REPORT TO GOVERNOR KATE BROWN ON CAPITAL PUNISHMENT IN OREGON

GENERAL COUNSEL OFFICE
OFFICE OF GOVERNOR KATE BROWN
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INTRODUCTION

Oregon Governor Kate Brown has tasked her General Counsel's office with preparing this Report on the history and present circumstances of Oregon's capital punishment regime.

No single report could ever credibly claim to be a "definitive work" on a subject that carries such legal, moral, sociological, and philosophical weight and history as does the death penalty. This Report is certainly not such a work. It may therefore prove useful at the outset to say what this Report seeks to accomplish, and what it does not attempt to accomplish.

This Report is intended to survey the landscape of capital punishment in Oregon. Specifically, this Report provides the Governor's Office with a brief contextualized account regarding:

1. The legal and practical history of Oregon's capital punishment system;
2. The present status of Oregon's capital punishment system, including its legal status and functional/operational challenges; and
3. An Oregon Governor's clemency powers as they may be exercised lawfully in the capital cases.

This Report is not intended to be the "final word" on any topic, and does not even attempt to engage with many of the well-conceived arguments and observations relating to the death penalty. There are many, many nuanced writings on this topic, and while this Report cites some of them, its purpose is narrowly focused to the subjects listed above. This Report does include a brief recitation of the arguments made most often by proponents and opponents of capital punishment, but does not adopt or endorse any of them.

This Report includes seven sections covering the following topics:

- An overview and brief history of the death penalty in Oregon

- An examination of the logistics of executions in Oregon
- An explanation for the length of time that passes before a death sentence can be carried out
- An exposition of the administration of lethal injections
- A snapshot of Oregon's death row today
- A survey of the policy debate on capital punishment
- An analysis of gubernatorial clemency authority

In short: this Report is directed toward providing an objective, summary account of the practical and legal history and current status of Oregon's capital punishment regime, and of the Oregon Governor's powers as they intersect (or potentially intersect) with that system. The purpose of this Report is to inform, not to make recommendations. It therefore takes no position on the wisdom, effectiveness, or moral standing of Oregon's constitutionally enacted death penalty system.

If there is one conceptual thread that runs through the entirety of this document, it is the unremarkable observation that the death penalty is an enormously complicated subject that is not well-suited to easy ideological line-drawing. It is a subject whose very premise incorporates deep human tragedy (the killing of a victim or victims), and then proceeds through an intricate series of technical legal machinations whose outcome may seem just or unjust either because of the particular facts of a case, or — often — a person's *ex ante* moral or intellectual beliefs. That the discussion that follows does not address in depth the very real human dimensions implicated by capital punishment is not to suggest that they are unimportant; to the contrary, popular views of these dimensions have been the driving force behind Oregon's death penalty history. Such dimensions are, however, outside the useful purpose of this Report, which is to help arm

decision-makers with the facts, law, and history, which may help provide a useful framework for grappling with this issue in the public arena.[1]

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Office of Oregon Governor Kate Brown
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[1] The General Counsel's office acknowledges and extends its abiding thanks to Hannah Hoffman, a student at the University of Michigan Law School, who assisted in the research and drafting of this Report, and Jennifer Andrew, who assisted in compiling, editing, and formatting this Report.

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I. OVERVIEW OF OREGON'S CAPITAL PUNISHMENT REGIME

This Section provides a brief discussion of the history and current state of Oregon's capital punishment regime. The following topics are discussed:

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C. Oregon's Death Sentences and Executions Since the Early Twentieth Century
D. A Present-Day Snapshot of Oregon's Death Row
E. A Discussion of "Aggravated Murder," The Only Death-Eligible Oregon Crime
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G. A Comparison of Oregon and Sister States with Regard to Historical and Contemporary Policies and Applications of Capital Punishment.

Several of these topics are examined in more detail elsewhere in this Report; the purpose of this Section is to provide some context for the more extensive discussions that follow.

A. Legal History of Capital Punishment in Oregon

Capital punishment was employed at the time of Oregon's statehood, and since then its legal status has swung back and forth between being authorized and proscribed multiple times. Usually, these swings have been effected by popular vote; less commonly, they have been the result of legislative or judicial action. Oregon's death penalty history has featured periods of significant activity as well of long stretches of near-dormancy. Capital punishment is presently authorized in the Oregon Constitution[2] as an available punishment only for aggravated murder.[3]

Oregon's territorial government allowed capital punishment, and it continued to be administered after statehood for some time without being explicitly codified.[4] The original state

[2] OR. CONST. art. I, § 40.
[3] "Aggravated murder" is defined by OR. REV. STAT. § 163.095 (2015).
[4] State v. Finch, 54 Or. 482, 495–96, 103 P. 505, 511 (1909).

constitution contained no provision for the death penalty;[5] in 1864, the Oregon Legislature adopted a statute explicitly authorizing it.[6] That statute remained in effect until 1914, when voters passed Measure 334[7] by just 157 votes.[8] Measure 334 wrote a prohibition of the death penalty into the Oregon Constitution for the first time.[9]

Oregon voters reversed this proscription six years later when they passed Measure 304[10] by a large margin,[11] amending the constitution to authorize capital punishment.[12] Measure 304 for the first time in Oregon's history tasked juries (rather than judges) with deciding whether to impose death sentences.[13]

The electorate changed its mind again in 1964: voters passed Measure 1,[14] which amended the Oregon constitution and repealed the death penalty for the second time since statehood.[15]

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[5] THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 401–04, 448, 456 (Charles H. Carey ed., 1926), *cited in* State v. Quinn, 290 Or. 383, 399, 623 P.2d 630, 640 (1981) (en banc).
[6] ORGANIC AND OTHER GENERAL LAWS OF OREGON 1843–1872 § 516, 407 (1874).
[7] OR. SEC'Y OF STATE, PROPOSED CONSTITUTIONAL AMENDMENTS AND MEASURES 58–59 (1914), *available at* http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1914m.pdf.
[8] *Oregon Election History*, OREGON BLUE BOOK, http://bluebook.state.or.us/state/elections/elections12.htm [hereinafter *Oregon Election History*].
[9] OR. CONST. art. I, § 36.
[10] OR. SEC'Y OF STATE, PROPOSED CONSTITUTIONAL AMENDMENTS AND MEASURES (WITH ARGUMENTS) TO BE SUBMITTED TO THE VOTERS OF OREGON 8–11 (1920), *available at* http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1920.pdf [hereinafter 1920 VOTERS' PAMPHLET].
[11] *Oregon Election History*, *supra* note 8.
[12] OR. CONST. art. I, §§ 37, 38.
[13] 1920 VOTERS' PAMPHLET, *supra* note 10, at 10.
[14] OR. SEC'Y OF STATE, STATE OF OREGON VOTERS' PAMPHLET 3–6 (1964), *available at* http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1964.pdf [hereinafter 1964 VOTERS' PAMPHLET]; *Oregon Election History*, *supra* note 8.
[15] OR. CONST. art. I, § 38.

In 1972, the U.S. Supreme Court declared the death penalty to be unconstitutional nationwide.[16] In 1976, the Court reversed course, and stated that the death penalty did not violate the federal constitution so long as certain safeguards (such as sentencing by jury) were in place.[17] These swings in federal constitutional law had no effect in Oregon because the death penalty had been forbidden under state law since Measure 1's passage in 1964.

In 1978, Oregon voters again reinstated capital punishment by passing Measure 8, which statutorily (but not constitutionally) authorized a death sentence upon certain findings of the trial judge (not the jury).[18] Specifically, Measure 8 (as codified at then-ORS 163.116) required a judge to determine — after the jury returned with a guilty verdict — whether a murder had been committed "deliberately"; if the judge made a finding of deliberateness, the judge could impose a death sentence.[19] In 1981, the Oregon Supreme Court held in *State v. Quinn* that this legal regime was unconstitutional because it denied defendants the right to have a jury determine whether each element of their alleged crimes was satisfied.[20] The *Quinn* Court did not decide the constitutionality of the death penalty itself.[21]

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[16] Furman v. Georgia, 408 U.S. 238 (1972).
[17] Gregg v. Georgia, 428 U.S. 153 (1976).
[18] *Oregon Election History, supra* note 8; OR. SEC'Y OF STATE, GENERAL VOTERS' PAMPHLET 48–51 (1978), *available at* http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1978.pdf.
[19] OR. REV. STAT. § 163.115(3)(1).
[20] State v. Quinn, 290 Or. 383, 406–07, 623 P.2d 630, 643–44 (1981) (en banc).
[21] *Id.*

With Measure 8 struck down, voters again wrote the death penalty back into the constitution in 1984 via Measures 6 and 7.[22] The vote was overwhelming, with 75 percent of voters casting ballots in favor of restoration of capital punishment.[23]

No capital punishment measures have appeared on the ballot since 1984. Referrals whose passage would constitutionally repeal the death penalty were introduced in the House of Representatives in 2013[24] and 2015,[25] each failed to make it out of committee.[26]

B. A Brief History of Oregon's Governors Exercising Their Clemency Powers in Death Penalty Cases

Amidst and between the series of constitutional, statutory, and judicial reversals and renewals of Oregon's capital punishment system during the twentieth century, Oregon's governors have employed their clemency powers in death cases numerous times. Democratic Governor Robert Holmes commuted three death sentences during his two-year term from 1956 to 1958.[27] Republican Governor Mark Hatfield commuted three death sentences in 1964,[28] after the passage of Measure 1 (which constitutionally repealed Oregon's death penalty). Both men staunchly opposed the death penalty as a matter of policy.[29] Hatfield was quoted in the 1964 voters' pamphlet as both opposing capital punishment and supporting Measure 1.[30]

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[22] OR. SEC'Y OF STATE, GENERAL ELECTION VOTERS' PAMPHLET 28–33 (1984), *available at* http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1984.pdf [hereinafter 1984 VOTERS' PAMHLET]; *Oregon Election History*, *supra* note 8.
[23] *Oregon Election History*, *supra* note 8.
[24] H.J.R. Res. 1, 77th Or. Legis. Assemb. (2013).
[25] H.J.R. Res. 5, 78th Or. Legis. Assemb. (2015).
[26] OREGON LEGISLATIVE INFORMATION SYSTEM, https://olis.leg.state.or.us/liz/2015I1.
[27] Eacret v. Holmes, 215 Or. 121, 123–24, 333 P.2d 741, 742 (1958) (en banc).
[28] Aliza B. Kaplan, *Oregon's Death Penalty: The Practical Reality*, 17 LEWIS & CLARK L. REV. 1, 11 (2013) (citing *History of Capital Punishment in Oregon*, OR. DEP'T OF CORR. (2000), https://www.oregon.gov/doc/OC/Pages/cap_punishment/history.aspx).
[29] *Id.* at 10–11.
[30] 1964 VOTERS' PAMPHLET, *supra* note 14.

In 2011, Democratic Governor John Kitzhaber became the latest governor to use his clemency powers to make a statement against capital punishment. Governor Kitzhaber issued a reprieve to forestall the imminent execution of Gary Haugen,[31] and announced that he would do the same for any other execution that was scheduled during his term of office. [32] This combination of reprieve-and-policy-statement has been referred to generally as a "moratorium" on the death penalty in Oregon. Governor Brown has been widely reported to have "continued" this moratorium, although she has undertaken no official action; this is based on her public statements that she would take time to determine her position on this issue, and would allow no executions while she so did.

Governor Kitzhaber explained that he intended for his reprieve to provoke a public conversation on Oregon's capital punishment system: "[T]he policy of this state on capital punishment is not mine alone to decide. It is a matter for all Oregonians to decide. And it is my hope — indeed, my intention – that my action today will bring about a long overdue reevaluation of our current policy and our system of capital punishment."[33]

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[31] Haugen elected to "volunteer" for execution in April 2011 by waiving all of his appeals and rights to post-conviction review, which led to the scheduling of his execution in late 2011. At the time, Haugen had been in prison for 30 years, originally for murdering his former girlfriend's mother. He received a death sentence in 2007 after he and a fellow inmate were convicted of killing another prisoner they believed had informed prison staff the duo was using drugs. Helen Jung, *Oregon Death Row Inmate Wants to Drop Appeals, Paving Way for First Execution in 14 Years*, OREGONIAN (May 9, 2011, 10:30 AM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/05/oregon_death_row_inmate_says_he_wants_to_drop_all_appeals_paving_way_for_first_execution_in_14_years.html.

[32] John Kitzhaber, Governor of Or., Statement on Capital Punishment (Nov. 22, 2011) (on file with the Office of Governor Kate Brown).

