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## Posthumous Organ Donation as Prisoner Agency and Rehabilitation

Amanda Seals Bersinger

Lisa Milot

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# POSTHUMOUS ORGAN DONATION AS PRISONER AGENCY AND REHABILITATION

*Amanda Seals Bersinger\* & Lisa Milot\*\**

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\* Associate, Bondurant, Mixson & Elmore LLP, Atlanta, Georgia.

\*\* Associate Professor, University of Georgia School of Law.

## INTRODUCTION

Organ donation creates an opportunity for prisoners to give back to the community whose social norms have been violated and it provides an opportunity to help a fellow citizen who desperately needs help. . . . And should the donor happen to be a death row inmate who is unlikely to see a release date, allowing good to come out of an otherwise hopeless situation only heightens the benefit to the institution and the community in general.<sup>1</sup>

In December 2001, Christian Longo killed his wife and three children and sank their bodies in an Oregon lake before heading to Mexico to celebrate the New Year.<sup>2</sup> To facilitate this escapade, Longo stole the identity of a New York Times reporter, Michael Finkel. In 2003, Longo was sentenced to death for these murders. As infamous as he became for his acts,<sup>3</sup> Longo is perhaps better known as the face of death row inmates' efforts to become organ donors.<sup>4</sup>

Unlike U.S. citizens generally, who are encouraged to become organ donors through drivers' license designations, advance directives, and state registries, in most instances inmates are barred from donating their organs until release. For death row inmates like Longo, and the more than 3,000 men and women who are not on death row but die in prison each year,<sup>5</sup> this proves to be a permanent bar.

It is clear that many inmates would choose to become donors if provided an opportunity. In Utah, for example, where the 2013 passage of a state law allowed inmates to register as posthumous organ donors for the first time,<sup>6</sup> nearly 250 signed up within weeks of the law's en-

1. CHRISTIAN M. LONGO, G.A.V.E.: GIFTS OF ANATOMICAL VALUE FROM THE EVERYONE 9 (rev. Dec. 15, 2009), [https://web.archive.org/web/20110427230313/http://www.gavelife.org/uploads/Living\\_Donations\\_By\\_Inmates.pdf](https://web.archive.org/web/20110427230313/http://www.gavelife.org/uploads/Living_Donations_By_Inmates.pdf).

2. Michael Finkel, *How I Convinced a Death-Row Murderer Not To Die*, ESQUIRE (Dec. 21, 2009), <http://www.esquire.com/features/christian-longo-0110>.

3. The development of a relationship between Finkel and Longo during this time was the subject of the 2015 film *True Story*. See Jeff Baker, 'True Story': A Horrific Oregon Murder Becomes a Jonah Hill-James Franco Movie, OREGONLIVE (Mar. 1, 2014, 6:11 AM), [http://www.oregonlive.com/books/index.ssf/2014/03/true\\_story\\_a\\_horrific\\_oregon\\_m.html](http://www.oregonlive.com/books/index.ssf/2014/03/true_story_a_horrific_oregon_m.html).

4. Longo published a *New York Times* editorial on the topic and is the founder of Gifts of Anatomical Value from Everyone, an organization that advocates for expanding the pool of potential organ donors. Christian Longo, Opinion, *Giving Life After Death Row*, N.Y. TIMES, Mar. 5, 2011, <http://www.nytimes.com/2011/03/06/opinion/06longo.html>. See generally G.A.V.E., <https://gavelife.wordpress.com/> (last visited Jan. 6, 2016) (providing more information on Longo's organization).

5. See MARGARET E. NOONAN & SCOTT GINDER, U.S. DEP'T OF JUSTICE, NCJ 242186, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2011–STATISTICAL TABLES 19 tbl.14 (Aug. 2013), <http://www.bjs.gov/content/pub/pdf/mljsp0011.pdf> (listing the total state prisoner deaths, excluding executions).

6. Inmate Medical Donation Act, 2013 Utah Laws 1 (codified at UTAH CODE ANN. § 64-13-44 (LexisNexis 2014)).

actment.<sup>7</sup> The Maricopa County, Arizona Sheriff's Office claims that 16,500 inmates have registered there to be posthumous donors.<sup>8</sup> Coupled with the efforts of inmates like Longo to donate, these examples show that significant numbers of inmates are willing to be organ donors. Yet in almost all instances, they are denied the opportunity to do so if they die prior to being released.

To date, the scholarship in favor of allowing inmates to donate their organs has largely focused on the benefit these donations could offer patients languishing on organ transplant lists, while objections center on the vulnerability of the imprisoned potential donors and their inability to make decisions freely. A *donor*-focused case for donation, however, is missing in this debate. This Article fills that gap by setting out the philosophical case for allowing prison inmates to fill this role, even though the aggregate increase in the supply of transplantable organs would be small.

As an initial matter, allowing prisoners to donate their organs upon death does not interfere with the goals of punishment. As long as no sentence reductions or other benefits are offered in exchange for donation, allowing prisoners to choose whether to donate their organs upon death should have no effect on either the general or specific deterrence value of punishment: Inability to donate is not integral to the punishment itself. Moreover, permitting donation allows society to condemn the acts that led to imprisonment, which is needed to achieve the retributive goal of punishment, without denying the prisoner's inherent humanity.

Beyond the absence of a reason not to allow donation, allowing inmates to choose whether to become posthumous donors would forward the rehabilitative aim of punishment. A prisoner choosing to donate is engaging in long-term planning, forging connections to a broader community, and expressing empathy for others, all of which help overcome some of the factors that may have led to his imprisonment in the first place. Even in instances in which the choice to donate might not cause these changes, it facilitates a display of rehabilitation that is otherwise denied to many inmates.

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

8. See Press Release, Maricopa Cty. Sheriff's Office, Arpaio's "I DO" Program (Inmates Willing To Donate Their Organs) Has Them Joining National Drive (Apr. 29, 2015) [hereinafter Press Release, "I DO" Program], <https://www.mcso.org/MultiMedia/PressRelease/Organ%20Donor.pdf>.

More abstractly, yet no less importantly, providing prisoners with the choice of whether to donate their organs provides them with an opportunity to exercise their agency. This remains true whether the prisoner chooses to donate or not, and whether he dies in prison or is released. In any case, he has been able to make an important decision in a context where decision-making is otherwise largely denied to him. For an inmate who is released, the decision whether to donate may provide him with a valuable sense of self-efficacy and control. And for those who die while imprisoned, it is a final act of autonomy.

Part II of this Article describes the current status of the law with respect to organ donation by inmates and efforts to allow such donation, and reviews the literature on point.<sup>9</sup> Part III, then, addresses the prevailing objections to inmate donation and finds them largely rooted in paternalism, speculation, and stigma.<sup>10</sup> It acknowledges, however, that concerns about the possible impact that allowing donation would have on the application of the death penalty are warranted but resolvable. Next, Part IV begins to make the affirmative case for posthumous donation, arguing that it is consistent with the aims of punishment.<sup>11</sup> Finally, Part V articulates a donor-focused case for permitting donation: Posthumous donation would allow inmates to exercise their agency and, in so doing, effect or reflect their rehabilitation, which is a larger social good.<sup>12</sup>

## II. BACKGROUND ON POSTHUMOUS DONATION BY PRISONERS

The idea that prisoners should be allowed to donate their organs is not novel. In practice, though, it is almost unheard of. Prisoners have only been allowed to become living organ donors in a small number of cases and usually only if they are related to the transplant recipient. And authorities have almost universally rejected efforts by prisoners to become donors at death.

### A. *The Legal Landscape of Organ Donation*

Two statutes govern organ donation in the United States generally. The National Organ Transplant Act (NOTA),<sup>13</sup> a federal statute, authorizes the creation of organ procurement organizations and prohib-

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9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part IV.

12. *See infra* Part V.

13. Pub. L. No. 98-507, 98 Stat. 2339 (1984) (codified as amended in scattered sections of 42 U.S.C.).

its payment for organs for transplant.<sup>14</sup> The Revised Uniform Anatomic Gift Act (UAGA),<sup>15</sup> which has been enacted by forty-six states and the District of Columbia,<sup>16</sup> provides that any adult may commit to being an organ donor.<sup>17</sup> The United Network of Organ Sharing (UNOS), a private, nonprofit organization, administers the procurement network authorized by NOTA and used by states in actualizing UAGA.<sup>18</sup>

Neither NOTA nor UAGA prohibits—or otherwise specifically contemplates—organ donation by inmates. The UNOS Ethics Committee has taken up the question of donation by death row inmates, announcing that it “opposes any strategy or proposed statute regarding organ donation from condemned prisoners until all of the potential ethical concerns (e.g., coercion, method of execution, issues of informed consent) have been satisfactorily addressed.”<sup>19</sup> Thus, while the Ethics Committee does not currently endorse this type of donation, its conclusion leaves some room for it.

Although few jurisdictions expressly address posthumous donation by inmates,<sup>20</sup> it is widely believed that nearly every one prevents it.<sup>21</sup> Apart from outright prohibitions, there are also practical concerns impeding posthumous donation. All currently accepted methods of execution—lethal injection, gas, electrocution, firing squad, and

14. See *id.* §§ 301, 372.

15. REV. UNIF. ANATOMICAL GIFT ACT (UNIF. LAW COMM’N) (rev. 2009).

16. *Anatomical Gift Act (2006)*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20%282006%29> (last visited Jan. 6, 2016); see, e.g., ALA. CODE §§ 22-19-160 to 19-184 (LexisNexis Supp. 2014); KAN. STAT. ANN. §§ 65-3220 to -3244 (Supp. 2014); WYO. STAT. ANN. §§ 35-5-201 to 5-25535 (2013). The Pennsylvania legislature is currently considering adopting UAGA. *Anatomical Gift Act (2006)*, *supra* note 16.

17. Uniform Anatomical Gift Act (2006) § 4, NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS (revised 2009).

18. *Id.* § 4.

19. *The Ethics of Organ Donation from Condemned prisoners*, U.S. DEP’T HEALTH & HUM. SERVS., <http://optn.transplant.hrsa.gov/resources/ethics/the-ethics-of-organ-donation-from-condemned-prisoners/> (last visited Dec. 27, 2015).

20. The Federal Bureau of Prisons is an exception. It explicitly prohibits posthumous donation. U.S. DEP’T OF JUSTICE, PROGRAM STATEMENT 6031.04, PATIENT CARE 44–45 (June 3, 2014) [hereinafter PATIENT CARE PROGRAM STATEMENT], [http://www.bop.gov/policy/progstat/6031\\_004.pdf](http://www.bop.gov/policy/progstat/6031_004.pdf).

21. See, e.g., Eric Meslin, *Death Row Organ Donation*, IND. U. CTR. FOR BIOETHICS, <http://bioethics.iu.edu/reference-center/topic-guides/deathrow/> (last visited Dec. 27, 2015) (collecting the failed efforts by state legislatures to allow posthumous donation by death row inmates and reporting that all states prohibit posthumous organ donation by death row prisoners). *But see*, e.g., N.J. ADMIN. CODE § 10A:16-9.1 (2014) (allowing inmates to register as posthumous organ donors and permitting living donation in extraordinary circumstances); UTAH CODE ANN. § 64-13-44 (LexisNexis 2014) (requiring the Utah Department of Corrections to allow organ donation by inmates who die while incarcerated); Press Release, “I DO” Program, *supra* note 8.

hanging—render some or all organs unsuitable for transplant.<sup>22</sup> Even for natural deaths in prison, the delay in procurement that necessarily results from transportation between a prison and a transplant center would likely leave few organs suitable for transplant.<sup>23</sup> Moreover, rates of hepatitis and human immunodeficiency virus (HIV) infection in prison populations suggest that organs from many prisoners would have only limited utility.<sup>24</sup> Thus, there is scant opportunity to apply NOTA or UAGA inside prison walls.

### B. *History of Prison Donation*

Despite the general prohibition that exists in the United States with respect to posthumous organ donation by prisoners, we have allowed the use of their body materials in other limited ways, specifically with blood crediting programs, living organ donations, and, in at least two instances, cadaveric donation.

#### 1. *Blood Crediting Programs*

Using inmates as sources of body materials is not unprecedented in the United States. Confronted with persistent blood shortages in the 1950s, several states implemented so-called “blood credit” or “blood-time” programs.<sup>25</sup> In Massachusetts, for example, inmates received five days’ credit for each pint of blood they donated.<sup>26</sup> Because inmates could donate as many as four times each year, the program initially offered up to a twenty-day reduction in sentence length for each year the inmate participated. This credit later increased to ten days per pint, with donation opportunities coming every eight weeks.<sup>27</sup> Thus, the potential credit rose to a little over two months per year.

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22. 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, 479 (2012). But see Shu S. Lin et al., *Prisoners on Death Row Should Be Accepted as Organ Donors*, 93 ANNALS THORACIC SURGERY 1773, 1774 (2012) (arguing that some lethal injection protocols would not preclude organ donation if performed in a hospital setting).

23. Lin et al., *supra* note 22, at 1777.

24. See *infra* notes 93–98 and accompanying text (discussing how prisoners are more likely to have diseases such as HIV, making their organs transplantable at a lower rate than in the population more generally).

