



PRISONERS ARE PEOPLE: THE RIGHT OF DEATH-ROW INMATES TO RECEIVE LIFESAVING ORGAN DONATIONS

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TABLE OF CONTENTS

I. INTRODUCTION..... 838

II. EIGHTH AMENDMENT AND THE DEATH PENALTY 839

 A. *Limitations the Supreme Court Imposed on the Death Penalty* 839

 B. *The Right of Prisoners to Receive Healthcare While Incarcerated* 841

III. THE POTENTIALLY INDEFINITE DEATH PENALTY APPEAL PROCESS . 843

 A. *Statistics of the Death Penalty*..... 843

 B. *The Steps for Appealing Capital Punishment* 846

IV. RACIAL BIASES IN THE CRIMINAL JUSTICE SYSTEM AND MEDICAL COMMUNITY 847

 A. *Procedural Issues in the Criminal Justice System* 848

 B. *Public Opinion of the Death Penalty*..... 850

 C. *Constitutionality of Racial Biases in Death Penalty Cases and How It Applies to Medical Treatment*..... 851

V. ETHICS OF DEATH-ROW INMATES RECEIVING AND DONATING ORGANS..... 853

 A. *Prisoners’ Rights to Donate Their Organs After Death* 854

 B. *Prisoners’ Rights to Receive Organs*..... 854

 1. Political Involvement 854

 2. Utilitarian Approach and Societal Worth 855

 3. Economic Concerns..... 857

 4. Organ Scarcity and Economic Incentives for Donation..... 857

VI. THE UNIVERSAL HUMAN RIGHT TO LIFE 860

 A. *Anonymity of Blood, Bone Marrow, and Organ Donations* 860

* J.D., 2020, Rutgers Law School, Newark, New Jersey. Special thanks to Barbara Hoffman, for all of your invaluable feedback and support during the drafting process; my parents, for always supporting me through all my academic endeavors; and Travis Dove and Juliana Zaloom, for an intriguing, specific conversation that spiraled into this Note topic.

<i>B. Organ Property Interests and Potential Discrimination on the Basis of the Recipient's Incarcerated Status</i>	862
<i>C. Prisoners' Diminished Societal Worth Wrongfully Deprives Them of Basic Human Rights</i>	864
VII. CONCLUSION	865

I. INTRODUCTION

Ronald L. Sellers' criminal prosecution posed a unique dilemma: he was facing trial for crimes relating to his active participation in white supremacy groups, while already serving a life sentence in a Nevada prison.¹ The United States government weighed whether to seek the death penalty with his conviction, but Sellers suffered from liver disease and would live only an estimated three years without a liver transplant.²

Sellers' medical necessity was a focal point of the defense's legal argument against capital punishment: The defense claimed that it would be unconstitutionally cruel to impose a death sentence while also having to handle the medically necessary liver treatment.³ Sellers' prosecution presented a textbook example of the ethical dilemma presented by imposing a life sentence on a prisoner in need of an organ transplant to survive.

James Earl Ray assassinated Dr. Martin Luther King, Jr., and was serving a ninety-nine-year sentence after his conviction for the murder.⁴ During his sentence, he was life-threateningly in need of a new liver due to a severe Hepatitis C infection.⁵ He was placed on the transplant waiting list, but did not receive an organ and died shortly thereafter.⁶

Critics may argue that death row or life sentence inmates are not "worthy" of receiving an organ transplant,⁷ especially considering that "organ shortage[s] mean that not all can be treated."⁸ As a general principle, however, all prisoners—regardless of whether they are on

1. Richard A. Serrano, *Inmate's Disease Poses Possible Death Case Dilemma*, SAN DIEGO UNION-TRIB. (Sept. 26, 2009, 12:00 AM), <https://www.sandiegouniontribune.com/sdut-nv-inmate-transplant-dilemma-092609-2009sep26-story.html>.

2. *Id.*

3. *Id.*

4. Mark F. Anderson, *The Prisoner as Organ Donor*, 50 SYRACUSE L. REV. 951, 974 (2000).

5. *Id.*

6. *See id.*

7. *Id.*

8. *See id.* at 975.

death row—are entitled to lifesaving healthcare, including medically necessary organ transplants.⁹ The fact that they are on death row should not diminish their viability and eligibility for organ transplantation because myriad institutional and ethical barriers could potentially give them at least as much use of a donated organ as a non-incarcerated recipient. The Eighth Amendment protects against denial of a transplant—a form of healthcare discrimination—as it constitutes “cruel and unusual punishment” to deprive any person of a medically necessary, lifesaving organ.¹⁰

This Note focuses on the constitutional, statutory, and ethical protections afforded to death-row inmates in need of organ transplants. Part II summarizes the general constitutionality of the death penalty, the limits the Supreme Court has placed upon it, and the basic healthcare rights of prisoners. Part III details the lengthy—and potentially indefinite—process for capital sentence appeals in the United States. Part IV analyzes the systematic racial biases in both the criminal justice system and the medical community in relation to the quantity and quality of healthcare that inmates at all levels receive. Part V discusses the overall rights for death-row inmates to both donate and receive organ transplants and ethical concerns that these issues raise. Part VI describes the right to life to which all people are entitled, even if they are incarcerated and regardless of their “societal value.”

II. EIGHTH AMENDMENT AND THE DEATH PENALTY

A. *Limitations the Supreme Court Imposed on the Death Penalty*

The Supreme Court has upheld capital punishment as a constitutional form of criminal punishment.¹¹ However, pursuant to the Eighth Amendment’s restraint on cruel and unusual punishment,¹² the Court has placed (imprecise and open-ended) restrictions on when the

9. *Id.* at 975 n.104.

10. *Id.*

11. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (“[W]e hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution.”). *But see* John D. Bessler, *Torture and Trauma: Why the Death Penalty Is Wrong and Should be Strictly Prohibited by American and International Law*, 58 WASHBURN L.J. 1, 97–101 (2019) (arguing that the death penalty is akin to torture because of the trauma it inflicts; since torture is strictly banned pursuant to international law, the death penalty should be internationally condemned). The overall constitutionality of the death penalty is beyond the scope of this Note. *See Glossip v. Gross*, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., dissenting) (outlining a detailed multi-prong argument against the constitutionality of the death penalty in any situation).

12. U.S. CONST. amend. VIII.

death penalty can be sentenced in criminal convictions.¹³ The limits on when the death penalty can be issued has been incorporated to all fifty states through the Fourteenth Amendment.¹⁴ The death penalty does not guarantee proportionality in terms of crime and punishment; a crime could constitutionally be punished harsher than it might facially entail based on a variety of aggravating factors.¹⁵

Minors cannot be sentenced to capital punishment under any circumstance, no matter how abhorrent the crime they committed or who was the victim of their crime.¹⁶ Similarly, a mandatory sentence of life imprisonment without the possibility of parole for minors violates the Eighth Amendment.¹⁷ Therefore, in the context of minors, life imprisonment without the possibility of parole is functionally equivalent to the death penalty in terms of retributive outcome, deterrence, and practical effect, because it permanently deprives a person of his or her freedom and livelihood.

People with mental disabilities also cannot receive the death penalty, because executing people for actions that they could not fully, cognitively recognize is morally impermissible.¹⁸

Further, not all crimes justify capital punishment for adult defendants. For example, the rape of a minor without intent to cause death is not a capital crime; modern capital punishment requires a

13. See Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 172 (1976) (“The Court has neither been able to give a precise definition of [cruel and unusual punishment] nor has it settled upon a procedure for determining whether any particular punishment violates the eighth amendment.”).

14. See *Rhodes v. Chapman*, 452 U.S. 337, 344–45 (1981); *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

15. See *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (“We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.”).

16. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

17. *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (“[M]andatory life without parole for those under the age of 18 at the time of their crime violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’”); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. . . . [I]f [the State] imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release.”).

18. See *Moore v. Texas*, 139 S. Ct. 666, 672 (2019); *Hall v. Florida*, 572 U.S. 701, 724 (2014) (finding that one does not specifically need to have an IQ below 70 to bring this argument against the death penalty); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Ford v. Wainwright*, 477 U.S. 399, 417–18 (1986).

criminal conviction of first-degree murder to impose the death penalty.¹⁹ Even for those crimes for which the death penalty may be constitutional, some forms of executions have been limited or banned entirely.²⁰

B. The Right of Prisoners to Receive Healthcare While Incarcerated

In general, prisoners are guaranteed medical treatment while in custody, including lifesaving and medically necessary organ transplants.²¹ In *Estelle v. Gamble*, the Supreme Court decided that withholding medical care from prison inmates violates the Eighth Amendment protection against cruel and unusual punishment.²² Lower courts have clarified that this protection extends only to medically necessary healthcare; voluntary procedures are not guaranteed for inmates.²³

19. *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (“In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.”); *see also* *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (finding that capital punishment for deaths that one did not personally commit during participation in armed robbery was not constitutional); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (“For purposes of imposing the death penalty, [the defendant]’s criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting [the defendant] to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.”); *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

20. *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (holding that use of midazolam for executions is constitutional because “the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims”). *But see* *Baze v. Rees*, 553 U.S. 35, 60–61 (2008) (plurality opinion) (“[A]n inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures.”).

