions-of-3-on-oklahomas-death-row.html. "That sequence of events brought attention to a gap in the [C]ourt's internal procedures, which require the votes of four [J]ustices to add a case to the [C]ourt's docket but five to stop an execution." *Id.*

143. *See infra* note 168.

144. See *supra* note 139, for a discussion of the traditional three-drug lethal injection protocol.

145. *Warner*, 776 F.3d at 725. Many states turned to midazolam for their lethal injection cocktail when more traditional lethal injection drugs became scarce. Glossip v. Gross, 135 S. Ct. 2726, 2734 (2015). See *infra* note 168, for a discussion of the lethal injection drug shortages.

146. Clayton Lockett was executed on April 29, 2014 in Oklahoma—the first person executed using the three-drug cocktail with midazolam. *Warner*, 776 F.3d at 725. Following the injection of the first two drugs and partway through the injection of the third, "Lockett began to move and speak. In particular, witnesses heard Lockett say: 'This shit is fucking with my mind,' 'something is wrong,' and '[t]he drugs aren't working.'" *Id.* (citation omitted). Lockett was not pronounced dead until forty-three minutes later, without ever receiving the rest of the third drug—potassium chloride. *Id.* Following this botched execution, President Obama and the United Nations expressed their disapproval; Oklahoma Governor Mary Fallin ordered a review of the protocol; and Robert Patton, head of the Oklahoma Department of Corrections, asked for all executions to be postponed until the execution protocol could be revised. Robert Barnes & Mark Berman, *Supreme Court Will Review Lethal Injection Drug Protocol Used in Executions*, WASH. POST (Jan. 24, 2015), http://www.washingtonpost.com/politics/courts_law/supreme-court-will-review-lethal-injection-drug-protocol-used-in-executions/2015/01/23/10841c10-a347-11e4-9f89-561284a573f8_story.html.

147. Richard Wolf, *Supreme Court Will Review Use of Lethal Injections*, USA TODAY (Jan. 23, 2015, 8:42 PM), http://www.usatoday.com/story/news/nation/2015/01/23/supreme-court-execution-drug/22212827/. Dennis McGuire reportedly "made snorting noises for [twenty] minutes before dying." *Id.*

Joseph Wood in Arizona.[148] Five states have already used this drug and at least five other states have proposed using it.[149]

While *Baze* provides that "[s]ome risk of pain is inherent in any method of execution" and "that the Constitution does not demand the avoidance of all risk of pain in carrying out executions,"[150] there was speculation that the Supreme Court would strike down the Oklahoma protocol.[151] Despite the compelling case made for finding the use of midazolam hydrochloride unconstitutional, the Supreme Court both permitted the continued use of the drug and affirmed the constitutionality of capital punishment in the United States in its June 2015 decision.[152] Nevertheless, the decision was rendered by a divided court,[153] with strong and impassioned opinions in the majority and dissents calling for the abolition of the death penalty.[154] Thus, the debate

148. *Id.* Joseph Wood "appeared to gasp hundreds of times during a death that took nearly two hours." *Id.*

149. Annie Waldman, *Lethal Rejection: Will the Supreme Court's Lethal Injection Review Kill the Death Penalty?*, PROPUBLICA (Feb. 4, 2015, 12:39 PM), http://www.propublica.org/article/will-the-supreme-courts-lethal-injection-review-kill-the-death-penalty.

150. Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion).

151. Waldman, *supra* note 149.

152. Glossip v. Gross, 135 S. Ct. 2726, 2732, 2739–46 (2015). Specifically, the court refused to find the lethal injection cocktail unconstitutional for two reasons. *Id.* at 2731. First, "the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain." *Id.* Second, there was insufficient evidence to overturn the lower court's holding that the prisoners failed to establish that the lethal injection protocol resulted in a substantial risk of severe pain. *Id.*

153. It was a 5-4 decision, with Justice Alito writing for the majority. *Id.* at 2730. Justice Scalia and Justice Thomas both filed concurring opinions, with Justice Breyer and Justice Sotomayor filing dissents. *Id.* at 2730–31.

154. In a clear argument for abolition, Justice Breyer, in his dissent, argued that "the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment.'" *Id.* at 2756 (Breyer, J., dissenting) (quoting U.S. CONST. amend. VIII). He called for a "full briefing on . . . whether the death penalty violates the Constitution" as opposed to "try[ing] to patch up the death penalty's legal wounds one at a time." *Id.* at 2755. Specifically, Justice Breyer noted "three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose." *Id.* at 2755–56. Justice Sotomayor had similar sentiments, condemning the court's upholding of "[a] method of execution that is intolerably painful—even to the point of being the chemical equivalent of burning alive." *Id.* at 2793 (Sotomayor, J., dissenting). Justice Scalia, in his concurrence, responded to the dissents and the reference to abolition with disdain, referencing Justice Breyer's "gobbledy-gook" argument, "full of internal contradictions." *Id.* at 2747 (Scalia, J., concurring). Justice Thomas called "for the Court to stop making up Eighth Amendment claims in its ceaseless quest to end the death penalty through undemocratic means." *Id.* at 2755 (Thomas, J., concurring).