25. See Mark F. Anderson, *The Prisoner as Organ Donor*, 50 SYRACUSE L. REV. 951, 972 (2000) (listing programs in Alabama, California, Massachusetts, Mississippi, Oklahoma, South Carolina, and Virginia); Jamila Jefferson-Jones, *The Exchange of Inmate Organs for Liberty: Diminishing the “Yuck Factor” in the Bioethics Repugnance Debate*, 16 J. GENDER RACE & JUST. 105, 132 (2013).

26. 1959 Mass. Acts 153 (codified as amended at MASS. GEN. LAWS ANN. ch. 127, § 129(A) (1959) (repealed 1989)); see also Anderson, *supra* note 25, at 971–72 (discussing Massachusetts’s blood credit program).

27. Anderson, *supra* note 25, at 971–72.

Although some states discontinued their blood credit programs in the 1980s, likely in response to concerns about HIV and other blood-borne pathogens,<sup>28</sup> the programs have continued in other states.<sup>29</sup> The practice of blood credit programs demonstrates a willingness by the states to bargain with inmates, exchanging liberty for their body materials. And, on an even more basic level, it shows an acceptance of the use of some body materials from prison populations that has not carried over to organs.

## 2. *Living Organ Donation by Prisoners*

Within tight constraints, some U.S. jurisdictions allow living organ donation by prisoners. The Federal Bureau of Prisons, for example, allows inmates to serve as living donors for members of their immediate family as long as the families bear the cost of the procedure.<sup>30</sup> The Texas Department of Criminal Justice policy only permits living donation by general population inmates, not death row inmates, and the donation typically occurs only when the intended recipient is a family member.<sup>31</sup> The South Carolina Department of Corrections provides education about tissue and organ donation to prisoners and allows donation if it determines that there is no present threat to security.<sup>32</sup> As with the federal approach, the South Carolina Department of Corrections will not bear any costs associated with donation.<sup>33</sup>

Some living donations do occur. In the early 1990s, a female inmate in federal prison donated a kidney to her child.<sup>34</sup> In 1995, Delaware allowed a death row inmate, Steven Shelton, to donate a kidney to his mother.<sup>35</sup> The following year, California permitted David Patterson,

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28. Jefferson-Jones, *supra* note 25, at 132.

29. Oklahoma and Virginia continue to use blood credit programs. See OKLA. STAT. tit. 57, § 65 (2011); VA. CODE ANN. § 53.1-191 (Supp. 2013); see also Campbell Robertson, *For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time*, N.Y. TIMES, Oct. 19, 2015, <http://www.nytimes.com/2015/10/20/us/for-offenders-who-cant-pay-its-a-pint-of-blood-or-jail-time.html> (detailing an Alabama judge's offer to criminal offenders). Alabama's blood credit program continued until 2015. See H.B. 40, Reg. Sess. (Ala. 2015) (repealing ALA. CODE § 14-9-3 (1975)).

30. PATIENT CARE PROGRAM STATEMENT, *supra* note 20, at 44–45.

31. Donny J. Perales, Comment, *Rethinking the Prohibition of Death Row Prisoners as Organ Donors: A Possible Lifeline to Those on Organ Donor Waiting Lists*, 34 ST. MARY'S L.J. 687, 703–04 (2003).

32. S.C. CODE ANN. §§ 24-1-285(A)–(B) (Supp. 2014).

33. *Id.* § 24-1-285(C).

34. Clifford Earle Bartz, *Operation Blue*, ULTRA: DION—*The Donation Inmate Organ Network*, 13 KENNEDY INST. ETHICS J. 37, 39 (2003).

35. Kellam, *supra* note 22, at 468.



who was then serving a sentence for burglary, to donate a kidney to his daughter.<sup>36</sup>

In other cases, inmates have come close to donation, but medical suitability thwarted their attempts. In 1996, the Alabama Supreme Court stayed the execution of David Larry Nelson so that doctors could determine if he would be a suitable kidney donor for his brother.<sup>37</sup> Nelson's brother, however, was apparently too ill for surgery,<sup>38</sup> and Nelson died in prison in 2009.<sup>39</sup>

More recently, a Mississippi case involving sisters Gladys and Jamie Scott captured popular<sup>40</sup> and scholarly<sup>41</sup> attention. In 2011, Mississippi's then-Governor, Haley Barbour, released the sisters, who were serving life sentences for their participation in a 1993 armed robbery,<sup>42</sup> on the condition that Gladys donate her kidney to Jamie.<sup>43</sup>

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36. See Evelyn Nieves, *Girl Awaits Father's 2d Kidney, and Decision by Medical Ethicists*, N.Y. TIMES, Dec. 5, 1998, <http://www.nytimes.com/1998/12/05/us/girl-awaits-father-s-2d-kidney-and-decision-by-medical-ethicists.html?pagewanted=print>; Kellam, *supra* note 22, at 468. Three years later, Patterson—who was still in prison—sought to donate his remaining kidney to his daughter after the first one began to fail, but an ethics panel denied his request. Marisa Lagos, *Kidney Transplant Recipient Dies/Former Oakland Woman's Father Donated His Organ While in Prison*, SFGATE (Mar. 19, 2007, 4:38 PM), <http://www.sfgate.com/bayarea/article/Kidney-transplant-recipient-dies-Former-Oakland-2608485.php>.

37. Jay Reeves, *Transplant Ethics*, BMARSH: UPBEAT ARCHIVE (Dec. 6, 1996), <http://www.bmarsh.com/upbeat/upbt9701>.

38. Liz Klimas, *Should an Inmate on Death Row Be Allowed To Donate Organs? Take Our Poll*, BLAZE (Nov. 15, 2013, 10:25 PM), <http://www.theblaze.com/stories/2013/11/15/should-an-inmate-on-death-row-be-allowed-to-donate-organs-take-our-poll/>.

39. Connie Baggett, *Death Row Inmate David Larry Nelson Dies in Holman Infirmary*, AL.COM: BLOG (Nov. 3, 2009, 11:35 AM), [http://blog.al.com/live/2009/11/death\\_row\\_inmate\\_da\\_vid\\_larry\\_n.html](http://blog.al.com/live/2009/11/death_row_inmate_da_vid_larry_n.html).

40. See, e.g., Timothy Williams, *Jailed Sisters Are Released for Kidney Transplant*, N.Y. TIMES, Jan. 7, 2011, <http://www.nytimes.com/2011/01/08/us/08sisters.html>; Susan Donaldson James, *Supporters Applaud Plan To Release Scott Sisters in Kidney Deal*, ABC NEWS (Dec. 30, 2010), <http://abcnews.go.com/US/scott-sisters-released-16-years-prison-kidney-deal/story?id=12508754>.

41. Scholars' responses to the Scotts' plan were mixed. Some argued that their case opened the door to the benefits of living donation by inmates. See, e.g., Aviva M. Goldberg & Joel Frader, *Prisoners as Living Organ Donors: The Case of the Scott Sisters*, AM. J. BIOETHICS, Oct. 2011, at 15, 15–16; Jefferson-Jones, *supra* note 25, at 131–34. Others argued that the case sets an alarming precedent that allows inmates to bargain their body materials for release. See, e.g., Jennifer L. Visconti, Note, *Exchanging a Kidney for Freedom: The Illegality of Conditioning Prison Release on Organ Donation*, 38 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 199, 200 (2012).

42. The saga of the Scott sisters began Christmas Eve that year, when they asked two men for a ride to the sisters' parents' home. Ward Schaefer, *The Tragic Case of the Scott Sisters*, JACKSON FREE PRESS (Nov. 3, 2010, 3:45 PM), <http://www.jacksonfreepress.com/news/2010/nov/03/the-tragic-case-of-the-scott-sisters/>. Later that evening, three other young men, the so-called "Patrick boys," robbed the two men who drove the Scotts home. *Id.* The victims walked away relieved of the \$11 to \$200 they carried (accounts conflict) but otherwise unharmed. *Id.* The Scotts insisted that they had nothing to do with the robbery and that they parted ways with the victims before the robbery. *Id.* The Patrick boys, however, accepted lesser sentences in exchange for their testimony against the Scotts. *Id.*

Mississippi permitted the sisters to leave the state immediately on release, a liberty not typically granted to recent parolees.<sup>44</sup> At the time of their release, it was not even clear that the Scotts were a sufficiently close match for transplant.<sup>45</sup> Two months after their release, doctors determined that Jamie would need to lose about 100 pounds before she could receive a transplant, while Gladys would need lose about forty pounds and quit smoking before she could donate.<sup>46</sup> Today, almost six years after their release from prison, the donation has not occurred, and the sisters have been barred from reentering Mississippi.<sup>47</sup> Still, Governor Barbour's willingness to release Gladys and Jamie Scott under these circumstances illustrates a willingness to accept living donation by prisoners at times, even if it means they do not finish their sentences.

Other inmates' attempts to donate have been unsuccessful because of state policy. For example, in November 2013, Ohio Governor John Kasich postponed the execution of Ronald Phillips for the 1993 murder and rape of his girlfriend's three-year-old daughter to determine whether Phillips could donate his "nonvital organs" before execution.<sup>48</sup> Phillips sought to donate a kidney to his mother, but Ohio officials ultimately denied his request because there would be insufficient time for him to recover between the surgery and his scheduled execution.<sup>49</sup>

There is at least one reported case of an inmate challenging a state's restrictions on living donation. Calvin Campbell, who was serving on Florida's death row, turned to the courts during his effort to donate

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43. Williams, *supra* note 40. It is widely believed that Governor Barbour, then a presumptive 2012 presidential candidate, allowed the Scotts' release with his public image in mind. See e.g., Jefferson-Jones, *supra* note 25, at 130–31; Brad Knickerbocker, *NAACP: Sisters' Release Makes Mississippi Gov. Haley Barbour 'Shining Example,'* CHRIST. SCI. MONITOR (Dec. 30, 2010), <http://www.csmonitor.com/USA/Politics/The-Vote/2010/1230/NAACP-Sisters-release-makes-Mississippi-Gov.-Haley-Barbour-shining-example>. See *infra* Part III.A.3, for a discussion of the Scott sisters' release and its implications for cadaveric donation by inmates.

44. Goldberg & Frader, *supra* note 41, at 15.

45. Williams, *supra* note 40.

46. Cindy E. Rodriguez, *Scott Sisters Must Lose Weight To Comply with Prison Release*, ABC NEWS (Feb. 24, 2011), <http://abcnews.go.com/US/scott-sisters-slim-kidney-transplant-place/story?id=12983690>.

47. Jimmie E. Gates, *Scott Sisters Denied Travel to Mississippi*, HATTIESBURG AM. (Aug. 11, 2015, 8:33 PM), <http://www.hattiesburgamerican.com/story/news/crime/2015/08/11/scott-sisters-barred-state/31503011>.

48. Alan Johnson, *Kasich Postpones Execution of Inmate Who Wants To Donate Organs*, COLUMBUS DISPATCH (Nov. 14, 2013, 7:10 AM), <http://www.dispatch.com/content/stories/local/2013/11/13/kasich-stops-execution-of-phillips.html>.

49. Associated Press, *Ohio: State Rejects Death Row Inmate's Request To Be Organ Donor*, N.Y. TIMES, Mar. 21, 2014, <http://www.nytimes.com/2014/03/22/us/ohio-state-rejects-death-row-inmates-request-to-be-organ-donor.html>.

his kidney to an ailing Florida youth.<sup>50</sup> Campbell brought suit pursuant to 42 U.S.C. § 1983, claiming that he had a constitutional right to donate his kidney. The U.S. Court of Appeals for the Fifth Circuit rejected the notion that Campbell was entitled to donate, explaining: “If he were free, the appellant would have the right to donate one of his kidneys to whomever he desired. He has no right to the relief he seeks, however, in consequence of his incarceration.”<sup>51</sup> The panel held that considerations of security and administrative expense outweighed any constitutional deprivation, but it did not deny that Campbell might have a right, constitutional or otherwise, to donate.<sup>52</sup>

Thus, although it is sometimes permitted, living organ donation by inmates is indisputably rare. Yet it is still relatively more common than opportunities for posthumous donation for inmates who die prior to release.

### 3. *Posthumous Organ Donation by Prisoners*

There is some history of cadaveric organ donation by inmates, although none recent. In both known cases, death row inmates donated organs after execution. In 1977, after the State of Utah executed Gary Gilmore, doctors harvested Gilmore’s pituitary gland, eyes, kidneys, and liver—all according to his wishes—for possible transplant.<sup>53</sup> Seven years later, when the State of North Carolina executed Margie Velma Barfield, officials rushed her body from Raleigh to nearby Winston-Salem.<sup>54</sup> There, doctors removed Barfield’s organs for transplant, also according to her wishes.<sup>55</sup> It is not publicly known if patients actually received Gilmore’s or Barfield’s organs, but they appear to have gotten closer to posthumous donation than any known inmate since.

More recent efforts to donate have been relatively common but diffuse and unsuccessful. Commentators have counted as many as fourteen death row inmates who have pursued the possibility of posthumous donation.<sup>56</sup> Before his 1995 execution, Jonathan Nobles asked Texas prison officials to use alternative lethal injection drugs to

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50. *Campbell v. Wainwright*, 416 F.2d 949, 950 (5th Cir. 1969) (per curiam).