21. *See* Andrew M. Cameron et al., *Should a Prisoner Be Placed on the Organ Transplant Waiting List?*, 10 *AMA J. ETHICS* 88, 88–89 (2008) (discussing the National Organ Transplant Act and its application to prisoners); *see also* Jeffrey Natterman & Pamela Rayne, *The Prisoner in a Private Hospital Setting: What Providers Should Know*, 19 *J. HEALTH CARE L. & POL’Y* 119, 146–47 (2017) (concluding that “[p]risoners at private hospitals are entitled to receive the same medical care as any other patient in the general population”).

22. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (“These elementary principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.”); *see also* U.S. CONST. amend. VIII.

23. *See* *Alston v. Howard*, 925 F. Supp. 1034, 1040 (S.D.N.Y. 1996) (“[T]he [C]onstitution does not contemplate that prisoners receive unfettered access to medical care, . . . [and the defendant]’s care . . . appears to have been of a quality well above what

The National Organ Transplant Act of 1984 (“the Act”) does not specifically bar prisoners from receiving organs or being placed on the organ registry based solely on their status as inmates.²⁴ The Act lays down the criteria for who receives priority in receiving organs within the federally regulated database.²⁵ There are different measures for determining organ waitlists based on the specific organ in need.²⁶ For example, patients awaiting kidney transplants can afford a lengthier waiting period because dialysis can “prolong the life of those with renal failure.”²⁷ In comparison, patients waiting for liver transplants have a more equal position on the list because prioritization is “based on their medical status and, hence, urgency of their need.”²⁸

Theoretically, prisoners—especially inmates with lengthy or life sentences—should be exceptional candidates for organ donation and receipt because of how well regulated their healthcare and everyday environment is. It is possible to monitor and control almost every aspect of their lives to ensure a smooth procedure and recovery.

However, providing donated organs to death-row inmates or those who have life sentences without parole poses a significant ethical dilemma.²⁹ A common perception amongst people who ethically oppose prisoners receiving organs is “that felons have violated the rules of society and ought to be punished, not rewarded with society’s most precious assets.”³⁰ This perception is dangerous because it fuels the narrative that prisoners are not entitled to the same adequate level of

might otherwise be available in the private sector.”) (citing *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)).

24. 42 U.S.C. § 274 (2012). Much deference is granted to the Organ Procurement and Transplantation Network regarding organ donation processes, but nothing in the statute explicitly bars prisoners from the process. *See id.* However, there could be other institutional bars to prisoners’ involvement. *See id.*

25. *Id.* The transplant must be medically necessary, as recommended by a doctor, in order for deliberate medical indifference. *See Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (“[A] difference of medical opinion’ . . . [between prisoner and his doctors] was insufficient, as a matter of law, to establish deliberate indifference.”) (quoting *Estelle v. Gamble*, 429 U.S. 97, 107–08 (1976)); *Willis v. Ritter*, No. 04-2303, WQH 2008 WL 821828, at *8 (S.D. Cal. Mar. 26, 2008) (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)).

26. *See Cameron et al.*, *supra* note 21, at 88–89 (discussing the United Network for Organ Sharing’s individually-developed policy for different organs).

27. *Id.* at 88.

28. *Id.* at 88–89.

29. *See id.* at 89–90.

30. *Id.* at 89 (detailing the case of Mr. Reading, the first prisoner to receive a heart transplant in 2002, leading to “a sense of outrage over the inherent injustice of awarding high-quality, costly care to a criminal at public expense when millions of law-abiding citizens remained uninsured and unable to afford similar care.”). It was ultimately recommended that Mr. Reading should “be given equal consideration . . . for a liver transplant based on his medical need.” *Id.* at 90.

healthcare to which non-incarcerated people have significantly easier access.

Three classes of bodily materials are most commonly donated for lifesaving functions: organs, blood, and bone marrow.³¹ Organs and blood are widely understood and agreed to be medically necessary when appropriate, but some may under-appreciate the importance of bone marrow. Bone marrow is “the soft, fatty material in the central cavities of big bones;” it is “the body’s blood manufacturing factory . . . enabl[ing] sick patients, whose own blood cells need to be killed to save their lives, to produce new blood cells,” potentially saving the recipient’s life.³² Bone marrow is regulated by the Act, in which it is grouped into the definition of “human organ” the statute provides.³³ However, the Ninth Circuit held that the most common medical transplant method for bone marrow actually makes “transplant” an anachronistic term because there is no transfer of an organ, just bodily fluids more akin to blood.³⁴ Regardless, the Act regulates the process, and bone marrow donation can be medically necessary, as long as the necessity is properly supported.³⁵

III. THE POTENTIALLY INDEFINITE DEATH PENALTY APPEAL PROCESS

A. *Statistics of the Death Penalty*

State and federal death sentence procedures differ in many ways. Since the reinstatement of the death penalty in 1976, 1,499 inmates have been executed nationwide, and 2,721 inmates are currently on death row around the country.³⁶ Since 1976, the states that have executed the most inmates are Texas (561 executions, 13 in 2018), Virginia (113, none in 2018), Oklahoma (112, none in 2018), Florida (98, 2 in 2018), and Missouri (88, none in 2018).³⁷

31. *Living-Donor Transplant*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/living-donor-transplant/about/pac-20384787> (last visited Mar. 3, 2020).

32. *Flynn v. Holder*, 684 F.3d 852, 856 (9th Cir. 2012).

33. 42 U.S.C. § 274e(c)(1) (2019).

34. *Flynn*, 684 F.3d at 864–65 (allowing for monetization for bone marrow donation because of the specifics of the actual donation process).

35. See *Crooks v. Nix*, 872 F.2d 800, 804–05 (8th Cir. 1989).

36. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated May 31, 2019) (showing that California, Florida, and Texas, in that order, are the states with the most current death-row inmates).

37. *Id.* (showing that relatively few executions occurred in 2018 or 2019). Nationally, lethal injection is historically the most common method of execution (1,322 executions), followed by electrocution (160), gas chamber (11), hanging (3), and firing squad (3). *Id.*

Notably, there are currently sixty-two federal inmates on death row, and the federal government has executed only three people from 1976 to the first half of 2020.³⁸ However, on July 25, 2019, Attorney General William Barr announced that the federal government, via the Federal Bureau of Prisons, would resume federal executions starting in December 2019.³⁹ There were five federal death-row inmates scheduled for execution (all between December 9, 2019 and January 15, 2020) at the time of the Attorney General's announcement, but several inmates commenced litigation, which has delayed the executions.⁴⁰

The mere length of the capital appeal process undermines the criminal justice system as a whole and “create[s] a sense of lack of finality in death penalty cases, thereby decreasing public confidence in the criminal-justice system.”⁴¹ Another proposition is “that execution after a long stay on death row may violate the Eighth Amendment” outside of

38. *Id.* The first three federally executed prisoners are Timothy McVeigh (terrorism), Juan Raul Garza (murder), and Louis Jones (kidnap and murder). *Executions Under the Federal Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty> (last visited Mar. 28, 2020). Federal death penalty can also be sentenced in jurisdictions that otherwise do not allow capital punishment, such as Puerto Rico. *Background on the Federal Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/background-on-the-federal-death-penalty> (last visited Mar. 28, 2020). “Contrary to what many believe, the federal death penalty is frequently employed in cases where a conviction or death sentence would have also been available in state courts,” which often relies on cases moving to federal court based on procedural technicalities. *Id.*; see also *Federal Laws Providing for the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/federal-laws-providing-death-penalty> (last visited Mar. 28, 2020) (listing federal statutes that could result in capital punishment).

39. Press Release No. 19-807, U.S. Dep’t of Justice, Office of Pub. Affairs, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019) <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> [hereinafter DOJ Press Release]; see also Nicholas Bogel-Burroughs, *These Are the 5 Men the Federal Government Plans to Execute*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/us/capital-punishment-death-penalty.html>.

40. DOJ Press Release, *supra* note 39; see also Bogel-Burroughs, *supra* note 39. The five condemned inmates (Daniel Lewis Lee, Lezmond Mitchell, Wesley Ira Purkey, Alfred Bourgeois, and Dustin Lee Honken) are all convicted of gruesome murders. See DOJ Press Release, *supra* note 39 (providing detailed summaries of the condemned and their crimes); see also Bogel-Burroughs, *supra* note 39 (same); Jessica Gresko & Colleen Long, *Court Sides with Trump Effort to Resume Federal Executions; More Litigation Ahead*, USA TODAY (Apr. 7, 2020, 3:10 PM), <https://www.usatoday.com/story/news/politics/2020/04/07/federal-executions-court-sides-trump-administration-efforts/2963957001/>.

41. James N. G. Cauthen & Barry Latzer, *Why So Long? Explaining Processing Time in Capital Appeals*, 29 JUST. SYS. J. 298, 299 (2008). Another downside to such a lengthy appeal process is that it undermines the most commonly assumed purpose of capital punishment, deterrence, because that effect is strongest when the crime and punishment are temporally close together. *Id.* at 300.

the constitutionality of the actual death sentence.⁴² Therefore, convicted criminals appealing their conviction must be entitled to lifesaving organ donations because they have not yet exhausted all potential avenues of proving themselves innocent, and they face a potentially long road ahead of them before the process is finalized and they are executed.

