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Rethinking the Prohibition of Death Row Prisoners as Organ Donors: A Possible Lifeline to Those on Organ Donor Waiting Lists.

Donny J. Perales

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**RETHINKING THE PROHIBITION OF DEATH ROW PRISONERS
AS ORGAN DONORS: A POSSIBLE LIFELINE TO
THOSE ON ORGAN DONOR WAITING LISTS**

DONNY J. PERALES

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"It seems like a terrible waste . . . [i]f you could use their organs, it would mean a lot of people could live."¹

I. INTRODUCTION

The human body contains more than twenty-five different transplantable organs, which, *inter alia*, includes the kidneys, heart, lungs, and corneas.² Since the first successful kidney transplant operation in 1956, the United States has made significant medical strides in the organ transplantation field.³ Enhanced surgical and organ preservation techniques, combined with an increase in expertise in organ immunology and the development of new antirejection drugs, such as FK-506, greatly increase the survival rates of organ recipients.⁴ As of 1992, over 85% of patients

1. See Jeff Testerman, *Organs of Condemned Sought for Transplant*, ST. PETERSBURG TIMES, Mar. 26, 2000, at 1B, 2000 WL 5604077 (quoting Sandra Moragues, who is a 51-year-old woman suffering from cirrhosis of the liver); see also W.F. Ross, Editorial, *Don't Use Guilt for Organ Donations*, POST-STANDARD (Syracuse, N.Y.), May 12, 2001, at A7, 2001 WL 5543143 (supporting condemned prisoner organ donation by stating, "It's wake-up time for death-row prisoners who have had their try at appeals . . . Why not put an end to the endless medical, food, clothing and shelter for the death-row prisoner and just dissect the beast?").

2. See Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 46 (1995) (discussing medical advancements in the organ transplant industry); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 389 (1996) (commenting on the historical background of organ donation and transplantation).

3. See Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner Is . . ."*, 20 J. CORP. L. 5, 6 (1994) (noting the vast improvement in organ transplantation in the past twenty-five years); see also Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213, 214 (2001) (discussing advances in modern transplant technology).

4. See Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner Is . . ."*, 20 J. CORP. L. 5, 6 (1994) (detailing the modern advancements of organ

receiving heart transplants survived past the first postoperative year, which is significant when compared to the eighteen-day survival of the first heart transplant recipient.⁵

Today, organ transplant surgery is no longer considered an extremely risky procedure; instead, medical professionals view it as a common surgical operation.⁶ Since 1980, doctors have successfully performed over 150,000 organ transplant surgeries.⁷ Organ transplantation continues to bring hope and new life to thousands of patients suffering from heart, lung, kidney, and other organ diseases.⁸ For example, in 1992, organ transplantation surgeries saved 16,000 lives.⁹ Organ transplantation is the most viable procedure available to prevent premature death for those afflicted with end-stage kidney, liver, lung, or heart disease.¹⁰

Despite the advances in medical science and the increased survival rates for organ recipients, many people are unable to receive an organ transplant because the demand for organs drastically exceeds the available supply.¹¹ In 2001, more than 68,000 Americans were on organ donor waiting lists, in which twelve people died per day due to the lack of com-

transplantation); Troy R. Jensen, *Organ Procurement: Various Legal Systems and Their Effectiveness*, 22 HOUS. J. INT'L L. 555, 555-56 (2000) (examining modern developments of organ transplantation).

5. See David E. Jefferies, *The Body As Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 623 (1998) (discussing organ transplantation history); see also Fred H. Cate, *Human Organ Transplantation: The Role of Law*, 20 J. CORP. L. 69, 69 (1994) (highlighting the efficacy and survival rate of organ transplant surgeries). As of 1991, the ten-year survival rate of patients receiving kidney transplants was greater than 80%, while the five-year survival rate for those receiving hearts was 67% and 63% for liver recipients. *Id.*

6. See Lisa E. Douglass, *Organ Donation, Procurement and Transplantation: The Process, the Problems, the Law*, 65 UMKC L. REV. 201, 201 (1996) (noting the advanced technological improvements in organ transplant operations).

7. See Fred H. Cate, *Human Organ Transplantation: The Role of Law*, 20 J. CORP. L. 69, 69 (1994) (discussing the increasing number of transplant programs throughout the United States).

8. See Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner Is . . ."*, 20 J. CORP. L. 5, 6 (1994) (emphasizing the effectiveness of organ transplant surgeries).

9. See *id.* (pointing out the success and efficacy of organ transplant surgeries).

10. See Mark F. Anderson, *The Future of Organ Transplantation: From Where Will New Donors Come, To Whom Will Their Organs Go?*, 5 HEALTH MATRIX 249, 254 (1995) (estimating that at least one-third of the patients with these diseases die before they get an organ transplant).

11. See *id.* at 250-51 (discussing this nation's organ shortage problem); Troy R. Jensen, *Organ Procurement: Various Legal Systems and Their Effectiveness*, 22 HOUS. J. INT'L L. 555, 556 (2000) (addressing the current worldwide organ shortage).

patible organs.¹² The United Network For Organ Sharing (UNOS) recovered 10,538 organs from donors for transplantation in 1999, but the number of people needing organs was seven times the amount of organs procured.¹³ In 2000, officials at UNOS added a new person to the organ donor waiting list every fourteen minutes.¹⁴

While the need for organs has reached epidemic proportions, the rate of organ donations remains stagnant.¹⁵ In 1992, an estimated 15,000 people were qualified organ donors, yet only 4,548 people donated their organs.¹⁶ Therefore, more than 20,000 kidneys and lungs, and 10,000 hearts and livers were beyond the reach of patients desperately waiting on organ donor lists.¹⁷ Much of the blame for the organ deficit lies in the current system of organ procurement.¹⁸ Commentators argue that this country does not have an organ shortage; it has a problem recovering organs.¹⁹

12. Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213, 213 (2001); see also David E. Jefferies, *The Body As Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 624 (1998) (analyzing the organ donation process and the resulting organ shortage crisis); Ellen Goodman, *The Bottom Line of Organ Donating*, ABILENE REPORTER-NEWS, Mar. 10, 1998, <http://www.texnews.com/1998/opinion/good0310.html> (last visited Feb. 15, 2003) (emphasizing the critical need for organs).

13. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 593 (2002) (examining the supply and demand of organs).

14. See Laurel R. Siegel, *Re-engineering the Laws of Organ Transplantation*, 49 EMORY L.J. 917, 917 (2000) (reporting the grim statistics of the nation's organ shortage).

15. See Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner Is . . ."*, 20 J. CORP. L. 5, 6 (1994) (indicating that donation rates have not increased, while demand for transplants has skyrocketed).

16. *Id.*

17. See David E. Jefferies, *The Body As Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 625 (1998) (detailing the waste of organs from potential donors).

18. See Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner Is . . ."*, 20 J. CORP. L. 5, 6 (1994) (implying that the flaws of the current organ donation system are one reason for the nation's organ shortage problem); Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213, 226-27 (2001) (criticizing the current American system of organ donation); David E. Jefferies, *The Body As Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 625-26 (1998) (asserting that the current organ donation system is the reason for the nation's organ shortage).

19. See Leonard H. Bucklin, *Woe Unto Those Who Request Consent: Ethical and Legal Considerations in Rejecting a Deceased's Anatomical Gift Because There Is No Consent by the Survivors*, 78 N.D. L. REV. 323, 323 (2002) (quoting Theodore A. Latour, Patient Representative for United Network for Organ Sharing).

The current system revolves around the notion of altruism.²⁰ The altruism-based organ donation system leaves the donative decision to the individual; however, it is this system that hinders effective organ procurement.²¹ Under this system, the donor must give prior consent before a doctor may remove any of the needed organs.²²

Although many Americans favor organ donation, a vast majority of them are hesitant to donate their organs.²³ For example, a 1990 Gallup poll showed that 85% of the public supported organ donation, but only 20% actually carried organ donor cards.²⁴ Several factors contribute to potential donors' reluctance to donate their organs under the altruism system, which include: the failure of potential donors to perceive any immediate personal benefit due to lack of incentive, reluctance to confront their own death or that of family members, and fear that they will

20. See Andrew C. MacDonald, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL'Y REV. 177, 178 (1997) (explaining the process and procedures of the current organ donation system). Currently, a living individual can choose to donate his organs after death by signing a donor card or a written document expressing intent to donate; alternatively, a decedent's family may choose to donate the organs on behalf of the decedent if he did not express any intent to donate. *Id.*

21. See Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213, 226-27 (2001) (emphasizing the adverse effects of a voluntary organ donation system on organ supply); see also Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 4-5 (1996) (reporting that the altruism-based organ donation system does not effectively obtain transplantable organs); Troy R. Jensen, *Organ Procurement: Various Legal Systems and Their Effectiveness*, 22 HOUS. J. INT'L L. 555, 570 (2000) (indicating the ineffectiveness of an organ donation system based on altruism).

22. See Troy R. Jensen, *Organ Procurement: Various Legal Systems and Their Effectiveness*, 22 HOUS. J. INT'L L. 555, 569 (2000) (stating that the voluntary system of organ donation requires consent before a person's organs may be removed). Proponents of the altruistic system claim that educational campaigns, which increase the public's awareness of the organ shortage crisis, are one possible way to increase organ donation. *Id.* at 570. These proponents assert that increasing the public's knowledge about the need for organs will result in more families donating their deceased loved ones' organs. See Marcia Mattson, *Looking for Ways to Increase Organ Donation*, FLA. TIMES-UNION (Jacksonville), May 9, 2000, at C1, 2000 WL 6825463 (highlighting the need for educating the public on organ donation).

23. See Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 6 (1996) (explaining why people are reluctant to donate their organs despite supporting the notion of organ donation). People often fail to "sign donor cards because doing so represents a concession that death is inevitable. To donate, people must overcome reluctance to confront either their own mortality or a close family member's death." *Id.* at 6-7.

24. See Ian C. Pilarczyk, *Organ Donor Trusts and Durable Powers of Attorney for Organ Donation: New Twists on the Living Trust and Living Will*, 13 PROB. L.J. 29, 35-36 (1995) (citing the public's statistical support for organ donation and explaining the reasons behind the public's failure to donate).

receive substandard medical care if a hospital finds out they are organ donors.²⁵ Moreover, many people are simply unaware that a critical shortage of organs exists, or they were never asked to become organ donors.²⁶

More than half of the families asked to donate a relative's organs refuse to do so.²⁷ Many family members do not donate their loved one's organs because of the traumatic effects of death on their ability to make a rational decision or their inability to "fully understand that their loved one is brain-dead despite a beating heart."²⁸ Another reason families fail to donate organs is the reluctance of physicians or health care officials to approach and ask permission from grieving family members to obtain their loved one's organs.²⁹

As a result of the organ shortage and the growing number of people on organ donor waiting lists, this Comment focuses on the prospect of implementing a publicly and legislatively approved organ procurement plan from condemned prisoners based on voluntary consent.³⁰ Texas, as well as all the other states, prohibits organ procurement from condemned prisoners and does not allow these prisoners to voluntarily donate organs after their death.³¹ Although this practice would not have a significant

25. See Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 6-9 (1996) (discussing several reasons why people do not donate their organs or those of family members).

26. *Id.* at 8.

27. Marcia Mattson, *Looking for Ways to Increase Organ Donation*, FLA. TIMES-UNION (Jacksonville), May 9, 2000, at C1, 2000 WL 6825463; see also Jeffrey A. Lowell, Editorial, *Prisoner Organ Donation Is a Bad Idea*, ST. LOUIS POST-DISPATCH, Feb. 24, 1998, at B7, 1998 WL 3321990 (echoing the problems of the altruism-based organ donation system on the organ supply). In excess of 75% of potential donors do not donate because their families decline to donate their deceased loved one's organs. *Id.* If families permitted organ donation from their deceased loved ones, there would be a sufficient supply of donor organs to meet organ demands. *Id.*

28. Jennifer Rutherford-McClure, Comment, *To Donate or Not to Donate Your Organs: Texas Can Decide for You When You Cannot Decide for Yourself*, 6 TEX. WESLEYAN L. REV. 241, 244 (2000).

29. See *id.* (discussing families' reluctance to donate their loved one's organs); see also Michael A. Williams, *End-of-Life Care and Organ Donation Decisions – A Doctor's Perspective*, PROB. & PROP., Sept./Oct. 2001, at 58, 61 (indicating that the failure of health care personnel to approach families about organ donation is one of the reasons for the organ shortage problem).

30. See, e.g., DR. JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 89 (1991) (suggesting that prisoner organ donation must be a voluntary decision); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 426-27 (1996) (advocating a voluntary consent system of procuring organs from executed prisoners).

31. See *Campbell v. Wainwright*, 416 F.2d 949, 950 (5th Cir. 1969) (refusing to allow an inmate to donate a nonvital organ for transplantation).

impact on solving the organ deficit crisis, it could save the life of a person in desperate need of a transplant.³² For instance, organ donation by a healthy condemned inmate potentially saves at least eight adults by providing two kidneys, two lungs, a heart, liver, pancreas, and small intestines.³³ Furthermore, surgeons can surgically divide the liver and use one half to save a dying infant, and the inmate's bone marrow can save a leukemia patient's life.³⁴

Part II of this Comment discusses the history of prisoner organ donation. Part III advocates a change in Texas policy through legislative reform, discusses the legal right of prisoners to donate their organs, and presents conflicts between the Texas policy and organ donation laws. Part IV examines the need for an execution scheme that would allow condemned prisoners to donate organs. Finally, Part V proposes and defends an anesthesia-induced execution method as a means to collect organs from condemned prisoners.

II. BACKGROUND

A. *Origination in the States*

Although it may seem odd, the concept of permitting prisoners to be donors is not new to this country.³⁵ During the 1950s, many states enacted laws to alleviate blood shortages by allowing prisoners to reduce their sentences by "a certain number of days for each pint of blood they donated."³⁶ For example, Massachusetts offered to shorten prisoners' sentences by five days for each pint of blood donated, not to exceed four

32. See DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE 77* (1991) (criticizing a California senator's argument that death row prisoner organ donation is futile because it would not supply enough organs). Procuring organs from condemned prisoners is not about the quantity of lives saved, it is about the quality of those lives. *Id.* Today, the net gain from practicing capital punishment is zero. *Id.* First, the condemned's death compounds the victim's loss of life combined with "the even more sickening loss of several lives when salvageable patients die waiting for innocent donor organs." *Id.* Another crucial element to consider is not the quantity of lives saved, but instead the attempt to impart some positive value to the use of capital punishment. *Id.*

33. DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE 43* (1991); see also Lisa Belkin, *Doctor Tells of First Death Using Suicide Device*, N.Y. TIMES, June 6, 1990, at A1, LEXIS, News, The New York Times File (reporting Dr. Jack Kevorkian's statement that each condemned prisoner could potentially save "five, six, [or] seven lives" and that it would be a waste to not use those organs).

34. DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE 43* (1991).

35. See Mark F. Anderson, *The Prisoner As Organ Donor*, 50 SYRACUSE L. REV. 951, 971 (2000) (summarizing the past use of prisoners as a source for body parts).