Further demonstrating the strong opinions of the divided court, four of the Justices read their opinions from the bench on June 29, 2015—a rare occurrence that signals "the importance [the decision] carried for them and the vehemence of their disagreement."

over the constitutionality of the death penalty is likely to progress into the future.[155]

Not only does the questionable constitutionality of certain methods of lethal injection pose a potential problem, but medical experts maintain that the execution chemicals used in the three-drug lethal injection are damaging to the organs and not conducive to posthumous organ donation.[156] Virtually all transplantable organs are destroyed by this method, beginning with the heart and lungs; consequently, the kidneys, liver, and other internal organs are also destroyed.[157] Indeed, the very purpose of lethal injection is to destroy these organs.

The timing concerns exist because inmates do not die on life support and, consequently, the donation "must be accomplished using protocols developed from donation after cardiac determination of death without life support."[158] Thus, "[p]risoners would be treated as if they were . . . patients in intensive care units with nonsurvivable injuries who have treatment withdrawn and a transplant team present to immediately try to retrieve organs after monitored cardiac arrest has occurred."[159]

Incarcerated or not, hearts cannot be used for transplantation after a non-life support death.[160] For a donor who is not incarcerated—in terms of salvaging the liver, kidneys, or lungs—"the donor in a hospital setting is taken directly to an operating room after cardiac arrest, and, after a

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Robert Barnes, *Supreme Court Upholds Lethal Injection Procedure*, WASH. POST (June 29, 2015), http://www.washingtonpost.com/politics/courts_law/supreme-court-upholds-lethal-injection-procedure/2015/06/29/2b5cee6e-1b3c-11e5-93b7-5eddc056ad8a_story.html.

155. Justice Scalia, for his part, is steadfast in his position that the death penalty has always been and will always be constitutional: "[N]ot once in the history of the American Republic has [the Supreme Court] ever suggested the death penalty is categorically impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*." *Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring). Significantly, however, *Glossip* represents "the first time in the last two decades that any of the court's liberals have embraced full-on death penalty abolitionism." Noah Feldman, *Death Penalty Survives, for Now*, BLOOMBERG VIEW (June 29, 2015, 11:41 AM), http://www.bloombergview.com/articles/2015-06-29/death-penalty-survives-for-now. With Justice Breyer's dissenting opinion and Justice Ginsburg's joining, there appear to be two Justices who support complete abolition of the death penalty. *See id.*

156. Aleccia, *supra* note 78 ("The three-drug cocktail used in lethal injection may render organs unsuitable for transplant."); Klimas, *supra* note 86 ("Some medical experts . . . warn that execution chemicals could render organs unusable if taken after lethal injection."); Smyth & Myers, *supra* note 49 ("[K]eeping vital organs viable during executions would require avoiding lethal injection . . . .").

157. Palmer, *supra* note 94, at 31.

158. Caplan, *supra* note 51, at 3.

159. *Id.* These patients are known as DCDD donors (donation after cardiac determination of death). *Id.*

160. *Id.*

waiting period of up to [five] minutes depending on the protocol in place at the hospital, a rapid retrieval operation is performed."[161]

While inmates would be treated similarly to the average DCDD donor, inmates are obviously *not* average DCDD donors and, therefore, additional concerns exist. With use of the three-drug cocktail, there is a ten to fifteen minute waiting period before the prisoner is examined for evidence of cardiac activity.[162] Additionally, as executions take place in maximum security prisons, it is argued that the donor would need to be transported to a medical facility to have access to the proper medical equipment and personnel.[163] This delay makes it substantially more difficult to recover viable organs.[164]

2. Application to the Utah Law

As to the concern that a judge or jury might be more likely to hand down a death sentence, a prosecutor more likely to seek capital punishment, or a governor more likely to grant clemency, there is an ironbound safeguard: the law is explicit in that inmates *must volunteer* to become organ donors.[165] Handing down a death sentence, while increasing the number of people on death row, will not necessarily result in more donations from the death row population. The inmate must still volunteer. The inmate must still be competent. The inmate must still pass the health screenings and all of the other steps that come between being given a death sentence and being declared a viable organ donor under the Utah law. Additionally, if the anonymity proposal is adopted,[166] the law should have no bearing on any potential granting of clemency after an inmate has decided to become or not to become an organ donor. Frankly, even without these safeguards, this concern largely underestimates the intelligence of judges and juries. It is hardly reasonable to assume that a judge, prosecutor, governor, or rational jury would advance the death penalty on the hopes of potentially saving a life down a long and tenuous line.

A possible solution to the problem of the three-drug lethal injection destroying organs could come with the adoption of the one-drug protocol

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161. *Id.* While kidney procurement appears to be as successful in this regard as it is for those who die on life support, procurement of livers and lungs is less certain. *Id.*

162. Lin, Rich, Pal & Sade, *supra* note 17, at 1776.

163. *Id.* at 1777.

164. *Id.*

165. UTAH CODE ANN. § 64-13-44(2)(a)–(b) (West 2013); *see also* H.B. 26, 60th Leg., Gen. Sess. (Utah 2013) ("This bill provides for inmates to *voluntarily* donate their organs posthumously." (emphasis added)).