51. *Id.*

52. *Id.*

53. *Organs Donated, Body Cremated: Gary Gilmore Saga Over*, CITIZEN OTTAWA, Jan. 18, 1977, at 1. Doctors reported that his kidneys were unusable because of the nature of his death—execution by firing squad. *Id.*

54. William E. Schmidt, *First Woman Is Executed in U.S. Since 1962*, N.Y. TIMES, Nov. 3, 1984, at A6.

55. *Id.*

56. See, e.g., Lin et al., *supra* note 22, at 1774.

preserve his organs for donation.<sup>57</sup> That same year, a Georgia death row inmate, Larry Lonchar, attempted to postpone his death sentence long enough for Georgia to change its method of execution from the electric chair to a method that would allow him to donate.<sup>58</sup> Although the U.S. Supreme Court heard his case and stayed his execution so that a federal court could determine the merits of his habeas corpus petition,<sup>59</sup> Georgia electrocuted Lonchar in November 1996<sup>60</sup> after the court denied his petition.<sup>61</sup> As a result, Lonchar died without donating his organs.<sup>62</sup> More recently, Ronnie Lee Gardner, who was executed by the State of Utah in 2010, sought to donate his organs after execution but was prohibited from doing so.<sup>63</sup>

Around the same time as Gardner, Christian Longo, the Oregon death row inmate who became an advocate for would-be prisoner-donors, initiated his effort to donate his organs after execution.<sup>64</sup> Longo has not only expressed his own desire to donate, but has also advocated for policy changes to allow inmates across the country to donate.<sup>65</sup> Prison officials oppose the idea, apparently on the grounds that they do not want to leave inmates with the misimpression that they could sell their organs for cash.<sup>66</sup> In 2011, Oregon Governor

57. Perales, *supra* note 31, at 709. The most common contemporary method of execution—a three-drug lethal injection protocol consisting of a sedative, a paralytic, and an agent to induce cardiac arrest—leaves organs unusable for transplant. Lin et al., *supra* note 22, at 1777.

58. Loretta Lepore, *Convicted Killer Appeals To Give Life to Others*, CNN (Dec. 3, 1995, 10:58 PM), [http://www.cnn.com/US/9512/death\\_row\\_donor/](http://www.cnn.com/US/9512/death_row_donor/).

59. *Lonchar v. Thomas*, 517 U.S. 314, 332 (1996).

60. Rhonda Cook, *Lonchar Dies in Electric Chair for '86 Killings: Two Jolts Are Needed at State Prison to Carry Out His Sentence for DeKalb-Triple-Murder*, ATL. J.-CONST., Nov. 14, 1996, at A1.

61. *See Lonchar v. Turpin*, 84 F.3d 386 (1996) (mem.).

62. *See Lepore, supra* note 58. In a cruel twist, Lonchar's execution contributed to Georgia's 2001 abandonment of electrocution as a method of execution. *See Dawson v. State*, 554 S.E.2d 137, 143–44 (Ga. 2001) (holding that electrocution violated state constitution's prohibition on cruel and unusual punishment). During Lonchar's execution, the warden subjected him to two cycles of electricity after witnesses reported seeing movement in Lonchar's chest following the first. Cook, *supra* note 60. In oral argument before the Georgia Supreme Court, counsel for the appellants in *Dawson* cited Lonchar's execution to demonstrate the brutality of this execution method. Bill Rankin, *Cruel or Just Grim? Georgia Justices Weigh Clinical Facts of Electric Chair*, ATL. J.-CONST., July 10, 2001, at A1.

63. *Utah Donations from Prisoners, supra* note 7.

64. For a firsthand account of Longo's effort, see generally *A Lethal Catch-22 for Christian Longo*, G.A.V.E. (Mar. 25, 2014), <https://gavelife.wordpress.com/2014/03/25/a-lethal-catch-22-for-christian-longo/>.

65. *Id.*; see also Finkel, *supra* note 2 (detailing Longo's intentions and efforts).

66. Mark Hanrahan, *Christian Longo, Death Row Inmate, Fights For Right To Donate His Organs After Execution*, HUFFINGTON POST, [http://www.huffingtonpost.com/2011/04/21/christian-longo-death-row-organ-donation\\_n\\_852090.html](http://www.huffingtonpost.com/2011/04/21/christian-longo-death-row-organ-donation_n_852090.html) (last updated June 21, 2011, 1:24 PM). It does not appear, however, that Longo is under this misimpression. *See infra* notes 127–128 and ac-

John Kitzhaber imposed a moratorium on the state's death penalty, which has largely mooted Longo's efforts to donate after execution.<sup>67</sup>

As evidenced by this history, posthumous donation is a particular concern for death row inmates. While most prisoners have an expectation of life beyond prison and, thus, can reasonably anticipate exercising the same freedoms with respect to organ donation as other citizens, policies blocking posthumous donation necessarily mean that death row inmates will never have the opportunity to contribute in this way.

### C. States' Efforts To Allow Organ Donation

Members of some state legislatures, often in response to efforts by individual inmates to donate, have waged their own campaigns to make organ donation possible. Each of these efforts has come within the last thirty years<sup>68</sup> after the two known cases of posthumous donation by inmates.<sup>69</sup>

The most far-reaching and successful effort is a Utah law that took effect in 2013 and allows prisoners to register to become posthumous organ donors.<sup>70</sup> That law, sponsored by Representative Steven Eliason, a Republican from Sandy, does not distinguish between death row and general population inmates and offers inmates nothing in exchange for registering as donors.<sup>71</sup> News outlets described it as the first state law explicitly permitting "general prisoners to sign up for organ donation" and acknowledged that it "cracks the door to the controversial option of allowing death-row inmates to donate as well."<sup>72</sup> Ronnie Lee Gardner, who sought to donate his organs before execution, served as Representative Eliason's inspiration.<sup>73</sup>

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accompanying text (collecting statements of inmates, including Longo, who have made it clear that they wish to donate their organs without receiving anything in return).

67. Brandi Grissom, *Considering Death Row for Organs*, N.Y. TIMES, Sept. 8, 2012, <http://www.nytimes.com/2012/09/09/us/considering-the-ethics-of-organ-donations-from-death-row.html>.

68. In addition to those described in this Section, bills in California, Connecticut, Pennsylvania, and Rhode Island that would allow inmates to register to become posthumous organ donors have been proposed but not passed. See A.B. 2440, 2009–2010 Gen. Assemb., Reg. Sess. (Cal. 2009); H.B. 6271, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 465, 2015–2016 Gen. Assemb., Reg. Sess. (Penn. 2015); H.B. 7076, 2007 Gen. Assemb., Jan. Sess. (R.I. 2008).

69. See *supra* notes 53–55 and accompanying text (discussing organ harvests for transplant after the executions of Gary Gilmore and Margie Velma Barfield).

70. UTAH CODE § 64-13-44 (2014).

71. *Utah Donations from Prisoners*, *supra* note 7.

72. *Id.*

73. *Id.*; see also *supra* note 63 and accompanying text (discussing Gardner's desire to donate and his ultimate execution).

In contrast to the successful passage of Utah's statute, legislative proposals that have offered reduced sentences in exchange for donation have failed. A 1998 bill introduced to the Missouri House of Representatives by Representative Chuck Graham, a Democrat from Columbia, proposed commuting any inmate's death sentence in exchange for his donation of a kidney or bone marrow (a so-called "Life for a Life" bill),<sup>74</sup> an effort inspired by the efforts of Milton Griffin.<sup>75</sup> In 2007, State Senator Ralph Anderson, a Democrat from Greenville, introduced a bill in the South Carolina legislature.<sup>76</sup> The proposal offered a sixty-day sentence reduction to inmates "who voluntarily donate[d] bone marrow or blood-forming cells."<sup>77</sup> During the same legislative session, Senator Anderson also proposed a bill that would enable the Department of Corrections to award up to 180 days of good conduct credit for a "particularly meritorious or humanitarian act,"<sup>78</sup> specifically intending that organ donation could be one such act. Similarly, bills proposed in Kentucky and Massachusetts have provided for "an educational good time credit of sixty (60) days to any prisoner who . . . [b]ecomes a living organ donor."<sup>79</sup>

Other state legislators have proposed measures to permit posthumous donation by death row inmates specifically; however, none of these proposals have become law. Most recently, Oklahoma State Representative Cory T. Williams, a Stillwater Democrat, sponsored a bill that would allow death row inmates to make anatomical gifts immediately prior to execution.<sup>80</sup> In 2000, Representative William F. Andrews, a Republican of Delray Beach, introduced a bill to the Florida House of Representatives that would change the state's execution

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74. H.B. 1670 (Mo. 1998); Jeffrey A. Lowell, *News Analysis: Proposed Organ Donation by Death Row Inmates Medically Risky, Coerced and Immoral, Expert Says*, WASH. U. ST. LOUIS REC., Apr. 9, 1998, <http://digitalcommons.wustl.edu/cgi/viewcontent.cgi?article=1790&content=record>.

75. In 1998, Griffin, a Missouri death row inmate, offered to donate his bone marrow or a kidney if it would spare him from execution. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 609 (2002).

76. See S.B. 417, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).

77. *Id.*

78. S.B. 480, 117th Gen. Assemb., Reg. Sess. (S.C. 2007). Neither bill offering reduced sentences in exchange for donation made it out of their committee, but a third bill proposed by Senator Anderson that session—creating an educational program on organ and tissue donation within the Department of Corrections—became law. 2007 S.C. Acts 41 (codified at S.C. CODE ANN. § 24-1-285); see also *supra* note 32 and accompanying text (discussing the South Carolina educational program). See Emily C. Lee, *Trading Kidneys for Prison Time: When Two Contradictory Legal Traditions Intersect, Which One Has the Right-of-Way?*, U.S.F. L. REV. 507, 507–08 (2009) for a discussion of all three of Senator Anderson's proposals. See also *supra* note 29 (discussing like programs in Alabama, Oklahoma, and Virginia).

79. H.B. 444, 2008 Reg. Sess. (Ky. 2008); H.B. 1624, 189th Gen. Ct. (Mass. 2015).

80. See H.B. 2703, 54 Leg., Sd. Sess. (Okla. 2014).

method from the electric chair to one more conducive to organ procurement to enable donation by willing death row inmates.<sup>81</sup> Similarly, Georgia State Representative Doug Teper, an Atlanta Democrat, introduced a bill to replace the electric chair with a guillotine for death row inmates who wished to donate organs in the midst of (and apparently in response to) Larry Lonchar's efforts to donate his organs.<sup>82</sup> Years earlier, in 1987, Kansas State Representative Martha Jenkins, a Leavenworth Republican, proposed a bill reintroducing capital punishment to the state and allowing condemned inmates to donate posthumously.<sup>83</sup>

Not surprisingly, the legislative focus has largely been on the potential benefit this type of policy change would offer patients awaiting transplantable organs. While discussing the Utah law that he sponsored, Representative Eliason stated his belief that prohibiting donation after execution is "a waste of perfectly good organs."<sup>84</sup> Similarly, contemporary press accounts quoted Senator Anderson, explaining that Bill 480 was designed to address the short supply of organs available for transplant. He said: "I believe we have to do something to motivate them. If they get some good time off, if they get out early, that's motivation."<sup>85</sup> Senator Anderson indicated that the shortage of donors in minority communities especially concerned him.<sup>86</sup> Representative Andrews of Florida introduced his bill by stating that if the state could "save some body parts to extend someone's life, [it] ought to do it."<sup>87</sup> However, absent from these discussions was the potential benefit donation offers the donors.<sup>88</sup>

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81. See H.B. 999, 2000 Leg., Reg. Sess. (Fla. 1999).

82. See H.B. 1274, 143d Gen. Assemb., Reg. Sess. (Ga. 1996); *supra* notes 58–62 and accompanying text (discussing Lonchar's attempt at organ donation and his ultimate execution).

83. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 433 (1996) (discussing the Kansas proposal and stating that the bill was passed in the Kansas House but defeated in the Kansas Senate). See generally H.B. 2062 (Kan. 1987).

84. *Utah Donations from Prisoners*, *supra* note 7 (quoting Rep. Steve Eliason).

85. Jenny Jarvie, *Inmates Could Trade an Organ for an Early Out*, L.A. TIMES, Mar. 9, 2007, at A25 (quoting Sen. Ralph Anderson).

86. Kevin B. O'Reilly, *Prisoner Organ Donation Proposal Worrisome*, AM. MED. NEWS (Apr. 9, 2007), <http://www.amednews.com/article/20070409/profession/304099964/6/> (reporting that a speaker at his church, who discussed the shortage of organ donors in minority communities, inspired Senator Anderson).

87. Jeff Testerman, *Bill Seeks Transplants of Organs of Executed*, ST. PETERSBURG TIMES, Mar. 26, 2000, [http://www.sptimes.com/News/032600/State/Bill\\_seeks\\_transplant.shtml](http://www.sptimes.com/News/032600/State/Bill_seeks_transplant.shtml) (quoting Rep. William F. Andrews).

