A LIFE FOR AN AFTERLIFE: ASSESSING THE POTENTIAL REDEMPTION OF CAPITAL INMATES' REQUESTS TO POSTHUMOUSLY DONATE ORGANS UNDER THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

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In 1969, the Fifth Circuit held that a capital prisoner has no right to donate an organ. In response to Florida inmate Calvin Campbell's petition for permission to undergo compatibility testing to determine whether he could donate a kidney to a local youth,[1] the court concluded the prison's administrative concerns, including the potential for escape and the financial burdens imposed by transportation costs, justified denying Campbell's request.[2] Despite subsequent legislative initiatives advancing inmate organ donation programs,[3] the decision to permit or prohibit organ donation by inmates remains within prison officials' discretion.[4] More recently, inmates' attempts to donate organs to family members have received some success. While prison officials rarely allow capital inmates to donate organs,[5] non-capital inmates are some-

1. Campbell v. Wainwright, 416 F.2d 949, 949-50 (5th Cir. 1969).

2. *Id.* at 950.

3. For a summary of legislative initiatives to allow capital inmates to donate their organs post-execution, 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), and Donny J. Perales, Comment, *Rethinking the Prohibition of Death Row Prisoners as Organ Donors: A Possible Lifeline to Those on Organ Donor Waiting Lists*, 34 ST. MARY'S L. J. 687, 694-97 (2003).

4. *See* Alstatt v. Smith, No. 91-5791, 945 F.2d 404, at *1 (6th Cir. Oct. 1, 1991) (holding that an inmate's §1983 claim seeking damages from prison officials for problems encountered while seeking to donate a kidney to his brother was properly dismissed because "Alstatt . . . while incarcerated, . . . has no absolute right to donate a kidney."); Lee v. Quarterman, No. C-07-476, 2008 WL 3926118 at *1-2 (S.D. Tex. Aug. 21, 2008) (denying inmate's request to donate an organ to a family member, absent compliance with the Texas Department of Criminal Justice's inmate organ donation policy).

5. *See* David Orentlicher & Eric Meslin, *Death-Row Donation Request Raises Ethical Concerns*, S. BEND TRIB., May 24, 2005, at B5 (discussing the denial of Michigan capital inmate Gregory Scott Johnson's request to donate his liver to his sister). *But cf.* Tom Coyne, *Inmate's Organ Donation Raises Concerns*, ASSOCIATED PRESS, May 19, 2005 (discussing Delaware capital inmate Steven Shelton's kidney donation to his mother and the stay of execution received by

times permitted to donate organs to family members.[6] Inmates' attempts to donate organs to non-family members have been less successful,[7] however, with capital inmates least likely to receive permission to make non-familial donations.[8]

Alabama capital inmate David Larry Nelson in order to determine whether Nelson could donate a kidney to his brother).

6. *See, e.g.,* Gay Elwell, *Prisoner Released to be Kidney Donor Charged with Break-In*, MORNING CALL (Allentown), Apr. 26, 1994, at B2 (discussing Pennsylvania inmate Henry Rodriquez, Jr.'s kidney donation to his sister); Mary Engels, *Inmate Is Donating Kidney to His Cousin*, DAILY NEWS, Jan. 16, 2001, at 7 (discussing a New York prisoner's kidney donation to his cousin); Colleen Jenkins, *Inmate Requests Release to Donate Kidney*, ST. PETERSBURG TIMES, Mar. 11, 2006, at 1 [hereinafter *Release to Donate*] (discussing Florida inmate Pond's kidney donation to his aunt); *Prisoner Donates Kidney to Sister*, GRAND RAPIDS PRESS, Aug. 15, 1994, at A1 (discussing Michigan inmate Alvin Gray's kidney donation to his sister); Beth Shuster, *Prisoner to Leave Jail to Donate His Bone Marrow*, L.A. TIMES, May 7, 1996, at B1 (discussing California inmate Leo Steven's bone marrow donation to his sister); Sarah Yang, *Transplanting of 2nd Kidney is Unethical, Panel Rules,* L.A. TIMES, Jan. 16, 1999, at A17 (discussing California inmate David Patterson's kidney donation to his daughter). *But cf.* Mark Gladstone, *Inmate's Try to Save Mom Thwarted*, SAN JOSE MERCURY NEWS, Aug. 12, 2005, at A1 (discussing the denial of California inmate Tyrone Allen's request to donate a kidney to his mother).

7. *See* John Pope & Mark Schleifstein, *Prison Blocks Inmate from Donating Organ; Meanwhile, Would-Be Recipient Sits, Waits*, TIMES (Picayune), Jan. 2, 2005, at 1 (discussing the denial of Louisiana inmate Steven Sage's offer to donate a kidney in response to an advertisement in a local newspaper).

8. An unusual sequence of events occurred in Georgia in 1995, when capital inmate Larry Lonchar challenged the state's then-method of execution, electrocution, in an attempt to secure a method of execution which would allow posthumous organ donation. After insisting that he wished to die and refusing to assist in his mandatory appeal for six years, Lonchar filed a habeas petition in state court and obtained a stay of execution. Lonchar v. Thomas, 517 U.S. 314, 317 (1996). After Lonchar changed his mind and told the judge that he no longer wished to proceed, his petition was dismissed. *Id.* at 317-18 Three days prior to his scheduled execution on June 23, 1995, Lonchar opposed his brother's "next friend" petition. *Id.* at 318. Immediately before his execution, however, Lonchar again changed his mind and filed another state habeas petition. *Id.* Lonchar told the judge that he was only litigating the claims in order to delay his execution in the hope that, during the delay, the legislature would change the state's execution method to lethal injection and enable him to donate his organs. *Id.* When the state court denied Lonchar's petition two days later, Lonchar filed a federal habeas petition. *Id.* Lonchar's case ultimately reached the Supreme Court. *Id.* at 319. One day after the Court reached a unanimous decision in Lonchar's favor, *id.* at 314, Lonchar decided to abandon his appeal because the legislature adjourned without changing the state's method of execution. Frank J. Murray, *High Court's Ruling May Enable Condemned Man to Donate Kidney*, WASH. TIMES, Apr. 3, 1996, at A6. Lonchar was executed by electrocution on November 14, 1996. Rhonda Cook, *Lonchar Dies in Electric Chair for '86 Killings Two Jolts*

Notably, capital inmates' requests to donate organs posthumously, although infrequent, are almost always denied.[9] For example, Texas inmate Jonathan Nobles requested to donate his organs post-execution because he desired to do something positive after "bringing so much darkness into this world."[10] Nobles characterized his request as an attempt to avoid a "sin of omission," and explained, "[F]or me not to attempt to do whatever I can that's good is wrong of me."[11] More recently, Christian Longo, a capital prisoner in Oregon, launched a media campaign declaring his desire to donate his organs post-execution.[12] Longo explained, "my only wish was that I would be able to affect some good with my death that would be of benefit to someone besides me."[13] Both Nobles' and Longo's requests were denied by prison officials.[14]

The purpose of this Note is to explore a potential vehicle which might enable capital prisoners who wish to donate their organs after execution to do so, in spite of prison policies disallowing the practice. This Note departs from the prior art in that its primary focus is the concern that restrictions on organ donation by capital inmates may deprive prisoners like Nobles and Longo of individual benefits,[15] rather than on society's tremendous need for their or-

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Are Needed at State Prison to Carry Out His Sentence for Delkalb Triple-Murder, ATLANTA J. & CONST., Nov. 14, 1996, at State News.

9. Daniel Faires, a Florida inmate serving a thirty-seven year sentence for murder, requested to be executed so he could donate his organs. According to Faires, "There is a virtually endless list of 'law abiding' citizens waiting to receive healthy organs for transplantation . . . why, since I'm going to die anyway, should these deserving people be denied access to my organs?" Faires' request was denied. *Case of Inmate Asking for Death Could Open Window for Inmate Organ Donation*, ASSOCIATED PRESS, June 6, 1992.

10. Leah Quin, *Inmate Who Tried to Be Organ Donor Executed*, AUSTIN AM. STATESMAN, Oct. 8, 1998, at B1. *See also* Ed Asher, *Prisoner Loses Ruling on Transplants; Inmate Wanted to Donate Organs Before Today's Scheduled Execution*, HOUSTON CHRON., Oct. 7, 1998, at A21.

11. Quin, *supra* note 10.

12. Alan Gustafson, *Longo, Killer on Death Row, Wants to Donate Organs*, STATESMAN J. (Salem, Or.), Dec. 16, 2009, at A1. Information about Longo's campaign is available at http://www.gavelife.org.

13. CHRISTIAN LONGO, GIFTS OF ANATOMICAL VALUE FROM THE EXECUTED: ORGAN DONATION FROM THE WILLFUL EXECUTED PRISONER 15 (2009) [hereinafter GIFTS OF ANATOMICAL VALUE], http://www.gavelife.org/uploads/Organ_Donation_from_the_Executed.pdf.

14. *See* Gustafson, *supra* note 12; Quin, *supra* note 10.

15. L.D. deCastro, *Human organs from prisoners: kidneys for life*, 29 J. MED. ETHICS 171, 173 (2003) ("[B]y prohibiting . . . [prisoners from donating their or-

gans.[16] In particular, Nobles' and Longo's altruistic requests raise the possibility that a capital prisoner's efforts to donate might be religiously motivated.

Religion is certainly no stranger to the field of bioethics. Debates about abortion,[17] euthanasia and assisted suicide,[18] and stem cell research[19] have become increasingly heated during the last century, as medical advances blurred distinctions which previously defined the boundaries of life, death, and mankind's relationship thereto.[20] For many, religious concerns are inextricably inter-

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gans] we could be taking away benefits not only from organ recipients but from the donors themselves.").

16. As of January 2012, the United Network for Organ Sharing (UNOS) reports over 112,600 names appear on its list of candidates waiting to receive an organ transplant. United Network for Organ Sharing Homepage, http://www.unos.org/ (last visited Jan. 11, 2012). Because UNOS requires patients undergo evaluation before they can be added to the list, this figure does not include patients who, despite their medical need to receive an organ transplant, do not satisfy UNOS' criteria for transplant candidacy. UNITED NETWORK FOR ORGAN SHARING, TALKING ABOUT TRANSPLANTATION: WHAT EVERY PATIENT NEEDS TO KNOW 10 (2012), http://www.unos.org/docs/WEPNTK.pdf. Even of those reflected by transplant lists, the United States Department of Health and Human Services reports that "an average of 20 people die each day waiting for transplants that can't take place because of the shortage of donated organs." Health Resources & Services Administration, U.S. Department of Health and Human Services, U.S. Government Information on Organ and Tissue Donation, http://www.organdonor.gov/about/data.html (last visited Jan. 11, 2012).

17. *See* Moira Stephens et al., *Religious Perspectives on Abortion and a Secular Response*, 49 J. RELIGIOUS HEALTH 513, 533 (2010) (concluding that the wide variation "between and within religious traditions" in participants choice of words when answering questions about abortion reflected the "degree to which—and the manner in which---they relate to the wider secular world.").

18. *See* William E. Stempsey, *The role of religion in the debate about physician-assisted dying*, 13 MED. HEALTH CARE & PHIL. 383, 383 (2010) ("Although most debate about physician-assisted dying has been carried on in secular terms, religious beliefs often lie covertly behind the debate.").

19. *See* Michael E. Nielson & Jennifer Williams, *Religious Orientation, Personality, and Attitudes About Human Stem Cell Research*, 19 INT'L J. PSYCHOL. RELIGION 81, 88 (2009) (finding participants who had an "intrinsically motivated, literalistic approach toward religion . . . [were] more likely to have moral objections to . . . [embryonic stem cell] research than those with a more open, questioning orientation to religion.").

20. For a review of religion's influence on society's attitude toward such advances, see Carla M. Messikomer et al., *The Presence and Influence of Religion in American Bioethics*, 44 PERSP. BIOLOGY & MED. 485 (2001). *See also* William R. LaFleur, *From Agape to Organs: Religious Difference Between Japan and America in Judging the Ethics of the Transplant*, 37 ZYGON 623, 632-37 (2002); William E. Stempsey, *Religion and Bioethics: Can We Talk?*, 8 BIOETHICAL INQUIRY 339, 341-43 (2011) [hereinafter *Religion and Bioethics*].

twined in issues that invoke questions about when life begins and ends.[21] Decisions about organ donation are not immune from religions' influence. Most religions with worldwide membership have formally adopted positions supporting organ donation,[22] and research has uncovered connections between an individual's religious affiliation and beliefs and his or her willingness to donate.[23]

Because religious beliefs often influence, and may even motivate, an individual's decision to become an organ donor, this Note explores whether a capital inmate could compel prison officials to allow him to donate organs upon execution as a religious exercise by bringing a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[24] Part I introduces the statutory right of action and discusses the RLUIPA's enactment and subsequent interpretations. Part II discusses the RLUIPA's religious exercise requirement, which ensures the statute will only provide relief from burdens on *religious* exercise. Part II explains that while the Christian principle of *agape* may motivate a capital inmate to donate his organs, he may face some difficulty proving that donation is a religious exercise because Christian religions do not require followers to become organ donors.

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21. *See Religion and Bioethics, supra* note 20, at 339 (arguing "religious faith must be recognized as an essential component of virtually all bioethical matters of any depth.").

22. United Network for Organ Sharing, Theological Perspectives on Organ and Tissue Donation (2012) (summarizing religious perspectives toward organ donation), *available at* http://www.unos.org/donation/index.php?topic=fact_sheet_9.

23. *See, e.g.,* David J. Dixon & Susan E. Abbey, *Religious Altruism and Organ Donation*, 41 PSYCHOSOMATICS 407, 410 (2000) (qualitative anecdotal study concluding "[r]eligion was the framework by which . . . [participants'] idea[s] to donate . . . [were] conceived and nurtured."); John J. Skowronski, *On the Psychology of Organ Donation: Attitudinal and Situational Factors Related to the Willingness to Be an Organ Donor*, 19 BASIC & APPLIED PSYCHOL. 427, 446 (1997) (concluding participants "seemed to be more willing to donate if they . . . anticipated the support of a religious leader, and . . . anticipated the support of the religious community."); Richard M. Ryckman et al., *Intrinsic-Extrinsic Religiosity and University Students' Willingness to Donate Organs Posthumously*, 34 J. APPLIED PSYCHOL. 196, 196 (2004) (finding that participants who were extrinsically religious and socially-oriented expressed increased willingness to donate their organs after death).

24. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2000). *See also* JODI PICOULT, A CHANGE OF HEART (2008) (fictional account of a capital inmate's successful RLUIPA claim challenging his method of execution in order to donate his organs).