36. *Id.*

donations in a year.³⁷ Other states, such as California,³⁸ Oklahoma,³⁹ Alabama,⁴⁰ and Virginia,⁴¹ enacted similar prisoner blood donor programs.⁴² Today, many of the prisoner blood donor programs no longer exist, not because of dissatisfaction with the results of the programs, but due to a need to standardize sentences and to make certain that prisoners serve a significant portion of their sentences.⁴³ A few states still have prisoner blood donor laws, but they are more restrictive than prior practices.⁴⁴

In recognizing the need for organs and the apparent waste of organs from executions, many state legislators have proposed statutes calling for prisoner organ donation.⁴⁵ In 2000, Florida State Representative William F. Andrews introduced House Bill 999, which proposed to allow death row prisoners to donate their organs upon execution.⁴⁶ Representative Andrews “believed that by donating organs, a serial killer like Ted Bundy

37. MASS. ANN. LAWS ch. 127, § 129A (Law. Co-op. 1989) (repealed 1989); Mark F. Anderson, *The Prisoner As Organ Donor*, 50 SYRACUSE L. REV. 951, 971-72 (2000).

38. See Mark F. Anderson, *The Prisoner As Organ Donor*, 50 SYRACUSE L. REV. 951, 972 n.86 (2000) (discussing 1957 Cal. Stat. ch. 1248, (repealed 1968), which permits prisoners to donate one pint of blood as many as four times a year in exchange for a five-day reduction in sentence).

39. See *id.* at 972 n.85 (citing 1961 Okla. Sess. Laws p. 438, § 1, which reduces prisoners' sentences by twenty days for each unit of blood donated, a maximum of four times per year).

40. See ALA. CODE § 14-9-3 (2002) (allowing a thirty-day reduction of sentence for a donation of one pint of blood or more one time per year).

41. See VA. CODE ANN. § 53.1-191 (Michie 2002) (permitting the parole board to reduce prison sentences for those who donate blood to other prisoners and to blood banks).

42. See Mark F. Anderson, *The Prisoner As Organ Donor*, 50 SYRACUSE L. REV. 951, 972 (2000) (reviewing the states' prisoner blood donor programs).

43. *Id.*

44. See, e.g., OKLA. STAT. ANN. tit. 57, § 65 (West 2002) (limiting prisoner donation of blood only to county jail inmates); VA. CODE ANN. § 53.1-191 (Michie 2002) (prohibiting prisoner blood donation for felonies committed after Jan. 1, 1995); see also Mark F. Anderson, *The Prisoner As Organ Donor*, 50 SYRACUSE L. REV. 951, 972 (2000) (illustrating the restrictions on current prisoner blood donor statutes).

45. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 431-33 (1996) (asserting that condemned prisoner organ donation has received support from several state legislators).

46. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 599 (2002) (discussing the United States' history of prisoner organ donation); see also Marcia Mattson, *Looking for Ways to Increase Organ Donation*, FLA. TIMES-UNION (Jacksonville), May 9, 2000, at C1, 2000 WL 6825463 (introducing Florida State Representative Andrew's bill proposing to allow prisoners to donate their organs); Jeff Testerman, *Organs of Condemned Sought for Transplant*, Sr. PETERSBURG TIMES, Mar. 26, 2000, at 1B, 2000 WL 5604077 (reporting Florida Representative Andrews's proposal).

would be doing a service by helping others to live.”⁴⁷ However, strong opposition from organ procurement organizations such as Lifelink, coupled with ethical, scientific, and legal issues prevented the bill from becoming law.⁴⁸ Representative Andrews later modified the bill to permit inmates to carry donor cards so they could have the opportunity to decide whether they want to donate their organs if they die in prison.⁴⁹

In 1998, Missouri State Representative Chuck Graham initiated a “Life for a Life” bill that would allow a death row prisoner to donate a kidney in exchange for a commuted sentence.⁵⁰ Representative Graham believed that allowing condemned prisoners to give bone marrow or kidneys could ease the organ shortage problem.⁵¹ As in Florida, the “Life for a Life” bill did not pass due to resistance from organ donation organizations claiming that the practice of exchanging organs for a reduced sentence violated federal prohibitions against the sale of human organs.⁵²

47. E-mail from Pam Hackett, Legislative Assistant to Representative William Andrews, Florida House of Representatives, to Donny J. Perales, Law Student, St. Mary’s University School of Law (Sept. 13, 2002, 13:54 CST) (on file with the *St. Mary’s Law Journal*).

48. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 599 (2002) (discussing the organizations and groups that oppose using condemned prisoners as organ donors); see also Marcia Mattson, *Looking for Ways to Increase Organ Donation*, FLA. TIMES-UNION (Jacksonville), May 9, 2000, at C1, 2000 WL 6825463 (explaining organizations’ reasons for opposing condemned prisoner organ donation).

49. Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 599 (2002); Marcia Mattson, *Looking for Ways to Increase Organ Donation*, FLA. TIMES-UNION (Jacksonville), May 9, 2000, at C1, 2000 WL 6825463.

50. See Jason Strait, *House Panel Nixes Plan for Inmate Organ Transplants*, ST. LOUIS POST-DISPATCH, Apr. 10, 1998, at C3, LEXIS, News, St. Louis Post-Dispatch File (reviewing the support for and arguments against the “Life for a Life” bill); see also Mark F. Anderson, *The Prisoner As Organ Donor*, 50 SYRACUSE L. REV. 951, 955 (2000) (describing the various reactions to the introduction of the bill).

51. See B. Drummond Ayres, *Political Briefing: Missouri May Spare Inmate Organ Donors*, N.Y. TIMES, Mar. 23, 1998, at A12, LEXIS, News, The New York Times File (reporting Missouri State Representative Chuck Graham’s proposal of permitting condemned prisoners to donate their organs in exchange for a commuted sentence). Milton V. Griffin, an inmate on Missouri’s death row convicted for stabbing and killing a man stated, “[I]f he could avoid [facing execution] by providing someone who is critically ill with a life-saving kidney or bone marrow, he not only would be saving his own skin but also ‘giving back to the community.’” *Id.*

52. See National Organ Transplant Act, 42 U.S.C. § 274e (2000) (prohibiting a person from transferring a body part for valuable consideration); TEX. PEN. CODE ANN. § 48.02 (Vernon 1994) (prohibiting the sale and purchase of human organs); see also Jeffrey A. Lowell, Editorial, *Prisoner Organ Donation Is a Bad Idea*, ST. LOUIS POST-DISPATCH, Feb. 24, 1998, at B7, 1998 WL 3321990 (giving reasons why organ donation centers oppose prisoner organ donation); Marcia Mattson, *Looking for Ways to Increase Organ Donation*,

The National Kidney Foundation and the National Bone Marrow Foundation expressed their belief that altruism should be the basis for organ donation.⁵³ Furthermore, critics argued that the bill was inequitable because it would spare the lives of healthy condemned prisoners, while unhealthy prisoners, who committed similar crimes would get the lethal injection.⁵⁴

Arizona State Representative Bill McGibben is another vocal proponent of prisoner organ donation. He proposed a bill that would give a condemned prisoner a choice between death by lethal injection or by organ removal.⁵⁵ Representative McGibben asked, "[I]f [death row prisoners] can do something positive for society on their way out, why not [let them]?"⁵⁶

Other state legislators have attempted similar legislation. For example, Indiana State Representative Jon Padfield initiated a 1995 resolution

FLA. TIMES-UNION (Jacksonville), May 9, 2000, at C1, 2000 WL 6825463 (detailing the arguments against using death row prisoners as organ donors).

53. See B. Drummond Ayres, *Political Briefing: Missouri May Spare Inmate Organ Donors*, N.Y. TIMES, Mar. 23, 1998, at A12, LEXIS, News, The New York Times File (conveying the organ donor banks' dislike of State Representative Graham's "Life for a Life" bill); see also Jeffrey A. Lowell, Editorial, *Prisoner Organ Donation Is a Bad Idea*, ST. LOUIS POST-DISPATCH, Feb. 24, 1998, at B7, 1998 WL 3321990 (outlining the arguments against using condemned prisoners as organ donors). The United States prohibits the buying and selling of organs. *Id.* "The use of organs from other than purely volunteer donors has been condemned worldwide by every recognized transplant organization. . . . The gift from organ donors, whether from living donors or from dead donors and their families, is and must be a purely altruistic, voluntary offering." *Id.*

54. See Mark F. Anderson, *The Prisoner As Organ Donor*, 50 SYRACUSE L. REV. 951, 955-56 (2000) (arguing against commuting a death sentence in exchange for donating organs); see also Ellen Goodman, *The Bottom Line of Organ Donating*, ABILENE REPORTER-NEWS, Mar. 10, 1998, <http://www.texnews.com/1998/opinion/good0310.html> (last visited Feb. 15, 2003) (reviewing some differing proposals to solve the organ deficit). Opponents argue that "Life-for-Life" programs might tempt juries or judges to impose the death penalty in hopes that a convicted inmate would opt to donate his organs to save his life and that of others. Mark F. Anderson, *The Prisoner As Organ Donor*, 50 SYRACUSE L. REV. 951, 955 (2000).

55. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 600 (2002) (presenting legislative support for using condemned prisoners as organ donors); see also Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 432 & n.213 (1996) (citing 1996 Ariz. Sess. Law 2271, which allows condemned prisoners to donate their organs by choosing execution by organ removal).

56. Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 600 (2002); see also Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 431-33 (1996) (emphasizing that many state legislators defend the proposal of allowing death row prisoners to donate their organs). Despite State Representative Bill McGibben's effort, the bill did not make it out of committee. *Id.* at 432.

pushing the Indiana Legislative Council to contemplate organ procurement from death row prisoners.⁵⁷ Furthermore, in 1996, Georgia State Representative Teper introduced a bill calling for an execution method that was compatible with organ procurement from executed prisoners.⁵⁸ The bill allowed condemned prisoners to choose between death by electrocution or, if they chose to be organ donors, death by guillotine.⁵⁹ Former Texas Attorney General Jim Mattox also expressed an interest in allowing executed prisoners to become organ donors.⁶⁰ Mr. Mattox stated, “[I]f you’ve got 100 people you’ve killed, we might have saved 300 or 400 people with their organs.”⁶¹ However, Mr. Mattox pointed out the difficulty in procuring organs under Texas’s lethal injection method.⁶² In spite of all the past attempts, no legislation has been enacted that allows condemned prisoners to donate their organs.⁶³

57. See Phyllis Coleman, “*Brother, Can You Spare a Liver?*” *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 26 n.158 (1996) (emphasizing states’ reluctance to pass legislation allowing condemned prisoners to donate their organs); see also Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 431-33 (1996) (reviewing states’ legislative proposals for allowing condemned inmates as organ donors). Representative John Padfield argued that his bill simply gave inmates the option to donate their organs. See Phyllis Coleman, “*Brother, Can You Spare a Liver?*” *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 26 n.158 (1996) (showing support for prisoner organ donation). Furthermore, Representative Padfield distinguished the difference between organ donation and organ harvesting, which procures organs against a person’s will, and proclaimed that he would never support a measure for organ harvesting. *Id.*

58. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 432 (1996) (highlighting Representative Teper’s bill).

59. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 600 (2002) (tracing the origins of support for using condemned prisoners as organ donors). Today, Georgia continues to use electrocution exclusively as the method of execution. *Id.*

60. See Kathy Walt, *Death in Texas; One Hundred Long Walks; After 13 Years of Executions, Public Response Has Declined*, HOUS. CHRON., Oct. 6, 1995, at A19, 1995 WL 9407507 (discussing the changes Texas Attorney General Jim Mattox would like to see in the execution process).

61. *Id.*

62. *Id.*

63. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 600 (2002) (emphasizing that every state legislative proposal for using condemned prisoners as organ donors has been unsuccessful).

B. *China's Practice: The Worst Case Scenario and an Example of What Not to Do*

Since 1984, China regularly procures organs for transplantation from executed prisoners.⁶⁴ An estimated 3,000 executed prisoners each year serve as a source of organs for transplant surgeries in China.⁶⁵ Chinese law proclaims that organ procurement from executed prisoners is permissible only when the prisoner freely consents to organ removal, when no one claims the body of the executed prisoner, or when the family of the prisoner gives permission for organ procurement.⁶⁶ Despite China's rigid requirements, there are many allegations that suggest a tainted system of organ procurement from condemned prisoners.⁶⁷

1. *China's Corrupt Practice*

Routinely, the Chinese government fails to abide by its strict organ procurement law.⁶⁸ There are many assertions that Chinese medical staffs immediately procure organs from executed prisoners without prior consent from the prisoner or the prisoner's family.⁶⁹ Reports show that

64. Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 597 (2002). See generally Allison K. Owen, Comment, *Death Row Inmates or Organ Donors: China's Source of Body Organs for Medical Transplantation*, 5 IND. INT'L & COMP. L. REV. 495 (1995).

65. See Allison K. Owen, Comment, *Death Row Inmates or Organ Donors: China's Source of Body Organs for Medical Transplantation*, 5 IND. INT'L & COMP. L. REV. 495, 496 (1995) (discussing China's practice of using executed prisoners as a source for organs).

66. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 425 (1996).

67. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 597 (2002) (condemning China's practice of procuring organs from executed prisoners); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 425 (1996) (detailing the atrocities of China's practice in extracting organs from executed prisoners). See generally Craig S. Smith, *Execution in China, Through a Brother's Eyes*, N.Y. TIMES, Mar. 11, 2001, at 1, LEXIS, News, The New York Times File (stating that Chinese doctors widely acknowledge the practice of procuring organs from executed prisoners, but are reluctant to discuss the matter on record).

68. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 597 (2002) (indicating that China's law concerning organ removal from condemned prisoners is a farce).

69. Allison K. Owen, Comment, *Death Row Inmates or Organ Donors: China's Source of Body Organs for Medical Transplantation*, 5 IND. INT'L & COMP. L. REV. 495, 495 (1995). When the family of an executed prisoner does not claim the body after execution, government officials will use the organs for transplantation. *Id.* at 500. However, the government often does not inform the prisoner's family of the date of the execution and usually prohibits contact between the prisoner and his family. *Id.* "By the time a family learns of the execution, it may be too late for them to claim the remains, thus making it easier for the Chinese government to justify the use of organs by claiming that the body

healthy prisoners with useful organs are often bumped up to the front of execution waiting lists.⁷⁰ In many instances, the executioners intentionally mishandle the executions to ensure that the inmates are alive when physicians remove their organs.⁷¹ Executions frequently take place according to the current transplant needs, with greed as the motivating factor in carrying out the executions.⁷² The organs from executed prisoners are often sold to the highest bidder, with some bids reaching \$30,000.⁷³ For example, Wang Guoqi, a burn specialist at the Tianjin Paramilitary Police General Brigade Hospital who is seeking political asylum, testified in the U.S. House Subcommittee on Human Rights that the hospital often sold organs and skin to wealthy patients; kidneys were sold for up to \$15,000 each.⁷⁴ Despite the horrific reports, the Chinese government denies these practices and conceals the number of executions and organs removed from condemned prisoners.⁷⁵

was not taken by the family.” *Id.* Furthermore, after removing the organs, officials often cremate the bodies so that the family would be unable to determine whether the organs were removed or not. *Id.*

70. See Ellen Goodman, *The Bottom Line of Organ Donating*, ABILENE REPORTER-NEWS, Mar. 10, 1998, <http://www.texnews.com/1998/opinion/good0310.html> (last visited Feb. 15, 2003) (describing China’s gruesome practice of procuring organs from condemned prisoners).