[33] *Id.*

C. Oregon Death Sentences and Executions Since the Early Twentieth Century

Oregon has sentenced relatively few people to death since statehood, and has actually executed fewer than half of those condemned. Since 1904 (the first year the Oregon Department of Corrections began keeping track), the state has sentenced 138 people to death.[34] Oregon has executed 60 of those sentenced to death (43 percent of those so sentenced). Executions were comparatively frequent until the early 1950s, but became a rarity during the latter half of the twentieth century. From 1948 to the present, Oregon has put nine people to death.[35]

Since 1962, Oregon has executed two inmates (Douglas Franklin Wright in 1996, and Henry Charles Moore in 1997),[36] both by lethal injection. [37] As with Gary Haugen in 2011, both men "volunteered" to be executed by waiving their rights to appeals and other legal challenges.[38] Oregon has not executed a non-volunteer in 54 years.[39]

A number of death row inmates have died on death row from non-execution causes. Two men committed suicide on the row in 1931.[40] Four people have died from natural causes since 1984.[41] The most recent inmate to die on death row was Mark Allen Pinnell, who died on December 14, 2015, at age 67 from chronic lung disease.[42]

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[34] *History of Capital Punishment in Oregon*, *supra* note 28.
[35] OR. DEP'T OF CORR., EXECUTIONS, https://www.oregon.gov/doc/OC/docs/pdf/exec_table.pdf. Oregon employed hanging as the means of execution for many years, and began using poison gas in 1939.
[36] *History of Capital Punishment in Oregon*, *supra* note 28.
[37] EXECUTIONS, *supra* note 35.
[38] *Id.*
[39] *Id.*
[40] *History of Capital Punishment in Oregon*, *supra* note 28.
[41] OREGON INNOCENCE PROJECT, *Death Penalty Study: Reversals* (June 13, 2016) (on file with the Office of Governor Kate Brown) [hereinafter *Reversals*].
[42] Maxine Bernstein, *Oregon's Oldest Death Row Inmate Mark Pinnell Died in Custody*, OREGONIAN (Dec. 14, 2015, 2:53 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/12/oregons_oldest_death_row_inmat.html.

Most people who have left death row have not done so at the end of their lives. Of the 44 people who have been sentenced to death but have not been executed and are not currently on death row, six have had their sentence commuted by a governor,[43] and at least 22 have had their convictions or sentences reversed by a court.[44] (The 10 people sentenced to death for whom official statistics do not account either died on the row from natural causes or were resentenced at some point before 1984.)[45]

D. A Present-Day Snapshot of Oregon's Death Row

Today, the 34 inmates on death row include 33 men and one woman; their ages range from 39 to 68.[46] Three death row inmates are black, three are Hispanic, and one is Native American; the remaining 27 are identified as white.[47] The inmates' death sentences come from the circuit courts of 11 counties around the state (see Figure 1).[48] Marion County, which houses the Oregon State Penitentiary, has sentenced the highest number of death row inmates (eight).[49]

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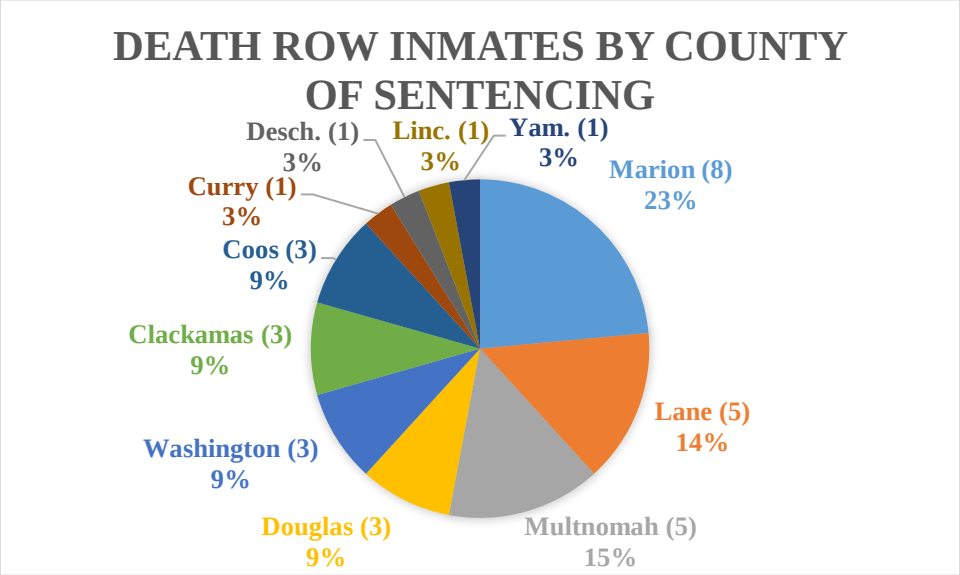
[43] *History of Capital Punishment in Oregon*, *supra* note 28.
[44] *Reversals*, *supra* note 41.
[45] *Id.*
[46] *Id.*
[47] OR. DEP'T OF CORR., CAPITAL PUNISHMENT IN OREGON, MISC. CAPITAL PUNISHMENT FACTS, https://www.oregon.gov/doc/OC/pages/cap_punishment/cap_punishment.aspx#Misc__Capital_Punishment_Facts [hereinafter OR. CAPITAL PUNISHMENT FACTS].
[48] *Id.*
[49] OR. DEP'T. OF CORR., OREGON OFFENDER SEARCH, http://docpub.state.or.us/OOS/intro.jsf [hereinafter OFFENDER SEARCH].

Figure 1:



E. Aggravated Murder — The Only Death-Eligible Crime in Oregon

"Aggravated murder" is the only crime in Oregon for which death is an available sentence.[50] Aggravated murder is a crime that meets the definition of murder (found at ORS 163.115), and which includes one or more "circumstances" stated in the aggravated murder statute.[51] Examples of circumstances which render a killing that would otherwise constitute murder an "aggravated murder" include: murder for hire; the victim being a child; the presence of torture prior to the murder; the victim being a law enforcement or judicial employee; multiple victims; or the perpetrator committing a murder after previously having been convicted of any past homicide.[52] Several inmates on death row — including Gary Haugen — previously had

[50] OR. REV. STAT. § 163.150 (2015).
[51] OR. REV. STAT. § 163.095 (2015).
[52] *Id.*

been convicted of murder and sentenced to life in prison, and received a capital sentence only after murdering a fellow inmate.[53]

To impose a sentence of death, Oregon statute requires a jury to make four findings: first, "[w]hether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;" second, "[w]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;" third, "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased;" and fourth, "[w]hether the defendant should receive a death sentence."[54] The judge must instruct the jury to consider mitigating circumstances like the defendant's age, prior criminal conduct, and pressure under which the defendant was acting at the time the offense was committed.[55] To reach a death sentence, the jury must give a unanimous, affirmative answer to each question; if the jury fails to answer "yes" to each question, a death sentence is forbidden and the presumptive sentence (from which the court may depart if mitigating circumstances warrant) is incarceration for life without possibility of parole.[56]

Of the 34 death row inmates, 21 were convicted of multiple counts of aggravated murder.[57] Just three were also convicted of sex crimes, but 11 were also convicted of murder or attempted murder for crimes other than those that landed them on death row.[58] Six are still in the process of directly appealing some element of their cases; 18 are in some stage of state post-

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[53] OREGONIAN, *Oregon Death Row*, http://www.oregonlive.com/pacific-northwest-news/index.ssf/oregon_death_row.html.
[54] OR. REV. STAT. § 163.150(1)(b) (2013).
[55] OR. REV. STAT. § 163.150(1)(c) (2013).
[56] OR. REV. STAT. § 163.150(1)(c)–163.150(2) (2013).
[57] OFFENDER SEARCH, *supra* note 49.
[58] *Id.*

conviction relief proceedings, and eight have exhausted all state-level challenges and have moved into the federal courts for federal habeas proceedings.[59]

F. Oregon's Lethal Injection Regime

Lethal injection is at present the exclusive means of execution available to Oregon.[60] The relevant statute requires what is referred to as a "three drug cocktail": "the punishment of death shall be inflicted by the intravenous administration of a lethal quantity of [1] an ultra-short-acting barbiturate in combination with [2] a chemical paralytic agent and [3] potassium chloride or other equally effective substances sufficient to cause death."[61] Oregon uses pentobarbital as the "short-acting barbiturate" and pancuronium bromide as the "paralytic agent."[62] Nembutal — the injectable form of pentobarbital — is manufactured by Danish pharmaceutical company Lundbeck, which announced in 2011 it would no longer sell the product in the United States to be used in executions.[63]

G. Comparing Oregon's Death Penalty Policy and Application to Other States and Nationwide Trends

1. Executions and New Death Sentences Are Trending Downward Nationwide

Executions nationwide are on a downward trajectory. The highest number of executions in the United States since 1976 was 98 in 1999.[64] In 2002, there were 71 executions nationwide;

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[59] OREGON INNOCENCE PROJECT, PENDING CAPITAL APPEALS & PCR (Apr. 14, 2016) (on file with the Office of Governor Kate Brown).
[60] OR. REV. STAT. § 137.473 (2013).
[61] *Id.*
[62] OR. CAPITAL PUNISHMENT FACTS, *supra* note 47.
[63] David Jolly, *Danish Company Blocks Sale of Drug for U.S. Executions*, N.Y. TIMES (July 1, 2011), *available at* http://www.nytimes.com/2011/07/02/world/europe/02execute.html?_r=0.
[64] DEATH PENALTY INFO. CTR., EXECUTIONS BY YEAR, http://www.deathpenaltyinfo.org/executions-year.

in 2010, there were 46; in 2011, there were 43; in 2013, there were 39; in 2014, there were 35; and in 2015, there were 28.[65]

As the number of executions per year goes down, a few states make up an increasingly higher percentage of the performed executions. For example, of the 39 executions nationwide in 2013, three states accounted for 29: Texas (16); Florida (7); and Oklahoma (6).

Similar trends are present for new death sentences. In 2015, there were 50 death sentences imposed nationwide;[66] in 2014, there were 73 such sentences; there were 140 such sentences in 2005; in 2000, there were 224; there were 315 such sentences in each of 1994 and 1996.[67]

2. Oregon Is Unusual in Its Inconstancy on Capital Punishment

Oregon stands out from other states in its ambivalence about the death penalty; most other states long ago settled the question one way or the other (or have changed their minds once and enduringly).

In 1847, Michigan became the first state to abolish capital punishment after completing its final execution in 1830, and voters later ratified the ban into the state constitution in 1963.[68]

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[65] *Id.*

[66] Emily Bazelon, *Where the Death Penalty Still Lives*, N.Y. TIMES (Aug. 23, 2016), *available at* http://www.nytimes.com/2016/08/28/magazine/where-the-death-penalty-still-lives.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=photo-spot-region&region=top-news&WT.nav=top-news&_r=1.

[67] DEATH PENALTY INFO. CTR., DEATH SENTENCES BY YEAR: 1976–2014, http://www.deathpenaltyinfo.org/death-sentences-year-1977-2009.

[68] Barton Deiters, *Why Has Michigan Opposed the Death Penalty for More Than 150 Years*, MLIVE (Apr. 17, 2012, 6:50 AM), http://www.mlive.com/news/grand-rapids/index.ssf/2012/04/why_has_michigan_opposed_the_d.html.

In 161 years, Michigan has never reinstated the death penalty, despite attempts during the 1980s to restore it.[69]

During the "Progressive Period" at the turn of the twentieth century, nine states (besides Oregon) repealed the death penalty.[70] Like Oregon, seven other states reversed this decision just a few years later.[71] Both Minnesota (1911)[72] and North Dakota (1915)[73] have proscribed capital punishment for more than a century. The other seven states that abolished the death penalty and then reversed the decision shortly thereafter have continued to allow capital punishment through the present day (excepting the brief period in the 1970s when the U.S. Supreme Court declared the death penalty unconstitutional nationwide).[74] Only Oregon voters spent the twentieth century reversing themselves on the issue repeatedly.[75]

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[69] *Id.*
[70] John F. Galliher et al., *Abolition & Reinstatement of Capital Punishment During the Progressive Era & Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538 (1992).
[71] *Id.* at 541.
[72] Nick Woltman, *This Bungled St. Paul Hanging Caused Minnesota to Abolish the Death Penalty*, TWIN CITIES PIONEER PRESS (Feb. 12, 2016), http://www.twincities.com/2016/02/12/from-the-archives-bungled-st-paul-hanging-was-minnesotas-last-execution/.
[73] N.D. SUP. CT., THE DEATH PENALTY: N.D. V. U.S., https://www.ndcourts.gov/court/news/deathpenalty.htm.
[74] *See* ARIZ. DEP'T OF CORR., ARIZONA DEATH PENALTY HISTORY, https://corrections.az.gov/public-resources/death-row/arizona-death-penalty-history; TENN. DEP'T OF CORR., DEATH PENALTY IN TENNESSEE, https://www.tn.gov/correction/article/tdoc-death-penalty-in-tennessee. DEATH PENALTY INFO. CTR., COLORADO, http://www.deathpenaltyinfo.org/colorado-1; DEATH PENALTY INFO. CTR., KANSAS, http://www.deathpenaltyinfo.org/kansas-1; DEATH PENALTY INFO. CTR., MISSOURI, http://www.deathpenaltyinfo.org/missouri-1; DEATH PENALTY INFO. CTR., SOUTH DAKOTA, http://www.deathpenaltyinfo.org/south-dakota-0; DEATH PENALTY INFO. CTR., WASHINGTON, http://www.deathpenaltyinfo.org/washington-1;
[75] Washington did reverse its death penalty one more time. The statute allowing capital punishment was abolished in 1975, but voters passed an initiative allowing for it in November of the same year. DEATH PENALTY INFO. CTR., WASHINGTON, http://www.deathpenaltyinfo.org/washington-1.