In addition to proving that organ donation qualifies as a statutory religious exercise, the capital prisoner must also demonstrate that a government-imposed imposition *substantially burdens* his ability to donate in order to satisfy his burden of proof. However, prison policies disallowing donation are not the only burdens on posthumous donation; rather, the execution process itself poses the most significant obstacle. Part III discusses the RLUIPA's substantial burden requirement and explains that the five methods of execution currently authorized in the United States likely satisfy the requirement because they are fundamentally incompatible with donation.

Even if the a prisoner satisfies his burden of proof under the RLUIPA, he will not be entitled to relief if the burden on his religious exercise furthers *compelling government interests* and is the *least restrictive means* of doing so. Although alternative methods of execution which would allow post-execution donation have been proposed, prisons would bear significant costs if forced to facilitate a capital inmates' efforts to donate. Part IV discusses the RLUIPA's compelling interest requirement and analyzes whether prison officials' interest in administrative convenience is sufficiently compelling to justify policies restricting donation.

In addition, because proposed methods would allow states to enforce capital sentences without burdening religious exercise, their existence suggests that states' existing execution protocols may not be narrowly tailored. Part V discusses the RLUIPA's narrow tailoring requirement and explains alternatives undermine the conclusion that authorized methods of execution are narrowly tailored because allowing posthumous donation advances penological goals at least as well as, if not more than, states' current capital punishment schemes. Finally, Part VI argues that under these circumstances, courts responsible for determining whether to dismiss a capital inmate's RLUIPA claim should be especially cautious. Courts must recognize that an erroneous decision favoring the government represents the epitome of a final decision. Not only would it prevent the capital prisoner from donating his organs, it would also deprive him of the opportunity to atone for his misdeeds before he is faced with ultimate accountability for them.

I

The RLUIPA codifies Congress' most recent effort to afford religious exercise with increased protection from government-imposed burdens.[25] Prior to the RLUIPA's enactment and that of its predecessor, the Religious Freedom Restoration Act (RFRA),[26] constitutional challenges to government-imposed burdens on prisoners' religious exercise were governed by the reasonableness standard set forth in *Turner v. Safley*[27] and subsequently applied in *O'Lone v. Estate of Shabazz*.[28] In *Turner*, the Court held a prison regulation that impinges on an inmate's constitutional rights is nevertheless valid "if it is reasonably related to legitimate penological interests."[29] Yet the *Turner* Court cautioned, when alternative means "remain available for the exercise of the asserted right, courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'"[30] The Court then applied *Turner's* reasonableness standard to a claim that prison regulations prevented Muslim inmates from attending Jumu'ah, a weekly congregation service, in *O'Lone*.[31] The *O'Lone* Court upheld the challenged regulation in part because "alternative means of exercising the right" remained available to the prisoners; the policy did not prevent the inmates from participating in other Islamic religious ceremonies, despite the importance of Jumu'ah.[32]

In response to these decisions, as well as the Court's decision in *Employment Division, Dep't of Human Resources of Oregon v. Smith*,[33] Congress enacted the RFRA, which prohibited the government from "substantially burdening" religious exercise, even if the burden resulted from a rule of general applicability, unless the imposition was the least restrictive means of furthering a compel-

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25. Cutter v. Wilkinson, 544 U.S. 709, 714 (2005).
26. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1993).
27. 482 U.S. 78 (1987).
28. 482 U.S. 342 (1987).
29. *Turner,* 482 U.S. at 89.
30. *Id.* at 90.
31. *O'Lone*, 482 U.S. at 349.
32. *Id.* at 351-52.
33. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882 (1990) (holding that the Free Exercise Clause does not prohibit a government from enforcing an otherwise valid law which, as applied, incidentally burdens religious conduct).

ling government interest.[34] The Court subsequently invalidated the RFRA as it applied to state and local governments.[35] In *City of Boerne v. Flores*, the Court held the RFRA exceeded Congress' remedial powers under Section 5 of the Fourteenth Amendment and lacked a basis under both the Commerce and Spending clauses.[36]

Congress again responded by enacting the RLUIPA, this time invoking its authority under the Spending and Commerce clauses,[37] and limiting the statute's protective reach to burdens imposed by land-use regulations[38] or on institutionalized persons.[39] In its institutionalized persons' provision, the RLUIPA contains a merits requirement,[40] a jurisdictional requirement,[41] and an exhaustion requirement.[42] The merits requirement mirrors the language of the RFRA, and provides:

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34. 42 U.S.C. § 2000bb-1 (1993).

35. City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

36. *Id.* at 532, 536. The RFRA remains operative as applied against the Federal Government. *See, e.g.,* O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003); Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950, 958-60 (10th Cir. 2001); In re Young, 141 F.3d 854, 863 (8th Cir. 1998).

37. 42 U.S.C. § 2000cc-1(b) (2000).

38. *Id.* § 2000cc.

39. *Id.* § 2000cc-1.

40. *Id.* § 2000cc-1(a)(1)-(2).

41. § 2000cc-1 applies "in any case in which . . . the substantial burden is imposed in a program or activity that receives Federal financial assistance; or…the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(1)-(2). This note assumes that the RLUIPA's jurisdictional requirement has been satisfied because "[e]very state . . . accepts federal funding for its prisons." Cutter v. Wilkinson, 544 U.S. 709, 716 n.4 (2005).

42. The Prison Litigation Reform Act of 1995 is the statutory source of the RLUIPA's exhaustion requirement, which provides: "No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States…or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (1996). The RLUIPA invokes the application of this standard: "Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act)." 42 U.S.C. § 2000cc-2(e) (2000). This note assumes that a prisoner bringing the hypothetical claim at issue has satisfied this requirement by exhausting all administrative remedies before asserting the claim.

> No government[43] shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.[44]

James Nelson has identified two models of review which characterize lower courts' applications of the RLUIPA's merits requirement, which he terms the "deferential model" and the "hard look model."[45]

While both models find support in the RLUIPA's legislative history, the deferential model of the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits relies on the joint statement of Senators Kennedy and Hatch that reviewing courts should give "due deference to the experience and expertise of prison and jail administrators."[46] Accordingly, deferential courts require an inmate to prove that a religious exercise is important or fundamental to his belief system and that a challenged policy is coercive in order to demonstrate a substantial burden on religious exercise.[47] Deferential courts take a more lenient approach toward the government's burden of proof, accepting administrators' expert opinions as proof of compelling governmental interests.[48] In addition, these courts require prison officials to show minimal consideration of alternatives in order to demonstrate narrow tailoring and avoid questioning internal or external inconsistencies in prison policies.[49]

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43. The RLUIPA defines "government" to include "a State, county, municipality, or other governmental entity created under the authority of a State…any branch, department, agency, instrumentality, or official of [such entities] . . . and . . . any other person acting under color of State law." 42 U.S.C. § 2000cc-5(4)(A)(i)-(iii) (2000).

44. *Id.* § 2000cc-1(a)(1)-(2).

45. James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2068 (2009).

46. 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy). *See also* Cutter, 544 U.S. at 717, 723; Fegans v. Norris, 537 F.3d 897, 902 (8th Cir. 2008); Fowler v. Crawford, 534 F.3d 931, 937 (8th Cir. 2008); Longoria v. Dretke, 507 F.3d 898, 902 (5th Cir. 2007); Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007); Hoevenaar v. Lazaroff, 422 F.3d 366, 370 (6th Cir. 2005).

47. Nelson, *supra* note 45, at 2068.

48. *Id.* at 2068-69.

49. *Id.* at 2069.

Conversely, the hard look model of the First, Second, Third, Fourth, Seventh and Ninth Circuits seeks to effectuate Congress' intention for the RLUIPA to prevent corrections officials from placing frivolous and arbitrary restraints on prisoners' religious exercise.[50] Hard look courts construe the substantial burden requirement liberally, and only require a prisoner to prove his religious beliefs are sincere and that a challenged policy imposes pressure or a difficult choice to satisfy his burden of proof.[51] These courts are skeptical of prison administrators' assertions and require administrators to empirically prove asserted interests are compelling.[52] Moreover, hard look courts require prison administrators to show actual consideration of alternative policies, as well as justify internal and external inconsistencies in the prison's regulatory scheme, to demonstrate narrow tailoring.[53]

II

The RLUIPA defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[54] In protecting only *religious* exercises, the RLUIPA requires a connection between a burdened exercise and the system of religious belief from which it is derived. The Court has explained that the term "religious belief" includes all sincere beliefs "based upon a power or being, or upon a faith, to which all else is subordinate, or upon which all else is ultimately dependent."[55] Lower courts have further recognized a religion or religious belief "addresses fundamental and ultimate questions having to do with deep and imponderable matters;"[56] "is comprehensive in nature' [and]…consists of a belief-system as opposed to an isolated teach-

50. *See* 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

51. Nelson, *supra* note 45, at 2069.

52. *Id.* at 2070.

53. *Id.*

54. 42 U.S.C. § 2000cc-5(7)(A) (2000).

55. United States v. Seeger, 380 U.S. 163, 176 (1965). *See also* United States v. Sun Myung Moon, 718 F.2d 1210, 1227 (2d Cir. 1983) ("In every religion there is an awareness of what is called divine and a response to that divinity.").

56. Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981). *See also* United States v. Kauten, 133 F.2d 703, 708 (2d. Cir. 1943) ("Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe.").

ing;"[57] and "often can be recognized by the presence of certain formal and external signs."[58] Thus, the requirement that a burdened practice must be an exercise of religious belief distinguishes statutory religious exercises from activities which are merely derived from a "way of life . . . based purely on secular considerations" or "philosophical or personal [choices]."[59]

Some consider the decision to donate one's organs to be inherently spiritual because it may involve an individual's quest to find meaning in life or for personal resources to cope with crisis, and may reflect his or her perception of the value of giving life to another. [60] However, a more concrete nexus to religious belief is necessary to demonstrate that organ donation constitutes a statutory religious exercise.[61] The following Part of this Note proposes that the Christian principle of *agape*, or "neighbor love," may provide such a foundation for the belief that organ donation is a religious exercise. Part A introduces the principle of *agape* and discusses contemporary arguments that Christians should engage in organ

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57. *Africa*, 662 F.2d at 1032. *See also* United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996) ("More often than not . . . [religious] beliefs provide a telos, an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans.").

58. Africa*,* 662 F.2d at 1032. *See also* Jacques v. Hilton, 569 F. Supp. 730, 735-36 (D.N.J. 1983), *aff'd*, 738 F.2d 422 (3d Cir. 1984) (holding that plaintiff's beliefs did not rise to the level of a religion where plaintiff's professed religion lacked "identifying marks common to most recognized religions," such as special prayers and rituals, "formal ceremonies to mark one's initiation into Church membership" and "other formal ceremonies related to the professed beliefs of the Church."); Church of the Chosen People v. United States, 548 F. Supp. 1247, 1253 (D. Minn. 1982) (recognizing "established history or literature," "formal or informal education of . . . leaders," "regular ceremonies," and possession of an "identifiable membership" as "external manifestations" of religions).

59. Wisconsin v. Yoder*,* 406 U.S. 205, 215-216 (1972).

60. John Gillman, *Religious Perspectives on Organ Donation*, 22 CRITICAL CARE NURSING Q. 19, 20 (1999). *See also Meyers*, 95 F.3d at 1483 ("Religious beliefs often address fundamental questions about life, purpose, and death…These matters may include existential matters, such as man's sense of being; teleological matters, such as man's purpose in life; and cosmological matters, such as man's place in the universe.").

61. *See* Womens Svcs., P.C. v. Thone, 483 F. Supp. 1022, 1040 (D. Neb. 1979), *aff'd*, 636 F.2d 206 (8th Cir. 1980), *vacated*, 452 U.S. 911 (1981) (holding that a "woman's obtaining of an abortion" was not "the practice of a fundamental religious tenent" despite religious leaders' testimony that "a woman's decision to abort or to bear a child was a deeply personal and important decision . . . [which] could be considered religious" and that "under some circumstances the decision to abort would be a moral necessity and . . . could be describe[d] as a religious duty.").

donation as an exercise of *agape*. Part B summarizes deferential and hard look constructions of the RLUIPA's religious exercise requirement and explains why organ donation is more likely a religious exercise under the hard look model.

A

Paradigmatically expressed by the "'double commandment' to love God and to love one's neighbor,"[62] the term *agape* connotes a Christian model of love through which a human being is enabled to develop connections with other humans and the divine by engaging in altruistic conduct.[63] Although philosophers have advanced a panoply of theories on the concept,[64] a few generalizations are possible. First, *agape* is rooted in "God's sacrificial love for human beings," exemplified by Jesus' self-immolation upon the cross.[65] Second, *agape* does not refer to an emotional love and does not require affection for others.[66] Rather, one expresses *agape* by engaging in sacrificial conduct for others' benefit.[67] Third, although *agape* is commonly referred to as "neighbor-love," it is not limited to members of one's own ethnic, cultural, or religious group.[68] Rather, the term "neighbor" theoretically extends to all persons including strangers and one's enemies.[69] Finally, scholars

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62. Victor Paul Furnish, *Love of Neighbor in the New Testament*, 10 J. RELIGIOUS ETHICS 327, 328 (1982).

63. *See* Thomas Jay Oord, *The Love Racket: Defining Love And Agape For The Love-And-Science-Research Program*, 40 ZYGON 919, 930-31, 934 (2005) (listing other scholars' definitions of *agape* and defining *agape* as "intentional response to promote well-being when confronted by that which generates ill-being."); John P. Reeder, Jr., *Assenting to Agape*, 60 J. RELIGION 17, 17 (1980) (defining *agape* as a "type of altruistic beneficence which directs an individual to act wholly for the sake of others."). *See also* Alan C. Tjeltveit, *Psychology's Love-Hate Relationship with Love: Critiques, Affirmations, and Christian Responses*, 34 J. PSYCHOL. & THEOLOGY 8, 10-11 (2006) (reviewing differences among scholars' definitions of *agape*).

64. For summary of the theories advanced by contemporary philosophers, see generally Stephen J. Pope, *Love in Contemporary Christian Ethics*, 23 J. RELIGIOUS ETHICS 165 (1995).

65. Barbara Hilkert Andolsen, *Agape in Feminist Ethics*, 9 J. RELIGIOUS ETHICS 69, 70 (1981).

66. *See* Furnish, *supra* note 62, at 332.

67. *See* Reeder, *supra* note 63, at 17.

68. *See* Furnish, *supra* note 62, at 328-29.