71. Allison K. Owen, Comment, *Death Row Inmates or Organ Donors: China’s Source of Body Organs for Medical Transplantation*, 5 IND. INT’L & COMP. L. REV. 495, 495 (1995).

72. Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 597 (2002); Allison K. Owen, Comment, *Death Row Inmates or Organ Donors: China’s Source of Body Organs for Medical Transplantation*, 5 IND. INT’L & COMP. L. REV. 495, 495 (1995).

73. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 597-98 (2002) (condemning China’s practice of procuring organs from executed prisoners and selling them to the highest bidder); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 425 (1996) (mentioning China’s black market for executed prisoners’ organs); Harry Wu Hongda, *A Grim Organ Harvest in China’s Prisons*, WORLD PRESS REV., June 1995, at 22, 22 (reporting China’s procedures for obtaining organs from executed prisoners).

74. Bill Nichols, *Panel Told of Organ Harvests on Executed Chinese Inmates*, USA TODAY, June 28, 2001, at A12, 2001 WL 5465806. Mr. Wang’s job at the hospital encompassed removing skin and corneas from 100 executed prisoners. *Id.* Mr. Wang claimed that he refused to work at the hospital after an incident where doctors removed kidneys from a prisoner while he was still alive and then left the prisoner to die. *Id.* Mr. Wang said, “After this incident, I have had horrible, recurring nightmares, . . . I have participated in a practice that serves the regime’s political and economic goals far more than it benefits the patients.” *Id.*

75. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 425 (1996) (referring to the Chinese government’s attempt to keep its prisoner organ extraction practices undisclosed).

Notwithstanding China's atrocious practices and black market, there is evidence that some Americans travel to China and pay for an organ transplant to avoid the long waiting list in the United States.⁷⁶ Dr. Thomas Diflo, a surgeon from New York, claims that he has seen more than six patients in his clinic who had implanted kidneys purchased from China's death row.⁷⁷ Dr. Diflo said that the patients buying the organs were typically young Chinese-American women, and that they "weren't distressed about snatching organs from the condemned"; however, "he was overwhelmed by the [moral] implications" of purchasing organs from a system that fosters gross violation of human rights and nonconsensual organ procurement.⁷⁸ Likewise, the United States government continues to react negatively to China's organ-harvesting process.

2. U.S. Response to China's Practice

In the U.S., Congress has expressed outrage over alleged Chinese organ harvesting from executed prisoners.⁷⁹ The State Department's an-

76. See Froma Harrop, Editorial, *Phony Rectitude About Transplants*, PROVIDENCE J., Nov. 21, 2001, at B07, 2001 WL 29796498 (describing "unethical" Americans' journeys to China to procure organs). See generally Brian Kates, *Live Organ Donors Smuggled to U.S.*, CHARLESTON GAZETTE, Sept. 8, 2002, at P8A, 2002 WL 5217580 (discussing illegal organ donor solicitation); Stanley Oziewicz, *Shady World of Transplant Tourism in China Exposed*, S. CHINA MORNING POST, June 5, 2001, at 14, 2001 WL 22849288 (exploring the ramifications of a Vancouver businessman's operation of helping suffering patients traveling to China for kidney transplants).

77. See Erik Baard & Rebecca Cooney, *China's Execution, Inc.*, 46 VILLAGE VOICE 3640 (2001), 2001 WL 9089514 (claiming that no American doctor before Dr. Diflo had spoken publicly about seeing patients who received organs bought from China); see also Craig S. Smith, *Donated Inmates' Organs Raise Issues of U.S. Ethics*, HOUS. CHRON., Nov. 18, 2001, at 30, 2001 WL 23644005 (reporting Dr. Diflo's experience with a Chinese-American patient who went to China to receive a kidney from an executed inmate).

78. See Erik Baard & Rebecca Cooney, *China's Execution, Inc.*, 46 VILLAGE VOICE 3640 (2001), 2001 WL 9089514 (recounting Dr. Diflo's reaction to treating patients with transplanted organs from condemned Chinese prisoners). Dr. Diflo recalls, "Several patients were very up-front and candid about it, that they bought an organ taken from an executed convict for about \$10,000, . . . Most of the patients are ecstatic to be off of dialysis, and none has seemed particularly perturbed regarding the source of the organs." *Id.*

79. Bill Nichols, *Panel Told of Organ Harvests on Executed Chinese Inmates*, USA TODAY, June 28, 2001, at A12, 2001 WL 5465806. See generally Elaine Sciolino, *China's Prisons Forged Zeal of U.S. Crusader*, N.Y. TIMES, July 10, 1995, at A1, LEXIS, News, The New York Times File (asserting that China's detainment of a man fighting for human rights is one reason for the deteriorating relations between the U.S. and China). In 1994, Peter Hongda Wu, a human rights activist, went to China, and, while working for the BBC, impersonated a wealthy American seeking to purchase an organ for his sick uncle. *Id.* Mr. Wu visited twenty-seven prison camps and documented China's practice of extracting organs from executed prisoners for sale to wealthy purchasers. *Id.*

nual human rights report also harshly criticizes China's practice, and government officials regularly confront Chinese officials on this issue.⁸⁰ The Chairperson of the House Subcommittee on Human Rights, Representative Ileana Ros-Lehtinen of Florida, sponsored a bill that would prevent Chinese doctors from obtaining visas to travel to the U.S. to take part in any medical training conferences involving organ and tissue transplantation.⁸¹ In addition, California Representative Tom Lantos spearheaded a resolution advising the International Olympic Committee to reject Beijing's bid to host the 2008 Summer Olympics based partly on China's human rights record.⁸²

3. China's Practice As an Argument Against Condemned Prisoner Organ Donation

Opponents of prisoner organ donation cite China's organ harvesting procedure as a substantial reason why the U.S. should not adopt this practice.⁸³ They argue that if the U.S. decides to "implement such a system, the sale of organs would become a normal practice, the number of executions would rise without justification, and the organs of executed prisoners would be taken without consent."⁸⁴ Though these arguments are valid, China's use of capital punishment is significantly different from capital punishment in this country.⁸⁵ In China, an execution takes place without public notice or witnesses, and the state cremates the body without an autopsy to further conceal inappropriate practices.⁸⁶ Capital punishment in China "causes anxiety for even the strongest advocate of [this country's] capital punishment system."⁸⁷

It is obvious that Americans do not advocate China's gruesome practices in light of the "expedited execution process, the complete disregard for consent, and the secrecy" surrounding its organ-harvesting process.⁸⁸ However, that is not to say that China's practices would permeate a Texas

80. See Bill Nichols, *Panel Told of Organ Harvests on Executed Chinese Inmates*, USA TODAY, June 28, 2001, at A12, 2001 WL 5465806 (illustrating the U.S. government's disapproval of China's prisoner organ-harvesting practices).

81. *Id.*

82. *Id.*

83. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 598 (2002) (criticizing China's executed prisoner organ procurement).

84. *Id.*

85. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 426-27 (1996) (contrasting the capital punishment systems of the U.S. and China).

86. *Id.*

87. *Id.* at 426.

88. *Id.*

inmate donor program, or that of any other state.⁸⁹ Certainly, Texas courts will not follow China's use of the death penalty on over sixty-eight crimes, including tax evasion and car theft.⁹⁰ Furthermore, in *Coker v. Georgia*,⁹¹ the U.S. Supreme Court reversed a death sentence imposed for the rape of an adult woman based on the Eighth Amendment, because the sentence was disproportionate to the crime.⁹²

Unlike China's practice, this Comment proposes an organ procurement plan based on voluntary consent of the condemned prisoner.⁹³ In addition, the executed prisoner's organs would go to patients registered on national organ donor lists, and not to the highest bidder.⁹⁴ Accordingly, Texas organ distribution law states that an organ procurement organization must distribute an organ for transplantation to individuals on organ donor waiting lists.⁹⁵ While the dangers of China's practices serve as a reminder to guard against corruption in organ procurement,⁹⁶ China's methods should not be an obstacle in reforming the current Texas prison policy and acquiring organs from condemned prisoners in a proper and useful manner.⁹⁷

89. See TEX. CODE CRIM. PROC. ANN. art. 43.20 (Vernon 1979) (addressing who can be present during executions). China's practice of executing prisoners without any witnesses present would not happen in Texas because Texas law calls for, *inter alia*, an executioner, the Board of Directors of the Department of Corrections, two physicians, a county judge, and sheriff to be present at the executions, in addition to relatives or friends of the condemned prisoner that he may request. *Id.*

90. Sean R. Fitzgibbons, *Cadaveric Organ Donation and Consent: A Comparative Analysis of the United States, Japan, Singapore, and China*, 6 ILSA J. INT'L & COMP. L. 73, 101 (1999).

91. 433 U.S. 584 (1977).

92. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (concluding that the death sentence of for rape of an adult woman is cruel and unusual punishment forbidden by the Eighth Amendment).

93. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 426-27 (1996) (advocating a voluntary consent system of procuring organs from executed prisoners).

94. See, e.g., National Organ Transplant Act, 42 U.S.C. § 274e (2000) (establishing that the sale and purchase of human organs violates federal law); TEX. PEN. CODE ANN. § 48.02 (Vernon 1994) (prohibiting a person from selling or purchasing human organs).

95. See TEX. HEALTH & SAFETY CODE ANN. § 692.0145(a) (Vernon Supp. 2003) (mandating that organs from organ procurement centers be distributed to individuals on organ donor waiting lists).

96. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 426-27 (1996) (suggesting that the public will serve as a check on the organ procurement process).

97. See *id.* at 427 (emphasizing that China's practices should not have a negative impact on our efforts to effectively procure organs from condemned prisoners).

III. CHANGING THE CURRENT TEXAS POLICY OF PREVENTING DEATH ROW PRISONERS FROM BEING ORGAN DONORS

A. *Texas Prisoner Organ Donation Policy*

As of February 2003, 5,000 Texans were on organ donor waiting lists, and twelve people died each day in need of an organ transplant.⁹⁸ Clearly, there are many more patients than available organs.⁹⁹ Consequently, it is imperative to look at other options to obtain transplantable organs.¹⁰⁰ As a result, this Comment seeks to bring to light the apparent waste of unused transplantable organs from condemned prisoners and focuses on allowing these prisoners to donate their organs.¹⁰¹

Currently, the Texas Department of Criminal Justice (TDCJ) has an organ donation policy for inmates, whereby the state incurs the costs of transportation to a hospital and security of the prisoner.¹⁰² The policy requires that the inmate formally submit a document stating his intent to donate, and there must be a request by a physician to take the inmate's organs.¹⁰³ However, the policy applies only to general-population inmates, and it does not allow prisoners on death row to donate their organs.¹⁰⁴ Prisoner organ donation primarily occurs when the prisoner

98. See TEX. DEP'T OF HEALTH, *Monthly Transplant Waiting List*, at <http://www.tdh.state.tx.us/agep/monthly.htm> (last modified Feb. 5, 2003) (reporting 5,254 people in Texas are on the organ donor waiting list, 80,841 people in the United States are on organ donor waiting lists); TEX. DEP'T OF HEALTH, *The Need*, at <http://www.tdh.state.tx.us/agep/need.htm> (last modified Feb. 5, 2003) (providing updated Texas organ donor statistics).

99. See TEX. DEP'T OF HEALTH, *The Need*, at <http://www.tdh.state.tx.us/agep/need.htm> (last modified Feb. 5, 2003) (asserting that the current need for organs outstrips the available supply of organs).

100. See generally Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1 (1996) (proposing alternatives to boost organ donation).

101. See *id.* at 2 (suggesting that death row inmate organ donation is bold and controversial).

102. See Dave Harmon, *As Execution Date Nears, Inmate's Wish to Donate Organs Still Shunned: Ethical Questions, Fear of Disease Are Obstacles for Death Row's Potential Donors*, AUSTIN AM.-STATSMAN, Sept. 8, 1998, at A1, 1998 WL 3624699 (discussing the current Texas Department of Criminal Justice organ donation policy); *Organ Donation Waved Off*, HOUS. CHRON., Sept. 9, 1998, at A18, 1998 WL 16769263 (reporting the Texas Department of Criminal Justice policy on prisoner organ donation). See generally TEX. DEP'T OF CRIMINAL JUSTICE, TDCJ HEALTH SERVICES DIVISION POLICY MANUAL: ORGAN OR TISSUE DONATION (1995) (on file with the *St. Mary's Law Journal*).

103. See *Condemned Man Is Hoping to Save Lives of Others: He Seeks to Donate His Organs for Transplant After Execution*, DALLAS MORNING NEWS, Oct. 21, 1993, at 25A, 1993 WL 9293740 (outlining Texas prison rules regarding prisoner organ donation).

104. See Michael Graczyk, *Condemned Inmate Who Tried to Donate Organs Put to Death*, HOUS. CHRON., Oct. 8, 1998, at A23, 1998 WL 16774943 (indicating that Texas prisoner organ donation policy does not extend to death row prisoners); Dave Harmon, *As*

donates an organ while still alive, and the donee is a family member.¹⁰⁵ Several Texas death row inmates have donated their bodies to medical schools for use as cadavers,¹⁰⁶ and two death row inmates from Delaware and Alabama donated their kidneys to relatives.¹⁰⁷ However, there has not been an organ donation by a death row inmate to a nonfamily member needing an organ.¹⁰⁸

Texas prison officials assert that condemned prisoners cannot donate their organs because of the chance of transmitting diseases, security concerns, "and the dilemma of keeping a death row inmate alive if the operation goes awry."¹⁰⁹ Larry Fitzgerald, a spokesman for the TDCJ, expressed concern about the unpredictability of the transplant procedure and the justice system.¹¹⁰ The TDCJ asserts that "[c]onvictions are overturned and sentences are commuted," thus there is no assurance that condemned prisoners will be executed.¹¹¹ Additionally, the TDCJ argues that the chemicals utilized in lethal injection damage the transplantable organs.¹¹² The TDCJ position is that "[u]ntil the ethics question is re-

Execution Date Nears, Inmate's Wish to Donate Organs Still Shunned: Ethical Questions, Fear of Disease Are Obstacles for Death Row's Potential Donors, AUSTIN AM.-STATESMAN, Sept. 8, 1998, at A1, 1998 WL 3624699 (explaining the Texas Department of Criminal Justice organ donation policy); Rick Halperin, *Death Penalty News – Texas*, at <http://venus.soci.niu.edu/~archives/ABOLISH/oct98/0092.html> (Oct. 7, 1998) (reporting that death row inmates are not allowed to donate organs).

105. See Dave Harmon, *As Execution Date Nears, Inmate's Wish to Donate Organs Still Shunned: Ethical Questions, Fear of Disease Are Obstacles for Death Row's Potential Donors*, AUSTIN AM.-STATESMAN, Sept. 8, 1998, at A1, 1998 WL 3624699 (discussing past history of prisoner organ donation).