88. Although this discussion was absent from Representative Andrews' bill, Representative Eliason noted the possible positive effect on a donor-inmate when he remarked, "How disappointing is that, there's somebody who maybe wants to atone for his sins in some way [and can't]." *Utah Donations from Prisoners*, *supra* note 7 (quoting Rep. Steve Eliason). See *infra*

D. *Existing Arguments in Favor of Donation*

Scholars and others who advocate for donation often do so by focusing on the benefit to the potential donees. They argue that permitting donation by inmates, whether posthumous or living, death row or otherwise, would increase the availability of organs for transplant and point to the fact that, in 2011<sup>89</sup> more than 3,000 inmates died in state prisons generally<sup>90</sup> and forty-three more were executed.<sup>91</sup> Because a healthy corpse can offer as many as fifty donation opportunities, some of which would be lifesaving, these deaths represent the possibility of thousands of lives saved or improved annually.<sup>92</sup>

Critics of this approach, however, stress that allowing inmates to donate their organs is unlikely to have a dramatic impact on the aggregate supply of available organs. Executions have grown increasingly rare, and the practical realities of prison life (and death) make donation difficult. Inmates are more likely than the general population to suffer from diseases like HIV that make donation impossible.<sup>93</sup> One estimate suggests that roughly one-half of prisoners would be eligible donors, with the others disqualified due to age, infirmity, or disease.<sup>94</sup> Current methods of execution would likely render few organs from death row inmates viable for donation.<sup>95</sup> Moreover, prisons are often geographically isolated, and the resulting time gap between death and transport to a medical facility capable of harvesting organs

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Part IV, for a more thorough discussion of the relationship between organ donations and penological purposes.

89. This is the most recent year for which data is available. NOONAN & GINDER, *supra* note 5, at 19 tbl.14.

90. *Id.*

91. DEATH PENALTY INFO. CTR., *THE DEATH PENALTY IN 2012: YEAR END REPORT 1* (Dec. 2012), <http://www.deathpenaltyinfo.org/documents/2012YearEnd.pdf> (including figures for 2011).

92. Danielle M. Wagner, Comment, *Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, 33 DUQ. L. REV. 931, 943 n.109 (1995). It should be noted that Wagner derives this figure from a 1991 *Washington Post* article. *Id.* (citing *Re-usable Body Parts*, WASH. POST, May 28, 1991). Given the advances in medical technology, the figure has likely risen over the last two decades. As of December 2014, more than 120,000 people were waiting for organs. *The Gap Continues to Widen*, U.S. DEP'T HEALTH & HUM. SERVS., <http://www.organdonor.gov/about/graphdescription.html> (last visited Jan. 11, 2016).

93. Arthur Caplan, *The Use of Prisoners as Sources of Organs—An Ethically Dubious Practice*, AM. J. BIOETHICS, Oct. 2011, at 2. *But see* Mark Joseph Stern, *HIV-Positive People Can Soon Donate Organs*, *Great News*, SLATE (Nov. 22, 2013, 11:37 AM), [http://www.slate.com/blogs/outward/2013/11/22/hiv\\_positive\\_organ\\_donation\\_hope\\_act\\_signed\\_into\\_law.html](http://www.slate.com/blogs/outward/2013/11/22/hiv_positive_organ_donation_hope_act_signed_into_law.html) (reporting on the enactment of the HIV Organ Policy Equity Act, which lifted a ban on research of organ transplants between HIV positive people).

94. Lin et al., *supra* note 22, at 1777.

95. Caplan, *supra* note 93, at 2–3.



would leave many organs unsuitable for transplant.<sup>96</sup> As a result, the estimated net increase in donors if death row inmates were allowed to donate is less than one-fifth of 1%,<sup>97</sup> and the figure seems unlikely to rise markedly if the pool of donors expands to include those dying from causes other than execution.<sup>98</sup>

Thoracic surgeon Shu S. Lin and nurse Lauren Rich make a slightly different argument, appealing to the benefit donation would offer individual patients suffering from end-stage organ failure rather than the potential for an aggregate increase in the organ supply.<sup>99</sup> They assert that “[p]ursuing every opportunity for organ donation is not merely an attempt to ‘close the ever-widening gap between demand and supply of organs’” but, rather, an appropriate means of helping individual patients.<sup>100</sup> The lifesaving benefit of donation to a single patient suffering from end-stage organ disease is immeasurable. Thus, the life options for the specific organ recipients would be greatly augmented, even if the overall organ supply were not.

The history and scholarship focused on the practicalities of organ donation by inmates does little to resolve the debate in this area.

### III. PHILOSOPHICAL OBJECTIONS TO POSTHUMOUS DONATION BY PRISONERS

Unlike the primary arguments in favor of allowing inmates to donate their organs posthumously, which focus on the benefits to the donees, objections to donation generally focus on the donors—the inmates.<sup>101</sup> Most critics cite fears about coercion as a reason to prohibit cadaveric donation. These objections employ an overbroad definition of coercion, however, and often arise from speculative and paternalistic assumptions about inmates. Other objections seem motivated by an irrational revulsion at the thought of sharing body materials with a criminal, but this stigmatization is an inappropriate basis on which to legislate. Fears about the impact inmate organ donation will have on

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96. Lin et al., *supra* note 22, at 1777.

97. *Id.*

98. See NOONAN & GINDER, *supra* note 5, at 19 (showing that the leading cause of death in prison is disease, accounting for 2,867 of 3,232 state prison deaths in 2010).

99. Lin et al., *supra* note 22, at 1773–75 (arguing that there is no medical, ethical, or logical reason to prohibit death row organ donation in light of the potential benefit for those suffering from end-stage organ failure).

100. See *id.* at 1773 (quoting Caplan, *supra* note 93, at 1).

101. This Part focuses on the philosophical objections to posthumous donation. Other authors have dealt with the practical difficulties imprisonment poses for effective donation. See *supra* notes 93–98 and accompanying text, for a discussion of these issues.

sentencing, especially as it relates to capital punishment, however, seem appropriate but resolvable.

### A. Coercion-Based Objections

Fears of coercion underlie many of the objections to allowing inmates to donate organs. The UNOS Ethics Committee lists coercion as one of the top ethical concerns that must be resolved prior to allowing donation by death row inmates,<sup>102</sup> and commentators, such as Caplan and Pal, find it an insurmountable obstacle to overcome.<sup>103</sup> Moreover, state officials worry that inmates will choose to donate under the misperception that doing so will provide them with favorable treatment, making participation less than voluntary.<sup>104</sup>

#### 1. Allowing Donation Is Not Coercive in Any Meaningful Sense

In the narrowest sense of the term, coercion involves threat of an unfavorable change in circumstances that compels an individual to make one choice to avoid that unfavorable change. Alternatively, coercion may be part of an offer to improve circumstances so dramatically that the individual accepts the offer, even if she would not make the same choice under different circumstances.<sup>105</sup> In this sense, coercion exists when one cannot make or act on decisions free from the intervention of another's will.<sup>106</sup> Living donation in exchange for a reduced sentence, which has been proposed by several state legisla-

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102. See *supra* note 19 and accompanying text (discussing the Committee's opposition).

103. See *supra* notes 120–29 and accompanying text (discussing Caplan's and Pal's opposition).

104. See *supra* notes 66–67 and accompanying text (discussing prison officers' fear that inmates will misinterpret organ donation as selling organs for cash).

105. See Jefferson-Jones, *supra* note 25, at 133 (“Traditionally, coercion involves the threat that an unfavorable change in circumstances will occur if the coercee does not take the action desired by the coercer.”). Though Jefferson-Jones would not categorize an offer too good to refuse as coercion because it is a conditional offer rather than a conditional threat, it seems that a conditional offer changing the circumstances of those who accept so favorably—from incarceration to freedom, for example—erases any meaningful distinction between a threat and an offer. This militates in favor of including an offer too good to refuse, such that it intervenes on one's will, as coercive. Cf. Sally Satel, Opinion, *Let Prisoners Donate Their Organs*, N.Y. TIMES, Apr. 25, 2013, [www.nytimes.com/roomfordebate/2013/04/25/should-prisoners-be-allowed-to-donate-their-organs/let-prisoners-donate-their-organs](http://www.nytimes.com/roomfordebate/2013/04/25/should-prisoners-be-allowed-to-donate-their-organs/let-prisoners-donate-their-organs) (asserting that decision-making remains voluntary when one is not subject to an “offer that is ‘too good to refuse’”).

106. Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1153 (2010) (defining autonomy as the ability to act freely without government intervention); see Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 889 (1994) (“[C]oercion’ connotes the deliberate and wrongful subjecting of one human being to the will of another or domination that disrespects the other’s equal moral worth.”).

tures,<sup>107</sup> or other reprieve from punishment, which occurred in the case of the Scotts,<sup>108</sup> risks coercion in this sense, as would posthumous donation in exchange for better treatment while in prison. Purely voluntary, nonincentivized cadaveric donation by inmates, however, does not implicate concerns about coercion under this narrower definition. Indeed, in this narrow and meaningful sense, *prohibiting* donation is coercive in that it prevents inmates from exercising their free will.

However, some scholars worry about a broader conception of coercion in which the nature of the prison environment necessarily restricts prisoners' autonomy and inhibits their ability to make free choices. The Berne Declaration and Greenpeace voiced this concern in 2010 when they awarded the "Public Eye Award" to Roche, a multinational pharmaceutical company, for its irresponsibility in using organs from executed Chinese prisoners in its clinical trials.<sup>109</sup> The organizations noted: "Even when a prisoner supposedly consents to an organ donation, such consent, while imprisoned cannot be considered of one's own free will."<sup>110</sup> Professor Lawrence O. Gostin echoed this critique when he argued: "Free consent is not truly possible under [the] coercive conditions" of prison life, where inmates' keepers determine every aspect of their lives and inmates "will do almost anything to make their lives better."<sup>111</sup> Under this definition of coercion, inmates are vulnerable and unable to make truly voluntary choices because the restrictions on liberty concomitant with incarceration prevent them from making voluntary and informed choices.<sup>112</sup>

Concerns about coercion are rooted in the fear that some outside force may operate on the prisoner to deprive him of his free will, but denying willing prisoners the opportunity to donate imposes an even

107. See *supra* notes 74–79 and accompanying text, for examples of this type of proposed legislation. See also Hinkle, *supra* note 75, at 610–15 (objecting to living organ donations in exchange for a reduced sentence because the nature of the prison environment and the promise of liberty prevent informed consent); Visconti, *supra* note 41, at 215–16 (opposing release conditioned on living organ donations, as in the Scotts' case because it violates NOTA's prohibition on exchanging organs for something of value).

108. See *supra* notes 42–47 and accompanying text (discussing the Scott sisters' case and its aftermath).

109. Judith Schrepf-Stirling, *Roche's Clinical Trials with Organs from Prisoners: Does Profit Trump Morals?*, 121 J. BUS. ETHICS 315, 315 (2014).

110. *Id.*; see also Adnan Sharif et al., *Organ Procurement from Executed Prisoners in China*, 14 AM. J. TRANSPLANTATION 2246, 2247 (2014) ("[I]ncarcerated inmates condemned to death are not in the position to make an autonomous and informed consent for organ donation.").

111. Lawrence O. Gostin, Opinion, *Prisoners Shouldn't Be Allowed To Donate Their Organs*, N.Y. TIMES, Apr. 25, 2013, <http://www.nytimes.com/roomfordebate/2013/04/25/should-prisoners-be-allowed-to-donate-their-organs/prisoners-shouldnt-be-allowed-to-donate-their-organs>.

112. See Caplan, *supra* note 93, at 4; Gostin, *supra* note 111; Lin et al., *supra* note 22, at 1776.

more direct restraint on prisoners' autonomy.<sup>113</sup> Speaking of the exchange implicit in Missouri's unsuccessful "Life for a Life" proposal,<sup>114</sup> one commentator observed: "Prisoners, like all other individuals, must have control over whether to donate their organs."<sup>115</sup> That assertion applies with equal force to those who wish to donate as to those who do not, and it fails to appreciate that inmates who wish to donate currently have no such control.

Prohibiting donation based on this second conception of coercion is overbroad and, by some measures, is its own form of coercion. The prevailing prohibition on posthumous donation by inmates deprives those who wish to donate of autonomy and agency even more directly than would purporting to give inmates choice but exerting pressure because of the terms of the exchange.<sup>116</sup> In short, it "coerces" in the more direct sense: It prevents the exercise of the will of inmates who, given the option, would freely choose to donate.

Accordingly, coercion in its second sense is not truly "coercion" as much as it is a denial of agency. Coercion certainly denies agency, but for it to be distinguishable from incarceration and other restrictions on agency, coercion must be something more than reduced choices. Moreover, if we accept this broader definition of coercion, it might exist for donors outside of the prison context, especially in cases of living donation,<sup>117</sup> yet the same outcry for the prohibition of living donation does not exist. Limiting agency under the rubric of coercion is appropriate only when one is being compelled to make a choice she would not make under different circumstances.

Defining coercion more narrowly does not ignore the possibility it is real. Restriction of inmates' liberty defines incarceration, and the natural desire to be free from those restrictions invites the possibility of

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113. Lin et al., *supra* note 22, at 1775 ("It is hypocritical to argue that organ donation by death row 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.")