69. *See* Don Browning, *Love as Sacrifice, Love as Mutuality: Response to Jeffrey Tillman*, 43 ZYGON 557, 559 (2008).

generally agree that *agape* encompasses elements of both sacrifice and community.[70]

Christians who advocate organ donation often cite the principle of *agape* as a foundation for the practice.[71] Proponents assert that "organ transplants are fundamentally expressive of the highest possible form of human altruism . . . ."[72] Finding support in Christian history,[73] parables,[74] and contemporary traditions,[75] their arguments emphasize the life-giving results, sacrificial nature, and communal effects of organ donations.

Although it is not a precise example of *agapic* organ donation, some Christians regard the Judeo-Christian account of creation as a rudimental description of bodily sacrifice with life-giving results. According to Christian belief, God used one of man's bones to create woman:

> So the LORD God caused the man to fall into a deep sleep; and . . . took one of the man's ribs and then closed up the place with flesh. Then the LORD God made a woman from the rib he had

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70. *See* Andolsen, *supra* note 65, at 69.

71. Alan Jotkowitz, *New Models for Increasing Donor Awareness: The Role of Religion*, 4 AM. J. BIOETHICS 41 (2004) ("A common theme of the Judeo-Christian ethic is the development of an unselfish concern for others and this pursuit should be applied wholeheartedly towards organ donation."). *See also* R. J. Howard, *We Have an Obligation to Provide Organs for Transplantation After We Die*, 6 AM. J. OF TRANSPLANTATION 1786, 1788 (2006) [hereinafter *Obligation to Provide Organs*] ("Permitting organ removal is a way of showing love for one's neighbor even after death."); Bobby A. Howard, *What the Bible Says About Organ Transplants*, 15 J. CHRISTIAN NURSING 26 (1998) [hereinafter *What the Bible Says*], *available at* http://www.christianliferesources.com/?library/view.php&articleid=417 ("The overarching principle is that we are obligated as Christians to love everyone. . . One way to express this love is through the convenient provisions of modern technology that make organ donation and transplantation possible.").

72. LaFleur, *supra* note 20, at 640.

73. *See* Stevens v. Berger, 428 F. Supp. 896, 900-01 (E.D.N.Y. 1977) ("[I]t is . . . far easier to satisfy triers that beliefs are religious if they are widely held and clothed with substantial historical antecedents and tradition concepts of a deity than it is where such factors are absent . . . Although support from tradition, history, or authority is not required, without it a plaintiff may be unable to produce enough other evidence of religiosity. . .").

74. *See* United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996) ("Most religions embrace seminal, elemental, fundamental, or sacred writings. These writing often include creeds, tenets, precepts, parables, commandments, prayers, scriptures, catechisms, chants, rites, or mantras.").

75. *See id.* ("Most religions include some form of ceremony, ritual, liturgy, sacrament, or protocol. These acts, statements, and movements are prescribed by the religion and are imbued with transcendent significance.").

> taken out of the man, and he brought her to the man. The man said, "This is now bone of my bones and flesh of my flesh; she shall be called 'woman,' for she was taken out of man.[76]

While man's physical sacrifice of his bone is not a sophisticated example of *agape*, because it seems as though man did not sacrifice his bone with the intent to benefit woman,[77] some still regard the Christian account of creation as significant. Proponents consider the creation story to signify divine sanction for both physical transplantation of body parts and the resulting connection between donor and recipient. Referring to the creation story, Southern Baptist minister Guy Walden concludes, "Not only does God approve of [tissue transplant], but he himself performed the first one."[78]

Proponents frequently cite Jesus' teachings and crucifixion as more direct support for the belief that organ donation affords Christians an opportunity to engage in *agape*.[79] Because Christians believe that Jesus frequently taught ethical lessons through the use of parables,[80] some consider Jesus' parables instructive on the nature of an *agapic* sacrifice. When a follower asked how to achieve eternal life through expressions of *agape*,[81] Jesus offered the parable of the Good Samaritan as an example:

> A man was going down from Jerusalem to Jericho, when he was attacked by robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as

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76. Genesis 2:21-23.

77. For a discussion of "what *agape* intends for the neighbor," see generally Stephen Post, *The Purpose of Neighbor-Love*, 18 J. RELIGIOUS ETHICS 181 (1990).

78. Kim A. Lawton, *Curing or Killing?*, CHRISTIANITY TODAY, May 18, 1992 at 40, 41.

79. BRADFORD HOSPITALS NHS TRUST, CHRISTIANITY AND ORGAN DONATION: A GUIDE TO ORGAN DONATION AND CHRISTIAN BELIEFS 3 (2003) ("Throughout his life Jesus taught people to love one another and he proved his love for the world on the cross. It seems in keeping with this that Christians consider organ donation as a genuine act of love and a way of following Jesus' example.").

80. *See* United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996) ("Religious beliefs often prescribe a particular manner of acting, or way or life, that is 'moral' or 'ethical" . . . A moral or ethical belief structure also may create duties—duties often imposed by some higher power, force, or spirit—that require the believer to abnegate elemental self-interest.").

81. Luke 10:25-29.

> he traveled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, brought him to an inn and took care of him. The next day he took out two denarii and gave them to the innkeeper. "Look after him," he said, "and when I return, I will reimburse you for any extra expense you may have."[82]

At the conclusion of the story, Jesus asked his follower, "which of these three do you think was a neighbor to the man who fell into the hands of robbers?"[83] The man replied, "the one who had mercy on him," and "Jesus told him, 'go and do likewise.'"[84]

Scholars have interpreted Jesus' message in the Good Samaritan parable to illustrate two principles regarding the nature of an *agapic* sacrifice which support extending the principle to organ donation. Bobby Howard views the passage as calling Christians to express *agape* in ways that directly meet others' specific needs, including the need to receive an organ transplant:

> The parable of the Good Samaritan demonstrated the standard that everyone is a neighbor and that people should be willing to love in a way that meets the needs of their neighbor. This includes giving first aid and the best health care possible. In the current era, this includes organ donation and transplantation.[85]

By comparison, Ann Mongovern's analogy emphasizes the magnitude of the personal sacrifice described in the parable and inherent in organ donation:

> The good Samaritan gives of himself at great personal cost . . . in order to address the dire needs of a stranger randomly assaulted by bandits. Organ donors and their families give of themselves at great cost . . . in order to address the dire needs of others, often though not always strangers, randomly assaulted by disease.[86]

Finally, proponents often consider Jesus' crucifixion to most directly support the belief that organ donation is an exercise of *agape* for two reasons. First, Jesus' crucifixion exemplifies the

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82. Luke 10:30-35.
83. Luke 10:36.
84. Luke 10:37.
85. *What the Bible Says*, *supra* note 71.
86. Ann Mongovern, *Sharing Our Body and Blood: Organ Donation and Feminist Critiques of Sacrifice*, 28 J. MED. & PHIL. 89, 92 (2003).

practice of bodily sacrifice for the salvation of others.[87] According to Christian belief, Jesus' crucifixion represents the culmination of God's divine plan, making "the forgiveness of sins and eternal life . . . possible through His suffering and resurrected body . . . ."[88] Because Christians believe that Jesus was both fully human and God's divine son, his "service and . . . self-giving love are to be . . . [Christians' normative] standard."[89] Thus, some Christians believe that organ donation presents an opportunity to emulate Jesus' sacrifice. As Mongovern explains, "Jesus' outpouring of his body and blood was the penultimate salvific act, one that defeated human death and renewed the connection between humanity and God. Contemporary organ donation vividly imitates this salvific sharing of the body."[90] Others, such as Nikolaus Knoepffler, argue that Christians are obliged to engage in organ donation in order to

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87. David C. Thomasma, *The Quest for Organ Donors: A Theological Response*, 69 HEALTH PROGRESS 22, 24 (1988) (arguing that Jesus' sacrifice of his own body reminds Christians to engage in self sacrifice for others and that "[o]rgan donation may be a kind of Eucharistic act, itself symbolic of sacrifice and unity."). *See also* United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996) ("Many religions have been wholly founded or significantly . . . influenced by a deity, teacher, seer, or prophet who is considered to be divine . . . .").

88. Philip A. Mellor & Chris Shilling, *Body Pedagogics and Religious Habitus: A New Direction for the Sociological Study of Religion*, 40 RELIGION 27, 31 (2010). *See* William E. Stempsey, *Laying Down One's Life for Oneself*, 4 CHRISTIAN BIOETHICS 202, 209 (1998) [hereinafter *Laying Down One's Life*] ("[T]he death of Jesus cannot be construed as a suicide . . . for Jesus did not terminate his own life. He was, rather, martyred in obedience to the will of God."); *See also* United States v. Kauten, 133 F.2d 703, 708 ("[A religious belief] is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets."); *Meyers*, 95 F.3d at 1483 ("Religious beliefs often are 'metaphysical,' that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.").

89. James E. Davison, *Organ Donation: Giving the Gift of Life*, 104 CHRISTIAN CENTURY 1146, 1147 (1987) ("[W]e can, to a limited degree, take the kind of action that God does in creation and redemption . . . .[in trying] to foster life and restore it whenever we have the opportunity to do so.").

90. Mongovern, *supra* note 86, at 91. *See also* Myron Ebersole, *Organ Transplants*, *in* MEDICAL ETHICS, HUMAN CHOICES: A CHRISTIAN PERSPECTIVE 111 (John Rogers, ed., Herald Press 1988) ("Alleviating suffering while serving others—both in life and death—is an expression of Christlike loving.").

follow Jesus' example.[91] "Since Jesus gave his life for all persons, [Knoepffler] . . . views the act of providing organs following the death of our bodies as obligatory in the saving of other's lives."[92]

Second, because gifts given through sacrifice create and fortify relationships, Christians believe expressions of *agape* enhance the covenant of community established by Jesus' death on the cross. Proponents argue the sacrificial giving of one's self through organ donation enhances community because "a part of the donor remains and functions within the recipient,"[93] which bonds donors, recipients, and their families together through "their common indebtedness to God . . . ."[94] Similarly, in Catholic subsets of Christianity, initiation into the Church is considered "incorporation into the 'Body of Christ'," in which members share in sacred communion with God and other Christians.[95] To commemorate Jesus' crucifixion as the foundation for the covenant of community, Catholics practice the ritual of communion, or Eucharist, during which community members share bread and wine symbolizing Jesus' body and blood.[96] Some analogize the ritual to organ donation because "[t]he practice of organ donation tangibly creates community among those who participate. Thus both Eucharist and organ donation offer shared body and blood to maintain fellowship of the community."[97]

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91. *Obligation to Provide Organs*, supra note 71, at 1788. *See also* Nikolaus Knoepffler, *Organ donation as an ethical imperative*, 14 EUBIOS J. ASIAN & INT'L BIOETHICS 211, 211-13 (2004), *available at* http://www.eubios.info/EJ146/ej146h.htm.

92. *Obligation to Provide Organs*, *supra* note 71, at 1788.

93. Allen D. Verhey, *Organ Transplants: Death, Dis-organ-ization, and the Need for Religious Ritual*, *in* CARING WELL: RELIGION, NARRATIVE, AND HEALTH CARE ETHICS 161 (D. Smith ed., John Knox Press 2000). *See also* Thomasma, *supra* note 87, at 24 ("A theological understanding of one's body is far more communal than individualistic, seeing that body both redeemed and called to sacrifice with a social context.").

94. Verhey, supra note 93, at 166.

95. Mellor & Shilling, *supra* note 88, at 31.

96. Mongovern, *supra* note 86, at 91. *See also* Patricia Beattie Jung, *Abortion and Organ Donation: Christian Reflections on Bodily Life Support*, 16 J. RELIGIOUS ETHICS 273, 294 (1988) (noting that the fact that the ritual of communion is considered a shared ritual, rather than as acts of individual consumption, demonstrates that the ritual commemorates the community created by Jesus' sacrifice).

97. Mongovern, *supra* note 86, at 91.

B

While the Court has recognized that the "exercise of religion often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine,"[98] lower courts have been reluctant to extend the RLUIPA's definition of religious exercise to activities traditionally considered secular.[99] Consistent with pre-RLUIPA constructions under the First Amendment and RFRA,[100] deferential courts engage in an importance inquiry to evaluate whether an activity qualifies as a statutory religious exercise.[101] In stark contrast, the hard look courts' analysis departs significantly from pre-RLUIPA jurisprudence; these courts interpret the word "any" in the statutory definition to include discrete acts of religious exercise.[102] Moreover, because the definition prohibits centrality inquiries, hard look courts utilize sincerity analysis as an authenticating device.[103]

Despite the foregoing support for the nexus between *agape* and organ donation, donation is not likely a religious exercise under the deferential model. Because some Christians consider organ donation to be inconsistent with other important beliefs—such as

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98. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

99. Starr v. Cox, No. 05-CV-368-JD, 2006 WL 1575744 at *1, 4 (D.N.H. June 5, 2006) (denying preliminary injunction because plaintiff did not demonstrate a sufficient likelihood that his practice of Tai Chi, separate from Taoism, was a religious exercise).

100. *See, e.g.*, Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) (RFRA); Abdur-Rahman v. Mich. Dep't of Corr., 65 F.3d 489, 491-92 (6th Cir. 1995) (First Amendment and RFRA); Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) (RFRA).

101. Smith v. Allen, 502 F.3d 1255, 1280 (11th Cir. 2007) (holding that plaintiff failed to meet his burden of proof because "at a minimum the substantial burden test requires that a RLUIPA plaintiff demonstrate that the government's denial of a particular religious item or observance was more than an inconvenience to one's religious practice."), *abrogated by* Sossamon v. Texas, 131 S. Ct. 1651 (2011).

102. Hammons v. Saffle, 348 F.3d 1250, 1258-59 (10th Cir. 2003) (affirming the lower court's judgment that the denial of prayer oils did not violate the plaintiff's first amendment right to free exercise because the prisoner had other means available to practice his religion, but remanding the case to allow the plaintiff to pursue his claim under the RLUIPA's more protective standard).

103. Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008) ("Because the RLUIPA is a guarantor of sincerely held religious beliefs, it may not be invoked simply to protect any 'way of life, however virtuous and admirable, . . . if it is based on purely secular considerations.'").

the doctrine of resurrection of the body and the prohibitions against suicide and mutilation—organ donation is unlikely to satisfy the deferential model's importance requirement. The doctrine of resurrection of the body articulates the belief that Christians will be raised from the dead at the end of time,[104] and allows "Christians [to] look forward to a future . . . bodily life together in the presence of God."[105] Some Christians fear they "might need all . . . [of their] parts" upon resurrection and thus, argue that bodily resurrection precludes organ donation.[106] The prohibition against suicide expresses the belief that "[t]he sufferings of this life are not to be avoided…but accepted in solidarity with the suffering of Christ."[107] Hence, that some Christians consider these principles inconsistent with organ donation indicates donation is not fundamental or important to the exercise of *agape* or of other religious beliefs.[108]

Unlike deferential courts, when confronted with conflicting interpretations of religious principles, hard look courts consider the "relevant question . . . [to be], not what others regard as religious practice, but what the plaintiff believes."[109] Thus, organ donation is more likely a religious exercise under the hard look approach because a number of Christians disagree with such interpretations.[110] For example, Carroll Simcox argues that Jesus' resurrec-

104. *See* 1 Corinthians 15:20 ("Christ has indeed been raised from the dead, the first fruits of those who have fallen asleep.").

105. William F. May, *Religious Justifications for Donating Body Parts*, 15 HASTINGS CENTER REP. 38, 41 (1985).

106. Carroll E. Simcox, *The Case of the Missing Liver*, CHRISTIAN CENTURY, Feb. 26, 1986 at 200 (responding to one Christian's concern as expressed in a "Dear Abby" letter). "The fear that organs will be needed postmortem" may also negatively affect non-Christians willingness to donate organs. Michael T. Stephenson et al., *The Role of Religiosity, Religious Norms, and Bodily Integrity in Signing an Organ Donor Card*, 23 HEALTH COMM. 436, 440, 445 (2008) (finding a significant negative correlation between participants' concerns about postmortem bodily integrity and willingness to donate organs and concluding that participants were more strongly influenced by concerns about bodily integrity than other variables, such as religiosity).

107. *Laying Down One's Life*, *supra* note 88, at 214.

108. *See* Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007) (prison's failure to provide Jewish plaintiff with a kosher diet substantially burdened his religious exercise "[g]iven the strong significance of keeping kosher in the Jewish faith.").

109. Rouser v. White, 944 F. Supp. 1447, 1454 (E.D. Cal.1996).

110. *See* Blount v. Johnson, No. 7:04-cv-00429, 2007 WL 1577521 at *5 (W.D. Va. May 30, 2007) ("The fact that an individual's understanding of the origins or reasons for a particular religious practice may be mistaken, incomplete, or at

tion demonstrates bodily resurrection and organ donations are not mutually exclusive—Jesus' resurrection was possible despite the fact that his body was mutilated during crucifixion; his body was restored by God after death.[111] In addition, the belief that resurrection and eternal life reward "those who give their lives in obedience to God in love for others . . ."[112] suggests that a "person who loses—gives—any . . . organ as a servant of Christ shall find it,"[113] and that God will provide an appropriate vehicle if a donor needs a body upon resurrection.[114]

The prohibition against suicide can also be reconciled with organ donation because Christianity distinguishes suicide from the "sacrifice of one's life whereby for a higher cause, such as God's glory, the salvation of souls, or the service of one's brethren . . . ."[115] While condemning suicide, Christianity approves of martyrdom, a Christian's acceptance of death in furtherance of a cause that surpasses his individual interests.[116] Thus, it appears as though the prohibition would not apply when a capital prisoner accepts his death sentence in order to help others by donating his vital organs.[117] Similarly, while the prohibition against mutilation expresses the belief that humans are obliged to care for their bodies because they are created "in the image and likeness" of God, "when applied to the issue of organ donation, this principle provides support for the life-sustaining relationship that is expressed in the

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odds with the understanding of other followers and even experts of his stated religion is 'beside the point' when determining whether his personal belief is religious and sincere.").

111. Simcox, *supra* note 106, at 200 ("His body was raised from the dead, and on it were the raw wounds of the lash, the thorns and the nails . . . Our resurrection will be in the likeness of his, though likeness does not imply exact and total similarity."). *See also* Verhey, *supra* note 93, at 162 ("[R]esurrection [does not] depend on the intact condition of the body when it is buried. Rather . . . [it depends] on the power of God to make 'all things new.'").

112. Simcox, *supra* note 106, at 200. *See also* Mark Moran, *Acting Out Faith Through Organ Donation*, 103 CHRISTIAN CENTURY 572, 572 (1986) ("The option of organ donation gives Christians a concrete opportunity to act as 'people of the resurrection' by passing on the gift of life.").

113. Simcox, *supra* note 106, at 200.

114. *Id.* at 201. *See also What the Bible Says, supra* note 71 ("The earthly body is uniquely different from the future glorified body.").

115. *Laying Down One's Life*, *supra* note 88, at 217-18.

116. *Id.* at 207.

117. *See id.* at 205. *See also* F.J. Leavitt, *A volunteer to be killed for his organs*, 29 J. MED. ETHICS 175, 175 (2003) ("If suicide is sometimes justifiable, then it might also be justifiable to kill oneself by removing one's organs for donation….").

donation of human body parts."[118] Because Christians believe God's gift of life encompasses not only creation ("life"), but also redemption ("new life"), organ donation thus presents an opportunity for the Christian donor to emulate God in passing on the gift of new life to the recipient.[119]

As these interpretations resolve apparent inconsistencies, the hard look model approach calls for a sincerity inquiry to distinguish protected religious exercises from activities based on "so-called religions which . . . are obviously shams and absurdities and whose members are patently devoid of religious sincerity."[120] When performing the analysis, lower courts have considered the following factors to be illustrative of sincerity: (1) whether the inmate professes membership in a religion and the length of such professed membership;[121] (2) whether the "religion" is recognized as legitimate and has membership outside of the prison;[122] (3) the conventionality of the practice sought within the inmate's professed belief system;[123] (4) the consistency, or lack thereof, between the inmate's purported belief system and actual conduct;[124] (5) whether the activity sought is consistent with the inmate's previ-

118. Jeremiah McCarthy, *Organ Donation: A Catholic and Interfaith Perspective on Its Ethical Warrants and Contemporary Public Policy Concerns*, *in* ORGAN DONATION IN RELIGIOUS, ETHICAL, AND SOCIAL CONTEXT: NO ROOM FOR DEATH 112 (William R. DeLong ed., Haworth Press 1993).

119. Davison, *supra* note 89, at 1147.

120. Theriault v. Carlson, 495 F.2d 390, 394-95 (5th Cir. 1974).

121. *See* Couch v. Jabe, 479 F. Supp. 2d 569, 584 (W.D. Va. 2006) (considering inmate's self-identification as a Sunni Muslim for fifteen years as a factor demonstrating sincerity).

122. *See* Marria v. Broaddus, No. 8297, 2003 WL 21783633, at *7 (S.D.N.Y. July 31, 2003) ("Sincerity analysis . . . can be guided by such extrinsic factors as a purported religious group's size and history.").

123. *See* Abdulhaseeb v. Calbone, 600 F.3d 1301, 1314 (10th Cir. 2010) ("In considering whether a practice is a 'religious exercise,' we certainly are not prohibited from referring to standard religious practice or interpretation."). *See also* Guzzi v. Thompson, 470 F. Supp. 2d 17, 27 (D. Mass. 2007) (denying request for preliminary injunction because plaintiff's request was not conventionally associated with the religious beliefs to which he professed to adhere); Coronel v. Paul, 316 F. Supp. 2d 868, 879 n.11 (D. Ariz. 2004), *remanded*, 225 Fed. App'x 575 (9th Cir. 2007) (noting that "evidence concerning the conventional practice of a particular religion" is neither irrelevant to nor determinative of sincerity).

124. *See Marria*, 2003 WL 21783633, at *8 (considering the fact that inmate "has structured his daily lifestyle in conformity with the rigors of membership" in his professed religion to demonstrate sincerity). *See also Couch*, 479 F. Supp. 2d at 584 (considering inmate's adherence to religious fasting requirements during previous incarceration to demonstrate sincerity).

ous requests to engage in religious exercises;[125] (6) and the existence, or lack thereof, of factors motivating the inmate to be deceptive or fraudulent.[126]

Application of these factors indicates organ donation may constitute a statutory religious exercise under the hard look approach. Professed devotion to Christianity or Catholicism benefits the prisoner because both religions are well established and have substantial membership outside of the prison.[127] Additionally, if the plaintiff was a registered organ donor before receiving his capital sentence, the consistency between the exercise sought and his prior intent to donate is further evidence of sincerity.[128] Although organ donation is not a conventional religious exercise, the lack of

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125. *See, e.g.,* Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008) (considering the duration of time over which inmate sought to have his religious beliefs accommodated to demonstrate sincerity); Walker v. Iowa Dep't of Corr., 298 Fed. App'x 535, 537 (8th Cir. 2008) (ordering remand to remedy district court's failure to consider consistency of inmate's requests for dietary accommodations on non-holy days); Lindell v. Casperson, 360 F. Supp. 2d 932, 952-53 (W.D. Wis. 2005) (considering inconsistencies between inmate's current and prior requests for religious accommodations to demonstrate inmate's lack of sincerity).

126. *See, e.g., Abdulhaseeb*, 600 F.3d at 1314 ("A court may also consider . . . whether the litigants are merely relying on a self-serving view of religious practice"); *Coronel,* 316 F. Supp. 2d at 882 (explaining sincerity analysis allows consideration of inmate's motivations to fraudulently claim a sought accommodation to be a religious exercise); *Marria,* 2003 WL 21783633 at *7 ("Sincerity analysis . . . can be guided by such extrinsic factors as . . . whether the claimant appears to be seeking material gain by hiding secular interests behind a veil of religious doctrine.").

127. *See* Theriault v. Silber, 391 F. Supp. 578, 580 (W.D. Tex. 1975) (The task [of determining whether a religion or religious belief is actually at issue] is . . . "greatly simplified where . . . [a] historically established and recognized religion such as Islam, Judaism, or Catholicism is involved.").

128. Christian Longo opines, "I suspect that other inmate's decisions to end their appeals had little to do with the recurring benefits of their death. Therefore, I believe it unlikely that an adjustment to a slightly more humane protocol, even combined with the ability to donate, would be a game changer for an inmate not already predisposed to 'volunteering' to be executed." GIFTS OF ANATOMICAL VALUE, *supra* note 13, at 15. *See* Susan Morgan & Jenny Miller, *Communicating about gifts of life: the effect of knowledge, attitudes, and altruism on behavior and behavioral intentions regarding organ donation,* 30 J. APPLIED COMM. RES. 163, 173-74 (2002) (finding higher "altruism scores" among participants who had signed organ donor cards than those who had not, and finding a positive correlation between a non-signatory participant's "altruism score" and his or her intent to sign). *See also* Remmers v. Brewer, 361 F. Supp. 537, 542 (S.D. Iowa 1973), *aff'd*, 494 F.2d 1277 (8th Cir. 1974) ("[P]rison authorities and reviewing courts may be naturally reluctant to believe in the sincere religious conversions of those whose past conduct would seem to make such events unlikely.").

circumstances which might motivate the inmate to deceptively or fraudulently seek accommodation is telling. The "hard-wrought" nature of donation suggests that the exercise is truly a religious sacrifice "offered up in order to maintain connections between humanity and divinity."[129] Also, that plaintiff seeks to donate his organs after execution suggests his request is not a deceptive attempt to avoid execution.[130] Nevertheless, because execution by anesthesia-induced brain death—an alternative execution method which is conducive to post-execution organ viability—abrogates the risk of pain associated with lethal injection, it is possible that a capital inmate might seek to donate organs post-execution to avoid a painful death.[131]

III

In addition to proving that posthumous organ donation qualifies as a statutory religious exercise, a condemned inmate must demonstrate that prison policy substantially burdens donation in order to meet his burden of proof. The following Part of this Note argues that the five methods of execution currently authorized in the United States burden posthumous organ donation because

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129. Mongovern, *supra* note 86, at 90, 93 ("Considering the redemptive motivation of organ donation, the instrumental use of donor bodies, the moral force of the body-as-symbol, the traumatic circumstances surrounding donation, and the cultic imagery conjured by donation, it is clear that the donated organs are indeed hard-wrought gifts, indeed, sacrifices."). *See also Koger*, 523 F.3d at 797 (considering fact that inmate maintained pursuit of religious exercise despite the increased likelihood that his request would be accommodated if he had professed adherence to a more commonly recognized religion to demonstrate sincerity).

130. Christian Longo explains that his request to donate his organs after execution is sincere because "[I]f I fail at this mission, I will still choose to end my appeals and die." GIFTS OF ANATOMICAL VALUE, *supra* note 13, at 15. *See* Morgan & Miller, *supra* note 128, at 165 ("Organ donors have little, if anything, to gain by donating their organs after their deaths; it is purely an altruistic act . . . ."). *See also Coronel,* 316 F. Supp. 2d at 879 n.11 (listing "[a] demonstrated willingness to forego privileges by virtue of religious commandment" among factors indicating sincerity).

131. *See generally* Baze v. Rees, 553 U.S. 35, 63 (2008) (plurality judgment that Kentucky's three-drug lethal injection protocol did not involve a constitutionally intolerable risk of pain); *But cf.* Teresa A. Zimmers et al., *Lethal Injection for Execution: Chemical Asphyxiation?*, 4 PLOS MED. e156 (2007) (finding pharmacological data from executions conducted in North Carolina and California indicates that thiopental and potassium chloride may fail to cause anesthesia and cardiac arrest in some cases, leaving potentially aware inmates to die from pancuronium-induced asphyxiation).

they physiologically preclude successful cadaveric procurement. Part A summarizes cadaveric organ procurement methods and explains the relationship between their inherent limitations and the physiological mechanisms causing death in each method of execution. Part B then summarizes deferential and hard look constructions of the RLUIPA's substantial burden requirement and explains why hard look courts are more likely than deferential courts to conclude existing execution protocols substantially burden religious exercise.

A

Because the prisoner's execution must occur before his organs can be donated, procurement methods are limited to those used to remove organs from cadaveric donors. The first and most common method, procurement from a heart-beating cadaveric donor, refers to the process of removing organs from the body of a donor "who has been declared brain dead, but who maintains cardiovascular integrity on life-support."[132] The second method, procurement from an asystolic[133] donor, refers to the process of removing organs from the body of a donor who has been declared dead under traditional cardiopulmonary criteria.[134] For both methods, the timing of procurement is critical because the duration of time that elapses after the cessation of blood circulation constrains organs' viability.[135] Outcomes of asystolic procurements have traditionally been poor because organs begin to die upon the moment of asystole, when circulatory cessation prevents organs' continued receipt of oxy-

132. Mark S. Orloff et al., *Nonheartbeating Cadaveric Organ Donation*, 220 ANNALS SURGERY 578, 578 (1994). "Brain death" refers to the "complete and irreversible cessation of all brain and brainstem function." Donald H. Jenkins et al., *Improving the Approach to Organ Donation: A Review*, 23 WORLD J. SURGERY 644, 645 (1999) [hereinafter *Improving Donation*].