California and Texas have among the highest populations of inmates currently on death row,⁴³ but the states' systems function differently in terms of appeals and the post-sentencing practices.⁴⁴ Texas is the state with the most total executions since 1976, with 561 through 2019.⁴⁵ Comparatively, California has executed only thirteen inmates on death row in the same timeframe despite having more inmates currently on death row (740).⁴⁶ The practicalities of the appeal process for capital punishment in each state may partially explain this disparity.

In Texas, there are widespread complaints that the state does not provide adequate legal assistance to indigent defendants, resulting in underrepresented clients who often do not get a fair trial.⁴⁷ The Texan appeal system has been plagued by "complaints of racial bias, ineffective counsel and other legal issues" amongst death-row inmates during the appeal process.⁴⁸

California's appeal process for capital punishment is not as controversial as Texas' process is, but it is effectively the same procedure.⁴⁹ It appears that the problem boils down to the effectiveness of public defenders and other counsel for indigent defendants. Access to adequate legal representation is a constitutional requirement.⁵⁰ Depriving defendants of representation mars the criminal justice system and potentially results in the execution of innocent defendants.

42. *Id.* (citations omitted).

43. *See Facts About the Death Penalty*, *supra* note 36.

44. *See* OFFICE OF THE ATTORNEY GENERAL OF TEXAS, CAPITAL PUNISHMENT APPELLATE GUIDEBOOK (Oct. 2018), <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/crime-victims/Capital-Punishment-Appellate-Guide-EGN.pdf>; *California Death Penalty Appeals Overview*, SAFE CAL. (Nov. 5, 2017), <https://www.safecalifornia.org/california-death-penalty-appeals-overview/>.

45. *Facts About the Death Penalty*, *supra* note 36.

46. *Id.*

47. Mike Ward, *Report: Texas Death Penalty Appeals Process Deeply Flawed*, HOUS. CHRON. (Sept. 20, 2016, 12:10 AM), <https://www.houstonchronicle.com/news/politics/texas/article/Report-Texas-death-penalty-appeals-process-9233144.php>.

48. *Id.*

49. *See generally California Death Penalty Appeals Overview*, *supra* note 44.

50. *The Right to Counsel*, FINDLAW, <https://criminal.findlaw.com/criminal-rights/the-right-to-counsel.html> (last visited Mar. 28, 2020).

In California, a 2016 proposition passed that was designed to speed up the appeal process, as opposed to eliminate it all together.⁵¹ However, in March 2019, California Governor Gavin Newsom “announced a moratorium on capital punishment . . . granting a temporary reprieve for the . . . inmates on the state’s death row, the largest in the Western Hemisphere.”⁵²

B. The Steps for Appealing Capital Punishment

The capital punishment appeal process starts with a direct appeal to the state’s appellate court, which is automatic in most states and “limited to issues from the trial”; second, there is a state post-conviction procedure that ends up at “the state’s highest court”; and finally, there is the option of federal habeas corpus, of which the last and ultimate resort is the Supreme Court.⁵³ In total, more than 160 death-row inmates have been exonerated between 1973 and 2019, with the annual average increasing in recent years from three to five.⁵⁴ The massive amount of almost-executions has been used as a call to arms for those opposed to the death penalty—a reaction that only gets stronger with each death-row inmate exonerated.⁵⁵ If there is even one person who could be wrongfully

51. Kim Bellware, *California Votes to Speed Up Death Penalty, Rather Than Abolish It*, HUFFPOST, https://www.huffingtonpost.com/entry/california-death-penalty-results_us_581f62bce4b0e80b02caa779 (last updated Nov. 14, 2016).

52. Tom Arango, *California Death Penalty Suspended; 737 Inmates Get Stay of Execution*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/california-death-penalty.html> (“The move is highly symbolic because legal challenges have already stalled executions in California; the last one was in 2006.”). Nonetheless, California prosecutors have continued seeking capital punishment, and the California Supreme Court rejected petitions from two men sentenced to capital punishment from disallowing the practice even though the sentence cannot be carried out. Nico Savidge, *California Supreme Court Lets New Death Penalty Cases Proceed, Despite Gavin Newsom’s Moratorium*, MERCURY NEWS (Sept. 11, 2019, 3:52 AM), <https://www.mercurynews.com/2019/09/11/california-supreme-court-lets-new-death-penalty-cases-proceed-despite-gavin-newsoms-moratorium/>.

53. *Death Penalty Appeals Process*, CAP. PUNISHMENT CONTEXT, <https://capitalpunishmentincontext.org/resources/dpappealsprocess> (last visited Mar. 28, 2020) (noting that there is also the possibility of executive clemency “held by a governor or other body to grant relief to a person facing execution”).

54. *Facts About the Death Penalty*, *supra* note 36.

55. See Editorial, *The Latest California Death Row Exoneration Shows Why We Need to End the Death Penalty*, L.A. TIMES (Apr. 27, 2018, 10:50 AM), <https://www.latimes.com/opinion/editorials/la-ed-death-penalty-california-benavides-201804257-story.html> (describing the case of Vicente Benavides Figueroa, who was wrongfully “convicted of raping, sodomizing, and murdering his girlfriend’s 21-month-old daughter” and spent twenty-five years on death row before being released).

executed, the procedural issues of the death penalty process in the United States are deeply flawed enough to justify significant public outcry.

The Supreme Court has widely acknowledged the possibility for reversal of conviction or remand to lower courts of capital punishment. In *Thompson v. McNeil*, the Court noted that the criminal justice system produces many errors in capital punishment cases and many defendants are exonerated later in their sentences.⁵⁶

The appeal process is potentially indefinite, and the Court also held that it is unconstitutional to execute death-row inmates after excessive delays.⁵⁷ Further constitutional issues arise from the indefiniteness of the appeal process, which is exemplified in *Wearry v. Cain*, allowing for the possibility of reversal as a result of due process failures and other procedural mishaps that fall beyond the scope of the specific case.⁵⁸ Despite the seemingly doomed finality of capital punishment, the appeal process for those convicted and sentenced to execution is lengthy, potentially indefinite, and plagued by questions concerning the validity of the convictions, making the definitive perception of the sentence misleading.⁵⁹

IV. RACIAL BIASES IN THE CRIMINAL JUSTICE SYSTEM AND MEDICAL COMMUNITY

Racial biases in the criminal justice system result in greater rates of capital punishment for disadvantaged populations—mainly people of color—which effectively means that their lives are unequally valued in society.⁶⁰ People of color are more likely to be sentenced to execution for the same crime a white person commits and receives a less severe penalty.⁶¹ The slightest indication of racial biases should cast major

56. *Thompson v. McNeil*, 556 U.S. 1114, 1115–16 (2009) (“Today, condemned inmates await execution for an average of nearly 13 years.”).

57. *See id.* at 1116 (“In sum, our experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel.”).

58. *Wearry v. Cain*, 136 S. Ct. 1002, 1008 (2016) (arguing that reviewing the defendant’s case was preferable to “forcing Wearry to endure yet more time on Louisiana’s death row in service of a conviction that is constitutionally flawed”).

59. Cauthen & Latzer, *supra* note 41, at 298 (“43 percent of those sentenced to death between 1973 and 2005 were still in prison awaiting the application of the sentence or the resolution of their appeals.”). States have differing procedures for reviewing death penalty appeals, most of which have the initial trial sentence automatically reviewed by “the state court of last resort.” *Id.*

60. *See* Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 27–31 (2002) (presenting the empirical data surrounding the lack of proportionality in death sentences by race).

61. *See id.* at 28–29.

doubt about whether the death penalty is constitutional as enforced⁶² and whether death-row inmates are entitled to receive organ transplants, because society should advocate more adamantly for their individual human rights.

A. *Procedural Issues in the Criminal Justice System*

Several procedural issues plague the criminal justice system and affect the racial biases present. Improper collection of evidence can taint the investigatory process and lead to biases because the investigating officers can improperly use their discretion to act in bad faith and not investigate something as thoroughly as a potential capital punishment case requires.⁶³

DNA evidence, in particular, is subject to a high level of scrutiny for death penalty cases because it is a relatively new area of evidence that was not available for collection or analysis in many death penalty trials and convictions for the inmates who currently sit on death row.⁶⁴ In many reported cases, the new discovery or proper reanalysis of DNA evidence results in exoneration of a death penalty conviction, showing how powerful and definite this form of evidence can be when analyzed

62. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 348–49 (1997) (concluding that execution can be constitutional, as long as the methods to execute are properly investigated to ensure humanity, which some of the most frequently used ones are not, as of 1997). Since there are some methods of execution (for example, hanging and beheading) that are inconsistent with the Eighth Amendment, the line between what is permissible and what is not can be blurred. Even the most widely accepted “humane” method, lethal injection, could be considered inhumane under some circumstances. See Devi Nampiarampil, *How a Death Row Inmate’s Request to Give His Organs Kept Him Alive*, NEWSWEEK (Apr. 29, 2015, 10:51 AM), <https://www.newsweek.com/how-death-rows-request-give-his-organs-kept-him-alive-326552> (discussing a case where a prison inmate awaiting lethal injection requested to donate organs but was denied).