106. See TEX. CODE CRIM. PROC. ANN. art. 43.25 (Vernon 1979) (permitting the Anatomical Board of Texas to acquire unclaimed bodies of condemned prisoners).

107. Dave Harmon, *As Execution Date Nears, Inmate's Wish to Donate Organs Still Shunned: Ethical Questions, Fear of Disease Are Obstacles for Death Row's Potential Donors*, AUSTIN AM.-STATESMAN, Sept. 8, 1998, at A1, 1998 WL 3624699.

108. See *id.* (reporting that there has not been organ donation between a death row prisoner and a stranger).

109. Leah Quin, *Inmate Who Tried to Be Organ Donor Executed*, AUSTIN AM.-STATESMAN, Oct. 8, 1998, at B1, 1998 WL 3627351.

110. Dave Harmon, *As Execution Date Nears, Inmate's Wish to Donate Organs Still Shunned: Ethical Questions, Fear of Disease Are Obstacles for Death Row's Potential Donors*, AUSTIN AM.-STATESMAN, Sept. 8, 1998, at A1, 1998 WL 3624699.

111. See Letter from Kathy Cleere, Coordinator, Texas Department of Criminal Justice Ombudsman Program, to Donny J. Perales, Law Student, St. Mary's University School of Law (Nov. 1, 2002) (on file with the *St. Mary's Law Journal*) (stressing that the unpredictable nature of the justice system is one reason for not allowing condemned prisoners to donate their organs).

112. See E-mail from Larry Fitzgerald, Public Information Officer, Texas Department of Criminal Justice, to Donny J. Perales, Law Student, St. Mary's University School of Law (Sept. 4, 2002, 07:38 CST) (on file with the *St. Mary's Law Journal*) (confirming that the chemicals in a lethal injection render organs useless); see also Dave Harmon, *As Execution*

solved by the medical community, elected officials, and members of the general public, the issue of organ donation by condemned offenders will remain on the table.”¹¹³ Although these are valid reasons for disallowing organ donation by condemned inmates, they are not insurmountable taking into account the pressing need for organs and the benefit of saving lives.¹¹⁴

The fear of passing a disease from prisoners to patients is one of the main reasons behind not allowing death row prisoners to donate organs.¹¹⁵ Even though some condemned prisoners afflicted with illnesses (i.e., HIV and Hepatitis) are unsuitable for organ donation, the inmates’ organs would undergo the same stringent testing as any other organs procured from traditional donors before being transplanted.¹¹⁶ Organs procured from condemned prisoners must comply with the Texas law requiring donated organs to undergo medical examination for acceptability.¹¹⁷ In fact, “tissue typing and immunologic testing could be done prior to the execution, ensuring better matches and increasing the likelihood of successful transplants.”¹¹⁸ Arguably, the TDCJ personnel should know more about their inmates’ health than hospital staff receiving an organ donation from a catastrophic accident.¹¹⁹ Since medical testing is availa-

Date Nears, Inmate’s Wish to Donate Organs Still Shunned: Ethical Questions, Fear of Disease Are Obstacles for Death Row’s Potential Donors, AUSTIN AM.-STATESMAN, Sept. 8, 1998, at A1, 1998 WL 3624699 (explaining that the use of the lethal injection means that organ transplants would have to occur prior to execution).

113. See Letter from Kathy Cleere, Coordinator, Texas Department of Criminal Justice Ombudsman Program, to Donny J. Perales, Law Student, St. Mary’s University School of Law (Nov. 1, 2002) (on file with the *St. Mary’s Law Journal*) (indicating that a change in the current Texas policy must be approved by the medical profession, elected officials, and the general public).

114. See Phyllis Coleman, “*Brother, Can You Spare a Liver?*” *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 32 (1996) (asserting that the potential to save lives is enough incentive to overcome the ethical concerns involved in allowing condemned prisoners to donate their organs).

115. See Leah Quin, *Inmate Who Tried to Be Organ Donor Executed*, AUSTIN AM.-STATESMAN, Oct. 8, 1998, at B1, 1998 WL 3627351 (reporting Texas prison officials’ fear of transmitting disease when condemned prisoners donate their organs).

116. See E-mail from Pam Hackett, Legislative Assistant to Representative William Andrews, Florida House of Representatives, to Donny J. Perales, Law Student, St. Mary’s University School of Law (Sept. 13, 2002, 13:54 CST) (on file with the *St. Mary’s Law Journal*) (arguing that prisoners would undergo the same testing procedures as other organ donors).

117. See TEX. HEALTH & SAFETY CODE ANN. § 692.011 (Vernon 1992) (authorizing medical examination of donated organs to ensure acceptability for transplant purposes).

118. Phyllis Coleman, “*Brother, Can You Spare a Liver?*” *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 27 (1996).

119. See E-mail from Pam Hackett, Legislative Assistant to Representative William Andrews, Florida House of Representatives, to Donny J. Perales, Law Student, St. Mary’s

ble to ensure that a condemned prisoner's organs are suitable for transplantation, the TDCJ needs to re-evaluate its policy of forbidding condemned prisoners from donating in light of the need for organs.¹²⁰ Consequently, the pressing need for organs should compel the TDCJ to recognize the right of condemned inmates to donate their organs.¹²¹

B. *The Right of Condemned Inmates to Donate Their Organs*

The right of condemned prisoners to donate their organs should be recognized under the same theory as the right to die or refuse medical treatment.¹²² Generally, courts concede that prisoners have a constitutionally protected right to die or refuse medical treatment when the prisoner's individual liberty interest outweighs any competing penological interest.¹²³ Using this balancing of interests approach, it is arguable that the interests of a condemned inmate in saving another person's life through organ donation and society's immense need for organs considerably outweigh the competing concerns of the Texas prison system.¹²⁴ Arguably,

University School of Law (Sept. 13, 2002, 13:54 CST) (on file with the *St. Mary's Law Journal*) (stating that the Secretary of the Florida Department of Corrections proclaimed that they know more about their inmates' health than hospitals know about their organ donors).

120. See Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 27 (1996) (arguing against the notion that prisoners' organs are unsuitable for transplantation).

121. See DR. JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 78 (1991) (emphasizing the importance of honoring a death row inmate's right to donate his organs).

122. See Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 60 n.122 (1995) (introducing the concept of the "right to die" ordaining the proposition of a person having a right to donate organs).

123. See, e.g., *Thor v. Super. Ct.*, 855 P.2d 375, 391 (Cal. 1993) (finding that a competent quadriplegic state prisoner's individual liberty interest in refusing life-sustaining treatment outweighed any competing state or prison interest in continuing with the treatment); *Singletary v. Costello*, 665 So. 2d 1099, 1109 (Fla. Dist. Ct. App. 1996) (asserting that a prisoner's right to refuse medical intervention prevailed over any state interest in preservation of life); *Zant v. Prevatte*, 286 S.E.2d 715, 717 (Ga. 1982) (holding that when a prisoner protests for a transfer by going on a hunger strike, the prisoner may invoke his right to privacy and refuse intrusions on himself, even those intrusions intended to preserve his life). See generally Arlene McCarthy, Annotation, *Prisoner's Right to Die or Refuse Medical Treatment*, 66 A.L.R.5TH 111 (1999) (discussing a prisoner's constitutional right to die or refuse medical treatment).

124. See DR. JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 78 (1991) (arguing that honoring a condemned prisoner's right to donate his organs enhances "the quality of capital punishment"); Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 32 (1996) (emphasizing that the benefits of saving lives outweigh competing ethical concerns); Arlene McCarthy, Annotation, *Prisoner's Right to Die or Refuse Medical Treatment*, 66 A.L.R.5TH 111, 117-18 (1999) (discuss-

because the opportunity to save lives prevails over competing penological concerns, Texas courts should recognize a prisoner's right to donate his organs.¹²⁵

The Texas prison system should also change its policy because it conflicts with current organ donation law.¹²⁶ The Texas Anatomical Gift Act allows any person having testamentary capacity to "give all or part of the person's body" for organ donation purposes.¹²⁷ There is no language that specifically, or implicitly, forbids prisoners from being organ donors when they express their wishes to donate on the required documents.¹²⁸ Thus, the Texas prison system's policy forbidding death row prisoners from being organ donors contradicts the Texas law permitting individuals to make anatomical gifts.¹²⁹ In conclusion, the Texas prison system's prohibition of prisoner organ donation must change to conform with current organ donation laws and in response to this state's organ shortage dilemma.¹³⁰

ing courts' balancing of interests in determining a prisoner's right to die or refuse medical treatment).

125. See Lindy K. Lucero & Jeffery P. Bernhardt, *Substantive Rights Retained by Prisoners*, 90 GEO. L.J. 2006, 2009 (2002) (stating that "[i]n the absence of a legitimate administrative concern, . . . prisoners may not be hindered from gaining access to the judicial process").

126. See TEX. HEALTH & SAFETY CODE ANN. § 692.003 (Vernon 1992 & Supp. 2003) (allowing people to donate their organs); TEX. TRANSP. CODE ANN. § 521.401 (Vernon 1999) (allowing a person who wishes to donate organs to do so by executing a statement of gift).

127. TEX. HEALTH & SAFETY CODE ANN. § 692.003(a) (Vernon 1992 & Supp. 2003).

128. See *id.* § 692.003(b) (indicating that a will or another document will be sufficient to make a gift); see also *id.* § 692.004 (enumerating those people eligible to execute an anatomical gift); Sigrid Fry, Note, *Experimentation on Prisoners' Remains*, 24 AM. CRIM. L. REV. 165, 167-68 (1986), WL 24 AMCRLR 165 (discussing organ donation laws and how they pertain to prisoners). Neither the Uniform Anatomical Gift Act, nor any state versions of that act, mentions prisoners. *Id.* at 167. "This omission could indicate that prisoners are to be treated no differently than other persons regulated by the Act." *Id.* at 167-68. However, it may also mean that organ donation laws are not applicable to prisoners. *Id.* at 168.

129. The Texas prison system has also contradicted the recently expired Texas law on organ donation by inmates. See Act effective June 20, 1997, 75th Leg., ch. 1422, § 3, 1997 Tex. Gen. Laws 5328 (expired 2002) (allowing inmates who die in the state's custody to indicate if they want to donate organs); see also *Inmate's Effort to Give Organs Spurs Lawsuit*, AUSTIN AM.-STATESMAN, Oct. 6, 1998, at B2, 1998 WL 3627174 (reporting the filing of a lawsuit alleging that the state violated its own policy on prisoner organ donation).

130. See Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 32 (1996) (emphasizing that the benefit of saving lives outweighs the consequences of not allowing prisoners to donate their organs).

C. *Legislative Reform: Amending the Texas Execution Law*

Due to the need for organs, the Texas Legislature should enact legislation facilitating or enabling death row prisoners to be organ donors.¹³¹ Legislation is needed in light of the current TDCJ policy forbidding condemned prisoners from donating their organs.¹³² Although using condemned prisoners as organ donors would not supply enough organs to solve this state's organ shortage problem,¹³³ the Legislature should consider the qualitative effects of allowing death row prisoners to donate their organs to save dying patients who would otherwise not have a chance to live.¹³⁴ Thus, the Texas Legislature needs to amend the state's execution law to allow condemned prisoners to donate their organs.¹³⁵

The present Texas execution law states that "the sentence shall be executed . . . by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death. . . ."¹³⁶ TDCJ policy forbids death row prisoners from donating their organs because the current lethal injection method renders organs useless.¹³⁷ In order to address this issue and facilitate organ donation by condemned prisoners, the Legislature should amend the execution law by requiring the Texas prison system to provide an alternative method of execution for condemned prisoners wishing to donate their organs in accordance with Texas organ donation laws to pre-

131. See DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE 74* (1991) (detailing Dr. Kevorkian's attempts to pass a California bill allowing death row prisoners to donate their organs).

132. See Letter from Kathy Cleere, Coordinator, Texas Department of Criminal Justice Ombudsman Program, to Donny J. Perales, Law Student, St. Mary's University School of Law (Nov. 1, 2002) (on file with the *St. Mary's Law Journal*) (stating that "the issue of organ donation by condemned offenders will remain on the table" until it is resolved by elected officials).

133. See DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE 77* (1991) (arguing that the potential amount of organs supplied is not a good reason to reject organ donation by condemned inmates).

134. See *id.* (stressing that the obvious usefulness of organs from condemned prisoners should not be ignored).

135. See *id.* at 179-80 (discussing a legislator's attempt to pass a bill in Kansas allowing prisoners to be executed in a manner that would allow them to donate organs); see also Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 28 (1996) (indicating that some states need to change their execution methods to allow condemned inmates to donate and preserve their organs during execution).

136. TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon Supp. 2003).

137. See Letter from Kathy Cleere, Coordinator, Texas Department of Criminal Justice Ombudsman Program, to Donny J. Perales, Law Student, St. Mary's University School of Law (Nov. 1, 2002) (on file with the *St. Mary's Law Journal*) (stressing that the lethal injection execution method is a barrier to condemned prisoner organ donation).

vent damage to transplantable organs.¹³⁸ In passing such a law, the Legislature would significantly benefit society by giving condemned prisoners an opportunity to provide lifesaving organs, which arguably outweighs the competing concerns against such organ donation.¹³⁹

1. Texas Death Row Inmate: Jonathan Nobles

Correspondingly, the effort of executed inmate Jonathan Nobles provides additional support for the Texas Legislature to amend its execution statute to provide condemned inmates with an alternative execution method allowing organ donation.¹⁴⁰ Jonathan Nobles strenuously attempted to become the first death row inmate in this country to donate his organs to a nonrelative, but the TDCJ denied his requests pursuant to its policy, and he was executed in 1995.¹⁴¹ Among the reasons for denying the request, the TDCJ stated that the “execution would require Texas prison officials to use nonpoisonous drugs in the lethal injection process because the poisons would contaminate the organs.”¹⁴² Mr. Nobles suggested that the TDCJ could use something other than the sodium thio-pental to execute him in order to preserve his organs.¹⁴³ Furthermore, Mr. Nobles stated, “We’re looking at the difference between life and death, . . . [i]f I’m executed, what’s the difference in the format to preserve someone’s life? Death is death.”¹⁴⁴ The Texas Legislature should recognize Jonathan Nobles’s effort to take positive steps for society and

138. See DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE 75* (1991) (reproducing a bill proposed in California which provided an alternative method of execution for prisoners wishing to donate organs).

139. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 427 (1996) (asserting that allowing organ donation from condemned prisoners would establish a net gain of lives for society from an execution system that providing minimal benefits).

140. See *Condemned Man Is Hoping to Save Lives of Others: He Seeks to Donate His Organs for Transplant After Execution*, DALLAS MORNING NEWS, Oct. 21, 1993, at 25A, 1993 WL 9293740 (reporting on the attempt by death row inmate Jonathan Nobles to donate his organs); Leah Quin, *Organ Donation Argument Fails to Stay Austin Man’s Execution*, AUSTIN AM.-STATESMAN, Oct. 7, 1998, at B9, 1998 WL 3627271 (recounting Jonathan Nobles’s campaign for condemned prisoners’ right to donate organs).