133. An asystolic donor is an organ donor whose heart has stopped beating. Asystole refers to "the absence of sufficient cardiac activity to generate a pulse or blood flow." Robert Steinbrook, *Organ Donation After Cardiac Death*, 357 NEW ENG. J. MED. 209, 210 (2007).

134. P. J. Hauptman & K. J. O'Connor, *Procurement and Allocation of Solid Organs for Transplantation*, 336 NEW ENG. J. MED. 422, 423 (1997).

135. 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, 58 (1995) ("The primary complication [threatening the use of organs procured from cadaveric donors] is locating cadavers that have fresh organs which can be used by the intended done.").

gen.[136] By the time of procurement, organs have been subjected to prolonged periods of circulatory obstruction and therefore demonstrate "a high incidence of…necrosis…and primary nonfunction."[137] Thus, asystolic procurements are typically performed when a donor's circulation and respiration have been artificially maintained after "devastating and irreversible" brain or spinal cord injury. [138] In such cases, the brief interval between "withdrawing care, pronouncing death, and recovering organs" increases the likelihood of successful organ recovery.[139]

Procurement from cadaveric heart-beating donors, however, ameliorates the risks created by circulatory obstruction because life support machines maintain the donor's circulation and respiration throughout the procurement process.[140] Even during heart-beating procurements, the procurement team must carefully monitor the donor's blood pressure, intravascular volume, intracranial pressure, and endocrine levels to prevent and respond to complications which may jeopardize organs' viability.[141] Before a donor's organs are harvested, they are flushed with a cold preservation solution to remove the donor's blood and begin the preservation process.[142] Once extracted, organs are stored in a sterile container filled with wet ice and transported to the locations where recipients will receive the transplants.[143] Timing remains critical during the process of preservation and transportation because organs that have undergone prolonged periods of oxygen deprivation are incapable of cellular regeneration and as a result, will not function in the recipient's body.[144]

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136. *See* James L. Bernat, *The Boundaries of Organ Donation After Circulatory Death*, 359 NEW ENG. J. MED. 669, 671 (2008) ("[T]he sooner death can be declared after asystole, the less damage from warm ischemia will occur in the organs."). *See also* Hauptman & O'Connor, *supra* note 124, at 423 ("The outcome of uncontrolled donation was poor…perhaps because of the longer warm ischemic interval.").

137. Orloff et al., *supra* note 132, at 579.

138. Steinbrook, *supra* note 133, at 209-11.

139. *Id.*

140. Orloff et al., *supra* note 132, at 579.

141. *Improving Donation*, *supra* note 132, at 645-46.

142. Kimberly Baskette & John M. Ritz, Organ *Harvesting and Transplants: Like Other Technologies, Medical Technology Has Been Changing Human Life*, 69 TECH. TCHR. 5, 7 (2010).

143. *Id.*

144. *Id.*

Electrocution

Electrocution, authorized in eight states,[145] is carried out by affixing one electrode to a prisoner's shaved head and another to his ankle.[146] An electric current with an "initial voltage of 2,000 to 2,200 and amperage of 7-12," is administered and "subsequently . . . lowered and reapplied at various intervals,"[147] creating a closed-circuit electrical system within the prisoner's body.[148] Traveling along a restricted course through the prisoner's body, the electrical current destroys organs and internal tissue in its path, fatally damages his nervous system, and ultimately stops his heart.[149] During this process, the condemned's internal organs and skin are "cooked."[150]

Whether or not the electric current passes directly through a particular organ is irrelevant to its survival because the current's intensity[151] causes the prisoner's entire body to reach boiling temperatures.[152] In fact, executioners must allow an inmate's body to cool for several minutes after electrocution appears complete before checking his vital signs.[153] Once death has been confirmed, the body must be further allowed to cool before an autopsy can be performed.[154] Nevertheless, during some autopsies, physicians have observed that organs were still too hot to be touched.[155]

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145. Alabama, Arkansas, Florida, Kentucky, Oklahoma, South Carolina, Tennessee, and Virginia. *See* ALA. CODE §15-18-82(a) (2002); ARK. CODE ANN. §5-4-617(b)(1) (2009); FLA. STAT. ANN. §922.105(1) (LexisNexis 2005); KY. REV. STAT. ANN. § 431.220(1)(b) (LexisNexis 1998); OKLA. STAT. ANN. tit. 22 § 1014(B) (West 2011); S.C. CODE ANN. § 24-3-530(A) (1995); TENN. CODE ANN. § 40-23-114(b) (2000); VA. CODE ANN. § 53.1-234 (2007).

146. Glass v. Louisiana, 471 U.S. 1080, 1087 n.13 (1985) (denying cert.) (Brennan, J., dissenting).

147. *Id.* at 1087 n.13.

148. Patton, *supra* note 3, at 398.

149. *Id.*

150. *Id.*

151. *Glass*, 471 U.S. at 1088 n.18 ("[T]he force of the current is so strong that it sometimes literally ruptures the prisoner's heart.").

152. *Id.* at 1088 ("[T]he prisoner almost literally boils . . . the temperature in the brain itself approaches the boiling point if water.").

153. Philip R. Nugent, *Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution*, 2 WM. & MARY BILL RTS. J. 185, 199 (1993).

154. *Id.*

155. *Glass*, 471 U.S. at 1088 ("[W]hen the post electrocution autopsy is performed, the liver is so hot that doctors have said that it cannot be touched by the human hand.").

Notwithstanding the overall bodily temperature increase caused by electrocution, the subsequent confirmation protocol ensures that organs are anoxic,[156] and therefore no longer viable for donation, when death is finally verified.[157] Because death is determined by the absence of cardiac activity, confirming death requires circulatory cessation, which necessarily results in organ death due to oxygen deprivation. Also, because the body's high temperature after electrocution prevents immediate examination, the extended period of warm ischemia time, which elapses before death can be confirmed, precludes subsequent cellular regeneration.[158]

Lethal Gas

Execution by lethal gas, authorized in four states,[159] is carried out by releasing cyanide gas into an execution chamber. Depending on the concentration of cyanide and the rate and volume of inhalation, exposure to the gas causes a condemned inmate to first become hypoxic, then anoxic; and finally, death from asphyxiation occurs after his heart and brain are fatally deprived of oxygen.[160] For several minutes during the hypoxic period, the inmate's heart is slowly deprived of oxygen,[161] causing pain in correlation with the "diminishing [amounts of] oxygen reaching . . . [his] tissues."[162] Next, during the anoxic period, the inmate's brain remains alive for approximately two to five minutes.[163] Even after brain death occurs, his heart continues to beat for approximately seven minutes, "though at a very low cardiac output."[164]

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156. Anoxia refers to the "[a]bsence or almost complete absence of oxygen from inspired gases, arterial blood, or tissues." STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000).

157. *See* W.H. Marks et al., *Organ Donation and Utilization, 1995-2004: Entering the Collaborative Era*, 6 AM. J. TRANSPLANTATION, 1101, 1104-05 (2006) ("[Decrease in cadaveric organ donations] is partly due to a slight increase in the number of deaths due to anoxia, which is more damaging to organs.").

158. Nugent, *supra* note 153, at 199.

159. Arizona, California, Missouri, and Wyoming. *See* ARIZ. REV. STAT. § 13-757(B) (LexisNexis 1998); CAL. PENAL CODE §3604(a) (Deering 1996); MO. REV. STAT. §546.720(1) (2007); WYO. STAT. ANN. §7-13-904(b) (2007).

160. Gray v. Lucas, 463 U.S. 1237, 1241 (1983) (denying cert.) (Marshall, J., dissenting).

161. *Id.*

162. *Id.*

163. *Id.* at 1242.

164. *Id*.

From the beginning of this process, the inmate's inhalation of cyanide gas destroys his organs' viability because cyanide gas "blocks the utilization of oxygen in the body's cells."[165] Even if organs have not become fully necrotic when brain death or asystole occur, prolonged oxygen deprivation throughout the entire process precludes cellular regeneration and renders organs useless for transplantation.

Firing Squad

Execution by firing squad, authorized in only two states,[166] is carried out by strapping the condemned prisoner to a chair and pinning a circular white target to the clothing above his heart.[167] Several marksmen fire at the target from an enclosure positioned approximately twenty feet from the prisoner.[168] Blood loss from either the rupture of the heart or another large blood vessel, or the tearing of the lungs, results in death.[169] Thus, the mechanisms which cause the prisoner's death are exsanguination and the resulting oxygen deprivation in his brain.[170]

When properly performed,[171] execution by firing squad does not necessarily destroy the condemned's vital organs, with the exception of his heart.[172] For the purpose of donation, however, execution by firing squad renders his organs useless. Because death

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165. *Gray*, 463 U.S. at 1241.

166. Oklahoma and Utah. *See* OKLA. STAT. ANN. tit. 22 § 1014(C) (West 2011); UTAH CODE ANN. § 77-18-5.5(3)-(4) (2004).

167. Jason Weisberg, *This Is Your Death*, THE NEW REPUBLIC, July 1, 1991 at 23, 24.

168. *Id.*

169. *Id.*

170. Casey Lynne Ewart, Note, *Use of the Drug Pavulon in Lethal Injections: Cruel and Unusual?* 14 WM. & MARY BILL RTS. J. 1159, 1166 (2006).

171. If the marksmen miss, the prisoner slowly bleeds to death. For example, when Elisio Mares was executed by a Utah firing squad in 1951, none of the five marksmen wanted to fire the lethal bullet because Mares was so well-liked, and all aimed away from the target, his heart. As a result, Mares slowly bled to death. STEPHEN TROMBLEY, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 11 (1992).

172. Prisoner's organs have been used for post-execution transplantation in China, where executions are carried out by firing squad. Organ donation after execution is possible in China because death by firing squad is accomplished by firing a gun shot into the back of the condemned's head at point-black range. Whitney Hinkle, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 598 (2002).

results from blood loss, the prisoner's organs are fatally deprived of oxygen and thereafter, are not viable for transplantation.[173]

Hanging

Execution by hanging, authorized in three states,[174] involves fastening a ligature around the condemned inmate's neck and then dropping him a particular distance determined by weight.[175] During the drop, the weight of the prisoner's body and the force of gravity cause the ligature to tighten.[176] Despite the use of detailed instructions regarding the correct distance of the drop,[177] the construction of the noose,[178] and the preparation of the rope,[179] "there is no single pathway to death by judicial hanging."[180] Rather, various mechanisms cause or contribute to death, including "occlusion of the carotid arteries, . . . occlusion of the vertebral arteries, . . . occlusion of the jugular airway, . . . reflexive cardiac arrest, . . . occlusion of the airway, . . . tearing, transaction, trauma or shock to the spinal cord, . . . fracture or separation of the cervical spinal column, . . . interruption of the odontoid process, and . . . irreversible brainstem damage."[181] Because it depends on which mecha-

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173. Patton, *supra* note 3, at 398 n.64.

174. Delaware, New Hampshire, and Washington. *See* DEL. CODE ANN. tit. 11, § 4209(f) (1994); N.H. REV. STAT. ANN. § 630:5(XIV) (1991); WASH. REV. CODE. ANN. §10.95.180(1) (West 1996).

175. Campbell v. Wood, 18 F.3d 662, 683 (9th Cir. 1994) ("The purpose of the drop . . . is to ensure that forces to the neck structures are optimized to cause rapid unconsciousness and death.").

176. *Id.*

177. *Id.* at 684. Calculation of the proper length of the drop is essential because:

If the drop is too short in relation to the weight of the prisoner, death is likely to result from the mechanism of airway occlusion…the condemned will asphyxiate…If the drop is too long in relation to weight, death may result from decapitation . . . Between these two extremes, drop lengths are likely to cause death by some combination of vascular, spinal, and nervous mechanisms.

Id.

178. *Id.* at 685 (explaining that the optimum position of the knot ensures "that energy from the drop is transferred to the spinal structures and that the carotid and vertebral arteries will likely be occluded.").

179. *Id.* at 683, 685 (explaining that the rope should be boiled and stretched to eliminate most of its elasticity to ensure that the "the kinetic energy caused by the drop will be quickly transferred to and borne by the neck structures, rather than simply being absorbed by the rope.").

180. Campbell v. Wood, 18 F.3d 662, 683 (9th Cir. 1994).

181. *Id*.

nisms occur, the cause of death in a particular hanging cannot be predicted in advance. Typically, "interruption of vascular, spinal, or nervous functions . . . results in rapid unconsciousness and death."[182] However, if hanging only causes airway occlusion, death will result from asphyxiation, which may not occur for several minutes.[183]

Like execution by firing squad, hanging does not necessarily destroy all of the condemned's internal organs.[184] Nevertheless, because it is impossible to predict which mechanisms will cause death, successful post-execution organ donation is unlikely. If death is caused by cardiac arrest or airway occlusion, prolonged oxygen deprivation will prevent subsequent organ viability. Even if the cause of death is a spinal cord fracture and the resulting irreversible brainstem damage, organs will be fatally deprived of oxygen during the process of removing the inmate's body from the gallows, which ultimately precludes cellular regeneration.[185]

Lethal Injection

Lethal injection is the primary method of execution used in all United States jurisdictions which retain the death penalty, and the only method authorized by seventeen jurisdictions.[186] Of the remaining sixteen states that allow capital punishment, five authorize the use of an alternate method of execution if lethal injection is declared unconstitutional;[187] seven authorize the use of an

182. *Id.* at 684.
183. *Id.*
184. Patton, *supra* note 3, at 401.
185. *Id.*
186. Colorado, Connecticut, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Montana, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Texas, and the United States Military. *See* COLO. REV. STAT. § 18-1.3-1202 (2002); CONN. GEN. STAT. § 54-100(a) (2007); GA. CODE ANN. § 17-10-38(a) (2000); IDAHO CODE ANN. § 19-2716 (2009); IND. CODE ANN. § 35-38-6-1(1) (West 2002); KAN. STAT. ANN. § 22-4001(a) (1999); LA. REV. STAT. ANN. § 15:569 (B) (2010); MISS. CODE ANN. § 99-19-51 (1998); MONT. CODE ANN. §46-19-103(3) (1999); NEB. REV. STAT. ANN. § 83-964 (LexisNexis 2009); N.C. GEN. STAT. § 15-187 (1998); OHIO REV. CODE ANN. § 2949.22(A) (LexisNexis 2001); OR. REV. STAT. § 137.473(1) (2005); PA. CONS. STAT. § 4304(a)(1) (2009); S.D. CODIFIED LAWS § 23A-27A-32 (2008); TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon 2009); U.S. Army Regulation No. 190-55, U.S. Army Corrections System: Procedures for Military Executions (2006).
187. Arkansas (electrocution), Delaware (hanging), Oklahoma (electrocution and firing squad), Utah (firing squad), and Wyoming (lethal gas). See ARK. CODE

alternate method upon the inmate's request;[188] three authorize the use of an alternate method upon the inmate's request but subject to date restrictions;[189] and one authorizes the use of an alternate method if lethal injection is not practical.[190] In addition, the federal death penalty is implemented "in the manner prescribed by the law of the State in which the sentence is imposed."[191]

Although the precise details of states' lethal injection procedure are rarely publically disclosed,[192] most states have adopted a "three-drug protocol," that involves consecutive injections of three chemicals.[193] First, the prisoner is injected with a "fast-acting barbiturate sedative" to induce unconsciousness.[194] Next, a neuromus-

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ANN. §5-4-617 (2009); DEL. CODE. ANN. tit. 11, § 4209(f)(1994); OKLA. STAT. tit. 22, § 1014 (2011); UTAH CODE ANN. § 77-18-5.5 (2004); WYO. STAT. ANN. §7-13-904 (2007).