166. *See supra* p. 495.

as the means of execution. Eight states have adopted the one-drug protocol,[167] largely out of necessity due to shortages affecting the availability of drugs necessary for the three-drug cocktail.[168] The one-drug protocol consists of one large dose of an anesthetic—usually sodium thiopental or pentobarbital.[169] "The dosage, however, would exceed that normally administered and would be sufficient to render the condemned

167. *State by State Lethal Injection*, *supra* note 138. These states are Arizona, Georgia, Idaho, Missouri, Ohio, South Dakota, Texas, and Washington. *Id.* Additionally, Arkansas, California, Kentucky, Louisiana, North Carolina, and Tennessee have all expressed an intent to convert to the one-drug protocol. *Id.*

168. In 2011, Hospira, Inc.—the sole American manufacturer of the anesthetic sodium thiopental—announced that it would no longer be producing the drug. Erik Eckholm & Katie Zezima, *States Face Shortage of Key Lethal Injection Drug*, N.Y. TIMES (Jan. 21, 2011), http://www.nytimes.com/2011/01/22/us/22lethal.html?_r=0. This departure from the market was due to fear of liability in Italy—where the factory that produces the drug was located—after Italy decided that the drug was not permitted to be exported if it would be used for capital punishment. *Id.* Consequently, some states turned to England to supply sodium thiopental; that is, until England *also* banned the export of drugs for use in capital punishment. *Id.* Subsequently, the European Union instituted an export ban on lethal injection drugs in 2011, including sodium thiopental. Matt Ford, *Can Europe End the Death Penalty in America?*, ATLANTIC (Feb. 18, 2014), http://www.theatlantic.com /international/ archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/. States thus turned to an alternative drug, pentobarbital, to replace sodium thiopental. Glossip v. Gross, 135 S. Ct. 2726, 2733 (2015). Pentobarbital was used in all forty-three executions administered in 2012 until it, too, became unavailable when death penalty abolitionists lobbied against the Danish manufacturer of the drug. *Id.* Following suit, "some smaller drugmakers elsewhere in the world . . . also declined to sell sodium thiopental and other lethal-injection drugs to U.S. states, citing activist pressure, the fear of lawsuits, and their ethical obligations." Ford, *supra*. This led some states to turn to "so-called compounding pharmacies, or to use combinations of new and untested drugs to put inmates to death," resulting in legal claims of undue suffering. Dan Frosch, *Wyoming Considers Firing Squad as Death-Row Backup*, WALL ST. J. (Jan. 25, 2015, 8:00 PM), http://www.wsj.com/articles/ wyoming-considers-firing-squad-as-death-row-backup-1422230396. This series of events led the "[s]tates [to] change their protocols 'with a frequency that is unprecedented among execution methods in this country's history.'" *Glossip*, 135 S. Ct. at 2796 (Sotomayor, J., dissenting) (quoting Deborah W. Denno, *Lethal Injection Chaos Post*-Baez, 102 GEO. L.J. 1331, 1335 (2014)).

169. *State by State Lethal Injection*, *supra* note 138. Notably, the one-drug protocol is the same method that is used in physician-assisted suicides in states where the practice is legal. Erik Eckholm, *Panel Urges One-Drug Lethal Injection*, N.Y. TIMES (May 7, 2014), http://www.nytimes.com/2014/05/07/us/panel-urges-one-drug-lethal-injections.html?_r=0. It is also the preferred method for euthanizing animals, as it is considered "more humane and less prone to error." THE CONSTITUTION PROJECT, IRREVERSIBLE ERROR: RECOMMENDED REFORMS FOR PREVENTING AND CORRECTING ERRORS IN THE ADMINISTRATION OF CAPITAL PUNISHMENT 140 (2014), http://www.constitutionproject.org/wp-content/uploads/2014/06/ Irreversible-Error_FINAL.pdf. However, there are still difficulties in obtaining these drugs. *See supra* note 168.

clinically brain-dead."[170] This one-drug lethal injection could allow for viable organ donations from executed inmates.[171]

While the one-drug protocol effectively leads to anesthesia-induced brain death, in order for this method to be successful for organ donation, the inmate would need to be attached to an artificial ventilation system.[172] If this can be done, "[t]he procedure . . . would be identical to that used regularly by physicians who procure organs from their brain-dead patients."[173] There are, however, two major obstacles. First, most prisons are not equipped with the requisite artificial ventilation system, the necessary medical equipment, or medical personnel. Second, it could be argued that this practice violates the dead-donor rule.[174]

As to the lack of medical technology, the necessary medical equipment could be placed in the prison if it is not already equipped.[175] However, this necessarily comes at a substantial cost. A more practical solution would be for a surgical vehicle commonly used by hospitals in emergency situations to be available on site.[176] As for the necessary medical personnel, doctors and nurses are prohibited by their governing associations from participating in executions.[177] Indeed, this conflict has

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170. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 401 (1996).

171. Adams, *supra* note 4. Compare this proposal to a proposal by Representative Joe Dorman in Oklahoma, who drafted a bill that would allow inmates to be anesthetized, have their organs removed, and then be kept on life support until their execution. Graham Lee Brewer, *Oklahoma Lawmaker Wants to Allow Death Row Inmates to Donate Organs*, NEWSOK (Nov. 6, 2013, 12:00 PM), http://newsok.com/oklahoma-lawmaker-wants-to-allow-death-row-inmates-to-donate-organs/article/3901532. This proposed removing the organs *before* a person is declared brain dead. Both the ethics and the practicality of this proposal were criticized, with the Oklahoma Corrections Department coining it a "potential disaster." *Id.*

172. Kellam, *supra* note 29, at 481.

173. Patton, *supra* note 170, at 401.

174. The dead-donor rule is a fundamental concept for organ donation, providing that "vital organs should only be removed from dead patients, and that living patients should not be killed for or by organ procurement." Lin, Rich, Pal & Sade, *supra* note 17, at 1776.