114. See *supra* notes 74–75 and accompanying text, for a discussion of the proposed legislation.

115. Hinkle, *supra* note 75, at 614 (concerning living organ donations by inmates).

116. This is true even though jurisdictions employ these practices while prohibiting posthumous donation. See generally *supra* notes 25–29 and accompanying text (discussing blood crediting programs); *supra* notes 40–47 and accompanying text (detailing the case of the Scott sisters).

117. Hinkle, *supra* note 75, at 612 (discussing the pressure that family and physicians may exert when a relative is a suitable living donor for a family member); Shannon Ross, Opinion, *With Organ Donations, Let Prisoners Give Life to Others*, N.Y. TIMES, Apr. 25, 2013, <http://www.nytimes.com/roomfordebate/2013/04/25/should-prisoners-be-allowed-to-donate-their-organs-with-organ-donations-let-prisoners-give-life-to-others> ("As for coercion, whether it's an overwhelming conscience, a yearning to make amends or the impending death of a loved one, virtually all donation is coerced.").

enticing inmates with explicit or implicit exchanges on their liberty. Understanding that inmates are an especially vulnerable population, we afford prisoners special protection in other contexts, like medical research. For example, the National Institute of Health acknowledges that incarceration could affect prisoners' abilities "to make a truly voluntary and uncoerced decision whether or not to participate as subjects in research" and, accordingly, has established additional safeguards to protect them.<sup>118</sup> The sort of posthumous donation for which this Article advocates would not countenance coercion, and educating both prisoners and prison officials to ensure that no change in the conditions of an inmate's confinement occur can likely mitigate the possibility of the less direct, more implicit form of coercion.<sup>119</sup>

## 2. *Coercion Objections Rest on Speculative Assumptions*

Concerns about coercion, whether in its broader or narrower sense, often seem to be grounded in the supposition that inmates would not make the decision to donate absent their incarceration. Moreover, at times these concerns assume that inmates are incapable of understanding that the donation is a gift, not an exchange for more favorable treatment.

For example, thoracic surgeon Jay D. Pal has opposed donation by inmates, arguing that legal, ethical, and logistical problems counsel against allowing donation.<sup>120</sup> Dr. Pal correctly observes that prisoners "are subject to physically and psychologically stressful conditions that undoubtedly affect the decisions they make."<sup>121</sup> But he then argues that, even in the absence of "any explicit promise of reward for donation, . . . prisoners may 'understand themselves to be making an im-

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118. 45 C.F.R. § 46.302 (2015).

119. Identifying a precondition that would mitigate concerns surrounding coercion and posthumous donation, bioethicist Ruth Faden wrote that "the quality of medical care for prisoners who wish to be posthumous organ donors should not be permitted to deviate from standard medical practice for organ procurement[.]" a standard that should apply even if posthumous donor is not incarcerated. Ruth Faden, Opinion, *The Utah Law Allowing Prisoners To Donate Organs Is Fine*, N.Y. TIMES, Apr. 25, 2013, [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](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). In fact, to ensure that a donation is not coerced in the more direct sense, prison officials should take care to treat prisoners who have agreed to serve as donors no differently than other inmates, not just in their medical treatment, but in every aspect of their incarceration.

120. Lin et al., *supra* note 22, at 1776–77. Dr. Pal was writing specifically about death row inmates, but his arguments seem to apply with equal force to inmates who die in prison under other circumstances.

121. Lin et al., *supra* note 22, at 1776.

licit exchange for their generosity.’”<sup>122</sup> Professor Lawrence Gostin expresses a similar concern when he worries that “[d]espite rules that organ donations should not affect prisoner conditions, [prisoners] will believe otherwise.”<sup>123</sup> Gostin fears that, because death row inmates are at higher risk of exploitation than prisoners generally, they will feel even more pressure to donate if they misunderstand the terms of their donations.<sup>124</sup>

These objections rest on factual premises that are at best speculative and at worst false. There is little basis for the belief that no inmate would elect to donate on his own, free from the inherent restrictions of incarceration.<sup>125</sup> The widespread, and largely diffuse, efforts of inmates to donate over the last thirty-plus years under varying circumstances undermine the notion that no inmate would willingly donate.<sup>126</sup> Moreover, there is no reason to believe that prior to or after imprisonment these individuals volunteer to be organ donors at different rates than adults with similar demographics but who are not imprisoned.

Further, a number of inmates who have expressed willingness to donate have done so with the explicit understanding that the donation would not affect the conditions of their incarceration. Shannon Ross, a Wisconsin inmate who has advocated for allowing inmates to donate both alive and posthumously, points out that “[a]s long as those of us incarcerated are clearly informed that we will receive no compensation for donating, which is completely doable, allowing us to donate is no less ethical than the current system.”<sup>127</sup> Likewise, Christian Longo has expressed his “personal belief that such donations should be made altruistically.”<sup>128</sup> And to the extent that inmates might agree to donate under this misimpression, it seems easy to dispel through the same sort of donor education and consent-seeking employed outside prison walls. Appropriate models for ensuring that inmates’ consent

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122. *Id.* (quoting Stuart J. Younger et al., *Ethical, Psychological, and Public Policy Implications of Procuring Organs From Non-Heart-Beating Cadaver Donors*, 269 J. AM. MED. ASS’N 2769 (1993)).

123. Gostin, *supra* note 111.

124. *Id.*

125. At the very least, this would support a freeze-frame model of posthumous donation, in which inmates who expressed their desire to be posthumous organ donors (by means recognized by UAGA) prior to their incarceration should be permitted to donate posthumously should they die during incarceration.

126. See generally discussion *supra* Sections II.B.2–3 (detailing the efforts of inmates to serve as organ donors, posthumous and living).

127. Ross, *supra* note 117.

128. LONGO, *supra* note 1, at 9.

to serve as posthumous donors would be willing and informed exist in other contexts as well.<sup>129</sup>

### 3. *Coercion Objections Regard Inmates Paternalistically*

The absolutist view that prisoners cannot, or will not, consent to donation absent the pressures associated with confinement undergirds coercion-based objections. That view takes the paternalistic position that society must protect inmates from themselves.<sup>130</sup> After all, the argument that the prison environment itself compels an inmate to donate only survives scrutiny if the inmate would not freely elect to donate were he not imprisoned and subject to that environment. But it is likely that the same things that motivate individuals to become organ donors *outside* of prison motivate those *inside*. As a class, there seems to be little reason inmates would need more protection from their desire to become cadaveric donors than would other vulnerable populations, like minors who signal their consent to donate on their applications for learner's permits and driver's licenses.

Moreover, living donation and blood crediting, which jurisdictions around the country more commonly permit, raise greater concerns about agency and the possibility of coercion given the often unambiguous benefits received by prisoners who consent to these transactions.<sup>131</sup> Recall, for example, the case of Gladys and Jamie Scott. Although the sisters proposed the donation that led to their early release,<sup>132</sup> Governor Haley Barbour granted their petition on the express condition that Gladys donate her kidney to Jamie. By reducing their sentences and granting them immediate release conditioned on donation, the state turned a donative transplant into a transaction for consideration. This imposes a much more explicitly coercive condition than does donation that offers no reprieve from incarceration,

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129. For example, physician-assisted suicide, or so-called death with dignity laws, might provide an appropriate model. *See, e.g.*, Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–995 (2009) (requiring a written request, waiting period, and safeguards for physicians to follow to ensure that consent is informed). It would also be appropriate to make the opportunity available only for inmates “who initiate discussions of organ donation on their own.” Patton, *supra* note 83, at 402. These (and other) practical concerns regarding how to implement a system of posthumous donation are beyond the scope of this Article.

130. Sally Satel brushes against this point when she asks: “What evidence supports the claim that prison itself distorts all inmates’ mental capacity to sort through the pros and cons of donation?” Satel, *supra* note 105 (arguing also that the view that prisoners cannot, as a class, voluntarily consent to donation “does not do justice to this nuanced issue”).

131. *See generally* discussion *supra* Sections II.A.3, II.B.1 (collecting jurisdictions that permit living organ donation, and blood crediting, respectively).

132. *But see* Goldberg & Frader, *supra* note 41, at 15 (arguing that the sisters were released for reasons other than the offer to effect a kidney transfer).

because Gladys faces the threat of reincarceration if she fails to donate.<sup>133</sup> Moreover, Jamie presumably faces the same threat if she fails to lose enough weight to make her a suitable transplant recipient. At the very least, the sisters have been barred from entering Mississippi with little explanation.<sup>134</sup>

That we have countenanced living organ donations under these circumstances and continue to allow blood crediting programs belies concerns about coercion in the posthumous donation setting. After all, the same opportunities for reprieve (in the event of donation), and reincarceration or restrictions on interstate travel (if no donation takes place), do not exist in the posthumous donation setting.

### B. Stigma-Based Objections

Coercion and impracticability are not the only concerns raised with respect to posthumous donation. Other objections seem to be founded in a pervasive stigma directed at prisoners. Although proponents of organ donation by inmates often point to evidence that potential organ recipients would not refuse an organ from an inmate donor<sup>135</sup> or to evidence of public support for organ donation by inmates,<sup>136</sup> it is unlikely that proponents would feel the need to study and respond to these concerns if they were not actually lingering in the background. Thus, these affirmations are non sequiturs unless there is an expectation that patients would be unwilling to accept organs from prisoners or that public disapproval for this practice exists. Instead, it appears that they are responding to unspoken concerns that

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133. *Id.* at 15 (“Although Barbour can technically order Gladys back to prison if she fails to donate within a year of her release, his office has remained quiet on whether he would exercise that power.”).

134. Gates, *supra* note 47.

135. See, e.g., Mark Curriden, *Inmate’s Last Wish Is To Donate Kidney*, A.B.A. J., June 1996, at 26, 26 (reporting that Melvin Ferguson, the assistant police chief who investigated the murders committed by Larry Lonchar and who was suffering from kidney failure, was willing to accept a kidney from Lonchar, despite his intimate familiarity with Lonchar’s crimes); Lin et al., *supra* note 22, at 1775 (collecting responses from sixteen patients on the Duke Lung Transplant Program’s active waiting list and noting that twelve patients responded that they would be willing to accept lungs from a death row inmate, and one responded that she would have responded “yes” in case of greater recipient instability”); Satel, *supra* note 105 (writing that she would accept an organ from a prisoner).

136. See, e.g., Lin et al., *supra* note 22, at 1775 (citing *Should Death Row Inmates Be Allowed To Donate Their Organs?*, NBC NEWS, HEALTH (Apr. 20, 2011), <http://health.newsvine.com/question/2011/04/20/6504300-should-death-row-inmates-be-allowed-to-donate-their-organs>; *Should Man Who Killed Wife and Two Children Be Allowed To Donate His Organs?*, SODA HEAD (Apr. 24, 2011), <http://www.sodahead.com/united-states/should-man-who-killed-wife-and-two-children-be-allowed-to-donate-his-organs/question-1707899/> [hereinafter Opinion Polls] (recounting results from three opinion polls providing “overwhelming support for the idea that condemned prisoners should be allowed donate their organs for transplantation”).



the criminality that landed the donor in prison might taint the organ transferee or result in a psychological rejection even if the transplant were a medical success.

Economist Alvin E. Roth examined the role of repugnance in regulating transactions, and argues that distaste for certain activities constrains those practices as much as technological constraints or the more traditional economic explanations of efficiency and incentives.<sup>137</sup> Critics then only obliquely refer to these concerns because of their underlying anti-intellectualism, relying on emotion rather than logic.<sup>138</sup> Once understood in this way, it becomes clear that repugnance rooted in stigmatization is not a philosophically or ethically sound basis for prohibiting organ donations by inmates.

These same stigma-driven objections do not appear to apply with equal force to living donations from inmates, which are, in greater measure, permitted. But living donation by inmates is mostly permitted with respect to blood materials, which are highly fungible products that physicians and patients accept as often coming from society's underbelly.<sup>139</sup> To a lesser extent, inmate organ donation is allowed with respect to living donations to family members, when the existing relationship between the donor and donee might be expected to mitigate the idea that accepting the organ would pollute the donee's body.

This generally unvoiced, gut-level reaction to the idea of incorporating a criminal's body materials into one's own body might be a reason that a patient would choose to reject an available organ and, instead, wait for the next one to become available. But this is no reason to bar prisoners from donating. Instead, potential donees could be told from where the available organ came, and they would be free to proceed with the transplant or pass the organ to the next suitable donee. Thus, this concern should affect, at most, the eventual order in which wait-listed patients receive organs and not whether prisoners should be permitted to be donors in the first instance.

### C. *Objections Based on the Application of the Death Penalty*

Amidst these largely misplaced objections, there is a wholly legitimate one. The desire to avoid introducing issues of organ supply into the already fraught application of the death penalty is likely the least

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137. Alvin E. Roth, *Repugnance as a Constraint on Markets*, J. ECON. PERSPECTIVES, Summer 2007, at 37, 38.

138. See Jefferson-Jones, *supra* note 25, at 107.

139. See generally KARA W. SWANSON, *BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA* 1–14 (2014) (discussing the history of professional blood donors).

addressable concern surrounding posthumous donation, at least as it pertains to death row inmates.<sup>140</sup> Introducing the supply of transplantable organs as a factor in the debate about the death penalty could further arguments by those who advocate for wider and more frequent application of the death penalty. It could also lead judges and juries to apply the death penalty with greater frequency<sup>141</sup> or to adjusting the timing of executions for more convenient transplant scheduling.<sup>142</sup> These—rather than concerns about coercion or jeopardizing punishment’s aims—are the most compelling reasons to consider thoughtfully the wisdom of allowing inmates to donate posthumously.