188. Alabama (electrocution), California (lethal gas), Florida (electrocution), Missouri (lethal gas), South Carolina (electrocution), Virginia (electrocution), and Washington (hanging). *See* ALA. CODE §15-18-82.1(a) (2002); ALA. CODE §15-18-82(a) (2002); CAL. PENAL CODE §3604(a)-(b) (Deering 1996); FLA. STAT. ANN. §922.105(1) (LexisNexis 2005); MO. REV. STAT. §546.720(1) (2007); S.C. CODE ANN. § 24-3-530(A) (1995); VA. CODE ANN. § 53.1-234 (2007); WASH. REV. CODE. ANN. §10.95.180(1) (West 1996).

189. Arizona (lethal gas), Kentucky (electrocution), and Tennessee (electrocution). *See* ARIZ. REV. STAT. § 13-757 (A)-(B) (LexisNexis 1998); KY. REV. STAT. ANN. § 431.220(1) (LexisNexis 1998); TENN. CODE ANN. § 40-23-114(a)-(b) (2000).

190. New Hampshire (hanging). *See* N.H. REV. STAT. ANN. § 630:5 (XIII)-(XIV) (1991).

191. 18 U.S.C. § 3596(a) (1994).

192. *See* Brief for American Civil Liberties Union, ACLU of Kentucky, and Rutherford Inst. as Amici Curiae Supporting Petitioners, Baze v. Rees, 2007 U.S. Briefs 5439, at *5-6 (2007) (No. 07-5439) (explaining that lethal injection protocols remain "shrouded in secrecy" because the procedures used are often kept confidential; the responsibility for creating procedures is often delegated to corrections officials without legislative oversight; witnesses are prevented from seeing all parts of the execution procedure during executions; and post-execution records and autopsies are kept confidential).

193. Baze v. Rees, 553 U.S. 35, 44 (2008). However, Ohio and Washington follow one-drug protocols. Ohio adopted its one-drug protocol in November 2009 after experiencing "exceptional circumstances" during the execution of Romell Broom two months prior. News Release, Ohio Dep't of Rehab. & Corr., Ohio Prisons Director Announces Changes to Ohio's Execution Process (Nov. 13, 2009), *available at* http://drc.ohio.gov/Public/press/press342.htm. Washington amended its capital punishment policy in March 2010, providing capital inmates who elect to be executed by lethal injection the option of choosing to be executed under a one-drug protocol rather than its three-drug protocol, which remains available. Wash. Dep't of Corr., Policy: Capital Punishment, DOC 490.200(IX)(A)(4)(d)(1) (Mar. 8, 2010).

194. *Baze*, 553 U.S. at 44.

cular-blocking agent which "inhibit[s] all muscular-skeletal movements" and stops respiration by "paralyzing the diaphragm" is administered.[195] Finally, the prisoner receives an injection of potassium chloride, which induces cardiac arrest by interfering with the "electrical signals that stimulate the contractions of the heart."[196] Because the neuromuscular-blocking agent and potassium chloride cause cardiopulmonary cessation, the process immediately destroys the inmate's heart and lungs, and his vital organs are rendered useless by oxygen deprivation shortly thereafter.[197]

B

The RLUIPA does not define "substantial burden," and deferential and hard look courts' interpretations of the term differ substantially. Consistent with pre-RLUIPA precedent,[198] deferential courts hold that a challenged imposition constitutes a burden only if it has the "tendency to coerce individuals into acting contrary to their religious beliefs."[199] In addition, to consider a burden substantial, deferential courts require a prison's entire regulatory scheme to be insufficiently tolerant of a plaintiff's religion.[200] In contrast, hard look courts consider the presentation of pressure or a difficult choice sufficient to burden religious exercise.[201] According to the Third Circuit, for example, a burden exists whenever "a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available . . . [or] the government puts substantial pressure on an adherent to substantially modify his behavior and violate his beliefs."[202] Moreover, to deem a burden substantial, hard look courts require only that the specific policy challenged interferes with religious exercise.[203]

The types of impositions recognized by both models as burdens on religious exercise suggest that both deferential and hard look

195. *Id.*
196. *Id.*
197. Patton, *supra* note 3, at 400.
198. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 448 (1988) (stating that the Free Exercise Clause "affords an individual protection from certain forms of government compulsion; it does not afford an individual the right to dictate the conduct of the Government's internal procedures.").
199. Adkins v. Kaspar, 393 F.3d 559, 569 (5th Cir. 2004).
200. Nelson, *supra* note 45, at 2072.
201. *Id.* at 2095.
202. Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007).
203. Nelson, *supra* note 45, at 2093.

courts would consider a government policy that forcibly compels an inmate to "modify his behavior in violation of his . . . beliefs" to satisfy the RLUIPA's burden requirement.[204] Accordingly, execution protocols which completely obstruct a capital inmate's efforts to donate his organs are likely statutory burdens because the five methods by which capital sentences may be carried out are fundamentally incompatible with post-execution organ donation. These methods absolutely frustrate capital prisoner's ability to posthumously donate his organs.[205] Because the state has imposed and will carry out the inmate's death sentence, a prison's use of the challenged execution protocol physically forces the inmate to violate his beliefs by foreclosing any chance that he might donate his organs.[206]

Nevertheless, a capital inmate who challenges his method of execution as a burden on his ability to posthumously donate organs is more likely to satisfy his burden of proof under the hard look model than under the deferential model. Hard look and deferential courts' conclusions will likely differ because there is a considerable divergence between their approaches to analyzing whether a burden is substantial. Under the hard look model, a burden on religious exercise may be substantial even if the imposition on religious exercise results from a discrete prison policy.[207]

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204. Smith v. Ozmint, 578 F.3d 246, 251 (4th Cir. 2009) (prison grooming policy substantially burdened plaintiff's religious exercise because it required him to cut his hair and was implemented with physical force, thus compelling "him to modify his behavior in violation of his . . . beliefs.").

205. Borzych v. Frank, 340 F. Supp. 2d 955, 968 (W.D. Wis. 2004), *aff'd*, 439 F. 3d 388 (7th Cir. 2006) ("An act that prevents an inmate from achieving his ultimate religious goal meets the 'substantial burden' test.").

206. *See, e.g.,* Crawford v. Clarke, 578 F.3d 39, 44 (1st Cir. 2009) (policy which did not provide inmates confined to special housing area an opportunity to participate in Jum'ah services, either in person or through closed-circuit television, burdened inmates' religious exercise); Greene v. Solano County Jail, 513 F.3d 982, 988 (9th Cir. 2008) (preventing a "maximum security prisoner from attending group worship services substantially burdened his ability to exercise his religion."); Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006) (finding plaintiff's removal from the "Ramadan observance pass list" qualified as a substantial burden because once removed, plaintiff "was excluded from special . . . Ramadan meals and therefore, could not fast . . . Unable to fast, he could not fulfill one of the five…obligations of Islam."); Jesus Christ Prison Ministry v. Cal. Dep't of Corr., 456 F. Supp. 2d 1188, 1205 (E.D. Cal. 2006) (finding that plaintiff's "[b]eing denied access to…religious materials compel[ed] inaction with respect to . . . core elements of plaintiffs' . . . faith," and thus demonstrated a substantial burden).

207. *See* Meyer v. Teslik, 411 F. Supp. 2d 983, 989 (W.D. Wis. 2006) ("It is difficult to imagine a burden more substantial than banning an individual from

Hard look courts have concluded that prison policies substantially burdened religious exercise even when the impositions caused by the restrictions were limited in duration[208] or result from a specific regulation.[209] It is likely that hard look courts would similarly conclude that execution by electrocution, lethal gas, firing squad, hanging, and lethal injection substantially burden religious exercise. Because each method both completely and ultimately prevents a condemned prisoner from donating his organs after death, they foreclose future opportunities for him to exercise *agape* by donating his organs or in other ways.

In contrast, the deferential model requires a plaintiff to show that the prison's "entire system of regulation…is not sufficiently tolerant of . . . [his] religion"[210] in order to prove a burden is substantial. In applying this standard, deferential courts have concluded a burden is not substantial if it is limited in duration or an "incidental" effect of a prison regulation which does not directly

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engaging in a specific religious practice . . . RLUIPA protects more than the right to practice one's faith; it protects the right to engage in specific, meaningful acts of religious expression in the absence of a compelling reason to limit the expression.").

208. *See* Shakur v. Selsky, 391 F.3d 106, 120 (2d Cir. 2004) (prison's refusal to allow plaintiff to attend a single religious feast amounted to a substantial burden because the feast was one of two major religious observances). *See also* Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 38 (1st Cir. 2007) (rejecting the government's argument that ban on inmate preaching did not substantially burden the inmate's religious exercise because the policy allowed the inmate to "pray, sing or recite during . . . [worship] services."); Al-Amin v. Shear, 325 Fed. App'x 190, 193 (4th Cir. 2009) (finding prison's requirement that plaintiff use his given name despite the fact that he considered doing so to be religiously offensive substantially burdened his religious exercise, notwithstanding the fact that plaintiff had alternate ways to practice his religion); *Meyer*, 411 F. Supp. 2d at 990 ("The fact that plaintiff could arguably have engaged in silent prayer is not, by itself, justification for forbidding his participation in communal worship and in no way undermines his contention that his ability to attend group worship services was substantially burdened when he was denied the opportunity to attend those services.").

209. *See Lovelace*, 472 F.3d at 188 (refusing to consider the aggregate effects of prison's dietary and worship policies in analyzing the restriction on plaintiff's ability to participate in worship services after he refused to comply with the prison's dietary policy).

210. Nelson, *supra* note 45, at 2072. *See also* Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004) ("[A] government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.").

address the religious exercise,[211] or if the prison's regulatory scheme accommodates the religious exercise in other ways.[212] Accordingly, deferential courts would not likely regard a state's authorized method of execution as a substantial burden on religious exercise. Although electrocution, lethal gas, firing squad, hanging, and lethal injection are not compatible with post-execution donation, their anticipated use has nothing to do with organ donation. Deferential courts are more likely to conclude execution protocols only incidentally affect donation because the purpose of a state's execution scheme is to carry out its capital sentences, not to prevent prisoners from donating organs.

IV

As a result of the complexity of the procurement process and the difficulty of maintaining the viability of an asystolic donor's organs, a capital inmate's request to donate his organs after execution implicates a number of institutional considerations. Prison officials have justified policies that disallow post-execution donation by citing the additional security and transportation costs involved, as well as by claiming that posthumous donation is not feasible. These justifications indicate that, in refusing to accommodate post-execution organ donation, a state may seek to further interests in achieving orderly and cost effective prison administration and in enforcing criminal sentences. The following discussion addresses these interests and their relationship to a government's burden of proof under the RLUIPA. Part A summarizes the deferential and hard look approaches to determining whether a challenged policy furthers a compelling government interest. Part B

211. *See* Baranowski v. Hart, 486 F.3d 112, 124-25 (5th Cir. 2007) (plaintiff's religious exercise was not substantially burdened when the lack of a rabbi or approved religious volunteer prevented him from congregating with other inmates during holy days). *See also Adkins*, 393 F.3d at 571 (policy requiring the presence of an outside volunteer during religious congregation did not substantially burden plaintiff's religious exercise because plaintiff's inability to observe every holy day resulted from "a dearth of qualified outside volunteers…not from some rule or regulation that directly prohibits such gatherings.").

212. *See, e.g.,* Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 815 (8th Cir. 2008) (holding that prison's refusal to provide plaintiff with halal meat did not substantially burden his religious exercise because he was provided with an alternative vegetarian diet); Smith v. Allen, 502 F.3d 1255, 1277 (11th Cir. 2007) (holding the denial of the plaintiff's request to possess a quartz crystal was not a substantial burden on his religious exercise because prison officials had granted his requests for a number of other religious items).

then explains why the additional transportation and security costs associated with post-execution donation are more likely to satisfy the RLUIPA's compelling government interest requirement under the deferential model than under the hard look model.

A

Deferential and hard look interpretations of the RLUIPA's compelling government interest requirement, also undefined by the statute, again, differ substantially. To determine the existence of compelling government interests, deferential courts evaluate whether the prison has an interest in its entire regulatory scheme, rather than whether it has an interest in refusing to grant an individualized exemption to the plaintiff.[213] Discussing the approach, the Eighth Circuit explained, "[W]e do not interpret RLUIPA to prevent a prison from applying certain important security regulations to all inmates without providing for exemptions."[214] Deferential courts' adoption of this broad standard allows prison officials to demonstrate compelling interests without "having to show that making . . . one requested exemption will undermine an entire policy."[215]

Accordingly prison administrators' concerns about the additional costs and resources required to accommodate a religious exercise are often sufficient to demonstrate a compelling interest under the deferential model. Deferential courts routinely conclude that because "administrative convenience" is "related to maintaining good order and controlling costs . . . [it] involves compelling governmental interests."[216] Because these courts reason that individualized exemptions "strain . . . prison resources and inmate-staff relations," the administrative convenience rationale provides a safe harbor under which prison officials may refuse to grant individualized exemptions.[217]

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213. Nelson, *supra* note 45, at 2085.