63. See *Fraud in Forensics: Five Cases of Abuse and Evidence Mishandling*, FORENSICS COLLS.: FORENSIC EDUC. BLOG, <https://www.forensicscolleges.com/blog/resources/real-cases-of-forensic-fraud-flawed-evidence> (last visited Mar. 28, 2020) (“In 2015, the FBI admitted to decades of relying on faulty hair analysis in trials, a grave error in criminal proceedings. Among those convicted on fraudulent evidence are 32 defendants sentenced to death, 14 of whom have either died in prison or already been executed.”).

64. *Id.*

properly.⁶⁵ Additionally, evidence that is discovered after a conviction has been entered can be brought forward under certain criteria.⁶⁶

Ineffective counsel, particularly when the defendant cannot afford a private attorney and is granted a public defender, is another institutional concern that can undermine the death penalty system. The Supreme Court has presented a two-part test to determine when counsel is ineffective and would invalidate a death sentence, both parts of which must be satisfied.⁶⁷ First, the attorney's performance must be deemed deficient, making "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."⁶⁸ Second, it must be proved "that the deficient performance prejudiced the defense," making the results of the trial unreliable.⁶⁹ Through this analysis, the Court provides significant deference to defense counsel's judgment when determining effectiveness based on a totality of the circumstances, as anything more invasive would interfere with the counsel's function.⁷⁰

Practically, the Court's ruling in *Strickland v. Washington* makes it difficult for a death-row inmate to successfully claim ineffective counsel, but courts can examine each part of the trial individually.⁷¹ The deference

65. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Mar. 28, 2020) (showing that 367 inmates, twenty-one of whom were on death row and sixty-one percent of whom were African American, have been exonerated with DNA evidence since DNA exoneration was introduced in 1989).

66. *Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). After conviction, the defendant's presumption of innocence is nullified and the burden to disprove his or her guilt is heightened, a standard that is not lessened for capital cases. *Id.* at 404–05 (citing *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (plurality opinion)). The only heightened requirement for capital cases is "that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed." *Id.* at 405 (holding that this does not apply to the defendant because "it is far from clear that a second trial 10 years after the first trial would produce a more reliable result").

67. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.").

68. *Id.*

69. *Id.*

70. *Id.* at 688–89 ("Judicial scrutiny of counsel's performance must be highly deferential.").

71. See *Messer v. Kemp*, 760 F.2d 1080, 1097 (11th Cir. 1985) (Johnson, J., dissenting) (finding the lawyer's trial strategies were acceptable, but his "conduct at the sentencing phase was clearly unreasonable"). *But see Hinton v. State*, 820 S.E.2d 712, 714–15 (Ga. 2018) (finding that counsel's representation was not ineffective because the jury's verdict was not likely prejudiced).

afforded to trial defense counsel makes it difficult for a death-row inmate to successfully argue ineffective counsel,⁷² thereby limiting the effectiveness of another avenue for post-conviction relief. However, it is not impossible for a death-row inmate to prove ineffective counsel, especially regarding racial biases in the trial process, providing some degree of procedural safeguards for death-row inmates negatively affected by racial biases.⁷³ Courts' deference to defense counsel is broad, but race is one element that the Court has recognized as more sensitive to abuse in the criminal justice system, subjecting racial claims to strict scrutiny in the constitutional context.⁷⁴

B. Public Opinion of the Death Penalty

The statistics regarding the racial biases of death-row inmates are illuminating. Since 1976, approximately 34% of executed prisoners have been black and approximately 56% were white.⁷⁵ The race of the *victims* in crimes in which the prisoner was executed was overwhelmingly white (75.5%), compared to 15.4% black and 7.0% Latino.⁷⁶ For interracial murder cases that resulted in an execution, when there was a white defendant and a black victim, only twenty-one executions were carried out; when the defendant was black and the victim was white, there were 294 executions.⁷⁷ Although approximately 13.4% of the United States population is black,⁷⁸ nearly one-half—41.68% as of April 1, 2019—of death-row prisoners nationwide were black.⁷⁹

Public support for the death penalty is greatly divisive amongst a variety of different cross-sections of the population and shows the powerful role race plays in such discussions. According to Pew Research

72. See *Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (recognizing the “high bar” set to successfully argue ineffective counsel).

73. *Id.* at 775–77 (finding the defendant’s counsel was ineffective under *Strickland* because the lawyer elicited testimony from an expert who he knew would connect Buck’s crime to his race, which the Court found prejudiced the verdict).

74. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (emphasizing that “the Equal Protection clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny’”).

75. *National Statistics on the Death Penalty and Race*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/race-death-row-inmates-executed-1976#defend> (last visited Mar. 28, 2020).

76. *Id.*

77. *Id.*

78. *Population Estimates*, U.S. CENSUS BUREAU (July 1, 2018), <https://www.census.gov/quickfacts/fact/table/US/PST045218#PST045218>.

79. DEBORAH FINS, CRIM. JUST. PROJECT OF THE NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 1 (Spring 2019), https://www.naacpldf.org/wp-content/uploads/DRUSA_Spring2019.pdf.

Center, 59% of white Americans favor the death penalty (34% opposing), with only 36% of black Americans (52% opposing) and 47% of Hispanic Americans favoring it (49% opposing).⁸⁰ Along political lines, 77% of Republicans, 35% of Democrats, and 52% of Independents support the death penalty.⁸¹ It is significant that the group of people most adversely affected by racial disparity in the criminal justice system is the group that is most adamant against capital punishment; the members of that group see firsthand the injustice that minority populations experience in the United States.

C. *Constitutionality of Racial Biases in Death Penalty Cases and How It Applies to Medical Treatment*

The racial disparity in the current United States criminal justice punishment system leaves open the possibility of constitutional pushback. Are the laws of the country facially disadvantaging people of color (particularly black Americans)? Or are criminal laws enforced with racial biases, either implicit or explicit? Either way, race-based inconsistencies in sentencing raise drastic implications.

As to prisoners' rights to receive organ donations, racial disparities in the criminal justice system can result in unequal administration of medical treatment. A white person who commits a serious crime is more likely to receive a less imposing punishment than a person of color who commits the same crime.⁸² If need for serious medical treatment arises,

80. J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RESEARCH CTR. (June 11, 2018), <http://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018>; see also Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151, 158–61 (2004) (detailing an alternate, older study finding that white people favor the death penalty significantly more than black people do, and that opinion does not significantly alter when the test subjects were informed of the racial disparity of the prisoners on death row). Bobo and Johnson's research further found that when participants were informed that more severe punishments are imposed on perpetrators who murder whites, black respondents decreased in support more than 10% while white participants only decreased 2% in support, which is too slight to be statistically significant. *Id.* at 161–63. Interestingly, when informed of racial disparities in the context of a "victimless" crime (more severe punishments for crack cocaine versus powder cocaine crimes), white and black respondents significantly decreased favor of that form of strict punishment, even though it is also a racial disparity in the criminal justice system. *Id.* at 166–68.

81. Oliphant, *supra* note 80.

82. See David C. Baldus et al., *Criminology: Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1228 (2011) ("Over the last thirty years, studies of state death-penalty systems have documented three types of evidence of racial disparities in the treatment of similarly situated death-eligible offenders.").

a white person could have greater liberties to exercise his or her medical rights as a result of the difference in sentencing.⁸³ Thus, an incarcerated person of color in need of an organ transplant is more likely to face legal hurdles to obtain lifesaving medical treatment. In this hypothetical, these two people committed the same crime but received different sentences, and when medical necessity arose, the criminal in the position of inherent societal privilege was able to seek medical treatment in a timelier manner than the one in an unprivileged position.

Regarding death-row inmates in particular, the racial disparity becomes even more egregious.⁸⁴ If two people commit the same homicidal act and one is sentenced to a certain amount of time in prison and the other is placed on death row, society inherently views them as different classes—one condemned to death and the other potentially worthy of redemption in prison.⁸⁵ These two equally guilty criminals will have access to different modes of medical treatment. Because persons of color are disproportionately sentenced to capital punishment, the person of color is then disparately impacted by how society and the criminal justice system implicitly disadvantage people of color and other minorities.⁸⁶ This systemic problem can only be rectified through fundamental changes in practices and ideologies that have been engrained in American culture since the country's inception.⁸⁷

In addition to criminal justice biases and despite the anonymity of the organ donation system, there is an underlying racial disparity in the statistics of donation.⁸⁸ Black Americans “make up nearly 30 percent” of the waiting list for organ transplants, representing more than double their percentage of the United States population.⁸⁹ Research shows “that African-Americans in low socioeconomic neighborhoods, along with poor education about transplants . . . are less likely to be listed for

83. *See id.*

84. *See id.*

85. *See* Ogletree, Jr., *supra* note 60, at 16–18.

86. *See id.*

87. *See generally* Sean P. Harvey, *Ideas of Race in Early America*, OXFORD RES. ENCYCLOPEDIA AM. HIST. (2016) (discussing the role early European settlers played in creating a classist society amongst the Native Americans and the enslaved Africans based on the concept of “race,” something that was not an inherent concept to non-Europeans at the time).