The state with perhaps the least ambivalent approach to the death penalty — Texas — has executed 805 people since 1930, 508 of whom were put to death after 1977.[76]

3. Oregon Stands Out for How Little It Uses Capital Punishment

The average number of executions carried out by the 43 states[77] that have allowed capital punishment (at least at some point) since 1930 is 121.[78] Oregon has executed 21 people since 1930. Only 11 states have executed fewer people than Oregon during those years, and four of those have since abolished the death penalty.[79] Since the U.S. Supreme Court deemed capital punishment to be constitutional in 1976, Oregon has executed just two people — fewer than all but four death penalty states, two of which have abolished their death penalty laws within the last five years.[80] And while some states allow capital punishment for crimes ranging from treason to kidnapping to drug trafficking, Oregon allows it only in cases of aggravated murder.[81]

4. The Demographics of Oregon's Death Row Are Similar to Most Other States

Where Oregon does not stand out is in the racial and gender disparities present on its death row. Two percent of the state's population is black,[82] but black defendants make up nine percent of death row and five percent of those executed.[83] Given Oregon's low numbers — 34

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[76] *Id.*
[77] Includes the District of Columbia.
[78] Capital punishment is currently legal in 30 states. NAT'L CONFERENCE OF STATE LEG., STATES & CAPITAL PUNISHMENT (Sept. 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx.
[79] *Id.*
[80] DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.
[81] TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT: 2013 STATISTICAL TABLES (2014) [hereinafter STATISTICAL TABLES].
[82] U.S. CENSUS BUREAU, QUICKFACTS (July 1, 2014), https://www.census.gov/quickfacts/table/PST045215/41,00.
[83] FACTS ABOUT THE DEATH PENALTY, *supra* note 80.

inmates on death row[84] and 60 executed in total — the disparity does not appear to be as profound, numerically. Three executed inmates have been black,[85] and three death row inmates are as well.[86] Three death row inmates are Hispanic, and one is Native American.[87]

The national numbers are similar. Black defendants, in particular, are widely overrepresented in death penalty sentencing and executions on a national level.[88] About 13 percent of the American population in 2014 identified as black,[89] but 43 percent of death row inmates and 34.5 percent of those executed are black defendants.[90] (An overrepresentation of between 2.5 and four times, just as in Oregon.)

Men also are dramatically overrepresented on death row in Oregon and elsewhere. Just one woman sits on death row in Oregon, compared with 33 men.[91] In fact, in 2013, nine jurisdictions (eight states and the federal government) had death rows with only one woman.[92] Of the 2,979 people sentenced to death in America in 2013, just 56 were women (1.8 percent).[93] Of those women, 68 percent were white and 25 percent were black.[94]

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[84] OR. DEP'T OF CORR., SUMMARY OF DEATH ROW INMATES (Mar. 16, 2016), *available at* https://www.oregon.gov/doc/OC/docs/pdf/death_row_inmates.pdf.
[85] EXECUTIONS, *supra* note 35.
[86] OR. CAPITAL PUNISHMENT FACTS, *supra* note 47.
[87] *Id.*
[88] FACTS ABOUT THE DEATH PENALTY, *supra* note 80.
[89] QUICKFACTS, *supra* note 82.
[90] FACTS ABOUT THE DEATH PENALTY, *supra* note 80.
[91] *Id.*
[92] STATISTICAL TABLES, *supra* note 81.
[93] *Id.*
[94] *Id.* (The U.S. Department of Justice did not break out statistics on how many female death row inmates are Hispanic or Native American.)

5. Oregon's History of Commuted Death Sentences Is Not Unusual

Oregon's history of commutations during the twentieth century is also not particularly unusual. Commutations of the death penalty have been not infrequent, and multiple governors have issued blanket commutations of an entire death row. Before 1976, six governors (including Holmes and Hatfield) commuted the sentences of all the inmates on death row in their respective states.[95]

In the years since the U.S. Supreme Court reinstated the death penalty in 1976, there have been 280 commutations.[96] There have been six blanket commutations by governors in five states, and many more commutations of individual inmates.[97] The governors who commuted the entire death row in their respective states have been primarily Democrats — of the six governors, just one was a Republican.[98] The only state where those commutations took place that still allows capital punishment is Ohio.[99] However, since 2011, Governor John Kasich has commuted the sentences of five inmates[100] and issued a reprieve for those scheduled for execution because the state has been unable to buy the drugs it needs to perform the lethal injection.[101]

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[95] These commutations were granted in Oregon, Oklahoma, Tennessee, Massachusetts, and Arkansas. DEATH PENALTY INFO. CTR., CLEMENCY, http://www.deathpenaltyinfo.org/clemency.
[96] Commutations do not include reprieves, such as the ones issued by Govs. Kitzhaber and Colorado Governor John Hickenlooper, which do not lessen or eliminate a sentence, merely delaying the execution of the death penalty. *Id.*
[97] *Id.*
[98] Gov. George Ryan of Illinois, a Republican, commuted the entire death row in his state in 2003. The other commuting governors were: Gov. Toney Anaya (New Mexico), Gov. Richard Celeste (Ohio), Gov. Jon Corzine (New Jersey), Gov. Pat Quinn (Illinois), and Gov. Martin O'Malley (Maryland). *Id.*
[99] Ohio has executed 52 people since 1977.
[100] OHIO DEP'T. OF REHAB. & CORR., CAPITAL PUNISHMENT IN OHIO, http://www.drc.ohio.gov/public/capital.htm.
[101] Alan Johnson, *Ohio Revises Death Penalty Protocol, Will Delay Executions*, COLUMBUS DISPATCH (Jan. 9, 2015), http://www.dispatch.com/content/stories/local/2015/01/08/death-penalty-protocol.html.

II. PERFORMING AN EXECUTION IN OREGON

The last time the Oregon Department of Corrections performed an execution was in 1997, but the department came within two weeks performing Gary Haugen's execution in late 2011 (which was postponed by Governor Kitzhaber's reprieve). That means that the staff of the DOC have planned and prepared for three executions in 20 years. These three events give a view into what performing an execution would entail if Oregon were to resume executions.

The execution of Douglas Franklin Wright in 1996 was, by all accounts, the most difficult of the three to plan. At the time, Oregon had not executed anyone in 32 years and had never used lethal injection as a method of execution.[102] The statute governing executions requires the superintendent of the Oregon State Penitentiary to oversee the process of preparation and execution, and it therefore fell to then-OSP Superintendent Frank Thompson to create a plan for executing Wright.[103]

Thompson had to start "from scratch" on creating an execution protocol.[104] He had moved to Oregon from Arkansas, where he ran several prisons (although he had never directly supervised an execution), so he modeled Oregon's protocol on the one Arkansas used.[105] He had

[102] Leeroy Stanford McGahuey was the last execution before Wright in 1996; he was put to death using lethal gas in 1964. *History of Capital Punishment*, *supra* note 28.
[103] Interview with Frank Thompson, Retired Superintendent, Or. State Penitentiary, in Salem, Or. (June 30, 2016) [hereinafter Thompson Interview].
[104] *Id.* The statute itself specifies only that an execution will be done by lethal injection, supervised by the superintendent of the penitentiary, and in the presence of a designated list of people. It is the administrative rule that outlines the procedures and specific details of how an execution is actually performed; it was this rule that Thompson and his staff rewrote to accommodate lethal injection. OR. REV. STAT. § 137.473 (2015); OR. ADMIN. R. §§ 291-024-0005–291-024-0090.
[105] Thompson Interview, *supra* note 103. Arkansas's protocol was modeled on Texas, which means Oregon's method of execution is relatively similar to the one used in Texas.

been at the penitentiary for less than two years when he began reworking its execution rule and leading its staff into unknown territory.[106]

Thompson personally recruited most of the members of the execution team from among the penitentiary staff.[107] A veteran himself, Thompson chose almost exclusively former members of the military, regardless of their personal opinions on capital punishment.[108] He believed the training one receives in the military — training that prepares soldiers to kill — would help members of the execution team guard against the psychological ramifications of carrying out the death penalty.[109]

To prepare for the executions, Oregon sent small teams to California (in the 1990's) and Texas (in 2011) to observe states' execution protocols. Former Department of Corrections Director Max Williams remembers being struck by how routine executions were in Texas: down the hall from the execution chamber was a room like a closet, with the white jumpsuits for future condemnees hung in a row like shrouds, labeled with names and dates of people scheduled to be put to death.[110] Former Superintendent Jeff Premo remembers that the execution they witnessed began at 6:00 p.m., and the whole team (including Texas corrections officials) were in a steak restaurant having dinner by 7:00 p.m.; the execution went that smoothly in the Texas prison.[111]

In preparation for the Haugen execution, Superintendent Premo made some changes to the execution protocol, most notably the relief to officers assigned to observe the condemned

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[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Interview with Max Williams, Former Dir., Or. Dep't of Corr., in Portland, Or. (July 5, 2016) [hereinafter Williams Interview].
[111] Interview with Jeff Premo, Former Superintendent, Or. State Penitentiary, in Salem, Or. (June 16, 2016) [hereinafter Premo Interview].

inmate (discussed above). He also changed the time of the execution from midnight to 7:00 p.m. in an effort to prevent it from becoming a spectacle for (often intoxicated) members of the public, which had been a problem 15 years earlier.[112] Superintendent Premo also refused to allow the execution to become a media spectacle, to the best of his ability. His staff turned down multiple interview requests from Oprah, and they kept a tight lid on media access.[113] "I was clear I would not make this a dog and pony show," he said.[114]

The staff also faced a challenge in finding an executioner and health care professionals to insert the IVs into Haugen's arms and declare the time of death.[115] Premo couldn't employ prison doctors because they are meant to have a close relationship with the inmates, who are their patients, and it would be morally fraught for a doctor to kill one of his own patients.[116] Further, medical professionals generally do not wish to perform executions; the American Medical Association recommends against it.[117] It was therefore very difficult to find medical professionals who were willing to help.[118] They ultimately recruited a former military doctor and

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[112] *Id.* Premo believed the earlier start time would give people less opportunity to go out to a bar first and rile themselves up to come down to the prison. This was not an idle concern: Former DOC deputy director Ben DeHaan said he left the penitentiary at 2 a.m. after the Wright execution in 1996, only to find the street outside full of hundreds of people. They were cheering and yelling – many had their children in tow – and DeHaan described it as akin to a "tailgate party." Some people had signs saying "light 'em up!" The "carnival atmosphere" that night was "more disturbing to (him) than anything." Telephone Interview with Ben DeHaan, Former Deputy Dir., Dep't of Corr., in Salem, Or. (July 7, 2016).

[113] Premo Interview, *supra* note 111.

[114] *Id.*

[115] *Id.*

[116] In fact, the DOC's own policies now require that "[c]apital punishment services shall be provided by people not otherwise associated with the delivery of health care within Oregon Department of Corrections' facilities. Or. Dep't of Corr., Health Services Section, Policy and Procedure #P-I-07, *available at* https://www.oregon.gov/doc/OPS/HESVC/docs/policies_procedures/Section_I/PI07%20Executions%202015.pdf.

[117] *See infra*, note 255.

[118] Premo Interview, *supra* note 111.

two nurses from outside the Salem area.[119] The executioner, who was unpaid, was recruited as well, and Premo had to train him or her.[120] The pair met repeatedly at a South Salem hotel where Premo showed the executioner how to empty syringes into a watermelon.[121]

But the staff had to contend with more than logistics. Thompson worried about the psychological impact of killing someone. It isn't natural for people to want to kill each other, he said, especially not in the absence of a war or an imminent threat to someone's safety.[122] Even for people who agree with capital punishment in theory, the actual act of putting someone to death can be very damaging, Thompson said.[123] He hoped that military training would provide an ameliorative effect for some of that damage.