175. While some prisons might be equipped with the necessary medical equipment or capable of updating the existing equipment to provide for possible organ removal, this is unlikely for most prisons. *See* Patton, *supra* note 170, at 423.

176. Another proposed solution would be to move the execution to a medical facility capable of recovering the organs post-execution. Lin, Rich, Pal & Sade, *supra* note 17, at 1777. However, moving an inmate on death row "to an unsecured location would be difficult, given the uncertainty of the appeals process, protests, demonstrations, security requirements, and potential for escape." *Id.* Additionally, "many hospitals will likely be resistant to accepting prisoners for execution." *Id.*

177. The American Medical Association, the World Medical Association, the American College of Physicians, the American Public Health Association, the American Society of Anesthesiologists, the Society of Correctional Physicians, and the American Nurses Association have all issued statements in opposition to the practice or precluding members

been discussed at length in legal scholarship.[178] However, this is not problematic for the same reason why the dead-donor rule is not implicated.[179] The dead-donor rule—which has also been discussed at length in legal scholarship,[180]—should not be implicated because organs are permitted to be removed following brain death under the dead-donor rule.[181] After brain death, physicians can no longer be said to be participating in an execution by assisting in organ removal. Regardless of

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from participating in executions. *E.g.*, Paul Litton, *Physician Participation in Executions, the Morality of Capital Punishment, and the Practical Implications of Their Relationship*, 41 J.L. MED. & ETHICS 333, 335 (2013). The American Medical Association's ethical guidelines provide: "A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution." *Opinion 2.06—Capital Punishment*, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page? (last updated June 2000). Indeed, it is argued that this practice "places the surgeon in the role of executioner," thus violating the Hippocratic Oath and promise to do no harm. *See* Lin, Rich, Pal & Sade, *supra* note 17, at 1776. The American Society of Anesthesiologists also condemns the practice, stating that "[p]hysicians are healers, not executioners." Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354 NEW ENG. J. MED. 1221, 1221 (2006). Similarly, the Society of Correctional Physicians and the American Nurses Association have both established outright prohibitions on involvement in executions. *Id.* at 1223. "Only the national pharmacists' society, the American Pharmaceutical Association, permits involvement, accepting the voluntary provision of execution medications by pharmacists as ethical conduct." *Id.*

178. *E.g.*, Daniel N. Lerman, Note, *Second Opinion: Inconsistent Deference to Medical Ethics in Death Penalty Jurisprudence*, 95 GEO. L.J. 1941, 1944–60 (2007); Litton, *supra* note 177.

179. *See infra* notes 180–81 and accompanying text.

180. For example, see Patton, *supra* note 170, at 403–05 and Kellam, *supra* note 29, at 481–82, for discussions on the implications of the dead-donor rule with regard to inmate organ donation. Also see generally Maxine M. Harrington, *The Thin Flat Line: Redefining Who Is Legally Dead in Organ Donation After Cardiac Death*, 25 ISSUES L. & MED. 95 (2009) and Jerry Menikoff, *The Importance of Being Dead: Non-Heart-Beating Organ Donation*, 18 ISSUES L. & MED. 3 (2002), for an examination of the legal definition of death with reference to organ donation.

181. Robert D. Truog, Franklin G. Miller & Scott D. Halpern, *The Dead-Donor Rule and the Future of Organ Donation*, 369 NEW ENG. J. MED. 1287, 1288 (2013). Furthermore, there has been discussion of modifying this rule in certain cases, such as for "donors who are declared dead on the basis of the irreversible loss of circulatory function." *Id.* There has also been discussion of modifying the rule to encompass donors with an irrevocable brain injury but with remaining brainstem activity. Lin, Rich, Pal & Sade, *supra* note 17, at 1776. Such modifications, however, would require changes to homicide laws to create legal exceptions. Truog, Miller & Halpern, *supra*, at 1288. Evidently, the dead-donor rule continues to be challenged and appears to be eroding. *See generally* Mark F. Anderson, *The Future of Organ Transplantation: From Where Will New Donors Come, to Whom Will Their Organs Go?*, 5 HEALTH MATRIX 249, 270–78 (1995) (discussing the possibility of changing requirements for cadaveric donors). Thus, even if the dead-donor rule were an obstacle, it would likely not be insurmountable.

whether medical associations follow this line of reasoning, physicians have been participating in executions for years.[182]

Utah, however, still utilizes the three-drug cocktail to carry out its executions.[183] That being said, the one-drug lethal injection has been highly endorsed,[184] and it is likely that other states, Utah included, will adopt this protocol as the means for carrying out executions in years to come.

Another method of execution that could allow for posthumous organ donation in Utah is death by firing squad.[185] Firing squads, while no longer commonly used, are still lawful in Utah for inmates who choose that particular method and were sentenced to death prior to 2004—the year when lethal injection became the established method of execution in the state.[186] Additionally, in 2015, Utah Representative Paul Ray

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182. Gawande, *supra* note 177, at 1223. Indeed, many states even *require* physician participation in executions. *Id.* "To protect participating physicians from license challenges for violating ethics codes, states commonly provide legal immunity and promise anonymity." *Id.* Thus, physicians and nurses have been willing to participate.