88. Joseph P. Williams, *A Donation Disparity*, U.S. NEWS (Sept. 18, 2018, 11:56 AM), <https://www.usnews.com/news/healthiest-communities/articles/2018-09-18/african-american-organ-transplant-patients-face-additional-hurdles>.

89. *Id.* (claiming “African-Americans’ lingering mistrust of the medical field” is a chief reason for the disparity, in addition to “differences in access to health care as well as other factors that disadvantage specific ethnic groups”).

transplantation compared to whites in similar neighborhoods.”⁹⁰ Further, fewer black people opt to be voluntary living donors, “medical conditions . . . often exclude many from being living donors,” and a “lack of understanding and a general mistrust of the medical community and the inherent fear . . . that the doctors . . . are less interested in saving the life of a patient if they are an organ donor.”⁹¹ Therefore, even outside the narrow context of death-row medical treatment, people of color are less trusting of the medical community, less likely to seek organ donations that they need to survive, and more prone to implicit discrimination in healthcare overall.

Racial biases in the criminal justice system, and specifically in the application of the death penalty, affect the rights of incarcerated minority populations from receiving constitutionally protected healthcare.⁹² When taken in conjunction with racial biases that are pervasive in the organ donation system, racial minorities may be at an even greater medical disadvantage.⁹³ The interaction between criminal justice and healthcare biases creates an overwhelming disadvantage for people who are entitled to basic human rights.

V. ETHICS OF DEATH-ROW INMATES RECEIVING AND DONATING ORGANS

There are substantial ethical concerns about whether prisoners—especially death-row inmates or those with life sentences—should ethically be entitled to receive organs from the national donor registry, often because of the possible alternative use of the organ.⁹⁴ Similarly, some question whether death-row inmates should ethically be allowed to *donate* their organs after execution.⁹⁵

90. *Id.*

91. *Id.*

92. See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

93. Williams, *supra* note 88.

94. See Kate Douglas, Note, *Prison Inmates are Constitutionally Entitled to Organ Transplants—So Now What?*, 49 ST. LOUIS U. L.J. 539, 569 (2005).

95. See J. Stewart Cameron & Raymond Hoffenberg, Commentary, *The Ethics of Organ Transplantation Reconsidered: Paid Organ Donation and the Use of Executed Prisoners as Donors*, 55 KIDNEY INT’L 724, 730 (1999); Adam Banner, ‘Grey’s Anatomy’ and the Ethics of Prisoner Organ Donations, (Feb. 5, 2018, 8:00 AM), http://www.abajournal.com/news/article/greys_anatomy_and_the_ethics_of_prisoner_organ_donations (discussing the moral implications of an episode of the television program *Grey’s Anatomy* in which this exact question is posed: a child is at the show’s hospital in need of a lifesaving organ, while a prisoner about to be executed is also a patient at the hospital). In the aforementioned *Grey’s Anatomy* episode, the prisoner’s execution is stayed based on consideration of the organ donation, but the episode ultimately ends with the prisoner “executed by the state through lethal injections,” making his organs unusable for transplant. *Id.* The major ethical dilemma faced here was whether the surgeon who would perform the procedure would

A. Prisoners' Rights to Donate Their Organs After Death

Death-row inmates who pledge to donate their vital organs after death often do so as a final act of atonement for their sins.⁹⁶ Critics opposed to death-row inmates donating their own organs postmortem often base their beliefs on ethics and general Western thinking, mainly “antipathy to the death penalty itself” and as a “reaction to possible abuses of the situation, such as illegal commercial exploitation.”⁹⁷ Generally, however, inmates have a right to bodily integrity, so they cannot be forced to donate their organs, bone marrow, or blood, but they can choose to if they so desire.⁹⁸

B. Prisoners' Rights to Receive Organs

1. Political Involvement

The debate over death-row inmates' eligibility to receive organ transplants has occasionally crossed into the political hemisphere. For example, death-row inmate Mitchell Rupe needed a liver transplant, causing “a revolt . . . in the state of Washington, [p]eople threaten[ing] to revoke organ-donor pledges, [and a] legislator introduc[ing] a bill to stop the state from funding any organ transplants for inmates sentenced to

essentially be acting as an executioner, potentially violating the Hippocratic Oath that medical professionals take to not harm patients. *Id.*

96. See generally Nampiarampil, *supra* note 62.

97. Cameron & Hoffenberg, *supra* note 95. While it is true that there is an extensive black market for organs, most notably in China, it is illegal to buy or sell organs in the United States. 42 U.S.C. § 274e (2018) (“It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”); see also *Wilson v. Adkins*, 941 S.W.2d 440, 443 (Ark. Ct. App. 1997) (affirming the lower court’s decision and finding a contract to donate bone marrow to a specific person for money “amounted to a sale of organs in violation of federal law”); Sunny Woan, Comment, *Buy Me a Pound of Flesh: China’s Sale of Death Row Organs on the Black Market and What Americans Can Learn From It*, 47 SANTA CLARA L. REV. 413, 434–35 (2007). In China, prisoner organs have apparently been used for purposes beyond medicinal use, as it was revealed scientists used prisoners’ organs for studies, without valid and proper disclosure of the source of the organs. Wendy Rogers & Matthew Robertson, Opinion, *Human Organs Harvested from Executed Chinese Prisoners Might Be Used for Scientific Research*, NEWSWEEK (Feb. 6, 2019, 4:38 AM), <https://www.newsweek.com/china-human-organ-harvesting-prisoners-scientific-research-1319831>. For further reading on the international view of organ trafficking and transplant tourism, see G.P. Westall et al., *Ethics of Organ Donation and Transplantation Involving Prisoners: The Debate Extends Beyond Our Borders*, 38 INTERNAL MED. J. 56, 56–59 (2008).

98. R. Bisi Adeyemo, Comment, *Don’t Break My Heart, My Achy Breaky Heart: A Call for Legislation to Expressly Grant Inmates the Right to Donate Their Non-Vital Organs*, 60 HOW. L.J. 781, 802–03 (2017).

death.”⁹⁹ The legislator proposed an outright statutory ban on this form of organ transplantation.¹⁰⁰ This proposition spurred widespread ethical furor.¹⁰¹

2. Utilitarian Approach and Societal Worth

In general, prisoners are guaranteed vital organ transplants, as they are with any other necessary lifesaving medical treatment, but this guarantee is not automatically transferred to those who will spend the rest of their lives behind bars or be executed by the government.¹⁰² However, some argue death-row inmates should not receive limited healthcare based on utilitarianism and preserving resources for those who will better benefit.¹⁰³ This view of how death-row inmates should spend the rest of their lives is flawed and amounts to inhumane treatment that violates the Eighth Amendment’s protections against cruel and unusual punishment.

Some posit that violent felons should not be entitled to organ transplants from the national registry because violence against others should be a powerful mitigating factor in determining worthiness for organs.¹⁰⁴ However, the Supreme Court has determined that prisoners are guaranteed healthcare while in prison, with no distinctions made for what kind of treatment or who is eligible to receive it, including on account of the inmate’s criminal history.¹⁰⁵ The Supreme Court makes it clear that prisoners are entitled to humane treatment throughout the period of incarceration, no matter the crime committed,¹⁰⁶ and their

99. Karen Brandon, *Furor Over Transplants for Death Row Inmates*, CHI. TRIB. (Mar. 1, 1996), <https://www.chicagotribune.com/news/ct-xpm-1996-03-01-9603010235-story.html>.

100. *Id.*

101. *Id.*

102. See Douglas, *supra* note 94, at 539, 569.

103. Michelle Masotto, Note, “*Death is Different*”: *Limiting Health Care for Death Row Inmates*, 24 HEALTH MATRIX: J.L. MED. 317, 334–35 (2014) (concluding that “[l]imiting care for death row [sic] inmates after the completion of the appeals will satisfy *Estelle*’s ‘evolving decency’ standard”).

104. See David L. Perry, *Should Violent Felons Receive Organ Transplants?*, MARKKULA CTR. FOR APPLIED ETHICS (Jan. 31, 2002), <https://www.scu.edu/ethics/focus-areas/bioethics/resources/should-violent-felons-receive-organ-transplants> (arguing that violent felons should not receive organs because violence against others should be a mitigating factor in deeming worthiness for organs).

105. *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976); see also *Alston v. Howard*, 925 F. Supp. 1034, 1039–40 (S.D.N.Y. 1996) (holding that medically necessary treatment is to be provided, but not voluntary procedures).