Thompson was right to worry. Studies of correctional officers involved in executions have shown that they develop sophisticated coping mechanisms to distance themselves from the act.[124] Anecdotal evidence shows that when those coping mechanisms fail, the results can be dire. Members of execution teams have reported grief, alcoholism, shame, and even suicide by fellow officers after being involved in putting inmates to death.[125]

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[119] *Id.*
[120] *Id.* Premo was (and remains) the only person besides the executioner to know his or her identity, so no one else could perform the training.
[121] *Id.*
[122] Thompson Interview, *supra* note 103.
[123] *Id.*
[124] *See* Amanda Gil et al., *Secondary Trauma Associated With State Executions: Testimony Regarding Execution Procedures*, 34 J. PSYCHIATRY & L. 25 (2006); Michael J. Osofsky et al., *The Role of Moral Disengagement in the Execution Process*, 29 L. & HUM. BEHAV. 371 (2005); Michael J. Osofsky & Howard J. Osofsky, *The Psychological Experience of Security Officers Who Work With Executions*, 65 PSYCHIATRY 358 (2002).
[125] *See, e.g.*, Alex Hannaford, *Inmates Aren't the Only Victims of the Prison Industrial Complex*, NATION (Sept. 16, 2014), https://www.thenation.com/article/inmates-arent-only-victims-prison-industrial-complex/; Vivian Giang, *Ex-Death Row Guard Describes the Chilling Hours Before an Execution*, BUS. INSIDER (Feb. 13, 2013), http://www.businessinsider.com/what-its-like-to-work-with-prisoners-on-death-row-2013-2; Sara Rimer, *Working Death Row: A Special Report – In the Busiest Death Chamber, Duty Carries its Own Burdens*, N.Y. TIMES (Dec. 17, 2000),

Within Oregon, participants in the executions of the 1990's remember experiencing this impact. The team assigned to observe the condemnee continuously for days before the execution experienced "Stockholm Syndrome," in which the officers became attached to the inmate about to die.[126] The effect was so memorable that Premo decided in 2011 that he would shorten the length of observation time and add members to the observation team during the Haugen execution in order to lessen the impact on officers.[127] Other staff members reported similar mental conflict: they understood executions to be part of their jobs, but they felt real pain in having to do it.[128]

Joe DeCamp, a former corrections officer (now administrator), played an integral role in planning the 1996 execution.[129] He struggled with it afterward.[130] Even though he had seen disturbing violent incidents as a corrections officer and always knew that executing someone was a possibility, he said it was hard to deal with after the fact.[131]

"You want to be prideful in your work, but how can you be proud that you killed somebody? That still bothers me," he said. "[N]o one was proud of the responsibility."[132]

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http://www.nytimes.com/2000/12/17/us/working-death-row-special-report-busiest-death-chamber-duty-carries-its-own.html?_r=0.

[126] Interview with Perrin Damon, Former Commc'ns Manager, Or. Dep't of Corr., in Salem, Or. (June 22, 2016) [hereinafter Damon Interview]; Premo Interview, *supra* note 111.

[127] Premo Interview, *supra* note 111.

[128] Damon Interview, *supra* note 126; Thompson Interview, *supra* note 103; Interview with Joe DeCamp, Adm'r, Dep't of Corr. Office of Gov't Efficiencies, in Salem, Or. (June 10, 2016) [hereinafter DeCamp Interview].

[129] *Id.* DeCamp was in charge of writing the "post orders," which were the detailed instructions for each officer involved in the execution. He likened his role to being the director of a play and assigning stage directions.

[130] *Id.*

[131] *Id.*

[132] *Id.*

The practical impact of the executions was largely manageable for the agency, albeit intense for the people directly involved. The staff practiced the execution over and over, drilling until they could do it almost reflexively.[133] They had to retrofit a room in the prison into an execution chamber, and they had to consider details ranging from the radio frequency to be used during the execution to how to accommodate protesters on the night of the event.[134] The communications team worked with the Federal Aviation Administration to restrict the airspace over the prison to prevent media helicopters from flying overhead.[135] They also outfitted a room in the prison with phone lines and other equipment the media would need to cover the execution.[136]

Few of those problems ended up being terribly expensive to solve. The greatest "cost" of an execution is in staffing resources. The Haugen execution (planning of which built on what had been done before in 1996 and 1997) would have required 197 people[137] working at the penitentiary during the night of the event, in addition to the 143 people who would have been working anyway on any typical night. Those extra staff would have included 21 officers to monitor the perimeter of the prison, 21 officers stationed in the death row housing unit, 18 "media day escorts" (which include 15 correctional officers and three public information staff), 15 members of the prison's tactical team (which operates like a SWAT team), 10 officers on the

[133] *Id.*; Damon Interview, *supra*, note 126; Thompson Interview, *supra* note 103.
[134] DeCamp Interview, *supra* note 128.
[135] Damon Interview, *supra* note 126.
[136] *Id.*
[137] This number includes 24 "external partners" – staff from the Oregon State Police, Salem Police Department, and other agencies.

tie-down team for the condemnee, three decoy executioners plus the actual executioner, and others.[138]

Neither the completed executions nor the aborted Haugen execution appeared to have a significant impact on the inmates or on the penitentiary. Both Thompson and Premo said they made an effort to keep things running as normally as possible, and that the most profound reaction came from the other men on death row in both cases.[139] The prison went into lockdown on the nights of the executions (and would have for Haugen), and Premo said he thought it important to serve a good dinner was served, show something popular on TV, and make chaplains available to talk to, in order to keep the inmates as comfortable as possible.[140] In all three cases, there were no riots or violence, although there was some relational tension between the inmates on death row.[141]

Premo's staff had worked for more than a year to prepare for the Haugen execution when Governor Kitzhaber issued a reprieve.[142] The staff put away plans the next day and have not revisited them.[143] If an execution were scheduled today, Premo estimated it would take about six

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[138] These numbers reflect the planning for the Haugen execution but are also very close to the staffing used during the 1996 execution of Douglas Franklin Wright and the 1997 execution of Harry Charles Moore. Staff at the penitentiary used those earlier executions as models for Haugen's execution, with only a few modifications.
[139] Thompson Interview, *supra* note 103.
[140] The dinner for inmates during the Wright execution was fried chicken. Damon said she remembers it distinctly because several inmates cracked a morbid joke about wanting executions more often if it meant getting their favorite dinner. Damon Interview, *supra* note 126.
[141] Thompson Interview, *supra* note 103; DeCamp Interview, *supra* note 128.
[142] Premo Interview, *supra* note 111.
[143] *Id.* This may have been the one real mistake in the process, according to Premo. The staff had worked very hard on the execution project and never received any debriefing or recognition for that work, which he said they deserved to have. At the very least, all that time spent planning how to kill someone should have been acknowledged because it was a difficult undertaking for many of the people involved.

months to plan.[144] Many of the people who worked on the Haugen team are still employed by the corrections department and remember the plan from five years ago.[145] And it was a good plan, Premo said: “If it were a bank heist, we would have got away with the money.”[146]

[144] *Id.*
[145] *Id.*
[146] *Id.*

III. WHY IT TAKES SO LONG TO EXECUTE A CAPITAL DEFENDANT

Last year, the Oregon Supreme Court decided *State v. Guzek*,[147] which is known as "*Guzek VI*" because the 2015 decision is the sixth time the Court has reviewed the 1988 conviction and sentence of Randy Lee Guzek, a death row inmate. Mr. Guzek's initial appeal of his 1988 conviction and sentence reached the Court in 1990. In that appeal — *Guzek I* — the Court affirmed Mr. Guzek's conviction but remanded the case for a new penalty-phase trial.[148] With two subsequent appeals to the Oregon Supreme Court and one appeal to the U.S. Supreme Court, Mr. Guzek won two additional penalty-phase retrials — to date, he has had a total of four penalty-phase trials. In *Guzek VI*, the Oregon Supreme Court finally affirmed Mr. Guzek's sentence. If he gets no further review from the U.S. Supreme Court, his direct appeals will finally be concluded. He may now — 28 years after his conviction — begin pursuing the next phase of challenges, post-conviction relief.[149]

Mr. Guzek's case exemplifies the delay (to say nothing of enormous resource commitment) built into Oregon's application of the death penalty. Mr. Guzek murdered Rod and Lois Houser on June 28, 1987; nearly 30 years later, his appeals continue with no end in sight.

The delay of executions like Mr. Guzek's is attributable, in large part, to state and federal laws governing review of death sentences and their underlying convictions. This section will account for why it takes so long before a convicted murder like Mr. Guzek is executed.

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[147] 358 Or. 251 (2015).

[148] ORS 163.150(1)(a) provides that a defendant found guilty of aggravated murder is subject to "a separate sentencing proceeding . . . before the trial jury" to determine the sentence. The statute directs the jury to make findings of fact relating to the crime and the defendant's continuing dangerousness, among other things. OR. REV. STAT. § 163.150(1)(b).

[149] "[A capital d]efendant may petition for post-conviction relief on any grounds stated in the post-conviction relief statutes after he exhausts his direct appeal rights." State v. Montez, 309 Or. 564, 606, 789 P.2d 1352, 1378 (1990) (citing OR. REV. STAT. § 138.510(1)).

In summary, there are five phases of legal process between the commission of an aggravated murder and an execution. The first phase is trial court proceedings, which consists of pretrial discovery and motion practice, trial, and post-trial motion practice. This first phase can take three years or more from the time of the crime, a period stretched even longer in the event of a pretrial ("interlocutory") appeal. The second phase is the direct appeal to the Oregon Supreme Court. When one factors in motions for reconsideration and petitions for certiorari to the U.S. Supreme Court, this second phase can take three to four years or longer. The third phase is the petition for post-conviction relief, trial court proceedings to adjudicate that petition, and appeals. This phase, from filing of the petition to conclusion of all appeals, can take six to eight years or more. The fourth phase is federal habeas corpus review. This phase, including all appeals (or attempts at appeals), can take four to five years or more. The final step after all avenues for review are exhausted and before an execution is performed is the death warrant hearing, which can add up to a year to the process. When one builds into this timeline the passage of time between phases (within the applicable statutes of limitation), it is virtually impossible for an execution to be performed in less than about 20 years from the time of the crime. And in the event that a reviewing court finds error at any stage, the process of trial, appeal, post-conviction relief, and habeas corpus review begins anew.

A. Pretrial and Trial Proceedings

The duration of trial court proceedings in capital cases is variable. The main constraint on the duration of trial court proceedings is defendants' speedy trial rights. In Oregon, the speedy trial requirement is both statutory and constitutional. Oregon statute requires that defendants be

brought to trial "within a reasonable period of time[.]"[150] This statute implements the state constitution's command that "justice shall be administered . . . without delay."[151] The parallel provision of the federal constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial."[152] There is no fixed rule for applying these statutory and constitutional limits; rather, the Oregon Supreme Court applies a fact-specific factor test to decide whether a pretrial delay is unreasonable.[153] In one case, the Court held that a five-year pretrial delay was constitutionally infirm.[154] Although state and federal speedy trial rights constrain the duration of pretrial proceedings to some extent, speedy trial rights are often waived by defendants. Further, delays caused by the defendant are not subject to the speedy-trial constraint.[155] The only constraint on delays caused by the defendant are those imposed in any given case by the trial judge (or, where applicable, appellate court).

Pretrial discovery, motion practice, and trial proceedings in capital cases are notoriously drawn out, even in optimal circumstances, because all participants go to great pains to avoid errors given the expectation of decades of appellate review. Defense counsel often tries to pursue every possible lead and bring every conceivable motion to preserve as many appellate issues as possible. Likewise, counsel for the State and the trial judge often leave no stone unturned in an effort to foreclose bases for reversal on appeal. Accordingly, it is typical for pretrial discovery and motion practice (even in the absence of a pretrial appeal, discussed below) to take more than

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[150] OR. REV. STAT. § 135.747; *see also* State v. Harberts, 331 Or. 72, 80, 11 P.3d 641, 647 (2000).
[151] OR. CONST. art. I, § 10.
[152] U.S. CONST. amend. VI.
[153] Harberts, 11 P.3d at 647 ("Determining whether the state did so is a fact-specific inquiry that requires the court to examine the circumstances of each particular case.").
[154] *Id.*
[155] *See, e.g.*, United States v. Bufalino, 683 F.2d 639, 646 (2d Cir. 1982) (delay caused by defendant does not result in speedy trial violation).

two years and for the trial itself to take several months. Even after a trial is concluded, capital cases typically involve additional months of motion practice before appellate proceedings begin.[156]

B. Pretrial Appeals

Pretrial proceedings can be protracted by interlocutory appeals and mandamus petitions. Oregon statute permits the State to appeal several types of pretrial (interlocutory) orders, including orders suppressing evidence, orders dismissing the indictment, and orders returning or restoring things seized.[157] In capital cases, appeals of orders suppressing evidence or dismissing the indictment go directly to the Oregon Supreme Court.[158] By statute, these interlocutory appeals must be concluded "no later than one year after the date of oral argument,"[159] but oral argument may be scheduled several months or as late as a year after the appeal is filed.