Yet it seems highly unlikely that this possible harm would occur. Few cases provide the possibility of the death penalty, and the probability is low that a particular defendant in one of those cases would opt to become an organ donor and would, in fact, die under circumstances that make donation feasible. Education on this point and protections ensuring that the inmate-donor is knowingly and freely choosing to donate are better harm preventatives than the current ban on inmate organ donation. Moreover, any increase in the frequency with which the death penalty is applied that may be associated with a change in donation policy should trigger an investigation into whether the possibility of posthumous organ donation was a factor in the sentencing long before the execution occurs. Simply being a factor in the debate, with no evidence that it actually affects the outcome in any case, is insufficient to overcome the very real benefits donation would provide.

Upon closer scrutiny, the primary objections to allowing inmates to donate their organs posthumously prove thin, speculative, and based more on emotion than logic. Even when concern is warranted, as it is with respect to the impact of a posthumous donation option on the application of the death penalty, the actual effect is unknown. Thus, an appropriate approach would be regulation and vigilance, not prohibition.

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140. Amy L. Friedman, Opinion, *We Must Draw the Line on Organ Donations by Death-Row Inmates*, N.Y. TIMES, Apr. 25, 2013, <http://www.nytimes.com/roomfordebate/2013/04/25/should-prisoners-be-allowed-to-donate-their-organs/draw-the-line-on-organ-donations-by-death-row-inmates>.

141. See Grissom, *supra* note 67 (“Would a donation affect jurors in murder cases who are weighing the death penalty versus life sentences? Or prosecutors deciding whether to seek the death penalty? Or governors deciding whether to grant clemency?”).

142. Critics allege this sort of manipulation occurs in China. See, e.g., Sharif et al., *supra* note 110, at 2248.

#### IV. POSTHUMOUS ORGAN DONATION AND THE PURPOSES OF PUNISHMENT

The philosophical objections to allowing posthumous organ donation by prisoners largely focus on the impact on individuals, including: (1) whether prisoners can freely decide to donate; (2) whether patients will benefit from this type of donation; and (3) the impact on defendants accused of capital offenses. However, there is also a potential societal objection to donation. If allowing donation by inmates undermines the purposes of punishment itself, then there is cause to believe that the costs of allowing this choice outweigh the benefits and, thus, tilt the scales toward prohibition.<sup>143</sup> This Part discusses the goals of deterrence and retribution;<sup>144</sup> Part V discusses organ donation's role in rehabilitation.

##### A. *Posthumous Organ Donation and Deterrence*

Deterrence as a justification for punishment relies on the premise that “would-be offenders balance the benefits and costs of crime.”<sup>145</sup> Punishment, then, increases the costs of crime. Thus, it prevents crime when the severity, certainty, and immediacy of punishment push the cost of crime above its benefit.<sup>146</sup>

Theorists generally refer to three related theories of deterrence. First, the general deterrence or general prevention theory provides that punishment of an offender deters others from committing future crimes for fear of enduring the same punishment.<sup>147</sup> Second, the special or particular deterrence theory posits that punishment should deter a specific criminal by subjecting him to an experience he wishes not to repeat.<sup>148</sup> Third, the incapacitation theory focuses on the physical confinement of incarceration, which prevents the particular impris-

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143. Arthur Caplan, for example, argues that organ donation is incompatible with retributive and deterrent aims of punishment and that states should prohibit donation on that basis. See Caplan, *supra* note 93, at 2–3.

144. See generally 24 C.J.S. *Criminal Law* § 1997 (2006) (describing the purposes of punishment).

145. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 205 (2013).

146. *Id.* at 206.

147. See generally 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., 1 SUBSTANTIVE CRIMINAL LAW § 1.5, at 33 (2d ed. 2003) (defining the deterrence rationale).

148. See Nagin, *supra* note 145, at 200 (“Specific deterrence concerns the aftermath of the failure of general deterrence—the effect on reoffending, if any, that results from the experience of actually being punished.”). See generally 1 LAFAVE & SCOTT, *supra* note 147, § 1.5, at 31 (defining particular deterrence).

oned individual from committing further crimes.<sup>149</sup> Incapacitation differs from specific deterrence because the offender experiences its effects during, rather than after, punishment, and both differ from general deterrence in that they act on the individual who is the subject of the punishment rather than the public at large.<sup>150</sup>

Allowing posthumous organ donation does not detract from punishment's deterrent effect under any of the three theories because the same punishment is actualized regardless of whether donation ever takes place. It does not compromise punishment's general deterrent aims because the punishment communicates the same threat to the public at large, irrespective of the donation: "[I]f you do these acts, you will be subject to punishment."<sup>151</sup> The donation is an unrelated activity that neither exacerbates nor mitigates the sentence. For the same reason, posthumous donation does not undermine punishment's specific deterrent effects. In fact, the practical realities of posthumous donation by inmates obviates any specific deterrent effect punishment may have: Because posthumous donation only touches inmates who die behind prison walls, there is no opportunity for punishment to elicit a behavioral response from those inmates after its completion.<sup>152</sup> Lastly, to the extent punishment deters other crimes through incapacitation, the period of incarceration endured by inmates who might posthumously donate has the same incapacitating effect regardless of whether donation is allowed.

As long as punishment is carried out—and it would be in the event of posthumous donation—allowing donation by an inmate does not undermine incarceration's deterrent aim. Ethicist Molly Gardner drives this point home when she points out that it is difficult "to imagine the combination of malicious, prudential, and either altruistic or praise-seeking motives that would cause a would-be killer to be de-

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149. See generally 1 LAFAYE & SCOTT, *supra* note 147, § 1.5, at 32 (defining the restraint rationale).

150. Nagin, *supra* note 145, at 200 (characterizing specific and general deterrence, unlike incapacitation, as a "behavioral response" to punishment).

151. Zachary Hoskins, *Deterrent Punishment and Respect for Persons*, 8 OHIO ST. J. CRIM. L. 369, 372 (2011).

152. For this reason, one might say that posthumous donation is completely irrelevant to punishment's specific deterrent aims. This might be true in the case of inmates who donate after execution, because execution grants inmates little opportunity to respond to their punishment. But, in the case of those for whom death behind prison walls is not a certainty, punishment may still have some (unrealized) specific deterrent effect that permitting posthumous donation does not compromise.

tered by the prospect of execution but not by the prospect of execution combined with organ donation.”<sup>153</sup>

This brings posthumous donation into contrast with systems for living donation, like blood credit programs, in which inmates who agree to donate receive a reduced sentence.<sup>154</sup> Those systems do undermine punishment’s deterrent effect. Punishment only specifically deters future crime to the extent an individual cannot reduce that punishment through later voluntary acts, like donation. In the case of the current programs allowing for sentence reduction by living donation, potential criminals can discount the severity of punishment commensurate with the amount of time by which their sentences may be reduced. Similarly, the possibility of donation in the event of conviction compromises punishment’s general deterrent effect, because others might anticipate living donation as a proverbial “get-out-of-jail-free” card.

Mississippi’s early release of Gladys and Jamie Scott on the condition that Gladys donate her kidney to Jamie also evidences this diminished deterrent effect.<sup>155</sup> And it perhaps explains why efforts, like those of Milton Griffin, to use donation as a means of avoiding execution failed<sup>156</sup>—and should fail. To the extent offenders view the possibility of punishment as a cost of committing crime, reducing sentences for donors mitigates crime’s negative repercussions because donation itself is not perceived as a form of punishment. It reduces both the severity and the certainty of punishment by giving healthy offenders with suitable organs a reprieve. No such diminishment occurs when the government carries out capital punishment (and its horror is in no way mitigated), or when a prisoner who has elected to donate posthumously serves his sentence or dies naturally while still imprisoned.

### B. *Posthumous Organ Donation and Retribution*

Retribution as an aim of punishment rests on the notion that “when a person commits a crime society is justified in expressing its condemnation of the act.”<sup>157</sup> Under this theory, an offense merits punishment

153. Molly Gardner, *Retribution, Deterrence, and Organ Donation*, AM. J. BIOETHICS, Oct. 2011, at 7, 9.

154. See generally *supra* notes 25–29 and accompanying text (describing blood credit programs and listing the states that use them); *supra* notes 64–79 and accompanying text (discussing legislative efforts in Kentucky, Massachusetts, Missouri, and South Carolina that, if successful, would have allowed inmates to receive a reduced sentence in exchange for organ donations).

155. See generally *supra* notes 42–47 and accompanying text (detailing the Scott sisters’ saga).

156. See Hinkle, *supra* note 75, at 609 (recounting the efforts of Griffin, a Missouri death row inmate, to make a living donation in exchange for being spared execution); Lowell, *supra* note 74, at 7 (describing the unsuccessful “Life for a Life” proposal Griffin inspired in the Missouri legislature).

157. Anderson, *supra* note 25, at 964.

irrespective of whether punishment has utilitarian effects like preventing future crime. Instead, punishment makes concrete the prisoner's responsibility for the harm caused.<sup>158</sup> Allowing donation is consistent with retributive principles because it appreciates the inmate as human, capable of good as well as evil.<sup>159</sup> In that sense, retribution revolves around the axis of human agency, and denying willing prisoners the opportunity to donate denies them that agency.<sup>160</sup>

This theory is in accord with the Kantian categorical imperative that one must not treat another as a means to an end.<sup>161</sup> According to Immanuel Kant, people have intrinsic worth regardless of whether they are ever useful to others.<sup>162</sup> Therefore, failing "to grant them the pursuit of their own (rational) projects and ends is to reduce them to something less than fully human."<sup>163</sup> Applying this principle to organ donation by prison inmates, ethicist Nancy Nyquist Potter argues that allowing prisoners to make living organ donations in return for sentence reductions is contrary to Kantian ethics because it appeals to prisoners' desire for reprieve from punishment and, in so doing, exerts a coercive influence on prisoners' free will.<sup>164</sup> But in the case of posthumous donation, in which prisoners stand to gain nothing except an effectuation of their desire to become donors, the same logic does not apply. Instead, posthumous donation achieves the Kantian aim of granting donors agency and the ability to pursue rational desires.

These principles are even clearer upon a closer examination of bioethicist Arthur Caplan's argument that because donation has the capacity to redeem, it is inconsistent with retribution as the moral ba-

158. See Gardner, *supra* note 153, at 8 (describing retribution as a "nonconsequentialist" justification for punishment).

159. Cf. L. Syd M. Johnson, *The Ethically Dubious Practice of Thwarting the Redemption of the Condemned*, AM. J. BIOETHICS, Oct. 2011, at 9, 10 ("Punishment motivated and justified by retributivism treats the criminal as a person, one who is responsible for [her] own actions, who has earned [her] punishment by voluntarily committing a crime, and who *deserves* to be punished, with the proper punishment determined by the crime.").

160. See *infra* Part IV, for a more thorough discussion of donation as it relates to inmate autonomy and agency.

161. See Nancy Nyquist Potter, *What It Means To Treat People as Ends-in-Themselves*, AM. J. BIOETHICS, Oct. 2011, at 6, 6.

162. *Id.* (citing IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* (James W. Ellington trans., 3d ed. 1993)).

163. *Id.* (citing KANT, *supra* note 162).

164. *Id.* Potter's argument rests on an assumption about prisoner psychology; she assumes "that prison makes it difficult for inmates to do anything for its own sake, because options are so limited and coercion so ever-present that prisoners' reasoning is reduced to a calculative, game-theoretic form." *Id.* This Article questions that assumption. See *infra* notes 186–93, 215–20, 223–27, and accompanying text (arguing that there are rational reasons for prisoners to choose to become donors).

sis of punishment.<sup>165</sup> Caplan reasons that donation's creation of an opportunity to laud donors and celebrate their altruism undermines the retributive effect of punishment.<sup>166</sup> The notion that potential redemption undermines punishment's retributive effect cannot withstand scrutiny.

First, and most importantly, if punishment achieves retribution at all, it does so regardless of whether the wrongdoer achieves redemption.<sup>167</sup> Retribution expresses the belief that "wrongdoers should be punished, not in spite of their value as persons, but because of it."<sup>168</sup> Thus, whatever capacity organ donation might have to redeem or otherwise increase a person's moral value is wholly unrelated to the retributive justification for punishment.

Second, the idea that permitting donation obstructs the retributive aim of punishment confuses retribution and revenge.<sup>169</sup> Writing about death row donation, Caplan fears that "[r]etribution may be made far more difficult to achieve as families and friends of victims watch as executed perpetrators are lauded in their final days by possible recipients and the media for their altruism in saving lives."<sup>170</sup> Emotion drives revenge, but those emotional responses have no place in retribution, which is the exclusive province of the state.<sup>171</sup>

Specifically, a family's emotional reaction to execution bears no relationship to whether retribution is achieved because retribution is a nonconsequentialist justification for punishment.<sup>172</sup> Satisfying victims' desire for vengeance "might be an instrumental aim or benefit of

165. Caplan, *supra* note 93, at 3–4. Caplan's argument focused on death row prisoners, but it seems likely he would make the same arguments regarding posthumous donation by inmates not on death row. If we accept the notion that redemption undercuts the retributive aims of capital punishment, it seems that the same would be true of other forms of punishment.