141. See Michael Graczyk, *Condemned Inmate Who Tried to Donate Organs Put to Death*, HOUS. CHRON., Oct. 8, 1998, at A23, 1998 WL 16774943 (discussing Jonathan Nobles’s failed attempt to donate organs prior to his execution).

142. See *Condemned Man Is Hoping to Save Lives of Others: He Seeks to Donate His Organs for Transplant After Execution*, DALLAS MORNING NEWS, Oct. 21, 1993, at 25A, 1993 WL 9293740 (explaining why the TDCJ does not allow organ donation by executed prisoners).

143. *Id.*

144. See *id.* (emphasizing the desire of Jonathan Nobles to donate his organs upon his execution).

amend the execution statute to provide an alternative execution method that permits organ donation for future condemned inmates.¹⁴⁵

2. A Willing Donee: Linda Jones

Not only did Jonathan Nobles want to donate his organs upon his execution, there was also an eager organ recipient.¹⁴⁶ In 1992, Linda Jones, needing a kidney because of Lupus, contacted Jonathan Nobles after hearing about his desire to donate his organs.¹⁴⁷ However, the TDCJ adhered to its policy and prevented the donation from taking place.¹⁴⁸ Sadly, Linda Jones died while waiting for a kidney at the age of thirty-two and left behind a daughter.¹⁴⁹ Crystal Webb, Linda Jones's sister, and an advocate for condemned prisoner organ donation, commented that Linda needed a kidney and she did not care whether it was from a "big hairy ape," all she wanted was for her sister to live.¹⁵⁰ Bill Colovos, Jonathan

145. See Dave Harmon, *As Execution Date Nears, Inmate's Wish to Donate Organs Still Shunned: Ethical Questions, Fear of Disease Are Obstacles for Death Row's Potential Donors*, AUSTIN AM.-STATESMAN, Sept. 8, 1998, at A1, 1998 WL 3624699 (indicating that Jonathan Nobles wanted something positive to come from his death through organ donation). Jonathan Nobles did not hope to get out of his death sentence or delay it, instead he simply wanted to do something good for society after causing so much harm and grief by his criminal acts. *Id.*

146. See *id.* (pointing out that people needing organs would accept organs from condemned prisoners); see also Rick Halperin, *Death Penalty News—Ohio, Texas*, at <http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/july98/0511.html> (Sept. 8, 1998) (indicating that Crystal Webb's sister, Linda Jones, contacted Jonathan Nobles about donating his organs).

147. See Dave Harmon, *As Execution Date Nears, Inmate's Wish to Donate Organs Still Shunned: Ethical Questions, Fear of Disease Are Obstacles for Death Row's Potential Donors*, AUSTIN AM.-STATESMAN, Sept. 8, 1998, at A1, 1998 WL 3624699 (reporting Linda Jones's efforts to arrange an organ transplant with Jonathan Nobles); see also Rick Halperin, *Death Penalty News—Ohio, Texas*, at <http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/july98/0511.html> (Sept. 8, 1998) (acknowledging that Linda Jones contacted Jonathan Nobles about his attempt to donate organs).

148. See Dave Harmon, *As Execution Date Nears, Inmate's Wish to Donate Organs Still Shunned: Ethical Questions, Fear of Disease Are Obstacles for Death Row's Potential Donors*, AUSTIN AM.-STATESMAN, Sept. 8, 1998, at A1, 1998 WL 3624699 (emphasizing the TDCJ's reluctance to permit death row inmates to donate their organs despite organ recipients willing to take the organs); *Organ Donation Waved Off*, HOUS. CHRON., Sept. 9, 1998, at A18, 1998 WL 16769263 (stating that the TDCJ does not allow death row inmates to donate their organs).

149. Dave Harmon, *As Execution Date Nears, Inmate's Wish to Donate Organs Still Shunned: Ethical Questions, Fear of Disease Are Obstacles for Death Row's Potential Donors*, AUSTIN AM.-STATESMAN, Sept. 8, 1998, at A1, 1998 WL 3624699.

150. See *id.* (indicating that the debate of allowing condemned prisoners to donate their organs needs to continue).

Nobles's attorney, remarked that the TDCJ is in essence "playing God" by denying the right to provide life to someone in need of an organ.¹⁵¹

Similarly, the denial by the TDCJ of the organ donation from Jonathan Nobles to Linda Jones violates Texas laws protecting a donee's rights.¹⁵² The Texas Anatomical Gift Act proscribes that "a donee's rights . . . created by a gift [is] superior to the rights of other persons."¹⁵³ Thus, the TDCJ interfered with Ms. Jones's right to accept an organ from Jonathan Nobles.¹⁵⁴ Since the TDCJ policy conflicts with Texas organ donation laws, the Texas Legislature needs to revise the present execution law to allow condemned prisoners to donate their organs.¹⁵⁵

IV. FINDING AN EXECUTION SCHEME THAT ALLOWS ORGAN PROCUREMENT

A. *Texas's Execution Scheme Prevents Organ Donation: The Need for a New Method*

In 1979, in *Ex parte Granviel*,¹⁵⁶ the Texas Court of Criminal Appeals permitted Texas to become the first state in the nation to employ lethal injection as a means of administering the death penalty.¹⁵⁷ Today, Texas

151. See Rick Halperin, *Death Penalty News – Texas*, at <http://venus.soci.niu.edu/~archives/ABOLISH/oct98/0092.html> (Oct. 7, 1998) (indicating that the TDCJ wrongfully violated its policy by refusing to allow Jonathan Nobles to donate organs); see also *Inmate's Effort to Give Organs Spurs Lawsuit*, AUSTIN AM.-STATESMAN, Oct. 6, 1998, at B2, 1998 WL 3627174 (reporting a lawsuit filed by Bill Colovos accusing the state of violating its organ donation policy by not allowing Jonathan Nobles to donate his organs).

152. See TEX. HEALTH & SAFETY CODE ANN. § 692.012 (Vernon 1992) (establishing that a donee's rights by gift are superior to other persons' rights).

153. *Id.*

154. *Id.*; see also *Inmate's Effort to Give Organs Spurs Lawsuit*, AUSTIN AM.-STATESMAN, Oct. 6, 1998, at B2, 1998 WL 3627174 (reporting on a lawsuit filed by Bill Colovos).

155. See *Condemned Man Is Hoping to Save Lives of Others: He Seeks to Donate His Organs for Transplant After Execution*, DALLAS MORNING NEWS, Oct. 21, 1993, at 25A, 1993 WL 9293740 (pointing out that something other than sodium thiopental can be used in the lethal injection to preserve organs); *Inmate's Effort to Give Organs Spurs Lawsuit*, AUSTIN AM.-STATESMAN, Oct. 6, 1998, at B2, 1998 WL 3627174 (discussing Bill Colovos's criticism of the TDCJ for violating its own prisoner organ donation policy by permitting general population inmates to donate, but not allowing donations from death row inmates).

156. 561 S.W.2d 503 (Tex. Crim. App. 1978) (en banc).

157. See *Ex parte Granviel*, 561 S.W.2d 503, 509 (Tex. Crim. App. 1978) (en banc) (finding that lethal injection is a permissible means of execution); see also DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE 53* (1991) (indicating that Texas was the first state in the nation to employ lethal injection as a method of execution); Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 979 (1995) (reporting that the first lethal injection in the United States occurred in Texas).

continues to use lethal injections in executions.¹⁵⁸ Lethal injections generally involve administering deadly solutions to the inmate through an intravenous tube inserted into the arm.¹⁵⁹ The lethal injection solution used in Texas consists of sodium thiopental, pancuronium bromide, and potassium chloride.¹⁶⁰ The sodium thiopental and pancuronium bromide act as a sedative that slows down respiration and induces unconsciousness.¹⁶¹ Thereafter, the potassium chloride causes heart failure by inhibiting all the functions of the heart, which in turn brings about cardiopulmonary cessation and subsequent destruction of the viability of the heart and lungs.¹⁶²

As mentioned, one of the factors Texas prison officials cite for disallowing death row prisoners to donate their organs is that the chemicals employed in the lethal injection method “are so powerful and pervasive they render the organs useless” for transplantation.¹⁶³ Not only does lethal injection damage transplantable organs, but many opponents argue the efficacy of the lethal injection method because it sometimes fails to induce a quick and painless death.¹⁶⁴ Furthermore, the drugs used do not have the Food and Drug Administration’s approval for lethal injection purposes.¹⁶⁵ However, this Comment does not propose that Texas should abolish the lethal injection method; instead, Texas should implement an

158. See TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon Supp. 2003) (stating the method for execution in Texas).

159. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 399-400 (1996) (describing the different methods of execution employed in the United States).

160. E-mail from Larry Fitzgerald, Public Information Officer, Texas Department of Criminal Justice, to Donny J. Perales, Law Student, St. Mary’s University School of Law (Sept. 4, 2002, 07:38 CST) (on file with the *St. Mary’s Law Journal*).

161. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 399 (1996).

162. See *id.* (reporting the physiological effects on the body caused by lethal injection solutions).

163. E-mail from Larry Fitzgerald, Public Information Officer, Texas Department of Criminal Justice, to Donny J. Perales, Law Student, St. Mary’s University School of Law (Sept. 4, 2002, 07:38 CST) (on file with the *St. Mary’s Law Journal*); see also Letter from Kathy Cleere, Coordinator, Texas Department of Criminal Justice Ombudsman Program, to Donny J. Perales, Law Student, St. Mary’s University School of Law (Nov. 1, 2002) (on file with the *St. Mary’s Law Journal*) (asserting that organ donation from death row prisoners is not feasible because lethal injection destroys organs).

164. See Louis J. Palmer, Jr., *Capital Punishment: A Utilitarian Proposal for Recycling Transplantable Organs As Part of a Capital Felon’s Death Sentence*, 29 UWLA L. REV. 1, 30-31 (1998) (asserting that lethal injection is not a permissible method of execution to obtain organs from executed prisoners).

165. *Id.*

alternative execution method that would make organ procurement from executed prisoners feasible.¹⁶⁶

166. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 602 (2002) (asserting that there is not a method of execution that would allow organ procurement from executed prisoners). One possible method is to employ the firing squad execution method used in Utah. See LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 91 (1999) (examining the firing squad execution method). This method employs several marksmen that aim at a target over the condemned prisoner's heart. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 398 (1996). However, Utah's method can cause damage to internal organs, such as the heart and lungs. *Id.*; see also LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 109 (1999) (criticizing the firing squad execution method as an impermissible way to procure organs from executed prisoners). Utah's firing squad method of execution "senselessly and needlessly destroys many transplantable organs as a result of piercing and ripping by bullets." LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 109 (1999). Several additional arguments highlight the inappropriateness of firing squads for executions. *Id.* First, firing squad executions are not clean. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 398 n.63 (1996) (discussing the horrific mess that resulted from Gary Gilmore's execution by firing squad). Second, firing squads do not normally cause a swift and humane death, but cause "capital murderers to languish, unattended, in pain and blood." LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 109 (1999). Lastly, the draping hood and circular target placed over the condemned prisoner takes away his humanity. *Id.* Another option for execution is the Chinese firing squad method, in which executioners fire a bullet into the base of the prisoner's brain. E-mail from Pam Hackett, Legislative Assistant to Representative William Andrews, Florida House of Representatives, to Donny J. Perales, Law Student, St. Mary's University School of Law (Sept. 13, 2002, 13:54 CST) (on file with the *St. Mary's Law Journal*). But see Brian Mooar, *Voicing Wish to Donate Organs, Baltimore Man Kills Himself; Suicide Occurs Outside Hospital in Bethesda*, WASH. POST, Nov. 3, 1995, at B01, 1995 WL 9270474 (reporting the story of a man who shot himself in the head so he could donate his organs, but the shooting rendered his organs useless). In Maryland, a man called 911 outside of a hospital to tell the police that he was going to commit suicide by shooting himself in the head, so he could donate organs. *Id.* However, the shot caused a sudden stoppage of his heart, which induced a precipitous drop in blood pressure and made his organs unsalvageable. *Id.* Therefore, a shot in the head may not be ideal for organ procurement. *Id.*; see also Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 398 n.64 (1996) (summarizing the article written by Brian Mooar). Although this option affords more leeway to obtain organs, the negative perceptions of China's practices and firing squad executions will not promote an ethical and conscientious image of prisoner organ procurement. See generally Allison K. Owen, Comment, *Death Row Inmates or Organ Donors: China's Source of Body Organs for Medical Transplantation*, 5 IND. INT'L & COMP. L. REV. 495, 495-97 (1995) (bemoaning China's practice of procuring organs from executed prisoners).

B. Execution by Organ Removal

One type of execution that would make organ procurement from executed prisoners possible is death by organ removal.¹⁶⁷ Under this style of execution, the act of removing organs from the condemned prisoner would serve as the vehicle for death.¹⁶⁸ This method of execution is quite practical for organ donation because it does not have damaging effects on organs, unlike the execution methods of lethal injection, hanging, firing squad, or gas chamber.¹⁶⁹ However, death by organ removal creates ethical dilemmas by violating the dead donor rule, the Hippocratic Oath, and the American Medical Association's (AMA) prohibition of physician participation in executions.¹⁷⁰

167. See, e.g., Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 29 (1996) (discussing the Arizona donor bill that allowed a condemned prisoner to choose either lethal injection or death by removal of vital organs for donation purposes); Laura-Hill Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 432 & n.213 (1996) (citing 1996 Arizona Session Law 2271, which proposed an option of death by organ removal for condemned prisoners as a possible way to increase organ supply).

168. See John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 9-10 (outlining the procedures involved in death by organ removal). But see UNITED NETWORK FOR ORGAN SHARING, *UNOS Ethics Committee: Ethics of Organ Donation from Condemned Prisoners*, <http://www.unos.org/Resources/bioethics.asp?index=6> (last visited Feb. 20, 2003) (criticizing death by organ removal). Under this form of execution, the prisoner would request death by organ removal five to seven days prior to the execution date. John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 9. At the time of execution, prison officials would take the condemned prisoner to the prison hospital and strap the prisoner onto a gurney, the prisoner would receive anesthesia to induce unconsciousness, and a transplant team would then remove the prisoner's organs. *Id.* After removal of the organs, the ventilatory machines would be turned off and death would be pronounced. *Id.* "Witnesses to the execution, including the victim's family, could view the insertion of intravenous lines and administration of anesthetic outside of the operating room." *Id.*

169. See *id.* (asserting that organ removal is a means of execution allowing organ donation).

170. See Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 30-31 (1996) (noting the ethical dilemma prisoner organ harvesting creates under the AMA's policy); Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 602-04 (2002) (addressing the ethical problems of procuring organs from executed prisoners). From a utilitarian point of view, execution by organ removal makes sense, in that "anesthetizing of the condemned and the recovery of organs . . . would produce optimum organs for transplantation." UNITED NETWORK FOR ORGAN SHARING, *UNOS Ethics Committee: Ethics of Organ Donation from Condemned Prisoners*, <http://www.unos.org/Resources/bioethics.asp?index=6> (last visited Feb. 20, 2003). "However, the cross-clamping the aorta and the ensuing cardiectomy, followed by the disconnection of the ventilator, create an unacceptable situation for the organ [transplant] team. . . . [by placing] the organ recovery team in the role of executioner." *Id.*

The dead donor rule requires that organs should only be removed from dead patients, and organ removal should not cause the death of donors.¹⁷¹ The dead donor rule is premised on “[l]aws and norms against homicide [that] forbid killings done for any purpose, including killings done to obtain organs to save the life of others.”¹⁷² The core objective of the dead donor rule is to protect the interests of living people, to assure them that donating organs will not shorten or end their lives, and to preserve respect for life.¹⁷³ As a result, execution by removal of organs violates the dead donor rule in that “[r]etrieval of vital organs itself would be the cause of death because once heart, lungs, and liver are removed one would soon have to turn off the heart-lung bypass machines that are sustaining function during removal of vital organs.”¹⁷⁴ In order for execution by organ removal to gain acceptance, there would have to be an exception to the dead donor rule.¹⁷⁵

Another problem with execution by organ removal is that the physicians extracting the organs would invariably cause the death of the condemned prisoners.¹⁷⁶ In 1980, the AMA made its first formal statement regarding physician participation in executions by stating that such partic-

171. Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 602-03 (2002); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 403 (1996); John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 6.