Mandamus is also a path to appellate review before trial proceedings are concluded. The writ of mandamus is a procedural mechanism to compel government officials, including trial judges, to perform an act that the law specifically requires.[160] The Oregon Supreme Court accepts a mandamus petition when there is no "plain, speedy and adequate remedy in the ordinary course of the law,"[161] that is, when the right at issue can be vindicated only by the Court's immediate attention. For instance, in *State v. Pena*,[162] a capital defendant used

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[156] *See, e.g.*, OR. REV. STAT. § 136.500 (motion in arrest of judgment); OR. REV. STAT. § 136.525 (motion based on insufficient evidence); OR. REV. STAT. § 136.535 (motion for new trial).
[157] OR. REV. STAT. § 138.060; *see also* State v. Hattersley, 294 Or. 592, 597, 660 P.2d 674, 676 (1983).
[158] OR. REV. STAT. § 138.060(2).
[159] OR. REV. STAT. § 138.060(3).
[160] OR. REV. STAT. § 34.110.
[161] OR. REV. STAT. § 34.110.
[162] 345 Or. 198, 191 P. 3d 659 (2008).

mandamus to obtain appellate review of a pretrial order denying a motion to disqualify the trial judge. Likewise, in *Turner v. Frankel*,[163] a capital defendant used mandamus to obtain appellate review of a trial judge's decision to permit a retrial after declaring a mistrial. In both cases, mandamus review was appropriate because an appeal after trial would not have saved the defendant from undergoing the burdens of what they argued was a fundamentally illegitimate trial. Unlike the interlocutory appeals permitted by ORS 138.060, there are no statutory time limitations on the Court's disposition of mandamus petitions.

In summary, it is typical for as many as three or more years to lapse between the commission of a crime and the conclusion of trial proceedings. This delay is caused by: pre-indictment investigation, pretrial discovery, pretrial motion practice, trial, and post-trial motion practice. Pretrial appellate proceedings (including mandamus) can add a year or more of additional delay.

Once trial proceedings are concluded, the real waiting begins.

C. Direct Review by the Supreme Court — The First Stage of Post-Trial Proceedings

Oregon law requires that "[t]he judgment of conviction and sentence of death . . . is subject to automatic and direct review by the Supreme Court."[164] Automatic and direct review by the Oregon Supreme Court expedites the appellate process by bypassing the Court of Appeals. However, a survey of recent direct death-sentence appeals to the Oregon Supreme Court reveals that the typical time from entry of the trial judgment to issuance of the appellate decision is approximately three years. This is most likely attributable to the Court's view that "[c]apital

[163] 322 Or. 363, 908 P. 2d 293 (1995).
[164] OR. REV. STAT. § 138.012.

cases require [its] most vigilant and deliberative review."[165] Also, the automatic-and-direct-review procedure can lengthen the appellate process because appellate review is mandatory in capital cases; it cannot be waived by the defendant.[166]

On direct appeal, the Oregon Supreme Court reviews both the conviction and death sentence. Because capital cases require a separate penalty-phase trial, and because that phase requires specific findings by the jury and is governed by a complex set of cases and legal standards, decisions that affirm the conviction but remand the case to the trial court for new penalty-phase trials are common. For instance, as mentioned above, Mr. Guzek has obtained three direct-appeal remands of his sentence for a total of four penalty-phase trials. Adding at least several months to the back-end of the Oregon Supreme Court's review, defendants are entitled to seek reconsideration of the Court's decision.[167]

Once the direct appeal to the Oregon Supreme Court is concluded, the defendant can seek further review of federal constitutional issues by the U.S. Supreme Court. The U.S. Supreme Court's review is discretionary and, in the vast majority of cases, the U.S. Supreme Court declines review. The process of petitioning for a writ of certiorari (i.e., asking the U.S. Supreme Court to accept an appeal) itself takes several months and extensions of time, plus extended Court deliberation on the petition, can drag out the process up to a year.[168] If the U.S. Supreme

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[165] State v. Guzek, 322 Or. 245, 264, 906 P.2d 272, 284 (1995) (*Guzek* II) (en banc).
[166] State v. Wagner, 305 Or. 115, 190–91, 752 P. 2d 1136, 1183 (1988) (*Wagner* I) (en banc) (Linde, J., dissenting).
[167] ORAP 9.25.
[168] For example, in the case of Mr. Guzek, the Oregon Supreme Court issued its decision in *Guzek III* on March 4, 2004, and denied reconsideration on September 8, 2004. Mr. Guzek then petitioned the U.S. Supreme Court for certiorari, which the Court granted on April 25, 2005 — nearly eight months after the Oregon Supreme Court's disposition of the appeal. The U.S. Supreme Court heard Mr. Guzek's appeal the following term and issued a decision on February 22, 2006. The U.S. Supreme Court's decision required further review by the Oregon Supreme Court, which rendered its decision a year later, on February 15, 2007. Thus, Mr. Guzek's

Court decides to hear the appeal, it typically takes an additional year for the Court to issue its decision.[169]

Thus, in a best-case-scenario for the State, where the conviction and sentence are affirmed and the U.S. Supreme Court denies certiorari, the direct appeal phase adds at least three to four years to the process. If the Oregon Supreme Court or U.S. Supreme Court finds some error in trial proceedings, a remand, further trial court proceedings, and successive appeal will at least double the delay.

D. Post-Conviction Relief — The Second Stage of Post-Trial Proceedings

Once the direct appeal is concluded and the conviction and sentence are affirmed, the defendant may begin the second type of challenge to his or her conviction and sentence: a post-conviction relief proceeding.[170] The petition for post-conviction relief is a procedural mechanism for a convicted defendant, after exhausting all direct appeals, to collaterally attack his or her conviction.[171] Stated differently, while the direct appeal focuses on particular legal errors in the trial (such as evidentiary rulings), the petition for post-conviction relief provides an opportunity for a court to consider any systemic or fundamental unfairness giving rise to the conviction or sentence. A common basis for petitions for post-conviction relief is ineffective assistance of counsel.

By statute, the four bases for post-conviction relief are: (1) "[a] substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's

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successful petition for certiorari added two and a half years to his direct appeal (not counting the resulting further trial court proceedings).

[169] *See, e.g., id.*

[170] *See* OR. REV. STAT. § 138.510(3)(b) (stating that a post-conviction relief petition must be filed within two years of the date the direct appeal is final).

[171] *See* OR. REV. STAT. §§ 138.510–138.680.

rights," (2) "[l]ack of jurisdiction of the court to impose the judgment [of conviction]," (3) unlawful or unconstitutional sentence; and (4) "[u]nconstitutionality of the statute making criminal the acts for which petitioner was convicted."[172]

Although post-conviction relief proceedings are colloquially characterized as part of the defendant's appeals, technically, the proceeding is not an appeal but instead an entirely distinct civil action. The petition takes a form similar to a civil complaint and is filed against "the official charged with the confinement of petitioner," usually, the prison superintendent.[173] The petition is filed in the trial court.[174] It is governed by the Oregon Rules of Civil Procedure and, accordingly, when the petition's merits turn on genuine factual disputes, the trial court adjudicates the petition with a trial.[175] Normally, the Oregon Department of Justice defends the conviction.[176]

As is typical for complicated civil matters, post-conviction relief trial court proceedings typically take several years to conclude. There are two reasons for this. First, civil discovery and motion practice take time. The defendant-petitioner must gather evidence from court records, attorney files, and, often, must take depositions. Given the sensitivity of capital cases in particular, trial judges are loathe to rush parties through discovery. Second, in the post-conviction relief phase, there are few incentives to move quickly. The defendant's interests favor delaying implementation of the sentence; the State's attorneys, who have a full plate of other litigation, have little incentive to hasten the process. Accordingly, extensions of time are common.

[172] OR. REV. STAT. § 138.530(1).
[173] OR. REV. STAT. §§ 138.560–138.580.
[174] OR. REV. STAT. § 138.560(1).
[175] OR. REV. STAT. §§ 138.560(1), 138.630.
[176] OR. REV. STAT. § 138.570.

Once post-conviction relief trial court proceedings are concluded, the defendant-petitioner is entitled to appeal.[177] Unlike the direct appeal, the post-conviction relief appeal goes first to the Oregon Court of Appeals. Although subsequent review by the Oregon Supreme Court is discretionary, the Court very often accepts review of capital post-conviction relief appeals, given their relative importance and high stakes. Defendant-petitioners can seek further review by the U.S. Supreme Court.

It is increasingly common for petitioners on death row whose petitions for post-conviction relief finally have been denied to file second (or successive) petitions for post-conviction relief in an attempt to assert and litigate claims that they neglected to raise in the first petition.[178] If the trial court denies or dismisses the petition as procedurally barred, the petitioner can pursue an appeal through the Court of Appeals, adding years to the process.

Although there is no rule-of-thumb for how long the post-conviction relief process takes, it would not be uncommon for trial court proceedings and appellate proceedings each to take three to five years (in addition to the pre-filing period of up to two years).[179] In other words, a typical petition for post-conviction relief, from filing through appellate judgment, could easily take six to ten years or more. As mentioned, if a petitioner files a second (or successive) petition for post-conviction relief, even if the petition is denied as procedurally barred, litigating this type of petition through appeal adds additional years to the process. Of course, if the petition is

[177] OR. REV. STAT. § 138.650.
[178] *See, e.g.*, Hayward v. Premo, 281 Or. App. 113 (2016); Cunningham v. Premo, 278 Or. App. 106 (2016).
[179] "A petition [for post-conviction relief] must be filed within two years of . . . the date the appeal is final in the Oregon appellate courts." OR. REV. STAT. § 138.510(3)(b). Most commonly, capital defendants file a petition for post-conviction relief much sooner than the conclusion of the two-year limitation period.

ultimately granted and a new trial is ordered,[180] the entire process, including direct appeals, starts anew.

E. Habeas Corpus — The Third Stage of Post-Trial Proceedings

Once all state-law challenges have been exhausted, a defendant may petition the federal trial court for a writ of habeas corpus.[181] Habeas corpus is a federal court procedure by which incarcerated persons can seek relief from imprisonment based on violations of their federal constitutional rights. In other words, habeas corpus is a second opportunity, after a petition for post-conviction relief is denied, to collaterally attack a conviction and sentence based on federal constitutional rights.

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), intended to streamline habeas corpus challenges to capital convictions and sentences. Unfortunately, AEDPA has had precisely the opposite effect; habeas litigation has multiplied since 1996.[182] AEDPA strictly limits the grounds for habeas petitions by permitting courts to grant relief only when the underlying state-court decision is contrary to settled U.S. Supreme Court case-law or based on a factual determination that is patently unreasonable. However, these narrower grounds are complex and hard to apply, which has given way to significant litigation

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[180] *See* OR. REV. STAT. § 138.520 (specifying a new trial as one type of relief that can be granted in a post-conviction relief proceeding).

[181] 28 U.S.C. § 2241(c); *see also* 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless . . . the applicant has exhausted the remedies available in the courts of the State . . . .").

[182] *See* Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN'S L. REV. 615, 662 (2004) ("AEDPA's habeas provisions, designed to streamline the habeas process and avert federal scrutiny of state-court 'adjudications on the merits,' in practice frequently prolong that process and lead federal courts to scrutinize state-court decisions at length in order to adhere to the Byzantine requirements mandated by AEDPA and Supreme Court precedent.").

about the AEDPA standards themselves. Thus, while AEDPA has succeeded in limiting the number of habeas petitions that are granted, it has failed in hastening executions.