106. See *Estelle*, 429 U.S. at 102.

societal worth does not deteriorate in such a manner as to deny the opportunity to receive lifesaving medical treatment.¹⁰⁷

Societal worth and inherent goodness (or lack thereof) should not be a requirement to receive a lifesaving organ. In the 2008 film *Seven Pounds*, the protagonist (played by Will Smith) plans to commit suicide in order to donate seven of his organs to seven specifically selected “worthy” people; this planned donation was framed as an act of redemption after he accidentally killed seven people while using his phone while driving.¹⁰⁸ The protagonist made such determinations about who would receive his organs after inserting himself into their lives to gauge what kind of moral people they are, hiding his true intentions.¹⁰⁹

Seven Pounds’ overarching themes have been heavily criticized regarding whether evaluating one’s personal worth to determine if they should receive lifesaving organs is a proper course of action; the answer is generally no, at least in the context of the film.¹¹⁰ Further, the protagonist’s ethical analysis of most of his designated recipients is surface level, which should not be enough to determine if each is a “good person” worthy of a lifesaving organ.¹¹¹ Of course, *Seven Pounds* is not an exact representation of realistic organ donation, especially not for death-row inmates (or any inmates, in general), as “[p]hysicians should not discriminate on the basis of social worth when evaluating transplant candidates.”¹¹²

The ethical dilemmas *Seven Pounds* poses reach the basic tenets of humanity: whether it is possible to determine who is a “good” person and who is a “bad” person based on an arbitrary evaluation. A real-world application of these themes disproves the ethical compass of *Seven*

107. See *id.* at 103–04.

108. SEVEN POUNDS (Columbia Pictures 2008).

109. *Id.*

110. Richard Pimentel, *The Ethics of Seven Pounds*, PHIL. NEWS, [https://www.philosophynews.com/page/The-Ethics-of-Seven-Pounds-\(this-article-contains-spoilers\).aspx](https://www.philosophynews.com/page/The-Ethics-of-Seven-Pounds-(this-article-contains-spoilers).aspx) (last visited Mar. 29, 2020). The ethical dilemma posed by *Seven Pounds* is mitigated by the fact that the organ donation would not come from a government-regulated registry, just a personal, targeted donation. However, the underlying principle of human worth is still applicable and is the main target of criticism. *Id.*; see also Maryann Johanson, *Why ‘Seven Pounds’ Is Unethical*, FLICK PHILOSOPHER (Jan. 5, 2009, 10:10 AM), <https://www.flickphilosopher.com/2009/01/why-seven-pounds-is-unethical.html> (“That’s pretty repulsive, the idea that anyone should be choosing who lives and who dies based on how worthy one man thinks they are . . .”).

111. See Pimentel, *supra* note 110.

112. Jasmine Villanueva-Simms, *Mind the Gap—The Prisoner as an Organ Recipient: A Review of the Practical Barriers Between Prisoners and Organ Transplants*, 14 J. HEALTH & BIOMEDICAL L. 149, 167 (2018).

Pounds and indicates that death-row inmates are indeed entitled to become transplant candidates.¹¹³

3. Economic Concerns

In addition to social worth concerns, economic concerns stem from organ donations and related healthcare to prisoners. Organ transplants are costly medical procedures.¹¹⁴ Tax dollars and other governmental revenue fund a majority of inmates' healthcare.¹¹⁵ But, this is the only source of healthcare that prisoners receive while incarcerated.¹¹⁶ If a prisoner is denied an organ transplant, he or she could incur further medical costs to society that could equal or surpass the cost of performing an organ transplant.¹¹⁷ There is arguably no more controlled environment for a person to receive medical treatment than within a prison because of the everyday regulation in that environment. Allowing death-row inmates vital organ transplants is an efficient and cost-effective way of regulating their health needs, in the long run.

4. Organ Scarcity and Economic Incentives for Donation

Another concern levied against death-row inmates receiving organs is widespread organ scarcity across the country and around the world. The number of patients in need of organ transplants far outnumbers the number of organs available for transplantation, meaning there are not enough organs donated to supply the ever-growing demand.¹¹⁸ People die

113. *Id.*

114. T. SCOTT BENTLEY & STEVEN J. PHILLIPS, MILLIMAN, 2017 U.S. ORGAN AND TISSUE TRANSPLANT COST ESTIMATES AND DISCUSSION, MILLIMAN RESEARCH REPORT 5 (2017) (providing a table that shows the average aggregate costs of transplanting a variety of the most commonly donated organs, proving the prices to potentially reach one million dollars for a single organ).

115. *See generally* HEALTH CARE SPENDING PROJECT, PEW CHARITABLE TRS., & MACARTHUR FOUND., STATE PRISON HEALTH CARE SPENDING: AN EXAMINATION (2014), <https://www.pewtrusts.org/~media/assets/2014/07/stateprisonhealthcarespendingreport.pdf> (providing an overview of state spending on various components of healthcare for inmates across the country).

116. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."); Andrew Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 666 (2009) ("[N]early 2.3 million U.S. inmates (about [one percent] of U.S. adults) must rely on their jailers for health care.").

117. *See* Brandon, *supra* note 99.

118. *Transplant Trends*, UNITED NETWORK FOR ORGAN SHARING, <https://unos.org/data/transplant-trends/> (last visited Apr. 17, 2020) (showing 112,941 people as of last visit on the nationwide waiting list for an organ transplant).

every day while on the transplant waiting list as a result of not receiving a vital organ in a timely manner.¹¹⁹

Of the several propositions to end organ shortages, many involve using prisoners who die while incarcerated—or who are executed—as donors.¹²⁰ A Utah law gives inmates the opportunity to voluntarily opt-in to donate their organs if they die in prison, regardless of whether or not they are on death row.¹²¹ This concept has some support because it gives prisoners autonomy over how their body can be used to help society in some way.¹²² However, critics argue that prisoners should not be able to donate organs as a solution to the organ scarcity problem “because of legal, medical, and ethical barriers.”¹²³

In China, organs are harvested from prisoners and persecuted ethnic and religious minorities, despite claims from the government that the practice would stop, raising substantial ethical furor internationally.¹²⁴ China’s practice is widely viewed as unethical, and “the dream is yet a

119. *Organ Donation Statistics*, U.S. GOV’T INFO. ON ORGAN DONATION & TRANSPLANTATION, <https://www.organdonor.gov/statistics-stories/statistics.html> (last visited Mar. 29, 2020) (“[Twenty] people die each day waiting for a transplant.”) (emphasis omitted).

120. See, e.g., Anderson, *supra* note 4, at 954.

121. UTAH CODE ANN. § 64-13-44 (West 2013); see also Jaclyn M. Palmerson, Note, *Inmate Organ Donation: Utah’s Unique Approach to Increasing the Pool of Organ Donors and Allowing Prisoners to Give Back*, 68 RUTGERS U. L. REV. 479, 481 (2015).

122. Amanda Seals Bersinger & Lisa Milot, *Posthumous Organ Donation as Prisoner Agency and Rehabilitation*, 65 DEPAUL L. REV. 1193, 1194–96 (2016).

123. Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 596 (2002).

124. Kirk C. Allison et al., *Historical Development and Current Status of Organ Procurement from Death-Row Prisoners in China*, 16 BMC MED. ETHICS 1, 1 (Dec. 3, 2015) <https://link.springer.com/content/pdf/10.1186/s12910-015-0074-0.pdf> (discussing China’s promise to only use “voluntarily donated organs” yet not taking legislative action to enforce this policy and still allowing prisoners to qualify as voluntary donors); Melissa Davey, *Call for Retraction of 400 Scientific Papers Amid Fears Organs Came from Chinese Prisoners*, GUARDIAN (Feb. 5, 2019, 12:00 PM), <https://www.theguardian.com/science/2019/feb/06/call-for-retraction-of-400-scientific-papers-amid-fears-organs-came-from-chinese-prisoners> (“While China vowed to stop using organs from executed prisoners in 2015, no new law or regulation has been passed banning the practice.”); James Griffiths, *Report: China Still Harvesting Organs from Prisoners at a Massive Scale*, CNN (June 24, 2016, 11:45 PM), <https://www.cnn.com/2016/06/23/asia/china-organ-harvesting/index.html> (reporting China’s failure to comply with their promise to not harvest organs from prisoners and the international community’s ethical reaction to the practice); Will Martin, *China Is Harvesting Thousands of Human Organs from its Uighur Muslim Minority*, UN Human-Rights Body Hears, BUS. INSIDER (Sept. 25, 2019, 7:33 AM), <https://www.businessinsider.com/china-harvesting-organs-of-ughur-muslims-china-tribunal-tells-un-2019-9> (“The China Tribunal . . . said . . . that the Chinese government was taking heart, kidneys, lungs, and skin from groups including Uighur Muslims and members of the Falun Gong religious group.”).

dream, while prisoners remain at risk under the demand [for organ sourcing] and ongoing medical exploitation of execution.”¹²⁵

Economic incentives have also been proposed to motivate more organ donors and reduce scarcity.¹²⁶ These incentives could potentially have further disparate impacts on poor and otherwise disadvantaged populations because they could feel implicitly coerced to donate their organs, even if it is not what they would personally prefer.¹²⁷ A class system could form in which the wealthy would have the privilege of not having to donate their organs, while the poor would not have such opportunities.¹²⁸ This analysis is ultimately a balancing test between the interests of the potential donor, potential recipient, and society, with no clear-cut ethical answer.¹²⁹

Similarly, organ donations as “community service” to atone for one’s crimes have been proposed.¹³⁰ This proposition is problematic because it also promotes a system of selling one’s autonomy to contribute to society when other alternatives are feasible. Such a system could coerce prisoners into undergoing medical procedures they would otherwise not do, in retribution for the acts for which they are already serving a prison sentence.