214. Fegans v. Norris, 537 F.3d 897, 907 (8th Cir. 2008).

215. Nelson, *supra* note 45, at 2086.

216. Baranowski v. Hart, 486 F.3d at 125 (holding that the prison's failure to provide plaintiff with a kosher diet furthered compelling government interests in maintaining order and controlling costs because prison's budget was inadequate to obtain kosher meals without detracting from the general food budget).

217. *Fegans*, 537 F.3d at 902-03.

Again citing the statements of Senators Kennedy and Hatch as authority,[218] deferential courts evaluating government interests refuse to second guess the judgment of prison officials who claim an interest is compelling and seldom require officials to offer more than their own testimony as proof.[219] In fact, even without evidence of actual problems, some courts conclude administrators' mere invocations of concerns about safety and security demonstrate that a government's interest is compelling.[220]

Hard look courts, on the other hand, regard interests in administrative convenience with cynicism, often holding that "the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement."[221] Rather, these courts require officials to demonstrate the existence of a logical nexus between asserted concerns about cost-saving and administrative simplicity and an actual effect on security.[222] Without substantial proof that such a nexus exists, hard look courts reject administrative convenience rationales and find connections between administrative concerns and security too attenuated to be compelling.[223]

Moreover, even when officials provide proof of a logical nexus, hard look courts test whether asserted interests are compelling by comparing challenged policies to officials' other policy choices.[224] Interpreting the RLUIPA to demand close examination of the authenticity of asserted governmental interests, these courts con-

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218. *See* 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

219. Hoevenaar v. Lazaroff, 422 F.3d 366, 372 (6th Cir. 2005) (reversing the district court's finding that the government had not met its burden of proof, and admonishing the lower court for failing to "give proper deference to prison officials.").

220. Fowler v. Crawford, 534 F.3d 931, 939 (8th Cir. 2008) ("[O]fficials charged with managing such a volatile environment need [not] present evidence of actual problems to justify security concerns.").

221. Washington v. Klem, 497 F.3d 272, 283 (3d Cir. 2007).

222. Koger v. Bryan, 523 F.3d 789, 800 (7th Cir. 2008) (admonishing prison officials for failing to support asserted interest in administrative convenience and finding that they "failed to show what effort would have been involved in providing a meatless diet…[or] how this would have hampered prison administration.").

223. Nelson, *supra* note 45, at 2102-03. *See also* Lovelace v. Lee, 472 F.3d 174, 191 (4th Cir. 2006).

224. Warsoldier v. Woodford, 418 F.3d 989, 1000 (9th Cir. 2005) (rejecting the government's assertion that hair-length restrictions furthered compelling interests in health and security because the prison did not similarly restrict the hair-length of female inmates).

clude that "[i]nadequately formed prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements."[225]

B

The physiological limitations of cadaveric procurement necessitate that post-execution organ procurements take place in a sterile surgical facility to stand a chance of success. Unless a prison already has a surgical facility, the government will incur additional costs for transportation and off-site security in order to accommodate the procedure.[226] To justify prohibitions against inmate organ donation, prison officials have argued that "[t]he cost of protection (for off-site surgery) would be significant."[227] Todd Slosek, a spokesman for the California Department of Corrections and Rehabilitation explained, "[W]e believe that the department is not authorized to spend taxpayer dollars on outside medical costs, transportation and guarding costs for inmates who choose to become donors."[228]

Under the deferential model, officials' concerns about the financial and administrative burdens created by the need for additional security and transportation implicate a governmental interest in administrative convenience. Because, as deferential courts would likely reason, prohibitions against inmate organ donation avoid these additional costs, policies disallowing donation further a prison's interests in orderly and cost-efficient prison administration. Without empirical proof that the expenditures would negatively impact prison safety or security, however, hard look courts would not consider such interests compelling. Moreover, even if prison officials could demonstrate a causal connection between financial and administrative burdens and a negative impact on prison security, institutions such as the Texas Department of Criminal Justice, are still unlikely to prevail under the hard look model. When, like the Texas Department of Criminal Justice, a prison permits and pays for noncapital inmates to donate organs, the internal inconsistency in a prison policy that permits some, but

225. Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 39 (1st Cir. 2007).

226. Patton, *supra* note 3, at 423. Some prisons already have fully-equipped surgical facilities. *Id.*

227. *Release to Donate*, *supra* note 6.

228. Gladstone, *supra* note 6 (quoting Slosek).

not all, inmates to donate suggests that the prison's interest in administrative convenience may not truly be compelling.[229]

V

If a prison demonstrates that a challenged policy furthers compelling government interests, to satisfy its burden of proof, it must also prove that the policy is the least restrictive alternative available to achieve those interests. The following discussion address two alternative methods of execution which are conducive to post-execution organ donation and analyzes their likely effect on the RLUIPA's narrow tailoring requirement. Part A summarizes the deferential and hard look approaches to determining whether a challenged government imposition is narrowly tailored.

Because capital punishment must, to some extent, advance penological goals to avoid violating the Eighth Amendment, states may have a compelling interest in maintaining existing execution protocols if granting an individualized exemption would undermine the purposes served by the state's capital punishment scheme. Thus, Part B discusses three penological goals recognized by the Court to justify the death penalty—retribution, deterrence, and incapacitation—and explains why deferential courts are more likely than hard look courts to conclude that states have a compelling interest in maintaining existing protocols in order to advance these goals.

Part B then discusses two proposed methods of execution that accommodate post-execution donation. As both require a physician to participate in the execution, prison officials might argue that current execution protocols are narrowly tailored because these methods are not feasible. Part B explains that doctors may legally participate in executions and discusses whether they would agree to do so. Finally, prison officials might also argue that a state's authorized execution method is narrowly tailored because proposed methods do not further its penological goals. Part B analyzes whether post-execution donation would frustrate states' interests in retribution, deterrence, and incapacitation and explains why deferential courts are more likely than hard look courts to

229. Perales, *supra* note 3, at 703 (citing *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).

conclude the five methods of execution currently authorized in United States are narrowly tailored.

A

Although, as one might anticipate, deferential and hard look courts treat them differently, the RLUIPA's narrow tailoring requirement reflects two concerns about alternative policies that are capable of accommodating a burdened religious exercise. The first assesses whether a burden was imposed in good faith and asks if officials actually investigated and considered less restrictive alternative policies. The second, which instead focuses on the practicality of alternative policies, asks whether less restrictive alternatives are feasible and, if they are, whether they would further compelling government interests as well as the challenged policy.

With respect to the good faith concern, deferential courts do not require prison officials to prove that they have seriously considered whether alternatives to a challenged policy could ameliorate the burden on religious exercise.[230] Some deferential courts consider prison administrators' testimony that alternatives do not exist to be conclusive on the issue, while others conclude that such testimony shifts the burden back to the prisoner to demonstrate a less restrictive alternative.[231] When a less restrictive policy clearly exists, deferential courts also regard prison officials' opinions about feasibility as conclusive. These courts are tolerant of internal and external inconsistencies in prison policies and avoid making institutional comparisons.[232] In fact, when offered evidence that other prisons made individual exceptions similar to that sought by the plaintiff, some courts refuse to compare the institutions outright, concluding that the probative value of such evidence is outweighed by the need to show prison officials "due deference."[233] Alternatively, other deferential courts diffuse the value of such evidence by making sua sponte factual distinctions between the institutions' size and inmate population,[234] level of secu-

230. Nelson, *supra* note 45, at 2088.

231. *Id.*

232. Fegans v. Norris, 537 F.3d 897, 905 (8th Cir. 2008) (accepting prison officials' argument that a grooming policy was the least restrictive means of furthering interests in health and safety, although the policy did not apply to female prisoners).

233. Nelson, *supra* note 45, at 2089.

234. *See* Fowler v. Crawford, 534 F.3d 931, 942 n.12 (8th Cir. 2008).

rity,[235] number of prison personnel,[236] or level of government running the facility.[237]

Conversely, with respect to the good faith concern, hard look courts refuse to regard a challenged policy as narrowly tailored unless prison administrators affirmatively demonstrate that they actually considered alternatives to the challenged policy.[238] Articulating the standard, the Ninth Circuit explained a prison "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice."[239] Hard look courts require officials to offer evidentiary proof of adequate reasons why less restrictive alternatives are not feasible or would not further interests served by the challenged policy.[240] These courts scrutinize prison officials' assertions about the inadequacy of alternative policies by comparing officials' justifications for the challenged policy with evidence of internal or external inconsistencies in the prison's entire regulatory scheme.[241] When provided evidence that other prisons have accommodated the religious exercise in which the plaintiff seeks to engage, hard look courts will not conclude that a challenged policy is narrowly tailored unless officials demonstrate that their prison significantly differs from such institutions, as well as that those institutional differences justify refusing to grant an individual exemption to accommodate the plaintiff's religious exercise.[242]

B

In the context of this hypothetical claim, state governments likely have a compelling interest in enforcing criminal sentences in

235. *See* Mann v. Wilkinson, No. C2-00-706, 2008 WL 4332520, at *2 (S.D. Ohio Sept. 17, 2008).

236. *See* Gooden v. Crain, 405 F. Supp. 2d 714, 718, 721 (E.D. Tex. 2005).

237. *See* Daker v. Wetherington, 469 F. Supp. 2d 1231, 1239 (N.D. Ga. 2007).

238. Nelson, *supra* note 45, at 2104.

239. Warsoldier v. Woodford, 418 F.3d 989, 999 (9th Cir. 2005).

240. Nelson, *supra* note 45, at 2104.

241. Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 42 (1st Cir. 2007) (finding that prison regulations banning prisoners from preaching while allowing prisoners to accept other leadership roles indicated that the prison officials had "not given consideration to possible alternatives.").

242. Nelson, *supra* note 45, at 2105. *See also* Shakur v. Schriro, 514 F.3d 878, 890-91 (9th Cir. 2008); *Warsoldier*, 418 F.3d 989, 1001.

order to advance penological goals.[243] The Court has instructed, to avoid a constitutional violation and ensure that a punishment comports with the "basic concept of human dignity at the core of the [Eighth] Amendment," a punishment must not be "so totally without penological justification that it results in gratuitous infliction of suffering."[244] Consequently, if states have an interest in avoiding an Eighth Amendment violation, they must also have an interest in ensuring that a criminal penalty is not "cruel and unusual because it is excessive and serves no valid legislative purpose."[245]

The Court's pronouncement in *Gregg v. Georgia* that capital punishment advances the goals of retribution, deterrence,[246] and incapacitation[247] indicates that, under the deferential model, a state's execution scheme, considered as a whole, furthers its interest in advancing penological goals. Retributive theories posit that offenders should be punished because they deserve punishment[248] and punishments should reflect the "moral seriousness of the offense."[249] Ergo, the Court has opined, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."[250]

By comparison, deterrence theories justify punishing wrongdoers in order to encourage others to abstain from the same miscon-

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243. Justice Scalia considers the Court's penological purpose requirement to apply only to capital punishment as a constitutionally permissible type of punishment, rather than to the individual methods with which it is carried out. *See* Baze v. Rees, 553 U.S. 35, 88 (2008) (Scalia, J., concurring) ("Even if that were uncontroversial in the abstract . . . it is assuredly controversial (indeed, flatout wrong) as applied to a mode of punishment that is explicitly sanctioned by the Constitution.").

244. Gregg v. Georgia, 428 U.S. 153, 183 (1976).

245. *See* Furman v. Georgia, 408 U.S. 238, 331 (1972) (Marshall, J., concurring) ("[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose.").

246. *Gregg*, 428 U.S. at 183.

247. *Id.* at 183 n.28.

248. B. Douglas Robbins, Comment, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted Upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1119 (2001). *See also Gregg,* 428 U.S. at 184 n.30 ("[S]ome crimes are so outrageous that society demands an adequate punishment, because the wrong-doer deserves it . . . .").

249. Robbins, *supra* note 248, at 1119.

250. *Gregg*, 428 U.S. at 184.

duct, lest they suffer the same consequences.[251] To achieve a deterrent effect, a punishment must be sufficiently severe, and its imposition must be sufficiently certain, to result from a violation of law.[252] Hence, the Court has remarked, for many people, "the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act."[253] Finally, incapacitation theories hold that "society may protect itself from persons deemed dangerous . . . by isolating" them to prevent future misconduct, provided that the danger feared is prevented by the restraint imposed.[254] Accordingly, the Court has noted, capital punishment may be warranted for those "categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate."[255]

Hard look courts, however, are less likely to find that states have a compelling interest in strictly adhering to established execution protocols because capital punishment is not authorized in every United States jurisdiction, which indicates the method by which a state executes offenders may not have a significant connection to the advancement of its penological goals. The availability of life imprisonment without the possibility of parole as an alternative to capital punishment led Justice Stevens to conclude that "incapacitation is neither a necessary nor a sufficient justification for the death penalty."[256] The same evidence also caused Justice Stevens to question the legitimacy of capital punishment's purported deterrent effect:

> Despite 30 years of empirical research. . . there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment . . . We are left, then,

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251. Robbins, *supra* note 248, at 1130.
252. *Id.*
253. *Gregg*, 428 U.S. at 185-86.
254. WAYNE R. LAFAVE, CRIMINAL LAW (4th ed. 2003), *reprinted in* CASES AND MATERIALS OF THE LAW AND POLICY OF SENTENCING AND CORRECTIONS 6 (Lynn S. Branham & Michael S. Hamden eds., 7th ed. 1997).
255. *Gregg,* 438 U.S. at 186.
256. Baze v. Rees, 553 U.S. 35, 78 (2008) (Stevens, J., concurring).

> with retribution as the primary rationale for imposing the death penalty.[257]

As Justice Stevens indicates, hard look courts would likely consider the availability of life imprisonment without parole as an alternative to capital punishment to undermine the conclusion that a state has a compelling interest in strictly enforcing its existing execution protocol in order to incapacitate offenders and deter others from committing capital crimes. However, as the same conclusion cannot necessarily be drawn regarding retribution, the following discussion of narrow tailoring assumes states have a compelling interest in executing capital inmates to further penological objectives.