183. *State by State Lethal Injection*, *supra* note 138.

184. The one-drug protocol is endorsed for a plethora of reasons, many of which are enumerated in an extensive report by the Constitution Project. For one, the report provides that the three-drug lethal injection "create[s] a high risk of improper administration of anesthesia" because "the administered dosage of anesthesia does not completely anesthetize all inmates, some of whom have been drug abusers for many years." THE CONSTITUTION PROJECT, *supra* note 169, at 139. Additionally, the preparation required for administering anesthesia "requires numerous steps and many opportunities for error, especially if the execution team members are not trained medical professionals." *Id.* Further, the administration of sodium thiopental has been problematic in terms of finding a suitable vein, inserting the needle in the right angle (which can affect the drug reaction time), and inserting the needle at the right rate, as "inserting the drug too vigorously can affect how fast the chemicals are absorbed by the body." *Id.* This report—which has been endorsed by experts both in opposition to and in favor of the death penalty, "includ[ing] former judges, police chiefs, attorneys general and governors who have signed execution warrants"—ultimately urges the adoption of the one-drug lethal injection protocol as a more humane means of executing inmates that is, at the same time, less prone to error. Paul Lewis, *Report Urges One-Drug Lethal Injection to Avoid Botched US Executions,* GUARDIAN (May 7, 2014, 11:41 AM), http://www.theguardian.com/world/2014/may/07/oklahoma-lethal-injection-execution-drugs-constitution-animals.

185. According to the Utah Department of Corrections, this method consists of five law enforcement officers, less than twenty-five feet away, aiming for a target on the inmate's heart with .30-caliber rifles. Margot Sanger-Katz, *Shoot Me Now*, SLATE (June 16, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/06/shoot_me_now.html. Of the five rifles, one is loaded with a blank so it cannot be determined who fired the fatal shot, mimicking a traditional military firing squad. *Id.* The inmate is hooded during the actual execution, and, in prior executions, the inmate was seated on a chair with a mesh sheet and a pan placed underneath to capture the blood. *Id.*

186. *Bill to Bring Back Firing Squad in Utah Clears 1st Hurdle*, CHI. TRIB. (Feb. 4, 2015, 9:24 PM), http://www.chicagotribune.com/news/nationworld/chi-utah-firing-squad-bill-20150204-story.html [hereinafter *Bill to Bring Back Firing Squad*]. The firing squad was last

proposed reinstating the firing squad in Utah as the default method of execution in the event that the drugs needed to carry out lethal injection could not be obtained thirty days prior to a scheduled execution.[187] This proposal passed in the legislature and was signed into law by Utah Governor Gary Herbert on March 23, 2015.[188] Thus, Utah law now provides that death by firing squad is the method of execution "if the sentencing court determines the state is unable to lawfully obtain the substance or substances necessary to conduct an execution by lethal intravenous injection [thirty] or more days prior to the date specified in the warrant issued upon judgment of death."[189]

It has been argued that firing squads are preferable as they would allow for viable organs to be donated after death.[190] Thus, a possible

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used in 2010, when Ronnie Lee Gardner requested it as his method of execution, making Gardner the third person to die by firing squad since the death penalty was reinstated in 1976. *Utah Revives Plan for Executions by Firing Squad*, USA TODAY (Nov. 20, 2014, 4:32 PM), http://www.usatoday.com/story/news/nation/2014/11/20/utah-revives-plan-for-executions-by-firing-squad/70018278/. Several other inmates in Utah have also chosen firing squad as their preferred method of execution and are currently working their way through the appeals process. *Id.*

187. *Bill to Bring Back Firing Squad*, *supra* note 186. See *supra* note 168 for a discussion of the difficulty in obtaining the drugs necessary for the three-drug lethal injection protocol. Similar legislation is also pending in Wyoming to authorize death by firing squad in the event that lethal injection is deemed unconstitutional or cannot be performed in a timely manner. S. File 13, 63d Leg., Gen. Sess. (Wyo. 2015); *see also* Frosch, *supra* note 168. The Wyoming bill passed the Senate in January 2015 with a 17-12 vote. Frosch, *supra* note 168. A similar law is already in existence in Oklahoma. Death Penalty, ch. 75, sec. 1, § 1014, 2015 Okla. Sess. Law Serv. Ch. 75 (West 2015). Foreseeing the potential unconstitutionality of lethal injection, the law provides for executions to be carried out by nitrogen hypoxia if lethal injection is deemed unconstitutional or is otherwise unavailable. *Id.* Further, if execution by nitrogen hypoxia is declared unconstitutional, along with lethal injection, the Oklahoma law provides that the execution should be carried out first by electrocution and then by firing squad if electrocution is declared unconstitutional. *Id.* Other states also have similar laws in place in the event that lethal injection is deemed unconstitutional or lethal drugs cannot be obtained by the state. *State by State Lethal Injection*, *supra* note 138.

188. Lee Davidson, *Utah Governor Signs 55 Bills into Law, Brings Back Firing Squad*, SALT LAKE TRIB. (Mar. 24, 2015, 9:00 AM), http://www.sltrib.com/home/2324630-155/utah-governor-signs-legislation-to-bring.