Therefore, some argue, prisoners are not entitled to receive the scarce organs that are available—harkening back to the troubling ideology of *Seven Pounds*—even if they are members of the waiting list.¹³¹ Death-row inmates, however, should not be punished for the nationwide lack of organs. Theoretically, if there were enough organs available for everyone who needed one, the general populace would likely find a different reason

125. Allison et al., *supra* note 124, at 6.

126. Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America’s Organ Shortage*, 13 GEO. MASON L. REV. 69, 132–33 (2004) (discussing how incentives could increase organ donations and therefore reduce scarcity); *see also* *Financial Incentives for Organ Donation*, NAT’L KIDNEY FOUND. (Feb. 1, 2003), <https://www.kidney.org/news/newsroom/positionpaper03>.

127. Cameron & Hoffenberg, *supra* note 95 (describing multiple arguments and counterarguments for various areas of incentives for organ donation and using executed prisoners as organ sources).

128. *See id.* at 726–28.

129. *See id.* at 727–28 (concluding that there is no clear answer to this dilemma, but leaning on the side of allowing paid organ donations in at least some situations).

130. Anderson, *supra* note 4, at 976.

131. *See* Martin F. McKneally & Robert M. Sade, *The Prisoner Dilemma: Should Convicted Felons Have the Same Access to Heart Transplantation as Ordinary Citizens? Opposing Views*, 125 J. THORACIC & CARDIOVASCULAR SURGERY 451, 452–53 (2003) (arguing the “pragmatic dimension” that prison budgetary restraints, and not diminished social or human worth, should keep many prisoners from receiving lifesaving organ transplants while in the prison system).

to deny death-row inmates organ transplants.¹³² In other words, the argument regarding organ scarcity as a justification for denying death-row inmates organs is significantly pre-textual and there would be other justifications employed to validate this justification that violates prisoners' rights and improperly stigmatizes them to the world.

VI. THE UNIVERSAL HUMAN RIGHT TO LIFE

Everybody in the United States (and internationally) should have a guaranteed right to live, as promised by the Founding Fathers.¹³³ Denying any prisoner a lifesaving organ violates the Constitution and basic human morals because it deprives the person of an inherent human right.¹³⁴ Prisoners are entitled to have their human rights respected no matter the atrocity of the crimes they committed.¹³⁵

A. *Anonymity of Blood, Bone Marrow, and Organ Donations*

Blood donors seldom know which patients will receive their donation.¹³⁶ The only information that can be ascertained about the recipient of donated blood at the time of donation is that the recipient will have a compatible blood type to that of the donor and the donation

132. See Mairi Levitt, *Could the Organ Shortage Ever Be Met?*, 11 LIFE SCI., SOC'Y & POL'Y, 1 (July 23, 2015) (indicating that if there were unlimited organs available, the supply and demand of organs would fluctuate in other ways, leading to new problems).

133. THE DECLARATION OF INDEPENDENCE para. 2. (U.S. 1776) ("endowed . . . with certain unalienable rights," one of which is "life.").

134. See Anderson, *supra* note 4, at 975 n.104.

135. See 18 U.S.C. § 2340A (2018) (condemning torture in the United States in solidarity and coalition with the Convention Against Torture, an international agreement that torture violates basic human rights). Torture is a violation of fundamental human rights "irrespective of the nationality of the victim or alleged offender." *Id.* § 2340A(b)(2). Therefore, some level of bodily integrity is engrained in federal and international law.

136. See Ronald Sullivan, *Blood Donors' Anonymity Is Upheld*, N.Y. TIMES, July 29, 1987, at B3 (reporting that "[b]lood donors must be allowed to remain anonymous, even if hospital patients who receive the blood later die of AIDS"). Therefore, blood donor anonymity is a steadfast doctrine that "is essential to protect donors from lawsuits and to maintain the nation's blood supply." *Id.* Now, there are measures in place to screen blood for transmittable diseases (meaning donated blood is generally much safer now than in 1987), but the anonymity remains. See *Keeping Blood Transfusions Safe: FDA's Multi-layered Protections for Donated Blood*, U.S. FOOD & DRUG ADMIN. (Mar. 23, 2018), <https://www.fda.gov/BiologicsBloodVaccines/SafetyAvailability/BloodSafety/ucm095522.htm> (detailing screening and safety measures used to keep "the United States blood supply the world's safest"); see also *Anonymous Blood Donors Meet the Woman Whose Life They Saved*, UCLA HEALTH (Jan. 17, 2017), <https://www.uclahealth.org/anonymous-blood-donors-meet-the-woman-whose-life-they-saved> (discussing a story in which a woman had the opportunity to meet her lifesaving donors, requiring the express permission of all the donors).

has the potential to save lives—information that could hardly be used to verify the recipient's identity.¹³⁷ Therefore, a potential blood donor cannot possibly know whether the person or people benefiting from his or her generous donation are in the prison system, making it impossible to reject donation based on that knowledge.

Bone marrow donation has a similar level of anonymity as blood donation, except bone marrow donors and recipients have greater viability for post-donation communication.¹³⁸ In the United States, anonymous communication is allowed between donor and recipient for the first year after the procedure, and after that, as long as both parties consent, they can contact each other non-anonymously.¹³⁹ Therefore, there is no feasible way for a donor to reject a donation on the basis of the demographics of the recipient.

Throughout the bone marrow screening process, there is anonymity between the potential donor and recipient; the only information the donor receives about the recipient is that “patient's age, gender, and disease.”¹⁴⁰ Although the specific rules of donor-patient contact vary, that anonymity remains until well after the transplant occurs, meaning that the bone marrow donor does not know who gets his or her genetic material until after transplantation.¹⁴¹

It can be an option for those in need of an organ transplant to receive the organ from friends or family as a living donor, so long as certain tests and requirements are met.¹⁴² Regarding bone marrow and organ donation from the national database, the process for finding compatible

137. See *What Blood Types Match?*, NAT'L KIDNEY FOUND., <https://www.kidney.org/transplantation/livingdonors/what-blood-types-match> (last visited Mar. 29, 2020), for a summary of which blood types a patient can give to and receive from which other blood types.

138. *Do Patients and Donors Meet?*, BE THE MATCH, <https://bethematch.org/transplant-basics/do-patients-and-donors-meet/> (last visited Mar. 29, 2020) (“In fact, by U.S. law and federal contract, we are required to have a system to keep patient and donor information confidential.”); see also *3 Principles of Donation: Anonymity, Gratuitousness, and Consent*, LE SITE DU DON DE MOELLE OSSEUSE, <https://www.dondemoelleosseuse.fr/3-principles-of-donation-anonymity-gratuitousness-and-consent> (last visited Mar. 29, 2020) (showing that this standard extends internationally).

139. *Do Patients and Donors Meet?*, *supra* note 138.

140. *Donation FAQs*, BE THE MATCH, <https://bethematch.org/support-the-cause/donate-bone-marrow/donation-faqs/> (last visited Mar. 29, 2020) (under the “What happens if I match a patient?” drop-down box).

141. *Id.* (specifying the various potential patient update options available to the participants).

142. Jennifer Whitlock, *How to Donate an Organ to a Friend or Family Member*, VERYWELL HEALTH (July 1, 2019), <https://www.verywellhealth.com/living-organ-donation-info-3157018> (detailing the requirement for personalized and targeted donations to a specific person).

donors is highly regulated and individualized.¹⁴³ Bone marrow transplants are regulated according to a national database of genetic samples of potential donors.¹⁴⁴ There has to be a match with the initial matching test and then further testing to be conducted before the donation procedure takes place.¹⁴⁵

B. Organ Property Interests and Potential Discrimination on the Basis of the Recipient's Incarcerated Status

Most anonymous organ donations come from postmortem donors,¹⁴⁶ making it impossible for the donor to object to the organ's intended recipient at the time of donation. Blood donors do not discover to whom their blood is donated, so they cannot raise objections about the recipients. Bone marrow, however, is given by a living donor and is matched to one specific person, but is still shrouded in anonymity.¹⁴⁷

What if a potential donor is matched with a prisoner recipient and, at some point before the procedure, the donor inadvertently discovers the identity of the recipient? Can the donor refuse to donate if he or she believes the recipient is unworthy to receive the bone marrow? If so, are there any legal actions the refused recipient can take to remedy the situation?

Generally, bone marrow donors have a right to refuse to continue the donation at any point before the operation once they waive their consent to the procedure, as with any medical procedure.¹⁴⁸ However, this policy could deny somebody a lifesaving medical procedure based on the donor's personal prejudices, some of which could be constitutionally protected or prohibited.

The Second Circuit Court of Appeals remanded a case dealing with specified organ donation to the New York Court of Appeals to determine

143. *Medical Guidelines—Who Can Join?*, BE THE MATCH, <https://bethematch.org/support-the-cause/donate-bone-marrow/join-the-marrow-registry/medical-guidelines/> (last visited Mar. 29, 2020) (bone marrow donation regulations); *Organ Donation Legislation and Policy*, U.S. GOV'T INFO. ON ORGAN DONATION & TRANSPLANTATION, <https://www.organdonor.gov/about-dot/laws.html> (last visited Mar. 29, 2020).