With permission from the federal trial court, the defendant-petitioner can conduct discovery in a habeas proceeding.[183] Evidentiary hearings are permitted when material facts are disputed or when the federal trial court determines that factual hearings in state court were insufficient.[184]

Once federal trial court proceedings are concluded, the defendant-petitioner may appeal to a federal appellate court, but only if he or she obtains a "certificate of appealability" from the trial or appellate court. To obtain a certificate of appealability, the defendant-petitioner must show "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[185] Although a certificate of appealability may ultimately be denied in many cases, these cases often involve rounds of briefing at the federal trial and appellate courts on whether the requirements to appeal are met. And even when a certificate of appealability is denied at both the federal trial and appellate courts, the defendant-petitioner may seek review of the denial by the U.S. Supreme Court.[186] Thus, imposing this additional procedural hurdle may not actually shorten, and may in some cases extend, the habeas litigation process.

Of course, when a certificate of appealability is granted, the defendant-petitioner receives a full appeal to the federal appellate court and, thereafter, may seek review of that court's decision by the U.S. Supreme Court.

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[183] Rules Governing Section 2254 Cases in the United States District Courts, Rule 6(a).
[184] Rules Governing Section 2254 Cases in the United States District Courts, Rule 8.
[185] Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal citation omitted) (interpreting 28 U.S.C. § 2253(c), which requires "a substantial showing of the denial of a constitutional right").
[186] Hohn v. United States, 524 U.S. 236, 253 (1998).

Once habeas proceedings are concluded, a defendant may file a second or "successor" habeas petition. To prevail on this kind of habeas petition, the defendant-petitioner must show either that the claim is based on a new, previously unavailable rule of constitutional law or that newly-discovered facts "could not have been discovered previously through the exercise of due diligence."[187] The defendant-petitioner must seek permission from the federal appellate court to file a new habeas petition on these bases. Here, too, while substantively rigid, these legal standards have given way to significant litigation about their meaning and application.

As with the petition for post-conviction relief, there is no rule-of-thumb for how long the habeas process takes. Given extensions of time and the possibility of discovery and an evidentiary hearing, a reasonable estimate is that a habeas petition will take two years at each of the federal trial and appellate courts, not including the initial statutory one-year filing deadline.[188]

F. The Death Warrant Hearing

In 1999, the Oregon Legislature created an additional judicial step before an execution may occur: the death warrant hearing.[189] The hearing's purpose is to ensure that all avenues for appeal have been exhausted or, if not, that the defendant is knowingly and voluntarily foregoing avenues of appeal available to him or her. Also, defendants can use the hearing as an opportunity to raise and litigate whether they are no longer competent and hence cannot be executed[190] and any other case-specific challenge to execution (such as the planned method of execution).

[187] 28 U.S.C. § 2244(b)(2)(B)(i) & (ii).
[188] 28 U.S.C. § 2244(d).
[189] OR. REV. STAT. § 137.463.
[190] OR. REV. STAT. § 137.463(4); Ford v. Wainwright, 477 U.S. 399 (1986).

The statute provides that the hearing shall take place within 30 days after the effective date of the appellate judgment, that is, after the Oregon Supreme Court's automatic and direct review is concluded.[191] At the hearing, the trial judge must determine whether the defendant intends to pursue any further challenges to the sentence or conviction, including a petition for certiorari to the U.S. Supreme Court, post-conviction relief, and federal habeas corpus review.[192] Although the statute does not explicitly say so, its implication is that a death warrant will issue only upon a finding that the defendant has exhausted all challenges to the sentence or conviction or that the defendant knowingly and voluntarily has forgone available challenges. If the trial court issues a death warrant, the warrant must specify an execution date not less than 90 days nor more than 120 days following the effective date of the appellate judgment.[193] A death warrant hearing can occur no more often than once every six months;[194] accordingly, if a question exists about whether the defendant has exhausted all available challenges or is knowingly and voluntarily waiving available challenges, the death warrant hearing can cause significant additional delay before implementation of the sentence.

G. The Longer It Takes, the Longer It Takes

An irony of capital appeals is that their duration compounds. As time passes, new legal standards emerge from cases before the Oregon Supreme Court, Ninth Circuit Court of Appeals, and U.S. Supreme Court. And when a new legal standard emerges, opportunities for new appeals are created. For instance, in *Atkins v. Virginia*, the U.S. Supreme Court decided that capital sentences of the mentally disabled violate the Eighth Amendment's prohibition of cruel and

[191] OR. REV. STAT. § 137.463(2).
[192] OR. REV. STAT. § 137.463(4)(b)−(c).
[193] OR. REV. STAT. § 137.463(5).
[194] OR. REV. STAT. § 137.463(6)(b)(B).

unusual punishment. This decision gave way to new litigation of the Oregon capital case *Pratt v. Armenakis*.[195] In *Pratt*, the Oregon Court of Appeals declined to consider the merits of the defendant's *Atkins* argument for procedural reasons but invited the defendant to assert the argument in a "successive" (that is, a new) post-conviction relief petition to be filed in the trial court.[196] Every few years, another decision like *Atkins* is handed down, creating new bases for appeal in Oregon capital cases. Thus, ironically, the longer a capital case pends on appeal, the more likely new bases for appeal will emerge, giving way to yet more appeals and more delay. In other words, the longer capital appeals take, the longer yet they will take.

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Given the above analysis, it is no wonder that the only two executions in Oregon in the last half-century have been of volunteers. For a defendant who pursues all avenues to challenge his conviction and sentence, in the State's best-case-scenario that all challenges fail and no new bases for appeal arise, an execution probably cannot occur sooner than about 20 years after the crime was committed. This is because — again, in the State's best-case-scenario that all challenges fail — the following timeline is a reasonable estimate of how quickly each stage of the process will unfold:

Commission of crime through conclusion of trial proceedings (including discovery, motion practice, trial, and post-trial motions, but not including a pretrial appeal or mandamus)	Three to five years
Direct appeal to Oregon Supreme Court, petition for rehearing, and petition for certiorari to U.S. Supreme Court	Three to four years
Time to file petition for post-conviction relief	Two years

[195] Pratt v. Armenakis, 199 Or. App. 448, 455, 112 P.3d 371, 375, *opinion adhered to on reconsideration*, 201 Or. App. 217, 118 P.3d 821 (2005).
[196] *Id.* at 455 n.5.

Post-conviction relief trial court proceedings (including discovery, trial, and post-trial motions)	Three to four years
Post-conviction relief appeals (including Oregon Court of Appeals, Oregon Supreme Court, and petition for certiorari to U.S. Supreme Court)	Three to four years
Time to file petition for writ of habeas corpus	One year
Habeas corpus litigation (including discovery and evidentiary hearing, litigation of certificate of appealability, and petition for certiorari to U.S. Supreme Court)	Four to five years
Death warrant hearing and time to execution	Six months to one year
TOTAL (approximation):	19.5 to 26 years

This timeline applies only to the improbable case that garners no reversals and no additional appeals based on newly discovered evidence or new case-law. If at any stage of the process, any reviewing court determines that reversal or relief is warranted, the likely result is a new trial (even if just a penalty-phase trial), which starts the whole process again. With just one or two successful challenges, defendants can keep the process of appeals going indefinitely.

IV. LETHAL INJECTION

A. History of Lethal Injection in the United States

The concept of execution by lethal injection was first considered seriously in Oklahoma in 1977.[197] The death penalty had just been reinstated[198] after a brief period of being found to be unconstitutional by the U.S. Supreme Court.[199] Oklahoma State Representative Bill Wiseman[200] and State Senator Bill Dawson sought a more humane method of execution than hanging, firing squad, electrocution, or lethal gas.[201] Wiseman and Dawson teamed up with then-state medical examiner Jay Chapman to create a sequence of drugs that would kill a person painlessly.[202] Senator Dawson then reached out to the head of Oklahoma Medical School's Department of Anesthesiology, who, during a single phone call, recommended specific drugs to fit Chapman's proposed sequence. Chapman and the department head were the only medical professionals consulted on this novel lethal injection protocol.[203]

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[197] Brief for the Fordham University School of Law, Louis Stein Center for Law and Ethics as Amicus Curiae in Support of Petitioners at 16, Baze v. Rees, 553 U.S. 35 (2008) (No. 07-5439) [hereinafter Fordham Brief].

[198] Robbie Byrd, *Informal Talks Opened Door to Lethal Injection*, HUNTSVILE ITEM (Oct. 3, 2007), http://www.itemonline.com/news/local_news/informal-talks-opened-door-to-lethal-injection/article_c48882d1-39b2-5613-820c-eda28193d4e0.html.

[199] Furman v. Georgia, 408 U.S. 238, 239 (1972) (the death penalty as applied violates the Eighth Amendment); Gregg v. Georgia, 428 U.S. 153, 169 (1976) (the death penalty "does not invariably violate the Constitution").

[200] Later in life, Wiseman expressed regret for his role in developing lethal injection, and eventually became an advocate for abolishment of the death penalty. Vince Beiser, *A Guilty Man: He Wanted to Make Capital Punishment Kinder. Instead, He Believes, He Made it Easier*, MOTHER JONES (Sept. 1, 2005), http://www.motherjones.com/politics/2005/09/guilty-man.

[201] Byrd, *supra* note 198; Fordham Brief, *supra* note 197, at 17.

[202] Byrd, *supra* note 198.

[203] *Id.* The Oklahoma Medical Association and its members refused to participate, citing the Hippocratic Oath). *See also* STEVEN H. MILES, THE HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE xiii (2004).

The Oklahoma statute that codified Chapman's cocktail was left intentionally vague; it required a "lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent . . . ."[204] The barbiturate was intended to act as an anesthetic to render the inmate unconscious (and eventually cause death), and the paralytic agent was to prevent involuntary movement.[205] After the law was passed, Chapman worked with the Oklahoma Department of Corrections to fine-tune the cocktail, eventually adding a third drug, potassium chloride, to stop the heart.[206] This combination of drugs became the primary method of execution in the United States.

Texas passed its lethal injection law the day after Oklahoma.[207] Although Texas officials considered using a single execution drug — at the recommendation of a veterinarian — Texas (like most death penalty states) ultimately adopted Oklahoma's three-drug cocktail.[208] On December 7, 1982, Texas used the three-drug cocktail in the first-ever execution by lethal injection in the United States.[209]

B. Lethal Injection in the States[210]

Between 1977 and 2002, 37 states adopted lethal injection as an — and for some, the only — authorized means of execution.[211] Currently, 30 states allow capital punishment by lethal

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[204] Fordham Brief, *supra* note 197, at 21 (citing S.B. 10, 36th Leg., 1st Sess. (Okla. 1977)).
[205] Baze v. Rees, 553 U.S. 35, 57 (2008).
[206] Fordham Brief, *supra* note 197, at 22–23.
[207] *Id.* at 21–22; Byrd, *supra* note 198.
[208] Byrd, *supra* note 198.
[209] Fordham Brief, *supra* note 197, at 28.
[210] The status of execution by lethal injection is constantly changing around the country, but these are the most current numbers as of the date of this report.
[211] Baze v. Rees, 553 U.S. 35, 44 (2008); Fordham Brief, *supra* note 197, at 24; Byrd, *supra* note 198.

injection;[212] 16 states permit execution only by lethal injection.[213] Twenty-three states still employ some version of Oklahoma's three-drug cocktail; eight have used a one-drug method in executions, and six more have announced plans to move to a single drug method.[214]

The above numbers portray a somewhat misleading picture of the current state of things "on the ground" with respect to lethal injection. For example, although 30 states allow for execution by lethal injection, many of those states are unable or unwilling to carry them out. Executions are definitively on hold in 12 states.[215] Aside from gubernatorial moratoria and stays not directly related to lethal injection,[216] executions are on hold in ten states for review of lethal injection protocols.[217] For example, California has been revising its lethal injection protocol since it was ruled unconstitutional in 2006;[218] to date, no proposed protocol has passed both substantive and administrative muster.[219] In Kentucky, the state where the U.S. Supreme Court's

[212] DEATH PENALTY INFO. CTR., STATE BY STATE LETHAL INJECTION, http://www.deathpenaltyinfo.org/state-lethal-injection [hereinafter DPIC LETHAL INJECTION].
[213] *Id.*; DEATH PENALTY INFO. CTR., METHODS OF EXECUTION, AUTHORIZED METHODS, http://www.deathpenaltyinfo.org/methods-execution [hereinafter DPIC METHODS].
[214] DPIC METHODS, *supra* note 213.
[215] DEATH PENALTY INFO. CTR., DEATH PENALTY IN FLUX, http://www.deathpenaltyinfo.org/death-penalty-flux.
[216] The governors of Colorado, Washington, and Pennsylvania have also put a halt to executions in their states but did not cite lethal injection isues. DEATH PENALTY INFO. CTR., STATEMENTS FROM GOVERNORS OF PENNSYLVANIA, WASHINGTON, COLORADO, AND OREGON HALTING EXECUTIONS, http://www.deathpenaltyinfo.org/node/5792.
[217] Arizona, California, Kentucky, Louisiana, Montana, Nevada, North Carolina, Ohio, Oklahoma, and Tennessee. DEATH PENALTY IN FLUX, *supra* note 215.
[218] Morales v. Tilton, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006).
[219] CAL. DEP'T OF CORR. & REHAB., THE HISTORY OF CAPITAL PUNISHMENT IN CALIFORNIA, http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html [hereinafter CAL. CAPITAL PUNISHMENT HISTORY].

foremost lethal injection case originated,[220] the Department of Corrections has been revising its lethal injection protocol (and executions have been stayed) since 2014.[221]

In addition, at least six states have publicly admitted to running out of the drugs used in lethal injections, and are struggling to purchase more.[222] South Carolina's supply expired in 2013, and in 2016, the Director of South Carolina's Department of Corrections stated, "We've tried to go everywhere we could go, and because the anti-death-penalty groups have been so good at stopping this, they won't sell us the drugs. Once we tell them we're DOC, the conversation stops there."[223] Over the next three years, Ohio has more than two dozen executions scheduled, the first set for January 12, 2017, but its Department of Rehabilitation and Correction reports that it cannot obtain the drugs necessary to carry out even a single execution.[224]

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[220] Baze v. Rees, 553 U.S. 35 (2008). *See* discussion *infra* Part IV.D.2.