172. John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 6.

173. Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 603 (2002).

174. John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 9.

175. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 603 (2002) (pointing out the difficulty in utilizing execution by organ removal); John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 9 (opining that death by organ retrieval would be valid only if an exception to the dead donor rule existed). The best argument for an exception to the dead donor rule is that the prisoner faces imminent and certain death in any case. *Id.* An exception to allow executions that protect organs would not deprive the inmate of continued life since he is already condemned by the state; thus, it would not impinge on the basic values underlying the rule. *Id.*

176. See Phyllis Coleman, “*Brother, Can You Spare a Liver?*” *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 30-31 (1996) (noting the arguments against using an execution by organ removal method); Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 603-04 (2002) (arguing that execution by organ removal violates the AMA’s prohibition of physician participation in executions); see also SCI. MUSEUM OF VA., *Organ/Tissue Donation and Transplantation* ¶ 13, at <http://www.smv.org/prog/B2Kprimorgtrans.htm> (last visited Feb. 20, 2003) (mentioning the ethical problems with death by organ removal).

ipation is contrary to medical ethics and the Hippocratic Oath.¹⁷⁷ The Hippocratic Oath proclaims that physicians should “do no harm” and must abstain from providing deadly medicine to anyone, even if asked.¹⁷⁸ Hence, a physician removing the organs of a condemned prisoner and causing his death would in essence violate the “do no harm” provision.¹⁷⁹ Moreover, the AMA professes that physicians participating in executions should be subject to sanctions, such as revocation of their medical licenses.¹⁸⁰ In conclusion, execution by organ removal provides a suitable method of extracting transplantable organs from condemned prisoners, but the barriers mentioned above preclude it from acceptance in the medical community.¹⁸¹ Therefore, Texas should look at other execution methods that preserve organs and conform to medical ethics.¹⁸²

V. PROPOSED METHOD

A. *Anesthesia-Induced Brain Death and Subsequent Organ Removal*

Texas's lethal injection method of execution needlessly wastes transplantable organs, and other execution methods are improbable; there-

177. See Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 984 (1995) (outlining the medical profession's response to laws prohibiting physicians from participating in executions).

178. See David J. Rothman, *Physicians and the Death Penalty*, 4 J.L. & POL'Y 151, 156 (1995) (discussing the implications of AMA policies on physician involvement in executions); see also Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 604 (2002) (explaining that the AMA fears, among other things, that patients will lose confidence in physicians' motives if they participate in executions).

179. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 604 (2002) (determining that the Hippocratic Oath prohibits physicians from active participation in the execution process).

180. Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 984 (1995).

181. See Phyllis Coleman, “*Brother, Can You Spare a Liver?*” *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 30-32 (1996) (indicating that the AMA is a major hurdle in permitting inmates to donate organs); Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 602-04 (2002) (stressing that execution by organ removal is not feasible); John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 9-10 (summarizing the conflicts in executing prisoners by organ removal).

182. See Phyllis Coleman, “*Brother, Can You Spare a Liver?*” *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 31 (1996) (indicating that execution by organ retrieval creates ethical dilemmas for transplant surgeons); John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 10 (recognizing that the critics of death by organ removal have won the debate and will probably continue to do so for some time).

fore, Texas needs to implement a new method of execution that would not destroy the organs or violate moral and ethical principles.¹⁸³ Anesthesia-induced brain death provides a medically feasible and useful method of execution for organ procurement from condemned prisoners.¹⁸⁴ Anesthesia-induced brain death is an ideal method because it would not destroy transplantable organs, and it would avoid the ethical concerns that plague death by organ removal.¹⁸⁵

The concept of anesthesia-induced brain death is simple.¹⁸⁶ At the time of execution, the condemned prisoner receives a dosage of sodium pentothal intravenously that causes unconsciousness.¹⁸⁷ Ten to fifteen seconds after the sodium pentothal is administered, the condemned prisoner would receive anesthesia in a manner similar to the process performed before invasive surgery.¹⁸⁸ However, the anesthesia administered exceeds the normal dosage given before invasive surgery, thereby render-

183. See LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 110 (1999) (criticizing the lethal injection execution method); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 401 (1996) (commenting on the excessive organ damage done by all current forms of execution).

184. See LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 111 (1999) (evaluating execution methods that would preserve organs); Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 28 (1996) (discussing Dr. Kevorkian's suggestion to cause anesthesia-induced brain death in prisoner organ donors); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 401 (1996) (asserting that anesthesia-induced brain death is a proficient method to obtain organs from condemned prisoners); Rhonda Cook, *Condemned Inmate Wants to Donate Organs; Kevorkian on Case: Larry Lonchar Wants a Death That Won't Ruin His Organs*, ATLANTA J.-CONST., June 16, 1995, at D1, 1995 WL 6530250 (reporting Dr. Kevorkian's request that death row inmate Larry Lonchar be anesthetized and then have his transplantable organs removed).

185. See LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 111 (1999) (addressing the effectiveness of anesthesia-induced brain death); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 401 (1996) (supporting the use of executions utilizing anesthesia to procure organs from condemned prisoners).

186. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 401 (1996) (introducing anesthesia-induced brain death as a preferred method of execution).

187. See LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 111 (1999) (outlining the anesthesia-inducement process); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 401 (1996) (describing process of death by anesthesia).

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

ing the condemned prisoner clinically brain-dead.¹⁸⁹ During the state of clinical brain death, the transplant team removes the healthy transplantable organs from the condemned prisoner.¹⁹⁰ This type of procedure is used regularly by physicians to procure organs from brain-dead patients.¹⁹¹

B. *The Proposed Organ Donation Procedures: Safeguarding a Prisoner's Free and Voluntary Choice to Donate*

In order to avoid the negative perceptions of exploiting a condemned prisoner for his organs and to gain public and legislative support, this Comment's proposal of using anesthesia-induced brain death as an execution method for organ donation lies on the premise that it is a strictly voluntary procedure for the condemned inmate.¹⁹² Advocates supporting prisoner organ donation assert, "[A] condemned [prisoner's] autonomy of choice must be respected at all times."¹⁹³ To further avoid concerns of coercion or exploitation, the opportunity to donate organs may be limited to those condemned prisoners who initiate talks of donating their organs or freely sign organ donor cards.¹⁹⁴ An inmate choosing

189. LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 111 (1999); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 401 (1996).

190. See LOUIS J. PALMER, JR., ORGAN TRANSPLANTS FROM EXECUTED PRISONERS 111 (1999) (stressing that execution by anesthesia-induced brain death allows efficient extraction of transplantable organs); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 401 (1996) (reporting the process of anesthesia-induced brain death and subsequent organ removal).

191. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 401 (1996) (citing Dr. Kevorkian's affidavit supporting a stay of execution for Larry Grant Lonchar, who wanted to donate his organs upon execution).

192. See DR. JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 89 (1991) (recognizing the need for a high degree of volunteerism to safeguard a prisoner's choice to donate); see also Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 402 (1996) (developing guidelines for execution by anesthesia-induced brain death).

193. DR. JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 89 (1991).

194. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 402 (1996) (limiting organ donations to prisoners who actively pursue them); Jeff Testerman, *Organs of Condemned Sought for Transplant*, ST. PETERSBURG TIMES, Mar. 26, 2000, at 1B, 2000 WL 5604077 (reporting that Florida State Representative William Andrews's suggestion that the Florida Department of Corrections provide donor cards to inmates upon incarceration); E-mail from Pam Hackett, Legislative Assistant to Representative Williams, Florida House of Representatives, to Donny J. Perales, Law Student, St. Mary's University School of Law (Sept. 13, 2002, 13:54 CST) (on file with the *St. Mary's Law Journal*) (discussing efforts to provide prisoners in Florida with organ donor cards).

to donate his organs must be given adequate time to reconsider his decision.¹⁹⁵ An assent by the prisoner must be unwavering, and there must be a guaranteed right to reverse the assent.¹⁹⁶ Furthermore, the condemned prisoner considering donation “should receive legal, psychological, and pastoral counseling to ensure that his decision is meaningful and reflects his personal choice.”¹⁹⁷ After the prisoner receives counseling and makes an unfettered decision to donate, he should be allowed to proceed with the formal requirements of expressing his decision in writing.¹⁹⁸

The TDCJ’s policy allowing general population inmates to donate their organs requires informed consent in writing and emphasizes that donations must be free and voluntary.¹⁹⁹ As a consequence, this Comment suggests that after making the decision to donate, the inmate must write and sign a formal statement, in his own words, expressing his intentions and reasons for choosing the anesthesia-induced execution method for the purpose of donating his organs.²⁰⁰ Additionally, to ensure that the decision is free and voluntary, a legal and lay witness should see the inmate sign his declaration of intent.²⁰¹ Any prisoner who changes his mind after expressing intent “must never again be a candidate for organ donation.”²⁰² Upon satisfaction of these proposed execution procedures, anesthesia-induced brain death followed by organ removal offers a practi-

195. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 402 (1996).

196. See DR. JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 89 (1991) (outlining suggestions that would allow prisoners to make a voluntary choice to donate organs).

197. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 402-03 (1996); see also Sigrid Fry, Note, *Experimentation on Prisoners’ Remains*, 24 AM. CRIM. L. REV. 165, 169 (1986), WL 24 AMCRLR 165 (asserting that it is even more important to be sure that an inmate’s consent is voluntary than with a free person due to the coercive environment in the prison setting).

198. See Phyllis Coleman, “*Brother, Can You Spare a Liver?*” *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 31 (1996) (asserting that the choice to donate belongs only to the prisoner and that organs should never be taken without his consent).

199. See TEX. DEP’T OF CRIMINAL JUSTICE, TDCJ HEALTH SERVICES DIVISION POLICY MANUAL: ORGAN OR TISSUE DONATION (1995) (on file with the *St. Mary’s Law Journal*) (stating that organ donation requires written, informed consent).

200. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 403 (1996) (proposing proper execution procedures).

201. *Id.*; see also Sigrid Fry, Note, *Experimentation on Prisoners’ Remains*, 24 AM. CRIM. L. REV. 165, 169 (1986), WL 24 AMCRLR 165 (stating that care must be taken to safeguard a prisoner from the influences of imprisonment that can adversely affect his ability to make a free and voluntary decision).

202. DR. JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 89 (1991).

cal and sensible method to extract transplantable organs from executed prisoners.²⁰³

C. *Confronting the Problems of the Proposed Organ Donation Method—Physician Participation in Executions: Facing the American Medical Association (AMA), the Hippocratic Oath, and the Dead Donor Rule*

The proposed organ donation method involving death by anesthesia followed by organ removal is a highly complex procedure in which physicians must play an essential role.²⁰⁴ The proposed method should involve only individuals trained in administering anesthesia to make certain that the condemned prisoners receive a lethal dosage.²⁰⁵ Accordingly, the proposed method calls for uniquely-trained and skilled transplant surgeons to remove and prepare the executed prisoner's viable organs for transport and transplant.²⁰⁶ As a result, the potential barriers to physician participation in procuring organs from executed prisoners under the proposed method must be examined.²⁰⁷

1. The AMA's Prohibition of Physician Participation in Executions

A probable stumbling block to the proposed organ donation method is the AMA's steadfast prohibition on physician participation in executions.²⁰⁸ As previously stated, the AMA considers a physician's partici-

203. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 403 (1996).

204. See *id.* (addressing the physicians' role in procuring organs after anesthesia-induced death of condemned inmates).

205. *Id.*

206. See Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 31 (1996) (stating that organ donation by inmates upon execution requires the presence of a physician transplant team); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 403 (1996) (indicating that physician participation is imperative).

207. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 403 (1996).

208. See COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AM. MED. ASS'N., CODE OF MEDICAL ETHICS E-2.06, http://www.ama-assn.org/apps/pf_online/pf_online?f_n=browse&doc=policyfiles/CEJA/E-2.06.HTM (confirming and strengthening the statement against physician participation in executions); Diane M. Gianelli, *Ethics Forum Debates Prisoners As Donors*, AM. MED. NEWS, Dec. 21, 1998, http://www.ama-assn.org/sci-pubs/amnews/pick_98/inta1221.htm (reiterating the AMA's strong stance in keeping physicians removed from executions). In 1990, three Illinois physicians participated in the execution of Charles Walker. See Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 984 (1995) (discussing Illinois law providing anonymity to doctors participating in executions). The doctors, despite impassioned pleas by the medical com-

pation in executions a violation of medical ethics and the Hippocratic Oath.²⁰⁹ For instance, the AMA's stance against participation prevents doctors from inserting the intravenous tube or suggesting and preparing the substances contained in a lethal injection.²¹⁰ The AMA also believes that physician participation in executions contravenes society's trust in the medical profession and weakens physician-patient relationships.²¹¹

Proponents of physician participation in executions maintain that a physician's involvement is necessary and proper for effective executions.²¹² They argue that it is crucial for physicians to assist in executions in order to avoid inhumane executions.²¹³ In 1982, Texas prison officials

munity to the Governor to stop the physicians, inserted intravenous lines, monitored the condemned inmate's condition, and pronounced his death. *Id.* After the execution, the Illinois legislature adopted a bill that provided physician anonymity in executions as a way to protect physicians from attacks by the AMA or other medical societies. *Id.*

209. Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 984 (1995).

210. See Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 30 (1996) (citing *Physician Participation in Capital Punishment; Committee on Ethical and Judicial Affairs, American Medical Association*, 270 JAMA 365, 368 (1993)). AMA guidelines for physician participation in executions state that participation involves, "[S]electing injection sites; starting intravenous lines as a port for a lethal injection device, prescribing, preparing, administering, or supervising injection drugs for their dose or types; inspecting, testing, or maintaining lethal injection devices; consulting with or supervising lethal injection personnel." *Id.* at 30-31 n.185 (quoting *Physician Participation in Capital Punishment; Committee on Ethical and Judicial Affairs, American Medical Association*, 270 JAMA 365, 368 (1993)).

211. Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 604 (2002).

212. See, e.g., DR. JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 62-63 (1991) (implying that the high degree of complexity of lethal injection requires medically trained and skilled doctors); Colman McCarthy, *Doctors in the Death Chamber*, WASH. POST, May 28, 1994, at A29, 1994 WL 2289357 (stressing that lethal injection as compared to other methods of execution requires medical competence).