144. *How Donors and Patients Are Matched*, BE THE MATCH, <https://bethematch.org/transplant-basics/matching-patients-with-donors/how-donors-and-patients-are-matched/> (last visited Mar. 29, 2020).

145. *Id.*

146. Health Res. and Serv. Admin., *The Deceased Donation Process*, U.S. GOV'T INFO. ON ORGAN DONATION & TRANSPLANTATION, <https://www.organdonor.gov/about/process/deceased-donation.html> (last visited Mar. 29, 2020).

147. *Donation FAQs*, *supra* note 140.

148. *Id.* ("You have the right to change your mind about being a donor at any time. Donating is always voluntary.")

whether the intended recipient was entitled to an organ either through property rights “or through a private right of action inferred from the New York Public Health Law.”¹⁴⁹ On remand, the New York Court of Appeals held that the “plaintiff, as a specified donee of an incompatible kidney, has no common-law right to the organ,” so he did not have a cause of action.¹⁵⁰ Further, the plaintiff was not protected under New York health law because, “[w]hile he was in need of a functioning kidney” and the organs were specified to him, the two kidneys left to the plaintiff were ultimately immaterial for the plaintiff.¹⁵¹ In other words, the plaintiff had no common-law property right to the kidneys, and health law does not apply because the kidneys served no actual medical purpose to the plaintiff, because the kidneys could not successfully be implanted into the plaintiff’s body.

The biggest takeaway from *Colavito v. N.Y. Organ Donor Network, Inc.* is that the ownership rights over promised organs are not immediately transferable to the donee, and there are factors that can invalidate the ownership claim altogether.¹⁵² Assuming that bone marrow falls in the same category as organs, the potential recipient of bone marrow has no legal entitlement to transplant, at least not from a common-law property perspective. The opinion in *Colavito* leaves the ultimate determination to the state courts for the health law issue, and states have different health laws.¹⁵³

Theoretically, a donor would have no way to discover pre-donation that the person to receive his or her bone marrow is a prisoner. This double-blind model keeps personal biases out of the donation process. A bone marrow donor can void his or her donation until the last second no matter what instigates the change of heart.¹⁵⁴ If a donor could find out his or her recipient ahead of time, the donor could opt not to donate solely based on that new information, which would cause great personal and

149. *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214, 232–33 (2d Cir. 2006). The basic facts in *Colavito* are that the plaintiff’s friend’s widow promised the plaintiff she would donate her husband’s kidneys to the plaintiff. *Id.* at 216. There was a problem with one of the kidneys, but before the other one could be sent to the plaintiff for the procedure, he was informed it had gone to somebody else. *Id.* These facts are similar to the hypothetical situation posed in the text because this was a supposed direct organ transplant for one specific person that was denied before the process could complete.

150. *Colavito v. N.Y. Organ Donor Network, Inc.*, 860 N.E.2d 713, 719 (N.Y. 2006).

151. *Id.* at 722 (“[B]ecause the kidneys were medically incompatible with plaintiff, he has no private right of action against defendants under New York Public Health Law.”).

152. *Id.*

153. *Colavito*, 438 F.3d at 232–33.

154. See N.Y. PUB. HEALTH LAW § 4305 (McKinney 2019).

medical strains on the patient, and operational strains on the matching procedure.¹⁵⁵

C. Prisoners' Diminished Societal Worth Wrongfully Deprives Them of Basic Human Rights

The social worth of prisoners is inherently diminished through the criminal justice system, marking them as criminals in the eyes of the court and the world.¹⁵⁶ Hence, some argue that prisoners should not automatically be entitled to receive donated organs.¹⁵⁷ But, no matter what someone has been through or done in his or her life, a prisoner is a person, and there is always the chance (albeit sometimes a miniscule one)¹⁵⁸ that the person is innocent of the convicted crime, or for some reason less culpable for the crime than the court deemed.¹⁵⁹

From an ethical and legal standpoint, widespread knowledge of prisoner receipt of organs or bone marrow should not affect donation rates because the principles laid out in *Estelle* dictate that prisoners are

155. Cameron et al., *supra* note 21, at 89–90 (“The transplant community may well wonder whether voluntary donation rates would drop if organs were routinely allocated to recipients that the public objected to so fundamentally. On the other side of the debate, however, supporters of allowing prisoners to receive transplants point out that society is morally obligated to provide those it has placed in prison with food, safety, and medical care and that deprivation of those has been judged by the United States Supreme Court [in *Estelle*] to be a violation of the constitutional protection against cruel and unusual punishment. Most believe further that prison is ideally designed to rehabilitate and reintroduce wayward citizens to society and that needed medical care should be considered part of the investment in their return.”) (citation omitted).

156. Anderson, *supra* note 4, at 974–75 (“The traditional answer to such questions has been that we cannot make distinctions between various potential organ recipients based on their personal worth.”).

157. *Id.*

158. Even a miniscule chance that a conviction could be overturned should be enough to guarantee any lifesaving medical procedure to a death-row inmate, solely based on the value of human life and problems with decreasing prisoners' societal worth. Further, wrongful convictions, while only confirmed in a relatively small number of cases, could overturn a death sentence. See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 472 (1996) (“The essential thing to know about mistaken convictions in capital cases is that they do happen and will continue to happen with some regularity.”).

159. This assertion does not address the questionable ethical morality of the death penalty writ large. For life sentences, there is a further argument that if a court and jury do not deem someone worthy of capital punishment for a crime, denying them a necessary organ should never be allowed because this categorical exclusion would effectively be a death sentence in and of itself, harkening back to the problematic morality of *Seven Pounds*. See *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (“In some cases, moreover, there will be negligible difference between life without parole and other sentences of imprisonment.”).

entitled to lifesaving medical treatment while incarcerated, no matter their prior crimes.¹⁶⁰

One final ethical distinction is that actual executions are rarer now than previously, making a substantial majority of “death sentences” effectively life sentences.¹⁶¹ Nonetheless, these inmates are stigmatized as “death-row” inmates, biasing public perception.¹⁶² Much of the debate over death-row inmates’ healthcare and lifesaving organ transplants centers around some potential “better” use of the organ. Would the public be irate over a life-sentence prisoner receiving an organ over a death-row inmate, even though in all likelihood either would receive the same fundamental use of the organ? What about a mortally ill little girl who receives an organ but it does not save her life, meaning that a death-row inmate might actually have received more practical use out of the organ? Due to the stigma around capital punishment, death-row inmates are discriminated against in the public sphere, but they should be entitled to the same level of medical treatment as any other person, including other prisoners.

VII. CONCLUSION

The issue of whether death-row inmates are constitutionally entitled to lifesaving organ transplants is far from definite. However, all prisoners are human beings, and they are entitled to the same basic human rights as everyone else. In the United States, the legislature and

160. Cameron et al., *supra* note 21, at 90 (concluding that the patient in question, who is serving a life sentence for a double homicide, “should . . . be given equal consideration by the physician for a liver transplant based on his medical need”).

161. See *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (denying certiorari to a petitioner who claims that his seventeen years on death row violates his Eighth Amendment protections); Dwight Aarons, *Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 79 (“Some contemporary claimants have spent about twice as long as the average inmate on death row and have unsuccessfully claimed that their inordinate stays on death row violate their Eighth Amendment rights.”). Though the court denied certiorari in *Lackey*, the issue was a novel one, so such denial “will permit the state and federal courts ‘to serve as laboratories in which the issue receives further study before it is addressed by this Court.’” *Lackey*, 514 U.S. at 1047 (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)).

162. See Gabrielle Wolf et al., *Criminal Law: Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 113 (discussing the stigma that inmates generally face after release from prison in regards to finding employment); see also Sandra J. Jones & Elizabeth Beck, *Disenfranchised Grief and Nonfinite Loss as Experienced by the Families of Death Row Inmates*, 54 OMEGA—J. DEATH & DYING 281, 296 (2007) (discussing the effect of a death-row inmate’s conviction, sentencing, and execution on the inmate’s family, who can “suffer[] from dysthymic disorder . . . , symptoms similar to Post Traumatic Stress Disorder, social isolation and stigmatization.”).

the judiciary act to protect the interests of prisoners to ensure that constitutional and human rights are being upheld.¹⁶³

The goal of ensuring equality of vital healthcare for incarcerated populations is further complicated by the racial biases that plague the criminal justice system and the United States as a whole, particularly the death penalty process.¹⁶⁴ How can a country ensure that all people receive the same protections under the law, while at the same time allow the criminal justice system to fester inherent institutional biases? The effect of racial biases in the system affect people of color's access to healthcare on a micro level because of the inequality of incarceration and the treatment received therein.

Capital appeals can last decades and pose a unique dilemma for death-row inmates, because they are condemned to death while also serving what practically amounts to a life sentence.¹⁶⁵ If a death-row inmate is serving his or her sentence and needs a lifesaving organ transplant to survive, he or she should be entitled to receive it, despite the perceived ethical, utilitarian, and economic concerns about helping a condemned inmate live longer only to execute him or her at a later date.

163. See generally Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389 (2009) (discussing the United States' application of human rights domestically and abroad and suggesting methods to make the policies more effective).

164. See Ogletree, *supra* note 60.

165. See Cauthen & Latzer, *supra* note 41, at 298.