[221] Will Wright, *The Death Penalty in Kentucky: Stayed and Uncertain*, KY. CTR. FOR INVESTIGATIVE REPORTING (Aug. 12, 2016), http://kycir.org/2016/08/12/the-death-penalty-in-kentucky-stayed-and-uncertain/.

[222] California, Indiana, Nebraska, Ohio, and South Carolina. *Id.* Arkansas stated its supply of vecuronium bromide, its paralytic of choice, ran out June 30, 2016, *Arkansas Running Out of Time to Execute Prisoners*, CBS NEWS (May 13, 2016, 11:22 AM), http://www.montereyherald.com/article/ZZ/20160513/NEWS/160517400, but it obtained a new supply the next month. *Arkansas Execution Drugs Apparently Made by Pfizer Subsidiary Despite Ban*, GUARDIAN (July 25, 2016, 6:03 PM), https://www.theguardian.com/us-news/2016/jul/25/arkansas-execution-drugs-apparently-made-by-pfizer-subsidiary-despite-ban.

[223] Allison M. Roberts, *Future of Executions in SC Remains Uncertain*, SPARTANBURG HERALD J. (Sept. 3, 2016, 8:22 PM), http://www.goupstate.com/news/20160903/future-of-executions-in-sc-remains-uncertain.

[224] Alan Johnson, *Ohio, Facing January Execution Date, Has Yet to Find Supply of Lethal-Injection Drugs*, COLUMBUS DISPATCH (June 27, 2016, 6:45 AM), http://www.dispatch.com/content/stories/local/2016/06/26/ohio-yet-to-find-supply-of-lethal-injection-drugs-facing-january-execution-date.html.

C. Lethal Injection in Oregon

Oregon adopted lethal injection by statute in 1984, using the "standard" three-drug cocktail.[225] It is the only method of execution currently authorized under state law.[226] ORS 137.473 provides that "[t]he punishment of death shall be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent and potassium chloride or other equally effective substances sufficient to cause death."[227]

The Oregon Department of Corrections' administrative rules effecting the lethal injection statute require that the superintendent of a prison where an execution is to take place, upon receipt of the death warrant, "assemble the supplies and prepare the equipment necessary to effect the execution . . . ."[228] The Superintendent is also charged with selecting the executioners.[229] Four days prior to the scheduled execution, the Assistant Director for Institutions and the Assistant Director for Programs "jointly work to ensure that the equipment and supplies for the lethal injection are collected and deposited in secure storage located within the execution room."[230] On the day before the execution, prison officials "ensure that a medically trained individual will prepare and secure the necessary syringes with the lethal solutions."[231] Backup syringes are also prepared and secured. In addition, prison officials "ensure that a medically trained individual will be available to insert an intravenous catheter(s) into an appropriate vein(s) of the condemned inmate."[232] On the day of the execution, the special

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[225] 1984 VOTERS' PAMPHLET, *supra* note 22, 28 – 33.
[226] OR. REV. STAT. § 137.473 (2013).
[227] *Id.*
[228] OR. ADMIN. R. 291-024-0016(2)(b).
[229] OR. ADMIN. R. 291-024-0016(3).
[230] OR. ADMIN. R. 291-024-0025(6).
[231] OR. ADMIN. R. 291-024-0060(2).
[232] OR. ADMIN. R. 291-024-0060(3).

security team escorts the inmate from a special death-watch cell to the execution room, and restrains the inmate on the gurney. Once the inmate is restrained on the gurney, the rules require that "[a] trained person(s) will connect the heart monitor machine to the inmate[,]" then "[a] medically trained person(s) will insert/connect intravenous catheters for lethal injection."[233] The straps, intravenous catheters, and injection equipment are all inspected again, at which point "the Superintendent shall signal the executioner(s) to begin injection of lethal solutions by syringe(s) into the injection port of the intravenous catheters."[234] The Department's administrative rules do not state the specific drugs that are to be used. However, the Department's non-rule protocol calls for pentobarbital as the short-acting barbiturate, pancuronium bromide as the paralytic agent, and potassium chloride to stop the heart.[235] Oregon most recently executed men in 1996 and 1997, the state's only two executions by lethal injection, and both died within 10 minutes of the first injection.[236]

D. Practical and Legal Challenges to Lethal Injection

1. Practical Challenges

States with a lethal injection statute like Oregon's face a host of practical difficulties. First, as noted, companies that make the drugs originally used in the three-drug cocktail now refuse to sell them to states for use in executions. Second, the alternatives to those now-unavailable original drugs are largely untested and executions using them have produced

[233] OR. ADMIN. R. 291-024-0071(4)(b)–(c).
[234] OR. ADMIN. R. 291-024-0080(1), (3).
[235] OR. CAPITAL PUNISHMENT FACTS, *supra* note 47.
[236] Bryan Smith, *Wright's Final Minutes: Clean, Calm and Quiet,* OREGONIAN (Sept. 7 1996); J. Todd Foster, *Moore's Son, Ex-Wife View His Body, Try to Remember Killer's Good Side*, OREGONIAN (May 17, 1997). The 1997 execution was delayed 16 minutes while prison staff searched for a secondary IV site. Foster, *supra* note .

gruesome, drawn-out deaths. Finally, the people who perform executions are rarely medical professionals with adequate equipment to administer the drugs effectively.

a. Access to Lethal Injection Drugs

States originally used sodium thiopental as the "ultrashort-acting barbiturate," but it has become nearly impossible to buy for use in lethal injections in the United States. In 2011, Hospira, the sole American manufacturer of sodium thiopental, announced it would stop producing it altogether.[237] The European Union[238] placed an export ban on the sale of both sodium thiopental and its most common alternative, pentobarbital, for use in lethal injections in 2011.[239] Pentobarbital has also become increasingly difficulty to buy. Before the EU export ban in 2011, the Danish pharmaceutical company Lundbeck, which produced the only injectable version of pentobarbital available in the United States, banned the drug's sale to prisons. [240] In 2016, pharmaceutical giant Pfizer announced it would end the sale of all drugs, including sodium thiopental, used for lethal injections.[241]

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[237] Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J. (Jan. 22, 2011, 12:01 AM), http://www.wsj.com/articles/SB10001424052748704754304576095980790129692.

[238] The European Union has banned capital punishment among its 27 member states, and nearly all members of the Council of Europe have abolished it as well. The exception is Russia, which has not ratified the proposition explicitly banning the death penalty. However, the country has imposed a moratorium on the death penalty since 1996. The only European country to still carry out executions is Belarus. CORNELL L. SCH., DEATH PENALTY WORLDWIDE, EUROPE: AN ALMOST DEATH PENALTY-FREE CONTINENT, http://blog.deathpenaltyworldwide.org/2012/04/europe-an-almost-death-penalty-free-continent.html.

[239] Juergen Baetz, Associated Press, *America's Lethal Injection Drug Crisis Starts in Europe*, BUS. INSIDER (Feb. 18, 2014, 6:30 AM), http://www.businessinsider.com/americas-lethal-injection-drug-crisis-starts-in-europe-2014-2.

[240] Jolly, *supra* note *63*.

[241] Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), http://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html?_r=0. The effects of the various bans have shown in Oregon's assisted-suicide program as well. Pentobarbital has historically been one of two medications prescribed to patients who wish to die

b. The Use of Alternative Lethal Injection Drugs Has Been Problematic

Difficulties obtaining the original drugs have led a handful of states to experiment with other combinations of drugs, to varying results. Four states have used midazolam as the first drug in lethal injection executions, twice with two other drugs and twice with only one additional drug, and three of the four executed inmates exhibited significant complications.[242] For example, Arizona's 2014 execution of Joseph Wood was by all accounts horrific.[243] Arizona officials used midazolam in combination with hydromorphone, and members of the media, prison staff, and families of both Wood and his victims watched as Wood snorted and gasped for breath for nearly two hours until he finally died.[244] After Wood had struggled for more than an hour, the Federal Public Defender's Office filed an emergency motion asking the Ninth Circuit Court of Appeals[245] to stop the execution on the grounds that it violated Wood's Eighth Amendment right

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under the 1997 law, and doctors have found it increasingly difficult to find the drug for assisted-death patients. *See, e.g.*, Nigel Jaquiss, *Penalized by the Death Penalty*, WILLAMETTE WEEK (May 20, 2014), *available at* http://www.wweek.com/portland/article-22574-penalized-by-the-death-penalty.html.

[242] DPIC LETHAL INJECTION, *supra* note 212. The U.S. Supreme Court implicitly approved of Oklahoma's use of midazolam as the first in a three-drug cocktail in *Glossip v. Gross*, 135 S. Ct. 2726, 2737–38 (2015).

[243] Bob Ortega, Michael Kiefer & Mariana Dale, *Execution of Arizona Murderer Takes Nearly Two Hours*, ARIZ. REPUBLIC (July 24, 2014, 12:24 AM), http://www.azcentral.com/story/news/local/arizona/2014/07/23/arizona-execution-botched/13070677/.

[244] *Id.*

[245] The Ninth Circuit was already familiar with Wood's case, as it had reversed the district court's denial of Wood's request for a preliminary injunction (later vacated by the Supreme Court). Chief Judge Alex Kozinski dissented from the court's denial of rehearing en banc, and, in doing so, nearly predicted Wood's outcome: "Subverting medicines meant to heal the human body to the opposite purpose was an enterprise doomed to failure. . . . Whatever happens to Wood, the attacks will not stop and for a simple reason: The enterprise is flawed. Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful . . . . But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf." Wood v. Ryan, 759 F.3d 1076, 1102–03 (9th Cir.) (Kozinski, C.J., dissenting), *vacated*, 135 S. Ct. 21 (2014).

against cruel and unusual punishment. Wood died before the court could rule on the motion.[246] Also in 2014, Ohio's execution of Dennis McGuire produced a similar result; after executioners administered high doses of midazolam and hydromorphone, McGuire snorted, coughed, and apparently continued to breathe for more than 15 minutes before dying.[247] In 2015, Ohio announced that it would stop using the drug combination in executions.[248]

c. Medical Expertise and Equipment

Another challenge to safe and effective execution by lethal injection is the lack of available medical equipment and the often ambiguous role the medical professionals involved in an execution are supposed to play. First, the rooms where the executions are carried out (which of course are in prisons, not hospitals or medical offices) frequently lack necessary equipment. Both a paramedic and a doctor participated in Oklahoma's 2014 botched execution of Clayton Lockett, however the standard IV equipment was deficient and they lacked the backup equipment necessary when that failed.[249] The medically trained executioners attempted to insert an intravenous needle for almost an hour, and the drugs were nonetheless unintentionally pushed into Lockett's tissue rather than into his vein.[250] As a result, Lockett groaned, writhed, and tried

[246] Ortega et al., *supra* note 243.
[247] Max Ehrenfreund, *Dennis McGuire Executed in Ohio with New Combination of Lethal Drugs*, WASH. POST (Jan. 16, 2016), https://www.washingtonpost.com/national/dennis-mcguire-executed-in-ohio-with-new-combination-of-lethal-drugs/2014/01/16/612e22a2-7ede-11e3-93c1-0e888170b723_story.html.
[248] Matt Pearce, *Ohio Won't Use Controversial Drug Combo for Executions Anymore*, L.A. TIMES (Jan. 8, 2015, 4:26 PM), http://www.latimes.com/nation/la-na-ohio-execution-drugs-20150108-story.html.
[249] Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015), http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/.
[250] *Id.*

to lift his head off the gurney until he died 43 minutes after administration of the first drug. [251] Similarly, during Florida's 2006 execution of Angel Nieves Diaz, the lethal injection drugs were pushed into the surrounding tissue, causing Diaz chemical burns and prolonging his death for 34 minutes.[252] Chapman himself, the Oklahoma state medical examiner who helped develop the three-drug protocol, has criticized the delivery of his three-drug cocktail in botched executions.[253]

Furthermore, even when medical professionals are present, their roles are not always clear, especially when the execution does not proceed as planned. During Lockett's execution, the participating doctor believed his role would be limited to checking for consciousness and pronouncing the time of death. When the paramedic was unable to place the IV, she looked to him, and his role went from merely observing to actively facilitating the execution.[254] During one California execution, which was eventually stayed, anesthesiologists refused to participate

[251] Kate Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett Was a "Bloody Mess,"* GUARDIAN (Dec. 13, 2014, 11:04 AM), https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess.