189. H.B. 11, 61st Leg., Gen. Sess. (Utah 2015). The passage of this law was extremely controversial. The American Civil Liberties Union of Utah, for instance, described the bill as "backward and backwoods." *Utah Brings Back Firing Squad Executions; Witnesses Recall the Last One*, NAT'L PUB. RADIO (Apr. 5, 2015), http://www.npr.org/2015/04/05/397672199/utah-brings-back-firing-squad-executions-witnesses-recall-the-last-one. Theodore Simon, president of the National Association of Criminal Defense Lawyers, described it as "an embarrassing step backward that would adversely affect Utah's reputation for moral leadership by providing for a mode of punishment that is almost universally rejected in the United States and throughout the world." Davidson, *supra* note 188.

190. Tony Rizzo, *Should Firing Squads Be Allowed*, CRIME SCENE KC (Apr. 23, 2010, 3:00 PM), http://blogs.kansascity.com/crime_scene/2010/04/should-firing-squads-be-allowed

solution could be to make the firing squad the default method of execution regardless of the availability of the drugs needed for lethal injection, following in the footsteps of the Utah law. However, there is naturally debate over the humanity of this method of execution.[191] Some argue that use of the firing squad is unnecessarily cruel as people have been known to survive the initial shot.[192] On the other hand, it has also been argued that death by firing squad is the *more* humane choice in comparison to lethal injection because it is faster[193] less prone to error,[194]

.html. Indeed, Caplan states that organs can be harvested following an execution by causing massive head injury, although he does not condone the practice of bringing back the firing squad. NAT'L PUB. RADIO, *supra* note 86. However, with the internal trauma that would result, it is likely that some, and possibly all, organs could be destroyed. Patton, *supra* note 170, at 398. Additionally, the current practice of targeting the heart in Utah would need to be changed.

191. It has been argued that "the firing squad could be seen as a devolution to a more primitive era," with the "visible brutality" and "blood and physical violence that comes with it" taking the country "a step in the opposite direction." Glossip v. Gross, 135 S. Ct. 2726, 2796–97 (2015) (Sotomayor, J., dissenting).

Interestingly, one commentator postulates that it is not actually the humanity of the procedure that raises the concern—the commentator firmly believes that it is the more humane method—but how comfortable people are with the method. Radley Balko, *In Praise of the Firing Squad*, WASH. POST (Feb. 6, 2015), http://www.washingtonpost.com/news/the-watch/wp/2015/02/06/in-praise-of-the-firing-squad/. He states: "We consider a method of execution humane if it doesn't make us uncomfortable to hear or read about it. What the condemned actually experience during the procedure is largely irrelevant." *Id.* The commentator provides that death penalty supporters are comforted by how lethal injection "resemble[s] a medical procedure," which is why it has become the most common method of execution. *Id.* Unlike lethal injection, "the firing squad is violent and archaic, and judging by the reaction to the bills in Utah and Wyoming, it most certainly *does* [bother] a lot of people . . . . And yet in the only way that should matter, the firing squad is likely *more* humane than the lethal injection." *Id.*

192. Rizzo, *supra* note 190. Cathy Connolly, a legislator in Wyoming, states: "Imagining a firing squad horrifies me in the same way as imagining a gallows being erected in the town square . . . ." Frosch, *supra* note 168.

193. Sanger-Katz, *supra* note 185. "A Utah inmate who in 1938 agreed to be gunned to death while hooked up to an electrocardiogram showed complete heart death within one minute of the firing squad's shots." *Id.* In contrast, with the typical lethal injection, a "complication-free lethal injection takes about nine minutes to kill an inmate." *Id.*

194. *Glossip*, 135 S. Ct. at 2796 (Sotomayor, J., dissenting) ("[T]here is evidence to suggest that the firing squad is significantly more reliable than other methods, including lethal injection using the various combinations of drugs thus far developed."); Sanger-Katz, *supra* note 185. One reason for this is that it is prison officials who often administer the drugs for lethal injection since doctors and nurses are prohibited or strongly discouraged from participating in executions by their professional associations. Sanger-Katz, *supra* note 185; *see supra* note 177. Thus, those administering the drugs typically have no medical training. Sanger-Katz, *supra* note 185. As evidence of the errors associated with lethal injection, it is estimated that as many as four out of ten executions are administered with an inadequate dose of anesthesia. Balko, *supra* note 191. With the firing squad, however, "[i]t's easy to find psychologically stable, trained professionals with experience shooting to

and painless.[195] Regardless, under present law, execution by firing squad is constitutional,[196] as affirmed by the Supreme Court in *Baze*.[197] However, that is not to say that, if the firing squad makes a reappearance, the Supreme Court will continue to uphold its constitutionality.[198]

This method would also obviate the timing concerns, as complete heart death occurs within a minute of the fatal shot being delivered, in contrast to the three-drug lethal injection, which takes nearly ten times as long.[199]

While this method is certainly an option in Utah, the one-drug lethal injection appears to be the less controversial method of execution to replace the three-drug protocol and the more promising method for posthumous organ donation. However, if lethal injection cannot be administered in Utah—and for inmates who have elected for death by firing squad—the use of the firing squad should still allow for posthumous organ donation to some extent.

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kill" and the firing squad protocol "provides a measure of certainty" that instantaneous death will result. Sanger-Katz, *supra* note 185.