213. See, e.g., DR. JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 62 (1991) (describing a botched lethal injection execution); Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 975-76 (1995) (citing Robert D. Truog & Troyen A. Brennan, *Sounding Board: Participation of Physicians in Capital Punishment*, 329 NEW ENG. J. MED. 1346, 1347 (1993), reporting on John Autry's execution); Colman McCarthy, *Doctors in the Death Chamber*, WASH. POST, May 28, 1994, at A29, 1994 WL 2289357 (reporting that it took forty-five minutes for the execution team to locate Ricky Ray Rector's vein prior to his execution). In March 1984, non-medical personnel incorrectly inserted the intravenous lines in Autry's arm by pointing the lines towards his fingertips instead of his heart, causing Autry to suffer excruciating pain for ten minutes before his death. Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 975-76 (1995). If the condemned inmate receives an insufficient

experienced difficulty in trying to insert the intravenous lines into the scarred veins of a condemned inmate, thereby inflicting great pain and spattering a large amount of blood.²¹⁴ The prison doctor present during the execution stated "that he could have done the job faster and neater."²¹⁵

Proponents downplay the significance of the Hippocratic Oath. They contend that it has limited authority to inhibit physicians' participation in executions.²¹⁶ For instance, a literal reading of the Oath forbids physicians from performing abortions, which is currently an accepted procedure, notwithstanding ethical considerations.²¹⁷

Additionally, many state legislatures enacted laws expressing their intention that physicians be present at executions, despite the AMA's prohibitions.²¹⁸ In Texas, the law specifically allows the prison physician

dose of sodium thiopental and potassium chloride, immediate death will not occur, and the inmate will slowly suffocate due to paralysis of the muscles used for breathing. DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE* 62 (1991). Similarly, improper injection of the intravenous lines outside of a vein would cause immediate, excruciating pain. *Id.* at 63.

214. See DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE* 62 (1991) (illustrating the consequences of nonmedically trained prison officials administering a lethal injection).

215. *Id.*

216. See *id.* at 160 (questioning the importance of the Hippocratic Oath); see also Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 406 (1996) (arguing that the Hippocratic Oath should not prevent a physician from procuring organs from a condemned prisoner). "For the majority of doctors . . . the [O]ath was something occasionally mentioned in medical school but rarely studied in detail. . . . Indeed, it is now uncommon for any American medical faculty to insist that the [O]ath be taken by graduating doctors." DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE* 160 (1991). "The Oath, while an extraordinarily powerful mantra of health professionals, has never been viewed as a static, self-contained code of behavior." Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 406 (1996).

217. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 406 (1996).

218. See, e.g., ALA. CODE § 15-18-83 (Supp. 2002) (stating that two physicians can be present at executions, including the prison physician); CONN. GEN. STAT. ANN. § 54-100(b) (West 2001) (allowing a physician to be present at executions); GA. CODE ANN. § 17-10-41 (1997 & Supp. 2002) (granting two physicians access to executions to determine when death has occurred); IND. CODE ANN. § 35-38-6-6(a)(3), (4) (Michie Supp. 2002) (permitting the prison physician and one other physician to attend executions); KY. REV. STAT. ANN. § 431.250 (Michie 1999) (allowing a physician to attend executions); LA. REV. STAT. ANN. § 15:570A (West 1992 & Supp. 2003) (stating that an "execution of the death sentence shall take place in the presence of . . . [a] physician"); NEV. REV. STAT. 176.355(2)(e) (2001) (indicating that the prison director shall invite a physician to the execution); N.J. STAT. ANN. § 2C:49-2 (West 1995) (permitting a physician to sedate the condemned inmate); N.M. STAT. ANN. § 31-14-15 (Michie Supp. 2000) (requiring prison warden to invite a physician to the execution); S.C. CODE ANN. § 24-3-560 (Law. Co-op. 1989) (indicating that a physician shall certify the execution); S.D. CODIFIED LAWS § 23A-27A-32 (Michie

and two other physicians to be present at executions.²¹⁹ Many states statutorily require a physician to “pronounce” or “determine” the death of the executed inmate.²²⁰ However, the AMA makes a distinction between “certifying” and “pronouncing” or “determining” death, in which the latter is forbidden.²²¹ The AMA asserts that “determining” or “pronouncing” death is unacceptable because it requires a doctor to monitor the condemned inmate’s vital signs during the execution; if the inmate is still alive, the doctor actively participates in the execution by ordering the execution to continue.²²² Thus, the prohibitions by the AMA and the states’ medical practices statutes conflict with state execution laws allowing or requesting the presence of physicians in executions; therefore,

1998) (stating that a licensed physician shall pronounce death); UTAH CODE ANN. § 77-19-10(3) (1999) (requiring a physician to pronounce death); VA. CODE ANN. § 53.1-234 (Michie 2002) (stating that a prison department physician, or his assistant, shall attend execution); WASH. REV. CODE ANN. § 10.95.180(1) (West 2002) (requiring a physician to attend the execution and pronounce death); WYO. STAT. ANN. § 7-13-904(a) (Michie 2001) (authorizing a physician to pronounce death); *see also* 725 ILL. COMP. STAT. ANN. 5/119-5(e) (West 2002) (providing anonymity for physicians who participate in executions); David J. Rothman, *Physicians and the Death Penalty*, 4 J.L. & POL’Y 151, 157-58 (1995) (discussing controversies over the Illinois law that provides anonymity to doctors involved in executions); Stacy A. Ragon, Comment, *A Doctor’s Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA’s Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 980-82 (1995) (discussing several states’ laws using medical professionals to help administer the death penalty). *But see* NEB. REV. STAT. § 29-2534 (1995) (prohibiting physician involvement in all aspects of the execution process). The Illinois law, which provides anonymity and shields doctors from attacks by the AMA for participating in executions, pays doctors in cash in order to leave no “paper trail.” Stacy A. Ragon, Comment, *A Doctor’s Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA’s Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 984-85 (1995). One of the reasons for enacting the Illinois anonymity statute is to shield the death penalty from attacks alleging that it violates the Eighth Amendment’s prohibition of “cruel and unusual punishment.” *Id.* at 985. Requiring a physician’s presence at executions ensures that executions in Illinois will not encounter the same problems that Texas had in executing John Autry. *Id.* Thus, the bill advocates physician participation in executions, and challenges based on the Eighth Amendment would likely be unsuccessful. *Id.* 219. TEX. CODE CRIM. PROC. ANN. art. 43.20 (Vernon 1979).

220. *See, e.g.*, IDAHO CODE § 19-2716 (Michie 1997) (mandating that a licensed physician shall pronounce death); WASH. REV. CODE ANN. § 10.95.180(1) (West 2002) (requiring a physician to attend the execution and pronounce death); *see also* Stacy A. Ragon, Comment, *A Doctor’s Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA’s Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 980 (1995) (reporting states’ attempt to seek the aid of physicians to assist or monitor the execution process).

221. *See* Stacy A. Ragon, Comment, *A Doctor’s Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA’s Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 986-88 (1995) (reviewing the AMA’s guidelines against physician participation in executions).

222. *Id.*

it is essential to examine the need for physician participation in executions.²²³

2. The Need for Physician Participation in Executions

Evidently, if the Texas prison execution team administers anesthesia to the condemned inmate, the physician transplant team's procurement of organs after pronouncement of the inmate's death does not necessarily qualify as physician participation in the execution process.²²⁴ Nonetheless, the high degree of complexity involved in administering anesthesia to a condemned inmate and the risks of error by execution personnel without medical training necessitates the use of physicians or, at a minimum, medically-trained individuals.²²⁵

223. *Id.* at 998. Pennsylvania provides an example of the conflict between the state's execution statute on one hand, and the state's medical practices statute and the AMA's prohibition of physician participation in executions on the other. *Id.* at 992. The Pennsylvania execution statute states that a physician shall pronounce death, hence making a physician's presence essential to carry out the execution. *Id.* However, the Pennsylvania Medical Practices Act gives the state medical board the authority to sanction physicians found guilty of "unprofessional" conduct, which includes deviating from or failing to conform with professional ethical and quality standards. Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 992 (1995). Thus, a physician who complies with the state's execution statute will violate the medical practices statutes, which can result in the medical board imposing sanctions on the physician. *Id.* Despite the obvious conflict of laws, there has not been any penalty imposed on a physician by the state medical board for violating the AMA's prohibition against physician participation in executions. *Id.* at 998. Nevertheless, the AMA continues to apply pressure on state licensing boards to sanction physicians who participate in executions. *Id.* As a result, licensing boards may start imposing penalties on doctors participating in executions in the future. *Id.*

224. Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 31 (1996).

225. See DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE* 62 (1991); see also Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 403 (1996) (commenting on the complexity of administering anesthesia). But see David J. Rothman, *Physicians and the Death Penalty*, 4 J.L. & POL'Y 151, 158 (1995) (emphasizing the simplicity of inserting lines into a condemned inmate's vein). "The skills of starting the lines and injecting the compounds are not the most complicated medical skills. You don't have to be a neurosurgeon to insert a line[, although] . . . legal literature would sometimes have it appear as though that is the case." *Id.* Nurses or nurse practitioners, such as a nurse anesthetist, may be good candidates to assist in executions because they possess sufficient medical skills to carry out the executions. Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 986 (1995). The American Nurses Association (ANA), like the AMA, claims that nurse participation in executions is unethical and a violation of the Nurse's Code. *Id.* However, the issue is not as critical for nurses. *Id.* While physicians may lose their licenses

Physician participation in the proposed organ donation method will save donees' lives. The AMA's Principles of Medical Ethics asserts a duty that "a physician shall recognize a responsibility to participate in activities contributing to an improved community."²²⁶ The focus of the AMA's prohibition and the Hippocratic Oath is to stop the physician from "causing death."²²⁷ But in essence, it is not the physician causing the death of the condemned inmate, instead the state causes it by sentencing, issuing the execution warrant, and carrying out the execution proceedings against the condemned inmate.²²⁸ Some physicians even argue that since there is no doctor-patient relationship between the condemned inmate and the doctor, assisting in executions does not violate medical ethics.²²⁹ Overall, the possibility of saving lives should provide sufficient incentive to overcome the ethical and moral conflict with the AMA and the Hippocratic Oath.²³⁰

3. The Role of the Dead Donor Rule and the Recognition of Brain Death

The dead donor rule presents an additional barrier to the proposed organ donation scheme.²³¹ As previously mentioned, the dead donor rule

for participation, nurses' participation in executions is never an issue for revocation of a license under the ANA. *Id.*

226. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 405 (1996) (quoting COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AM. MED. ASS'N, CURRENT OPINIONS § 2.06 (1992)); see also Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 985-86 (1995) (noting physicians' arguments for supporting involvement in executions). Physicians supporting participation in executions claim that such participation is part of their civic duty to serve their country, just like voting or serving on a jury. *Id.*

227. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 407 (1996).

228. See *id.*

229. Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 985 (1995). This argument has some flaws because some physicians do have a relationship with the condemned inmate, such as the prison physician. *Id.* Therefore, this argument is futile regarding the prison physician. *Id.*

230. See Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 32 (1996) (questioning moral and ethical barriers to organ procurement from condemned inmates); see also Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 407 (1996) (criticizing the Hippocratic Oath's hindrance of organ procurement from executed prisoners).

231. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 403 (1996) (responding to the dead donor rule's effect on organ procurement from executed prisoners).

forbids obtaining organs in a manner that kills the organ donor, regardless of consent or willingness of the donor.²³² The purpose of the rule is to prevent sacrificing one person's well-being to benefit another.²³³ Opponents argue that procuring organs from the condemned inmate brings about death and violates the dead donor rule.²³⁴ The key factor that determines whether or not the proposed method violates the dead donor rule is the proper definition of death.²³⁵

Traditionally, irreversible cessation of respiratory and cardiac functioning was the common law standard for determining death.²³⁶ However, the development of life support techniques and the emergence of organ

232. Stuart J. Youngner & Robert M. Arnold, *Ethical, Psychosocial, and Public Policy Implications of Procuring Organs from Non-Heart-Beating Cadaver Donors*, 269 JAMA 2769, 2271 (1993); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 403 (1996); see also John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 9-10 (reviewing the effect of the dead donor rule on organ procurement).

233. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 403 (1996).

234. See Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 602 (2002) (asserting that removing the condemned prisoners' organs before death would violate the rule); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 403 (1996) (discussing the dead donor rule's implications); John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 9 (identifying the dead donor rule's limitations on procuring organs from executed prisoners).

235. See John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 7 (summarizing brain death and the dead donor rule).

236. See, e.g., *Smith v. Smith*, 317 S.W.2d 275, 279 (Ark. 1958) (quoting the most recent Black's Law Dictionary definition of death); *Schmidt v. Schmidt*, 67 Cal. Rptr. 847, 854 (Cal. Ct. App. 1968) (defining death as the irreversible cessation of vital bodily functions, including respiration and pulsation); *In re T.A.C.P.*, 609 So. 2d 588, 593 (Fla. 1992) (accepting the cardiopulmonary definition of death); *Vaegemast v. Hess*, 280 N.W. 641, 643 (Minn. 1938) (accepting cessation of respiration and circulation as the definition of death); *Schmitt v. Pierce*, 344 S.W.2d 120, 133 (Mo. 1961) (en banc) (finding that death is the cessation of respiration and pulsation); see also BARUCH A. BRODY ET AL., *MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, and Statements* 105 (2001) (introducing the ethical issues surrounding brain death); Alexandra K. Glazier, *"The Brain Dead Patient Was Kept Alive" and Other Disturbing Misconceptions; A Call for Amendments to the Uniform Anatomical Gift Act*, 9 KAN. J.L. & PUB. POL'Y 640, 642 (2000) (stating that doctors originally declared death upon cessation of spontaneous heart-beat or breath); Samantha Weyrauch, *Acceptance of Whole-Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan*, 17 UCLA PAC. BASIN L.J. 91, 91 (1999) (noting that before modern medicine developed, the general consensus for death was "when all of the major organ systems of the body ceased to function"). See generally Thomas R. Trenkner, Annotation, *Tests of Death for Organ Transplant Purposes*, 76 A.L.R.3d 913 (1977) (exploring the legal problems connected to medical advancements with regards to the definition of death).

transplantation compelled a new definition of death.²³⁷ Organ transplantation makes it essential to quickly determine when a potential donor dies in order to effectively procure the organs before they deteriorate.²³⁸ Consequently, the concept of brain death emerged as the medically-preferred definition of death.²³⁹

Brain death proliferates the presumption that death occurs when there is an “irreversible cessation of all brain functioning.”²⁴⁰ Thus, the defini-

237. BARUCH A. BRODY ET AL., *MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, and Statements* 105 (2001); see also Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 404 (1996) (arguing that the new definition of death weakened the dead donor rule); Samantha Weyrauch, *Acceptance of Whole-Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan*, 17 UCLA PAC. BASIN L.J. 91, 99 (1999) (claiming that organ transplantation is the driving force behind recognition of the brain death standard).