166. *Id.* at 3.

167. See Gardner, *supra* note 147, at 8 ("[R]etributivism holds that a wrongdoer should be punished, not for how worthy he or she is as a person, but for what he or she has done."); Peter Murphy, *Would Donation Undercut the Morality of Execution?*, AM. J. BIOETHICS, Oct. 2011, at 13, 14 ("[W]here the prescribed harm is death, killing the prisoner is sufficient for just punishment; this punishment is just even if the prisoner receives some benefit, be it self-praise, redemption, public recognition, or anything else.").

168. Gardner, *supra* note 153, at 8 (citing IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT (1887)).

169. *Id.*

170. Caplan, *supra* note 93, at 3.

171. Gardner, *supra* note 152, at 8; see also 24 C.J.S. *Criminal Law* § 1997, at 25 (2006) ("The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole."); Johnson, *supra* note 159, at 10 (writing that the purpose of capital punishment is not "to use the murderer's death as a means to provide satisfaction to the families and friends of victims of murder").

172. Gardner, *supra* note 153, at 8.

execution, and a utilitarian might view it as an appropriate justification for execution over some other form of punishment, but it is an aim separate and distinct from retribution.”<sup>173</sup> Whatever emotional reactions this policy might engender from a victim’s friends or family members, it would not undercut punishment’s retributive justification.<sup>174</sup>

Third, Caplan’s argument rests on a speculative assumption regarding the response of a victim’s loved ones to execution. The possibility that executed inmates will enjoy acclaim after their decision to donate might indeed contribute to the emotional damage endured by families who have suffered unspeakable loss.<sup>175</sup> On the other hand, it seems equally possible that they would take comfort in the inmate’s decision to donate and the knowledge that others could benefit from the life-giving gesture in the midst of their pain and the loss they suffered.<sup>176</sup> In the case of death row donation, execution “may actually inhibit the processes of grieving and healing for victims’ friends and family members[.]” creating further friction with the fear that allowing donation would impede families’ grieving.<sup>177</sup>

And, just as it is speculative to assume a family’s emotional response to donation, it is uncertain, if not unlikely, that donors like Christian Longo—who killed his wife and threw his young children off a bridge after weighting down their bodies<sup>178</sup>—would enjoy public acclaim sufficient to overcome the condemnation of their conduct. This perspective is borne out in a public opinion poll in which the majority of respondents acknowledged the reprehensible nature of the crimes committed by death row inmates while indicating that these inmates should be able to donate their organs.<sup>179</sup> Gratitude for the decision to donate can coexist with disapproval of the conduct that landed the donor in prison.

Fourth, taken to its logical extreme, the argument that prisoners’ potentially praise-worthy conduct undermines punishment’s retribu-

173. Johnson, *supra* note 159, at 10.

174. Gardner, *supra* note 153, at 8.

175. And, in fact, family and friends of Longo’s victims are reported to oppose the idea of him living on in any way through organ donation. See, e.g., Johnny Dodd, *Murderer Depicted in Movie True Story Tells People: ‘I Don’t Feel I Can Be Redeemed,’* PEOPLE (Apr. 17, 2015, 12:45 PM), <http://www.people.com/article/true-story-real-life-christian-longo-speaks-out>.

176. Gardner, *supra* note 153, at 8.

177. *Id.* (citing evidence from Vik Kanwar, *Capital Punishment as “Closure”: The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215 (2002) and Scott Vollum & Dennis R. Longmire, *Covictims of Capital Murder: Statements of Victims’ Family Members and Friends Made at the Time of Execution*, 22 VIOLENCE & VICTIMS 601 (2007)).

178. See Finkel, *supra* note 2.

179. Lin et al., *supra* note 22, at 1775 (citing Opinion Polls, *supra* note 136).



tive purpose would prevent all manner of self-improvement by inmates. Prisoners would be unable “to apologize or make amends for their crimes, to educate themselves or others, to donate money to charity, to perform the simplest unselfish acts of kindness, to seek religion, or experience any form of spiritual growth or awakening.”<sup>180</sup> The same logic would extend beyond capital crimes and reach equally to those sentenced to finite periods of confinement.<sup>181</sup> Further, it would wholly eliminate punishment’s potential for rehabilitation. Thus, even if we assume, despite the foregoing discussion, that potentially redemptive conduct (like organ donation) does have the capacity to undermine retributive aims of punishment, prohibiting this kind of self-improvement so widely would be poor public policy.

Permitting inmates to donate their organs and other bodily materials posthumously is consistent with the goals of punishment. Because there is no principled reason to deny prisoners this option, they should be allowed the choice whether to become posthumous organ donors as long as protections are put in place to ensure that the choice is voluntary and that no inducements that undermine their freedom of choice or the purposes of punishment are offered.

## V. ORGAN DONATION, PRISONER AGENCY, AND REHABILITATION

That there is no clear reason to prevent prisoners from becoming posthumous organs donors provides a strong argument in favor of allowing them this freedom. Yet, even more importantly, there is also an affirmative case for allowing this type of donation: Permitting inmates autonomy over this decision affords them limited agency in a concrete and controlled realm, in which broader societal goals may be advanced, as it allows them to effect and display rehabilitation during imprisonment.

### A. *Organ Donation and Prisoner Agency*

Imprisonment’s defining feature is the restriction of liberty. Inmates are confined to a defined area in which their movements, decision making, and environment are constrained. Moreover, those convicted of crimes frequently suffer collateral consequences of conviction that endure after release.<sup>182</sup> In this context, then, prohibiting

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180. Johnson, *supra* note 159, at 9.

181. *Id.* at 9–10 (arguing that Caplan’s argument would “remov[e] any opportunity for reform, rehabilitation, penance, or redemption[.]” thwarting both deterrent and retributive aims of punishment).

182. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1810 (2012) (listing the collateral consequences of conviction

prisoners from becoming organ donors is just one feature of a package of prohibitions that come with conviction. Yet this prohibition is categorically different for the inmates who die while still imprisoned because the restriction endures beyond their sentences and into death. Thus, restricting the liberty of prisoners in this realm proves, in many instances, to be a permanent restriction.

Although personal autonomy is a concept that evades simple definition,<sup>183</sup> it is beyond dispute that it is one around which our government and social contract are organized. The U.S. Constitution, for example, protects positive and negative rights, both “rights to” and “rights not to,” so that individuals may order their lives in accord with their own wishes and desires.<sup>184</sup> In this sense, autonomy is relative and descriptive: It is the extent to which an individual can meaningfully govern her affairs.<sup>185</sup> Although incarceration does not itself restrict inmates’ ability to deliberate, it restricts options from which they may choose. By virtue of their incarceration, inmates are less autonomous than they would be outside of prison walls.

Allowing donation respects and advances prisoners’ descriptive autonomy because it offers an arena in which they may exercise their agency. Permitting donation would grant inmates a private space in which they could make decisions about the disposition of their bodies upon their death, free of government intervention,<sup>186</sup> while still preserving the purposes and effects of incarceration. Allowing inmates to exercise their descriptive autonomy would have benefits than the

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approved by the U.S. Supreme Court, including restrictions on the right to vote, serve on a jury, possess firearms, and occupational restrictions).

183. See generally Fallon, *supra* note 103 (explaining autonomy as both a descriptive and an ascriptive concept).

184. Joseph Blocher, *Rights To and Not To*, 100 CAL. L. REV. 761, 762–63 (2012) (introducing the concepts of a right “to” and a right “not to” and collecting constitutional embodiments of those rights); see also Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 175 (1982) (citing autonomy as a fundamental constitutional value reflected in cases involving contraception, abortion, privacy, free exercise, free speech, and procedural due process).

185. Fallon, *supra* note 106, at 877. But see also *infra* Part IV (collecting arenas in which the U.S. criminal justice system grants inmates some degree of agency). Descriptive autonomy is analogous to agency, which one might describe as a means of exercising autonomy. Agency might also prove a useful mechanism for distinguishing ascriptive autonomy from descriptive autonomy; inmates are no less ascriptively autonomous than persons not incarcerated, but they do have less agency. See *infra* notes 188–92 (discussing ascriptive autonomy and the effect of allowing posthumous organ donation on it).

186. See generally Hashimoto, *supra* note 106, at 1153 (defining “autonomy” as “the concept of private space within which a person can make and act upon decisions free from government intervention”).

psychic reward of exercising one's own will.<sup>187</sup> In a 1977 study of individuals who made living donations of kidneys to relatives, donors reported feeling happier and having higher self-esteem after the donation than before.<sup>188</sup> Although posthumous donation differs qualitatively from living, directed donation, it is not hard to imagine that posthumous donation, if allowed, would have a similar effect for an inmate who chose it during the period between making the choice and his death.

In contrast to descriptive autonomy, incarceration does not alter inmates' ascriptive autonomy, a concept that "represents the purported metaphysical foundation of people's capacity and also their right to make and act on their own decisions, even if those decisions are ill-considered or substantively unwise."<sup>189</sup> Autonomy in the ascriptive sense is not relative; it "is a moral entailment of personhood" and "no more subject to measurement and comparative assessment than is personhood itself."<sup>190</sup>

Allowing posthumous organ donation appreciates inmates' ascriptive autonomy, even if it does not advance or enhance it. Incarceration, or other means of restricting liberty, does not diminish ascriptive autonomy because it is synonymous with metaphysical conceptions of personhood and sovereignty.<sup>191</sup> Additionally, permitting or forbidding posthumous organ donation does not make inmates any more or less human.<sup>192</sup> Nonetheless, allowing inmates the opportunity to donate acknowledges their ascriptive autonomy and, in turn, their humanity.<sup>193</sup> Donation, when offered as an option in a context in which there are so many restrictions on descriptive autonomy, might have the capacity to make prisoners more aware of their ascriptive autonomy.

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187. See Fallon, *supra* note 106, at 899 (observing that humans "have an interest in living descriptively autonomous lives" and that descriptive autonomy "provides the foundation for pride and satisfaction in a life well-lived").

188. ROBERTA G. SIMMONS ET AL., *Living Related Donors: Cost and Gains*, in GIFT OF LIFE: THE SOCIAL AND PSYCHOLOGICAL IMPACT OF ORGAN TRANSPLANTATION 153, 178 tbl.6-2, 179 (1977).

189. Fallon, *supra* note 103, at 878.

190. *Id.*

191. See *id.* at 891 ("[P]eople to whom autonomy is ascribed are neither more or less autonomous than anyone else; all competent adult persons possess the right to be self-governing to the same degree." (footnote omitted)).

192. See *id.* at 878 (remarking that ascriptive autonomy equates "personhood with autonomy" and autonomy "with a moral entitlement to respect for one's agency," an idea that originated with Kant).

193. See *id.* ("All competent adults possess an equal right to personal sovereignty.").

The exercise of agency embodied by a decision of whether to become a posthumous organ donor is the same regardless of whether the inmate elects to donate. In either case, the inmate is permitted to make this decision for himself. Moreover, the benefits attained by this decision making in a small but important area of life exist whether the inmate dies in a way and at a time that makes donation possible. The benefits to the donor and to humanity are independent of the actual end result.

### B. *Comparable Grants of Agency*

Inmates already enjoy some constitutional and statutory affirmative rights<sup>194</sup> that grant them a measure of autonomy in arenas comparable to posthumous organ donation. For example, they have a constitutionally protected interest in being able to marry while in prison.<sup>195</sup> In upholding the right of inmates to marry, the U.S. Supreme Court emphasized that marriage was an expression of emotional support, public commitment, and, for some, religious faith.<sup>196</sup> Prisons must also afford inmates, even those who are a part of smaller religious sects, “reasonable opportunities” to exercise their religious faiths.<sup>197</sup> In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)<sup>198</sup> to protect and accommodate prisoners’ religious rights.<sup>199</sup> Among other things, RLUIPA protects the rights of inmates in federal and state prisons to worship freely while incarcerated. It prohibits governments from imposing “a substantial burden on the religious exercise of a person residing in or confined to an institution” unless the imposition both furthers “a compelling governmental interest” and is “the least restrictive means of furthering” that interest.<sup>200</sup>

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194. These affirmative rights stand in contrast to inmates’ Eighth Amendment rights to be free from cruel and unusual punishment. *See* U.S. CONST. amend. XIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

195. *Turner v. Safley*, 482 U.S. 78, 96 (1987) (holding unconstitutional a marriage restriction in Missouri state prisons, which prohibited marriage except by the prison superintendent’s approval and only permitted approval for compelling reasons, unconstitutional).

196. *Id.* at 95–96.

197. *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (*per curiam*).

198. Pub. L. No. 106–274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc to cc-5 (2012)).

199. *Id.* § 3(a) (codified as amended at 42 U.S.C. § 2000cc-1). *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28 HARV. J.L. & PUB. POL’Y 501, 514–39 (2005), for more information on RLUIPA and the elements of a prisoner’s claim for relief under that Act.

200. 42 U.S.C. § 2000cc-1(a). A rule of general applicability may impose a substantial burden.