195. *Glossip*, 135 S. Ct. at 2796 (Sotomayor, J., dissenting) ("[T]here is some reason to think that it is relatively quick and painless.").

196. Wilkerson v. Utah, 99 U.S. 130, 134–35 (1879) ("Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty . . . is not included in that category, within the meaning of the [E]ighth [A]mendment.").

197. Baze v. Rees, 553 U.S. 35, 48 (2008) (plurality opinion).

198. "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). In reinstating the death penalty, the Supreme Court provided that, while not conclusive, "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment" and that "public attitude" should be assessed regarding a given sanction. Gregg v. Georgia, 428 U.S. 153, 173 (1976). In *Baze*, the Supreme Court stated that "[o]ur society has . . . steadily moved to more humane methods of carrying out capital punishment. The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today's consensus on lethal injection." 553 U.S. at 62 (citing Gomez v. U.S. Dist. Court for N. Dist. of Cal., 503 U.S. 653, 657 (1992) (Stevens, J., dissenting)). Thus, considering the shift in society away from the firing squad and the "evolving standards of decency" that govern the Eighth Amendment, it is uncertain how this change will affect an assessment of the constitutionality of the firing squad as a method of execution. Indeed, in Justice Sotomayor's dissent in *Glossip*, she considered the firing squad, providing that, while the reversion to an earlier method of execution would not be per se unconstitutional, "some might argue that the visible brutality of such a death could conceivably give rise to . . . Eighth Amendment concerns." *Glossip*, 135 S. Ct. at 2797 (Sotomayor, J., dissenting). However, as the firing squad has only recently been reconsidered, this issue has not reached the Supreme Court and is not currently in jeopardy of being deemed unconstitutional.

199. Sanger-Katz, *supra* note 185.

While there are clearly significant hurdles in this arena, they are not insurmountable. Out of necessity, the one-drug lethal injection or the firing squad would have to be adopted to make post-execution donations possible. As the one-drug lethal injection is expanding in usage and offers other benefits in addition to allowing posthumous organ donation, the adoption of this method is not inconceivable. An artificial ventilation system would also need to be employed, and either medical equipment would need to be in place or a surgical vehicle would need to be on site for facilities not adequately equipped. Additionally, with use of the firing squad already approved in Utah, this option appears feasible as well.

D. Minimal Deaths and Unwilling Recipients

1. The Concern

Another argument against allowing death row inmates and inmates who die while in prison to become posthumous organ donors is that there are too few deaths and executions for the practice to make a meaningful difference.[200] It is well-documented that there are not an overwhelming number of people who die while incarcerated. According to the Utah Department of Corrections, of the roughly 7000 inmates in the system, only an average of ten inmates die annually while incarcerated.[201] Oftentimes, inmate deaths in Utah are in the single digits.[202] Nationwide, there are no more than around forty or fifty executions annually, which critics correctly argue will "not put much of a dent in the overall demand."[203] Further, in Utah, there has only been one execution in the

200. *E.g.*, Anderson, *supra* note 10, at 955 ("[T]here still are not enough people on death row (fortunately) to make [the population] a significant source of organs.").

201. Aleccia, *supra* note 78. Thus, at most there are roughly ten potential organ donors. However, the number of viable organ donors is likely to be substantially less—inmates would still need to opt into the program, they must be healthy enough for their organs to be viable, and the manner and circumstances of their death must allow for donation.

202. Adams & Williams, *supra* note 59.

203. Caplan, *supra* note 14. Only thirty-one states currently still have the death penalty, along with the United States government and the military. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Sept. 24, 2015). Additionally, since the death penalty was reinstated, the peak number of executions was in 1999 with ninety-eight executions. *Executions by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year (last updated Sept. 1, 2015). In 2011 and 2012 there were only forty-three executions; in 2013, there were only thirty-nine nationwide. *Id.* Still decreasing, in 2014 there were only thirty-five executions nationwide—the smallest number in two decades. *Id.* As of the writing of this Note, there have been twenty executions in 2015. *Id.*

past thirteen years.[204] Moreover, there are currently only nine inmates on death row in Utah.[205]

Yet another concern is that individuals on the waiting list might be unwilling to accept an organ donation from an inmate, whether from the general population or from death row.[206]

2. Application to the Utah Law

Despite the numbers which clearly indicate that the law will by no means solve the organ shortage problem, "the point of using consenting . . . inmates as organ donors is not to solve the problem of organ shortage but to help patients who are in dire need of transplantable organs. The number of patients directly helped is not relevant, given the hugely significant impact on the recipients."[207] Indeed, Gehrke provides that it is not the point of the law to fix the organ shortage problem, but to save lives, even if just one life is saved by the law.[208]

Additionally, while there are individuals who have expressed distaste at the idea and an unwillingness to accept organs from the prison population,[209] there are certainly people in need of transplants willing to accept a donation from whatever source is offering.[210] In fact, various

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204. *Death Penalty Now Rarely Used in Utah*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-penalty-now-rarely-used-utah (last visited Sept. 24, 2015). Moreover, prosecutors have only sought the death penalty in seven cases over the past five years in Utah, with none of them resulting in a death sentence. *Id.*

205. *Death Row Inmates by State and Size of Death Row by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year (last visited Sept. 24, 2015). It is worth noting that states such as California, Florida, Texas, Alabama, and Pennsylvania have significantly larger death row populations ranging from 184 inmates in Pennsylvania to 746 inmates in California. *Id.* If a similar law were passed in these states, this argument holds even less weight.