238. BARUCH A. BRODY ET AL., *MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, and Statements* 105 (2001); Samantha Weyrauch, *Acceptance of Whole-Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan*, 17 UCLA PAC. BASIN L.J. 91, 99 n.59 (1999) (illustrating the importance of the brain death standard to organ transplantation procedures); Thomas R. Trenkner, Annotation, *Tests of Death for Organ Transplant Purposes*, 76 A.L.R.3D 913, 914 (1977) (arguments that the traditional definition of death hinders successful organ transplantation). Making a distinction between the traditional respiratory or cardiac standard of death and brain death is crucial for heart, lung, and pancreas transplant procedures. Samantha Weyrauch, *Acceptance of Whole-Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan*, 17 UCLA PAC. BASIN L.J. 91, 99 n.59 (1999). When a person's heart stops beating, the transplantable organs' cells die from lack of oxygen making these organs useless for transplantation. *Id.*

239. See BARUCH A. BRODY ET AL., *MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, and Statements* 105 (2001) (introducing the concept of brain death); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 404 (1996) (advancing brain death as a proper test for death).

240. BARUCH A. BRODY ET AL., *MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, and Statements* 105 (2001); see also Alexandra K. Glazier, “*The Brain Dead Patient Was Kept Alive*” and *Other Disturbing Misconceptions; A Call for Amendments to the Uniform Anatomical Gift Act*, 9 KAN. J.L. & PUB. POL'Y 640, 642 (2000) (indicating that medical advancements caused doctors to declare death at termination of whole brain activity); Samantha Weyrauch, *Acceptance of Whole-Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan*, 17 UCLA PAC. BASIN L.J. 91, 94 (1999) (stating that brain death occurs when the brain ceases to regulate respiratory function). “The most frequently cited causes of brain death include: (1) direct trauma to the head; (2) massive hemorrhaging into the brain due to an aneurysm; and (3) the lack of adequate oxygen to the brain because of cardiac or respiratory arrest.” *Id.* Declaration of death upon irreversible cessation of whole brain activity “has . . . caused much confusion because a person declared dead by brain criteria is still warm to the touch and may be ‘breathing’ with the aid of a ventilator, thus challenging the traditional image of death.” Alexandra K. Glazier, “*The Brain Dead Patient Was Kept Alive*” and *Other*

tion of brain death allows declaration of death for those patients on life support once their brains cease functioning. It also enables physicians to maintain a patient on life support equipment while they procure the transplantable organs.²⁴¹

As acknowledgment of brain death became more prevalent in the medical community, the legal system and many states enacted laws to incorporate brain death into the definition of death.²⁴² In 1980, the Uniform Law Commissioners promulgated the Uniform Determination of Death Act, which declared that “[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.”²⁴³ In Texas, the law integrates the traditional death and

Disturbing Misconceptions; A Call for Amendments to the Uniform Anatomical Gift Act, 9 KAN. J.L. & PUB. POL’Y 640, 642 (2000).

241. See BARUCH A. BRODY ET AL., MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, and Statements 105 (2001) (emphasizing that advances in medical technology require recognition of brain death an alternative to traditional definitions of death); Thomas R. Trenkner, Annotation, *Tests of Death for Organ Transplant Purposes*, 76 A.L.R.3D 913 (1977) (establishing brain death as the appropriate test for death involving organ transplantation); see also Alexandra K. Glazier, “*The Brain Dead Patient Was Kept Alive*” and *Other Disturbing Misconceptions; A Call for Amendments to the Uniform Anatomical Gift Act*, 9 KAN. J.L. & PUB. POL’Y 640, 643 (2000) (discussing “heart beating” donors). “Heart beating” donation occurs when the donor is dead by brain death criteria while ventilation mechanisms maintain respiratory functions. *Id.* Under this procedure, organs continue to receive oxygenated blood despite the patient’s nonfunctioning brain. *Id.* “For this reason, the medical community has preferred anatomical gifts from decedents declared dead by brain criteria because there is time for planning and preparation between the declaration of death and the harvesting of donated organs.” *Id.* Today, nearly 99% of all organ donations come from donors declared brain-dead. *Id.*

242. BARUCH A. BRODY ET AL., MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, and Statements 108 (2001); see also James M. DuBois, *Non-Heart-Beating Organ Donation: A Defense of the Required Determination of Death*, 27 J.L. MED. & ETHICS 126, 132 (1999) (emphasizing that the desire to transplant organs pushed policy-makers to acknowledge brain death criteria in order to permit early pronouncement of death); Samantha Weyrauch, *Acceptance of Whole-Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan*, 17 UCLA PAC. BASIN L.J. 91, 91 (1999) (pointing out that all states recognize the brain death standard). Today, many industrialized nations accept whole brain death as a definition of death. *Id.* “In both the United States and Japan, the driving force behind acceptance of the brain death standard stemmed from a need for transplantable organs.” *Id.* Beginning in the early 1980s, many state legislatures enacted legislation that “included the whole brain standard of determining death as an alternative to the traditional heart-lung standard.” *Id.*

243. UNIF. DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 593 (1996); see also BARUCH A. BRODY ET AL., MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, and Statements 108 (2001) (reviewing the 1980 Uniform Determination of Death Act); James M. DuBois, *Is Organ Procurement Causing the Death of Patients?*, 18 ISSUES L. & MED. 21, 24 (2002), WL 18 ISSULM 21 (discussing the Uniform Determination of Death Act); Samantha Weyrauch, *Acceptance of Whole-Brain Death Criteria for*

brain death views by defining death as occurring when “there is irreversible cessation of the person’s spontaneous respiratory and circulatory functions” or “[i]f artificial means of support preclude a determination that a person’s spontaneous respiratory and circulatory functions have ceased, the person is dead when, in the announced opinion of a physician . . . there is irreversible cessation of all spontaneous brain function.”²⁴⁴

Given that Texas law recognizes death occurring when there is an irreversible cessation of all spontaneous brain function, the dead donor rule’s clout weakens against the proposed execution method.²⁴⁵ Under this proposed execution method, the administered anesthesia would induce irreversible cessation of brain function and render the inmate brain-dead in accordance with Texas law.²⁴⁶ Since the organ transplant team procures the organs after a declaration that the inmate is legally brain-dead, the physicians will in no way violate the dead donor rule’s mandate that physicians shall not cause the death of the organ donor when procuring his organs.²⁴⁷

Determination of Death: A Comparative Analysis of the United States and Japan, 17 UCLA PAC. BASIN L.J. 91, 103 (1999) (outlining the Uniform Determination of Death Act’s two definitions of death). The purpose of the Act was “to provide a source of organs from bodies that were declared legally dead as well as protection of the physician who made the determination of death.” *Id.*

244. TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1992 & Supp. 2003); BARUCH A. BRODY ET AL., *MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, and Statements 108-09* (2001) (citing TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1998)).

245. *See* TEX. HEALTH & SAFETY CODE ANN. § 671.001 (Vernon 1998) (recognizing irreversible cessation of brain functioning as a standard for death); *see also* Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 404 (1996) (stressing that the brain death understanding of death weakens the dead donor rule); John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 7 (stating that the whole brain death standard does not violate the dead donor rule).

246. *See* LOUIS J. PALMER, JR., *ORGAN TRANSPLANTS FROM EXECUTED PRISONERS* 111 (1999) (proclaiming that anesthesia-induced brain death is an efficient method of execution for organ transplantation); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 401 (1996) (discussing anesthesia-induced brain death).

247. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL’Y & L. 387, 404 (1996); John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP., Nov.-Dec. 1999, at 6, 7 (concluding that tests recognizing permanent cessation of brain function as the definition of death do not violate the dead donor rule).

4. Will Physicians Participate in the Proposed Prisoner Organ Procurement Plan?

Lastly, an issue arises as to whether physicians will participate in procuring organs from executed prisoners.²⁴⁸ Opponents assert that physicians will refuse to participate because of the trepidation of associating themselves with a process that is portrayed as brutal and dehumanizing.²⁴⁹ The media and the organ donation networks, such as UNOS, are actively spawning negative publicity against condemned prisoner organ donation despite the lack of open discussion and public debate on the subject.²⁵⁰ Additionally, the media's influence is so pervasive that even doctors supporting obtaining organs from executed inmates remark that the media's ability to shape public opinion presents an obstacle to new organ donation policies.²⁵¹ As a result, the media and organ donation networks strongly influence doctors' perceptions of what constitutes acceptable organ procurement practices.²⁵²

Despite the negative overtone contrived by the opposition, not all physicians condemn the idea of procuring organs from executed prisoners.²⁵³ For example, Dr. Les Olson, Director of the University of Miami's Organ Procurement Organization, "believes the transplant community should keep an open mind about organ procurement inside prison walls."²⁵⁴ Dr. Olson stated that using organs from condemned prisoners is more feasible if government authorities would permit intensive blood tests on potential inmate donors, ensure that death row inmates voluntarily consent, and equip execution sites with proper amenities to allow the transplant team to extract the organs immediately after execution.²⁵⁵ In that regard, Dr. Olson acknowledged that patients on organ donor waiting lists often

248. See Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 414 (1996) (questioning whether physicians would participate in procuring organs from condemned inmates).

249. *Id.*

250. See *id.* (noting the significance of the media and organ donor networks in shaping the public's negative perception of condemned prisoner organ donation).

251. *Id.*

252. *Id.*

253. See DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE 125* (1991) (stressing that Dr. Charles Bailey, an esteemed pioneer in heart surgery, supported organ donation from condemned prisoners); Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 415 (1996) (asserting that physicians do not universally denounce procuring organs from condemned prisoners).

254. Jeff Testerman, *Organs of Condemned Sought for Transplant*, ST. PETERSBURG TIMES, Mar. 26, 2000, at 1B, 2000 WL 5604077.

255. *Id.*

die, and it would be a mistake not to look at all the options to save those lives.²⁵⁶

Additionally, in a 1998 open forum sponsored by the AMA's Council on Ethical and Judicial Affairs, several physicians voiced their opinions regarding the use of prisoners as organ donors.²⁵⁷ Dr. Stephen Wallach, a Hawaiian alternate delegate, noted the likelihood of prisoners making informed, voluntary decisions to donate; however, Dr. Wallach warned of the dangers of taking advantage of the prisoner's choice to donate, such as moving a prisoner's execution date because of the need for his organs.²⁵⁸ In spite of this predicament, Dr. Wallach suggested that organ donation from condemned prisoners is possible when there are careful guidelines to prevent exploitation of the prisoners.²⁵⁹ Furthermore, Dr. Joseph Fennelly, a New Jersey physician, favored the practice based on a social altruism perspective.²⁶⁰ Dr. Fennelly felt that such donations might have positive effects on the condemned prisoners' families.²⁶¹ However, Dr. Charles J. Hickey, an Ohio alternate delegate, argued that this country's practice of procuring organs from executed prisoners would be viewed as "incredible barbarism" by other nations.²⁶² Despite the dele-

256. *Id.*

257. See Diane M. Gianelli, *Ethics Forum Debates Prisoners As Donors*, AM. MED. NEWS, Dec. 21, 1998, http://www.ama-assn.org/sci-pubs/amnews/pick_98/inta1221.htm (reporting physicians' statements made at the ethics forum on condemned prisoner organ donation).

258. *Id.*; see also Jeff Testerman, *Organs of Condemned Sought for Transplant*, ST. PETERSBURG TIMES, Mar. 26, 2000, at 1B, 2000 WL 5604077 (reporting on Dr. Malinin's opinion, an orthopedics professor and head of the University of Miami's Tissue Bank, that inmates should have the same right to donate their organs as anyone else does).

259. Diane M. Gianelli, *Ethics Forum Debates Prisoners As Donors*, AM. MED. NEWS, Dec. 21, 1998, http://www.ama-assn.org/sci-pubs/amnews/pick_98/inta1221.htm; see also Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 415-17 (1996) (discussing the difficulties Dr. Jesse Meredith faced in his attempt to procure organs from condemned inmate Velma Barfield upon her execution).

260. Diane M. Gianelli, *Ethics Forum Debates Prisoners As Donors*, AM. MED. NEWS, Dec. 21, 1998, http://www.ama-assn.org/sci-pubs/amnews/pick_98/inta1221.htm; see also Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 32 (1996) (indicating that by allowing a condemned inmate to donate his organs some good can come from the inmate's wrongdoing).

261. Diane M. Gianelli, *Ethics Forum Debates Prisoners As Donors*, AM. MED. NEWS, Dec. 21, 1998, http://www.ama-assn.org/sci-pubs/amnews/pick_98/inta1221.htm; see also Phyllis Coleman, "Brother, Can You Spare a Liver?" *Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 32 (1996) (suggesting that "[f]amily members, of both victims and condemned persons, can gain a measure of comfort" from knowing that others will have a second chance at life thanks to the donor's organ).

262. Diane M. Gianelli, *Ethics Forum Debates Prisoners As Donors*, AM. MED. NEWS, Dec. 21, 1998, http://www.ama-assn.org/sci-pubs/amnews/pick_98/inta1221.htm; see also

gates' debate during the forum, the Council failed to reach an official conclusion on the issue.²⁶³

Accordingly, physician anxiety and apprehension about the proposed policy is justifiable, but "such concerns pale in comparison to the potential benefits."²⁶⁴ Furthermore, much of the anxiety stems from the loss of public trust in the medical profession; however, procuring organs from condemned prisoners should not hinder public trust in physicians if the organ donation policy reflects legislative approval, public scrutiny, and the moral justification of allowing the condemned, through his donation, to contribute something positive to the community he harmed.²⁶⁵ Consequently, public and legislative approval would significantly ease apprehension.²⁶⁶ Such approval would initiate considerable physician support and participation in the transplant procedures without facing the qualms plaguing "all but the most resolute and determined physicians."²⁶⁷

VI. CONCLUSION

The critical need for organs and the appalling number of patients dying each year in need of an organ compel society to look into alternative methods of obtaining organs. One such viable method is allowing death row prisoners to donate their organs. Therefore, the current Texas prison policy forbidding condemned prisoners from donating their organs should be reconsidered. Furthermore, the apparent waste of transplantable organs from executed prisoners that could save the lives of ill-fated patients desperately waiting for a new organ necessitates a change in the Texas prisoner organ donation policy. Although there are valid arguments sustaining the policy, the benefits of saving lives considerably outweigh the competing concerns that condemned prisoners should not be organ donors. Taking this into account, it is time for Texas to re-examine its prohibition of organ donation by death row prisoners.

DR. JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE 126* (1991) (admitting physician reluctance in procuring organs from condemned prisoners).

263. See Diane M. Gianelli, *Ethics Forum Debates Prisoners As Donors*, AM. MED. NEWS, Dec. 21, 1998, http://www.ama-assn.org/sci-pubs/amnews/pick_98/inta1221.htm (noting that the AMA Council on Ethical and Judicial Affairs did not come to any conclusion regarding the issue of allowing condemned prisoners to be organ donors).

264. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 415 (1996).

265. *Id.*; see also Diane M. Gianelli, *Ethics Forum Debates Prisoners As Donors*, AM. MED. NEWS, Dec. 21, 1998, http://www.ama-assn.org/sci-pubs/amnews/pick_98/inta1221.htm (stressing the concern about a physician's role in the process, even for those advocating the right of prisoners to donate their organs).

266. Laura-Hill M. Patton, Note, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 417 (1996).

267. *Id.*