Religious exercise, as defined by the statute, means “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>201</sup> Thus, a religious exercise under RLUIPA need not be a religious obligation to merit protection. This definition, then, fits within the approach taken by many religious communities, which endorse organ donation as an expression of their beliefs but do not require it as a tenet of religious practice.<sup>202</sup> It remains to be seen whether restrictions on organ donation further compelling government interests and are narrowly tailored,<sup>203</sup> but the fact that RLUIPA would likely recognize organ donation as a religious exercise for religiously motivated inmates means that donation fits within the rubric of these inmates’ protected liberty interests. The religious practices RLUIPA protects are not a far stretch from donation, and the same justification for allowing prisoners to practice their religious beliefs should apply to granting them the agency to choose whether to donate their organs posthumously.

Even for those inmates whose desire to donate their organs is not religiously motivated, the interests that animate permitting prisoners to engage in religious rituals might bolster the case for allowing inmates the agency to donate. For example, to the extent that prisons recognize these religious rituals on death,<sup>204</sup> an inmate’s case for donation could be strengthened by the connection to the disposition of his body upon death. Alternatively, the desire to donate organs might be—for some inmates—an expression of the moral, but irreligious, convictions only incidentally related to what happens to their bodies after death.<sup>205</sup>

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201. *Id.* § 2000cc-5(7)(A).

202. See generally *Theological Perspectives on Organ and Tissue Donation*, UNOS, <https://www.unos.org/donation/facts/theological-perspective-on-organ-and-tissue-donation/> (last visited Mar. 22, 2014) (restating the positions of dozens of religious organizations). Scholars and clerics of Catholicism, Hinduism, Islam, Judaism, and most Protestant Christian denominations have expressed their support for organ donation. *Id.*

203. See generally Jessica Miller, Note, *A Life For an Afterlife: Assessing the Potential Redemption of Capital Inmates’ Requests to Posthumously Donate Organs Under the Religious Land Use and Institutionalized Persons Act*, 13 RUTGERS J. L. & RELIGION 87 (2011) (analyzing RLUIPA’s application to death row inmates’ efforts to donate their organs after execution and considering whether current methods of execution impose a substantial burden on donation).

204. See U.S. DEP’T OF JUSTICE, TECHNICAL REFERENCE T5360.02, MINISTRY OF BOP CHAPLAINS 6 (Nov. 18, 2004), <http://www.bop.gov/PublicInfo/execute/policysearch?todo=query&type=trm> (recognizing the right of inmates to have clergy perform various burial rituals).

205. Cf. LONGO, *supra* note 1, at 9 (asserting that organ donation by inmates cultivates a “generosity of spirit” and “provides an opportunity to help a fellow citizen who desperately needs help”).

### C. Agency and Rehabilitation

The benefits derived by a prisoner through his ability to exercise agency in this limited realm are not the only benefits weighing on the donor side of the donation equation. Allowing inmates to become posthumous organ donors provides an opportunity to reflect rehabilitative aims of punishment that might not otherwise be evident, particularly in the case of death row inmates.<sup>206</sup>

Like retribution and deterrence, rehabilitation is a commonly cited purpose of punishment.<sup>207</sup> Rehabilitation rests on the foundational belief that individuals are not inherently criminal. Instead, various criminogenic factors based on an inmate's biology, psychology, and societal setting drive the decision to engage in criminal activity. The rehabilitative approach to punishment seeks to alter the factors likely to cause criminal behavior by removing the individual from the setting in which criminality is fostered and to reform him.<sup>208</sup> Rehabilitative punishment, then, "cure[s] the wrongdoer of [his] criminality."<sup>209</sup>

In contrast to retribution (and like deterrence), rehabilitation is a consequentialist justification for punishment; its value lies in its effect—a reduced probability that the offender will commit again.<sup>210</sup> Unlike specific deterrence, however, reduced recidivism is not the sole justification for punishment under a rehabilitative model. Rehabilitation transforms individuals who have engaged in criminality; it makes future criminality less likely because the individual, once rehabilitated, is "happier to abide by the law than to break [it],"<sup>211</sup> and that transformation bears fruit other than reduced recidivism.

206. The same would be true of living donation. See Sally Satel, *supra* note 102 ("Donation can also be part of rehabilitation, preparing a prisoner for eventual freedom though [sic] thoughtful decision-making and, ideally, restitution."). However, such donations are not the focus of this Article.

207. See 24 C.J.S. *Criminal Law* § 1997 (2011) (listing rehabilitation as a purpose of punishment).

208. Kimberly L. Patch, Note, *The Sentencing Reform Act: Reconsidering Rehabilitation as a Critical Consideration in Sentencing*, 39 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 165, 171–72 (2013).

209. B. Douglas Robbins, Comment, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1132 (2001).

210. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000). Specific deterrence prevents future criminality by "inculcating a greater fear of punishment[.]" while rehabilitation makes future criminality less likely because punishment changes the character and tendencies of the punished. *But see id.* at 1316 n.8 (arguing that specific deterrence is synonymous with rehabilitation).

211. *Id.*

There is, however, broad skepticism about the possibility that rehabilitation may truly be successful. Criminals are oftentimes regarded as a group that exists separate from society and outside morality and, thus, incapable of rehabilitation. Providing opportunities for inmates to rehabilitate themselves undercuts the morality of execution and, specifically, its retributive aim: If rehabilitation is, in fact, possible, then capital punishment curtails the possibility of redemption for a condemned prisoner. These fears presuppose that inmates are not capable or worthy of redemption as an end in itself.<sup>212</sup> Reluctance to permit inmates to act in ways that might redeem or provide growth opportunities for them arises because it is more comfortable to treat inmates as less than human and outside our common moral community.<sup>213</sup> Society expects its members to elect actions such as organ donation, and prohibiting inmates from doing so reinforces the stigma that places them outside that moral community. Yet denying the possibility of rehabilitation to criminals denies our very humanity.

Some commonly cited factors that lead to criminal behavior include a lack of strong social associations, long-term planning, and empathy.<sup>214</sup> Educating inmates about organ donation and allowing them to decide whether to become posthumous organ donors may provide a valuable tool for beginning to overcome these very factors. Gratuitous posthumous organ donation requires an individual to think about the world from the perspective of a critically ill patient and that patient's loved ones. It is a selfless act that binds the donor to the larger community, both conceptually during life and physically after death. Moreover, it is the epitome of delayed gratification and long-term planning because there is no effect until the donor's death. Although providing, at most, one small step toward a prisoner's rehabilitation, it is an important step that is distinct from other rehabilitative measures.

Additionally, psychological research illustrates that granting inmates more autonomy benefits them by increasing their self-efficacy and perceived control, the lack of which are predictive of future criminal behavior. Self-efficacy is "the conviction that one can successfully

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212. See *supra* notes 180–81 and accompanying text (arguing that this fear misunderstands the retributive justification for punishment).

213. Johnson, *supra* note 159, at 10.

214. See, e.g., Joan Gottschall & Molly Armour, *Second Chance: Establishing a Reentry Program in the Northern District of Illinois*, 5 DEPAUL J. SOC. JUST. 31, 67 (2011). Some criminogenic factors, like poverty and a lack of educational or vocational training, would not be in play.

execute the behavior required to produce outcomes.”<sup>215</sup> It reflects confidence in one’s ability to effectuate desired outcomes. Perceived control denotes one’s general expectations about whether one’s behavior or external forces control outcomes. Some psychologists theorize that an internal locus of control leads to self-directed courses of action, whereas an external locus of control discourages them.<sup>216</sup> Increases in self-efficacy and perceived control are associated with improvements in mental health and well-being;<sup>217</sup> in fact, perceived control may be a better predictor of one’s functioning in society than actual control.<sup>218</sup> Similarly, lower senses of self-efficacy lead to depression and anxiety, whereas greater self-efficacy is associated with improvements in stress levels, thought control, psychological well-being, and general functioning.<sup>219</sup>

To the extent that giving inmates the autonomy to choose whether to donate their organs posthumously increases their self-efficacy and perceived control, simply providing the option to register as a donor improves a prisoner’s psychological and physical health. Providing inmates the opportunity to donate, thus, should contribute to greater confidence and self-efficacy regardless of the choice made by any given individual. Likewise, removing barriers to donation shifts the locus of control with respect to donation and is, therefore, likely to begin to overcome learned helplessness.<sup>220</sup> This shift, in turn, represents movement toward becoming a rehabilitated member of society.

For the prisoners who die while still serving their sentences, rehabilitation is not a salient penological purpose.<sup>221</sup> Nonetheless, allowing

215. Albert Bandura, *Self-Efficacy: Toward a Unifying Theory of Behavioral Change*, 84 PSYCH. REV. 191, 193 (1977). Self-efficacy is distinguishable from outcome expectations, the belief “that a particular course of action will produce certain outcomes.” *Id.*

216. *See, e.g.*, Barry Zimmerman, *Self-Efficacy: An Essential Motive To Learn*, 25 CONTEMP. EDUC. PSYCH. 82, 85 (2000).

217. *See* Ellen A. Skinner, *A Guide to Constructs of Control*, 71 J. PERSONALITY & SOC. PSYCH. 549, 549 (1996) (collecting studies showing that “across the life span” perceived control is “related to a variety of positive outcomes, including health, achievement, optimism, persistence, motivation, coping, self-esteem, personal adjustment, and success and failure in a variety of life domains”).

218. *See id.* at 551.

219. Albert Bandura, *Perceived Self-Efficacy in Cognitive Development and Functioning*, 28 EDUC. PSYCH. 117, 133–34 (1993).

220. *See* Skinner, *supra* note 217, at 551 (“[P]rolonged exposure to objective noncontingency produces cognitive, motivational, and emotional deficits, even in subsequent objectively controllable situations.”).

221. This is especially true for death row inmates because capital punishment is said to reject rehabilitation. *See, e.g.*, *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“[The death penalty] is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.” (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (per curiam))). *But see generally* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231 (2013)



inmates to donate posthumously creates a vehicle to express rehabilitation that might have taken place independent of the opportunity to donate. To this extent, it advances society's interest in punishment's potential for rehabilitation.

The experience of Christian Longo bears this point out. Longo has written about his own conviction and death sentence, explaining that after periods of denying guilt and trying to convince himself that his crimes were unimportant, "the enormity of what [he] did seeped in[.]" and "remorse and then a wish to make amends" followed.<sup>222</sup> Assuming that this is a truthful statement of Longo's thought processes, this transformation is an example of rehabilitation that permitting him to donate his organs would actualize. Even if it is not a truthful statement, though, allowing Longo to donate his organs posthumously does no harm, because he would receive no sentence reduction or other compensation in return.

If we conceive of rehabilitation more broadly, such that it includes punishment's capacity to transform the character of the punished, then creating an opportunity to donate posthumously might facilitate rehabilitation rather than merely creating an avenue for its expression. Allowing inmates to donate could encourage them to reflect on donation's potential for them to engage with their community and make amends.<sup>223</sup> Granting inmates, even those the criminal justice system has condemned to death, the opportunity to help others confers dignity upon them,<sup>224</sup> and the importance of human dignity is a steady undercurrent in Eighth Amendment jurisprudence.<sup>225</sup> That same emphasis bears in favor of recognizing inmates' dignity by giving them room to make transformative decisions.<sup>226</sup> In short, recognizing inmates' capacity for good by allowing them to volunteer as posthumous donors might lead them to recognize the same capacity for good in themselves.

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(arguing that the character-transformation component of rehabilitation remains relevant in the context of capital punishment, in part because it appreciates the humanity of death row inmates).

222. Longo, *supra* note 4.

223. Miller, *supra* note 203, at 135 (asserting that allowing donation after execution encourages inmates "to reflect on [their] own culpability, seek atonement, and ultimately do something beneficial for society"); *see also* LONGO, *supra* note 1, at 9.

224. Miller, *supra* note 203, at 135–36 ("Post-execution organ donation provides the capital inmate with an opportunity to make amends for [her] crime by opting to do something that saves lives and is useful to society, and thus carries the additional benefit of preserving the dignity of the condemned.").

225. Ryan, *supra* note 220, at 1270.

226. *Cf. id.* at 1267 (arguing that there is value in an offender's reform even outside societal reintegration).

Ultimately, offering willing inmates the opportunity to donate their organs connects them to their community and recognizes them as fully human members of our moral community.<sup>227</sup> Even if the potential aggregate benefit to patients is small, the benefit to individual inmates is great, and inviting inmates into the larger moral community benefits us all.

#### CONCLUSION

There are certainly less controversial—and more efficient—ways of increasing the pool of organs available for transplant than turning to prisoners. However, a *donor*-focused analysis reveals that allowing prisoners to choose whether to become posthumous organ donors serves a larger social function than can be measured by the effect on the availability of transplantable organs. Instead, the benefit to the prisoners themselves is substantial. Regardless of whether an individual prisoner elects to become a donor, the freedom to make the choice is a positive exercise of agency that does not interfere with the purposes of punishment. Moreover, the process of learning about organ donation and deciding whether to become an organ donor provides a rare opportunity for inmates to effect and display their rehabilitation. When viewed from this perspective, allowing prisoners to become posthumous organ donors is a larger social good.

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227. See Johnson, *supra* note 159, at 10 (opining that denying inmates the opportunity to perform acts we expect of members of our moral community denies them access to that community).