Proposed Alternative Methods of Execution

Those who advocate for capital prisoners to be permitted to donate their organs have proposed two alternative methods of execution that would permit post-execution organ procurement and transplantation. The first, execution by organ procurement, would literally bring about a condemned inmate's death by removing his organs.[258] Because execution by organ procurement would extend circulation while the condemned's organs are harvested, it would increase the likelihood that his organs will remain viable and thus, suitable for donation.[259] In comparison, the second method, execution by anesthesia-induced brain death, would be carried out in a manner similar to that of lethal injection. First, the condemned inmate would be rendered unconscious by an intravenous dose of a long-acting barbiturate sedative[260] and attached to an artificial ventilation system.[261] Rather than a neuromuscular-blocking agent and potassium chloride, anesthesia would then be administered in a dosage sufficient to render the prisoner clinically brain-dead.[262] Finally, the prisoner would be declared dead, and his organs would be harvested for transplantation.[263]

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257. *Id.* at 79.
258. Perales, *supra* note 3, at 714.
259. *Id.*
260. Patton, *supra* note 3, at 401.
261. *Id.* at 401 n.84 ("The surgical removal of organs takes place while the patient has intact circulation and is mechanically ventilated. Once the organs are removed, the ventilator and cardiac monitor are removed.").
262. *Id.* at 401.
263. *Id.*

The existence of these alternative methods, however, does not alone prove that states' existing execution protocols are not narrowly tailored. Because both proposed methods could only allow organ procurement if carried out under a doctor's supervision,[264] they are only feasible alternatives if physicians can and will participate in executions. While necessary to ensure post-execution organ viability, physician participation is potentially problematic because it is prohibited by the American Medical Association's ethical standards.[265]

Nevertheless, whether the proposed alternatives are feasible ultimately depends on physicians' willingness to participate in executions because ethical constraints are legally unenforceable and have been interpreted differently among medical professionals.[266] The AMA,[267] as well as similar national and state entities, is a professional membership organization whose ethical guidelines are not legally enforceable rules for physician conduct.[268] Not only have courts refused to enforce the AMA standards,[269] state legislatures have also enacted safe harbor statutes to "prevent medical boards from taking disciplinary action against medical providers who opt to participate in executions."[270] Thus, notwithstanding the

264. *See* Baze v. Rees, 553 U.S. 35, 64 (2008) (Alito, J., concurring) ("[T]he ethics rules of medical professionals . . . prohibit their participation in execution.").

265. Hinkle, *supra* note 172, at 603-05 (arguing that execution by organ procurement "clearly places the organ recovery team in the role of executioner.").

266. Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 26 (2009).

267. COUNCIL ON JUD. & ETHICAL AFF., AM. MED. ASS'N., CODE OF MEDICAL ETHICS § 2.06 (2008), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.shtml (last visited Jan. 21, 2011) ("A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.").

268. Alper, *supra* note 266, at 26. *See also* Jonathan I. Groner, *The Hippocratic Paradox: The Role of the Medical Profession in Capital Punishment in the United States*, 35 FORDHAM URB. L. J. 883, 904 (2008) ("The AMA is a voluntary organization. While its position on lethal injection is quite clear, the AMA has no legal enforcement authority.").

269. *See, e.g.,*Thorburn v. Dep't of Corr., 78 Cal. Rptr. 2d 584, 590 (Cal. Ct. App. 1998); Zitrin v. Ga. Composite State Bd. Med. Exam'r, 653 S.E. 2d 758, 762-63 (Ga. Ct. App. 2007); N.C. Dep't of Corr. v. N.C. Med. Bd., 363 N.C. 189, 204 (N.C. 2009).

270. Alper, *supra* note 266, at 30.

AMA's position, instances of physician participation in executions have been reported throughout the years.[271]

Other doctors have also expressed their willingness to participate in executions. Forty-one percent of participants in a 2001 study—surveying American physicians about their willingness to perform the actions defined by the AMA as "participation in execution"[272]— indicated they were willing to perform at least one of the prohibited actions; nineteen percent reported they were willing to administer the lethal drugs.[273] In other contexts, individual physicians have reported a perceived obligation to participate in executions "to the extent necessary to ensure a good death."[274] As Kenneth Baum elucidates, these physicians believe that "[t]o desert . . . [capital inmates] in their most vulnerable hour would be antithetical to the beneficent ideals of medical practice."[275]

Moreover, physicians may be more likely to participate in order to facilitate post-execution organ donations because their participation would result in an additional utilitarian benefit. The preceding expressions of physicians' willingness to participate are grounded in the desire to ensure appropriate pain management.[276] In the case of post-execution donation, however, physician participation in executions would also increase the availability of organs for transplantation, ultimately saving lives which otherwise might have been lost while waiting for transplants.[277] This utilitarian

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271. *Id.* at 46-48.

272. Neil Farber et al., *Physicians' Willingness to Participate in the Process of Lethal Injection for Capital Punishment*, 135 ANNALS INTERNAL MED. 884 (2001).

273. *Id.* at 886.

274. David Waisel, *Physician Participation in Capital Punishment*, 82 MAYO CLINIC PROC. 1073 (2007).

275. Kenneth Baum, *"To Comfort Always": Physician Participation in Execution*s, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 47, 62 (2001).

276. *See generally* Baum, *supra* note 275; Waisel, *supra* note 274.

277. For example, John Brown, Chief of Cardio-Thoracic Surgery and Surgical Director of the Cardiac Transplantation Program at Indiana University, explained in an interview:

> [I]t seems to me that once society has determined that an individual's life should be taken for a hideous crime he's committed, that rather than that life go to nobody's benefit, at least the organs from that individual should be offered back to society to repay a little bit of the debt to society that individual's behavior caused. It seems to me it makes good practical sense when there are so many patients waiting for organs, and many of them will die waiting for an organ that never comes. It just seems a crime to waste them. It would be my thought that this should be considered.

benefit provides an additional incentive for physicians to participate in an execution in order to facilitate subsequent organ procurement.[278]

Penological Goals Advanced by Permitting Post-Execution Organ Donation

Even if physicians are willing to participate in executions and execution by anesthesia-induced brain death is a feasible alternative, a state's existing protocols may nevertheless be narrowly tailored if posthumous donation frustrates the advancement of its penological goals. Because allowing post-execution organ donation advances the goals of incapacitation, deterrence, and retribution, the foregoing alternatives will likely cause hard look courts to conclude that current protocols are not narrowly tailored. That posthumous donation also furthers the additional goal of rehabilitation indicates existing methods of execution are not the least restrictive means of advancing penological goals.[279]

Allowing a capital inmate to donate his organs does not frustrate incapacitation because the condemned will be unable to commit crimes after his execution. Although capital punishment's deterrent effect on the general population remains a source of controversy, allowing execution by anesthesia-induced brain death and subsequent donation will not likely diminish that effect because deterrence requires the imposition of a sufficiently severe punishment with sufficient certainty. Execution effectuated by anesthesia-induced brain death is as severe a punishment as lethal injection because the ultimate consequence of both methods is

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Cory SerVaas, *Who Gets This Heart*, SATURDAY EVENING POST, Sept. 1, 1997, at 42. *See also* Coyne, *supra* note 5 (Dr. Arthur Caplan, Chairman of the Department of Medical Ethics at the University of Pennsylvania, opined that death row inmate, Gregory Scott Johnson, should be permitted to donate his liver to his sister if compatible because "[a] life could be saved and he might be the only person who can do it.").

278. *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) ("We must . . . ask what the balance of harm may be between death of an individual in renal failure and the obtaining of a kidney from an individual already dead by due legal process.").

279. *See* MODEL PENAL CODE § 1.02(2)(b) (1962) ("The general purposes of the provisions governing the sentencing and treatment of offenders are . . . to promote the correction and rehabilitation of offenders.").

death.[280] In addition, if the concerns of those who oppose organ procurement from the executed prove to be correct, and jurors become more willing to issue capital sentences in order to increase the pool of transplantable organs,[281] allowing post-execution donation should increase capital punishment's deterrent effect. In such a case, jurors' increased willingness to impose capital sentences would increase the likelihood that an offender will be sentenced to death for his commission of a capital crime. Even if such concerns are not realized, the use of anesthesia-induced brain death to accommodate post-execution donation still increases the certainty that a death sentence will be imposed. If a capital inmate consents to execution and decides to forego appealing his sentence, the chance that his sentence will be overturned will be eliminated.[282]

Retribution does not necessarily encompass the principle of *lex talionis*—"an eye for an eye," under which punishment imposed upon an offender is both proportionate to and results in the same damage as his own misconduct.[283] However, allowing post-execution donation similarly advances retributive goals because the punishment imposed—death—remains the same and thus, continues to be warranted by the crime. In fact, it is possible that prohibiting post-execution donation when accommodation is possible would not further retribution, but instead constitute vengeance by inflicting psychological harm beyond that associated with the capital sentence.[284]

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280. 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, 38 (1998) (arguing that mandatory post-execution organ donation would deter the commission of capital crimes because "[t]he fact that so few people donate their organs . . . demonstrates how reluctant people are to part with their organs even after death.").

281. *See, e.g.,* Cameron & Hoffenberg, *supra* note 278, at 729; John A. Robertson, *The Dead Donor Rule*, 29 HASTINGS CENTER REP. 9, 9 (1999).

282. *See* GIFTS OF ANATOMICAL VALUE, *supra* note 13 and accompanying text. *See also* Phyllis Coleman, *"Brother, Can You Spare a Liver?" Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 33 (1996).

283. Robbins, *supra* note 248, at 1119.

284. *Id.* (opining that vengeance imposes punishment, sometimes in excess of the amount deserved, in order to satisfy a desire to hurt the offender). *See also* L.D. deCastro, *supra* note 15, at 173 (arguing that restricting prisoners from donating their organs could deprive them of a "legitimate vehicle for atonement" and that such restrictions "must be regarded as excessive and unjust" when they are not part of an offender's court-imposed sentence). But *cf.* Palmer, *supra* note 280, at 38 (arguing that post-execution organ donation should be a mandatory

Moreover, allowing a capital prisoner to be executed in a manner compatible with organ donation may also advance rehabilitation, a penological goal not commonly associated with the death penalty. Rehabilitation theories posit that punishment "cure[s] the wrongdoer of his criminality"[285] and can be imposed under two approaches: the "authoritarian and paternalistic" model, and the "humanistic and liberty-centered" model.[286] According to the authoritarian model, punishment is an "instrument of institutional discipline" which "mold[s] the personality of offenders . . . [to] obtain their compliance with a predesigned pattern of thought and behavior."[287] Under the humanistic model, punishment instead "offers inmates a sound and trustworthy opportunity to remake their lives" and thus seeks to cultivate "a deep awareness of their relationships with the rest of society, resulting in a genuine sense of social responsibility."[288]

By rewarding the condemned's demonstration of remorse and quest for absolution, permitting his request to donate organs serves the authoritarian model of rehabilitation by reaffirming and encouraging his efforts to conform his assessment of his own culpability to that which society deems appropriate.[289] Allowing post-execution donation also furthers the humanistic model of rehabilitation by encouraging the inmate to reflect on his own culpability, seek atonement, and ultimately do something beneficial for society.[290] Post-execution organ donation provides the capital inmate

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component of imposing the death penalty in order to "round out society's quest for retribution.").

285. Robbins, *supra* note 248, at 1132.

286. Edgardo Rotman, *Do Offenders Have a Constitutional Right to Rehabilitation?* 77 J. CRIM. L. & CRIMINOLOGY 1023, 1025-1026 (1986).

287. *Id.* at 1025.

288. *Id.*

289. *See* CHRISTIAN LONGO, ORGAN DONATION FROM THE EXECUTED 1 (2010), *available at* http://www.gavelife.org/uploads/Longo-Williams65pp.pdf ("[A]fter some time here…I began to really look at what I had done to earn my place on death row. It was then that I started to realize that the sentence I was given is an appropriate one and it has become important to me to hold myself accountable for what I have done . . ."). *See also* Robbins, *supra* note 238, at 1145 ("Remorse, or the lack thereof, has long been an important factor in calculating criminal sentences . . ."). *Cf.*, Robertson, *supra* note 281, at 10 ("The purpose and effect of capital punishment is to end the life of a person who has himself taken life. Trying at the same time to preserve other lives through execution by organ retrieval only confuses the situation. It is best for organ transplantation and capital punishment to go their separate ways.").

290. Longo explains:

with an opportunity to make amends for his crime by opting to do something that saves lives and is useful to society, and thus carries the additional benefit of preserving the dignity of the condemned.[291]

VI

This Note's preceding discussion and analysis demonstrate that a capital inmate who seeks to donate his organs post-execution as an exercise of agape may be able to secure an alternate method of execution that would allow him to donate by asserting a claim under the RLUIPA. Whether he would prevail, however, would likely depend on whether the court reviewing his claim follows the deferential or hard look model of review. While his claim may succeed if reviewed by a hard look court, dismissal is a more likely result in deferential jurisdictions.

Nevertheless, in such a case, good reason exists for even a deferential court to follow the hard look approach. Even if posthumous organ donation is not important or fundamental to the condemned prisoner's religious beliefs, donation warrants RLUIPA protection as a religious exercise because the condemned's execution will be his first and final chance to save the lives of others through personal bodily-sacrifice. If his request is denied, he will not have another opportunity to practice the religious exercise.

> Organ donation creates an opportunity for prisoners to give back to the community whose social norms have been violated and it provides an opportunity to help a fellow citizen who desperately needs help. Cultivating such a generosity of spirit can do much to rehabilitate criminals conditioned by a life of hardship who think only of themselves. The more that is being done to prepare an inmate for positive reentry into the community benefits all involved . . . Should the donor happen to be a death row inmate who is forced to be executed, allowing good to come out of an otherwise hopeless situation only heightens the benefit to the institution and the community in general.

CHRISTIAN LONGO, PRISONER ORGAN DONATIONS? A CONSIDERATION OF PRISON INMATES VS. THE REST OF SOCIETY FROM THE EXECUTED 4-5 (2010), *available at* http://www.gavelife.org/uploads/Longo_-_Inmate_Consent.pdf. *See also* Coleman, *supra* note 282, at 33.

291. Patton, *supra* note 3, at 429. *See also* Mark F. Anderson, *The Prisoner as Organ Donor*, 50 SYRACUSE L. REV. 951, 966 (2000) (arguing that organ donation helps prisoners progress in the rehabilitative by "[c]ultivating a generosity of spirit"); Cameron & Hoffenberg, *supra* note 278, at 729 (arguing that allowing a capital prisoner to donate his organs after execution gives him "the opportunity to help 'repay' his . . . debt to the society that . . . [he] damaged . . . .").

Although accommodating such a request poses significant administrative obstacles for prisons, society will likely benefit if willing, suitable inmates are permitted to posthumously donate their organs. Not only would society benefit from an increase in the pool of organs available for transplant, allowing post-execution organ donation also provides an additional justification for the administration of the death penalty—rehabilitation. Notwithstanding these benefits, a court reviewing such a claim should recognize the significance of its decision. To rule against the capital inmate would not only deprive him of his final chance to redeem himself before being forced to stand before God and accept responsibility for his choices during life; it would also cause his judgment day to occur all the more quickly.