206. *See, e.g.*, Grissom, *supra* note 45.

207. Lin, Rich, Pal & Sade, *supra* note 17, at 1774.

208. Adams & Williams, *supra* note 59. He states: "Even if you get one inmate who's eligible to donate an organ . . . you can make a case that it's made a difference in that person's life. It's made a world of difference in that person's life." *Id.* (alteration in original).

209. Indeed, Mater Alexander, a liver transplant recipient, says she is not sure she would have accepted an organ from a death row inmate if it was offered to her. Klimas, *supra* note 86. Nonetheless, she supports the practice, wanting inmates to be permitted to "do something good before they leave this earth." *Id.*

210. Joanne Kelley, president of a support group for heart transplant recipients, says: "If someone is sick enough, long enough and wants to live, they'll gladly take an organ from someone who was incarcerated . . . ." Aleccia, *supra* note 78. Indeed, Hiland Doolittle, a heart transplant recipient from New York, says he would not have cared what heart he got. *Id.* John Afek, another heart transplant recipient, also states that he does not care who his donor was—he is just happy that he got his life back and his kids got their father back. Klimas, *supra* note 86. Further, Afek supports the practice, citing the vast number of people

surveys of the general population and of individuals currently waiting for an organ reveal that an overwhelming majority of people support allowing condemned inmates to donate their organs after death.[211] Those willing to accept such organs should be given the opportunity to do so.

E. The Goals of Punishment

1. The Concern

There is also the argument that organ donation from inmates is "incompatible with the goals of punishment."[212] Medical ethicist Caplan states: "Punishment and organ donation don't go well together. I don't think the kinds of people we're executing we want to make in any way heroic."[213]

2. Application to the Utah Law

While the argument that inmate organ donation is "incompatible with the goals of punishment" is understandable, it does not outweigh the potential for saving lives. It is also not necessarily true that posthumous organ donation from inmates is wholly inconsistent with the goals of punishment. The goals of the criminal justice system are many: "to punish justly, to deter future crime, and to return imprisoned persons to society with an improved change [sic] of being useful, law-abiding citizens."[214] Since organs can only be taken posthumously, the practice cannot be said to be inconsistent with trying to improve an inmate's chance of being a law-abiding citizen. "Nevertheless, permitting . . . inmates to donate organs offers them a real chance at 'being useful.'"[215] Moreover, it is unlikely that anyone would find that because an executed inmate donated his organs to help save people's lives that he or she is any way transformed into a hero with any and all past heinous crimes forgiven and forgotten. Indeed, "[t]his final act can never erase the

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who die on the waiting list and the demand for organs. *Id.* Another organ recipient—Scott King, a forty-six-year-old who received a kidney from a living donor—says: "It's much better to be alive than dead; so if someone is willing to donate, I'm all for it." Persky, *supra* note 51.

211. Lin, Rich, Pal & Sade, *supra* note 17, at 1775.
212. Smyth & Myers, *supra* note 49.
213. *Id.*
214. Rhodes v. Chapman, 452 U.S. 337, 352 (1981).
215. Coleman, *supra* note 7, at 33.

heinous crime[s] which landed [them in prison], but it does give [them] the opportunity to try to make amends."[216]

V. CONCLUSION

Utah has been a pioneer in this realm with the passage of this law. The law will certainly help save lives while allowing inmates to pay back a debt to society if they so wish. However, that is not to say that the law, and any other laws that might seek to emulate it, cannot be improved. There are several modifications that would make the law clearer, would alleviate many concerns, and would thus strengthen the law.

To address concerns over lack of consent and the potentiality for coercion, a provision requiring an inmate not to disclose that he or she volunteered to be an organ donor will help ensure effective and meaningful consent. Additionally, to ensure non-disclosure, the penalty for not abiding by this requirement could be to void the request. For full disclosure and to ensure that there is no implicit coercion, the law should explicitly state that deciding to become an organ donor will have no bearing on parole, winning clemency, or receiving any kind of favorable treatment while incarcerated. To ensure this, a requirement could be added providing that those involved in signing inmates up as organ donors cannot be the same officials who administer discipline. A prison-appointed panel could also be used to consider the authenticity of inmate requests to become posthumous organ donors.

Specifically regarding death row inmates becoming organ donors, a deadline could be established by which inmates on death row would be required to request to become an organ donor prior to the scheduled executions to prevent any last minute requests in an attempt to postpone an execution. As a practical necessity, the one-drug lethal injection would have to be adopted in order to allow for post-execution donation. Alternatively, the firing squad being reinstated as the primary method of execution would also allow for post-execution organ donations. With the one-drug lethal injection, an artificial ventilation system would have to be utilized in order to keep organs viable. Additionally, for prison facilities not adequately equipped, medical technology would need to be in place, or, more feasibly, a surgical vehicle would need to be on site at the time of execution.

This law not only helps fulfill the requests of inmates across the country, but has the capability of saving lives by widening the potential organ donor pool. Other states would do well to adopt similar legislation,

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216. *Id.*

preferably adopting the suggestions for improvement outlined in this Note. Doing so could very well help close the gap between those waiting for an organ transplant and those willing to provide the organs.