[252] *Botched Execution Likely Painful, Doctors Say*, NBC NEWS (Dec. 16, 2006, 10:29 PM), http://www.nbcnews.com/id/16241245/ns/us_news-crime_and_courts/t/botched-execution-likely-painful-doctors-say/#.V-Bdc_krJpg; Ben Crair, *Photos from a Botched Lethal Injection*, NEW REPUBLIC (May 29, 2014), https://newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida. Florida never disclosed the qualifications of the execution team member who placed the needle in Diaz, so it is unknown whether it was a medical professional. Crair, *supra*.

[253] Elizabeth Cohen, *Lethal Injection Creator: Maybe It's Time to Change Formula*, CNN (2007), http://www.cnn.com/2007/HEALTH/04/30/lethal.injection/ ("It seems ridiculous to me to be trying to find a vein when everyone's inside the chamber, feeling nervous and fiddling around trying to find the vein. . . . That's just ludicrous to me.").

[254] Stern, *supra* note 249.

when it became clear they were expected to ensure the prisoner remained unconscious, rather than simply to observe.[255]

2. Legal Challenges

Over the past two decades, death row inmates in multiple states have brought suits arguing that execution by lethal injection is unconstitutional under the Eighth Amendment of the U.S. Constitution, which prohibits "cruel and unusual punishment."[256] Oregon's courts have never decided a substantive challenge to the state's lethal injection protocol. [257]

In *Gregg v. Georgia*, the U.S. Supreme Court held that capital punishment is constitutional under the U.S. Constitution.[258] Lawsuits challenging lethal injection therefore generally argue that a state's specific execution protocols — that is, *how* the state executes — violate the Eighth Amendment's constitutional prohibition against cruel and unusual punishment.

Two U.S. Supreme Court cases address lethal injection protocols, *Baze v. Rees* (2008)[259] and *Glossip v. Gross* (2015).[260] In both cases, the petitioners were death row inmates awaiting execution by lethal injection.[261] The inmates brought declaratory suits seeking to have the lethal

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[255] Morales v. Tilton, 465 F. Supp. 2d 972, 976 (N.D. Cal. 2006). The anesthesiologists cited the American Medical Association's recommendation that its members not participate in executions. AM. MED. ASS'N, CODE OF ETHICS, OPINIONS, § 9.7.3 ("as a member of a profession dedicated to preserving life when there is hope of doing so, a physician must not participate in a legally authorized execution").
[256] U.S. CONST. amend. VIII.
[257] The Oregon Supreme Court held that lethal injection was constitutional in 1990, but that ruling was grounded in part by a finding that the petitioner who brought the challenge did not cite any case law or other sources to support his claim. The holding also came at a time when Oregon had never executed anyone by lethal injection. State v. Moen, 309 Or. 45, 97–98, 786 P.2d 111, 143 (1990).
[258] 428 U.S. 153, 187 (1976).
[259] 553 U.S. 35, 46 (2008).
[260] 135 S. Ct. 2726 (2015).
[261] *Id.* at 2731; *Baze*, 553 U.S. at 46.

injection protocols to be used in their executions in Kentucky and Oklahoma, respectively, declared unconstitutional as violating their Eighth Amendment right against cruel and unusual punishment.[262] The petitioners conceded that, if followed, the three-drug lethal injection protocols would be constitutional, but argued that the protocols were nonetheless unconstitutional "because of the risk that the protocol's terms might not be properly followed, resulting in significant pain."[263]

Although the Supreme Court was unable to produce an opinion in *Baze* that garnered a majority of five votes,[264] the *Glossip* majority opinion nevertheless reflected the standard and issues enumerated in Chief Justice John Roberts's plurality (three-Justice) opinion in *Baze*.[265] That plurality opinion — and *Glossip* decided seven years later — used a "substantial risk of serious harm" or "objectively intolerable risk of harm" standard for evaluating the constitutionality of execution methods.[266] Both the plurality in *Baze* and the majority in *Glossip* found the lethal injection protocols did not violate the U.S. Constitution because the protocols specified safeguards that were sufficient to ensure that the drugs would be administered correctly, and because the inmates failed to identify a known and available alternative[267]

Against this legal backdrop, it is unclear whether Oregon's lethal injection protocol would survive. Oregon's safeguards require that backup lines and backup drugs be prepared prior to commencement of the execution, like both Kentucky's and Oklahoma's.[268] In addition, all

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[262] *Glossip*, 135 S. Ct. at 2731; *Baze*, 553 U.S. at 46.
[263] *Glossip*, 135 S. Ct. at 2739–40; *Baze*, 553 U.S. at 41.
[264] The court instead issued seven opinions, none of which garnered more than three votes.
[265] *Glossip*, 135 S. Ct. at 2738 n.2 ("THE CHIEF JUSTICE's opinion [in *Baze*] sets out the holding of the case.").
[266] *Id.* at 2737–38; *Baze*, 553 U.S. at 50.
[267] *Glossip*, 135 S. Ct. at 2738–39, 2742; *Baze*, 553 U.S. at 41, 56. In both cases, the Supreme Court examined the protocols with a high level of deference to the decision of the lower court.
[268] *Glossip*, 135 S. Ct. at 2742; *Baze*, 553 U.S. at 55; OR. ADMIN. R. 291-024-0060(2).

three protocols address viability of the IV site: Oklahoma requires the execution team to confirm it;[269] Kentucky requires that the warden and deputy warden watch for signs of IV problems;[270] and in Oregon the "medically trained person" assists the Assistant Superintendent of Security in the final inspection of the IV catheters and injection equipment.[271] Kentucky further requires that IV team members have at least one year of medical professional experience, whereas Oregon's protocol requires that a "medically trained person" insert the IV catheter but does not specify the experience required of that "medically trained person."[272] The *Baze* plurality praised Kentucky's requirement that all members of the execution team participate in at least 10 practice sessions per year, each of which include a complete walk-through of execution procedures; Oregon's protocol is entirely silent on practice sessions.[273]

Furthermore, the crux of the question — and the point of the safeguards — is to ensure the condemned inmate does not feel the effects of the second and third drugs: "It is uncontested that, failing a proper dose of [the first drug] that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride."[274] Kentucky's written protocol requires that the warden and deputy warden check for consciousness, and if the prisoner is not unconscious one minute after the dose of sodium thiopental, then the backup dose is administered to the backup IV site before proceeding with the second and third drugs.[275]

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[269] *Glossip*, 135 S. Ct. at 2742.
[270] *Baze*, 553 U.S. at 55.
[271] OR. ADMIN. R. 291-024-0080(1).
[272] *Baze*, 553 U.S. at 55; OR. ADMIN. R. 291-024-0060(2)–(4).
[273] *Baze*, 553 U.S. at 55.
[274] *Id.* at 53. The first in the three-drug cocktail in *Baze* was sodium thiopental, while in *Glossip* it was midazolam. *Id.* at 44; Glossip v. Gross. 135 S. Ct. 2731 (2015).
[275] *Baze*, 553 U.S. at 45, 56.

Oklahoma requires the execution team to monitor the condemned inmate's level of consciousness throughout, and requires a pause after administration of midazolam.[276] By contrast, Oregon's protocol does not specifically stagger administration of the drugs, and does not even mention the inmate's consciousness.[277] Overall, the protocols approved of in *Baze* and *Glossip* are both more specific and more robust than Oregon's.

Prior to *Baze*, the U.S. District Court for the Northern District of California found in 2006 that California's lethal injection procedures fail to safeguard against an undue and unnecessary risk that the prisoner will suffer pain so severe as to violate the Eighth Amendment.[278] Like the protocols later validated in *Baze* and *Glossip*, California's protocol, if perfectly administered, would be constitutional.[279] Here, however, the court found that the state did not have the necessary safeguards in place to ensure proper administration of the protocol. [280] The absence of safeguards, and the evidence of botched executions apparently resulting from that absence, persuaded the court that the protocol did not sufficiently protect

[276] *Glossip*, 135 S. Ct. at 2742.
[277] OR. ADMIN. R. 291-024-0080(3) ("At 12:01 a.m. or as soon thereafter as possible, the Superintendent shall signal the executioner(s) to begin injection of lethal solutions by syringe(s) into the injection port of the intravenous catheters. As prescribed by OR. REV. STAT. § 137.473, the lethal solutions will include an ultra-short acting barbiturate in combination with a chemical paralytic agent and potassium chloride or other equally effective substances sufficient to cause death. . . . The executioner(s) shall signal the Superintendent when infusion of the lethal injection has been completed. Upon determining death of the inmate and time, the Superintendent will summon a medical professional to certify the inmate's death.").
[278] Morales v. Tilton, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006).
[279] *Id.* at 978. The court noted "the parties agree that it would be unconstitutional to inject a conscious person with pancuronium bromide and potassium chloride in the amounts contemplated by [the protocol]. Defendants' principal medical expert . . . testified that it would be 'terrifying' to be awake and injected with the contemplated dosage of pancuronium bromide and that it would be 'unconscionable' to inject a conscious person with the contemplated amount of potassium chloride." *Id.*
[280] *Id.* at 979.

against the risk of Eighth Amendment violations.[281] The court specifically noted the following inadequacies: "1. Inconsistent and unreliable screening of execution team members[;] 2. A lack of meaningful training, supervision, and oversight of the execution team[;] 3. Inconsistent and unreliable record-keeping[;] 4. Improper mixing, preparation, and administration of sodium thiopental by the execution team[; and] 5. Inadequate lighting, overcrowded conditions, and poorly designed facilities."[282] Oregon's lethal injection protocol does not meaningfully address any of these areas of concern. California has not executed anyone since the 2006 decision.[283]

* * * * *

Given the substantial difficulties surrounding lethal injection as a method of execution, it is not clear that Oregon could perform an execution pursuant to its current statutes. The Department of Corrections would likely struggle to obtain an "ultrashort-acting barbiturate," and moving to a one-drug protocol would require the Oregon Legislature to change the existing law. Furthermore, the most common single drug used in lethal injection is pentobarbital, which is extremely difficult to obtain for use in executions.[284] Even if a lethal-injection execution were possible in Oregon, it is not clear that Oregon's protocols would survive constitutional challenge. These obstacles make for a complicated path forward if Oregon were to choose to perform an execution today.

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[281] *Id.* at 980.
[282] *Id.* at 979–80.
[283] CAL. CAPITAL PUNISHMENT HISTORY, *supra* note 219.
[284] DPIC LETHAL INJECTION, *supra* note 212.

V. OREGON'S DEATH ROW TODAY

A. Demographics of Oregon's Death Row Inmates

The 34 inmates on death row comprise 33 men and one woman, aged 39 to 68.[285] Thirty-two of the male death row inmates are housed at the Oregon State Penitentiary,[286] and the female inmate is housed at the Coffee Creek Correctional Institution.[287] Three inmates are black, three are Hispanic, and one is Native American.[288] Their death sentences come from 11 counties around the state (see Figure 2) — Marion County, which houses the Oregon State Penitentiary, has sentenced the highest number of death row inmates (8).

The average age of Oregon's death row inmates is about 52 years old.[289] The youngest is Isaac Creed Agee (39), and the oldest is Eric Walter Running (65).[290] Two death row inmates are in their 30s, 13 are in their 40s, nine are in their 50s, and 10 are at least 60.[291]

The average inmate has been sitting on death row for about 16.5 years.[292] Of the 34 inmates, 12 have been under a death sentence for at least 20 years.[293] However, half of those people were sentenced in 1988 or 1989, with the rest spread out one at a time during the early 1990's.[294] Thirteen people have been on death row for some length of time between 10 and 20

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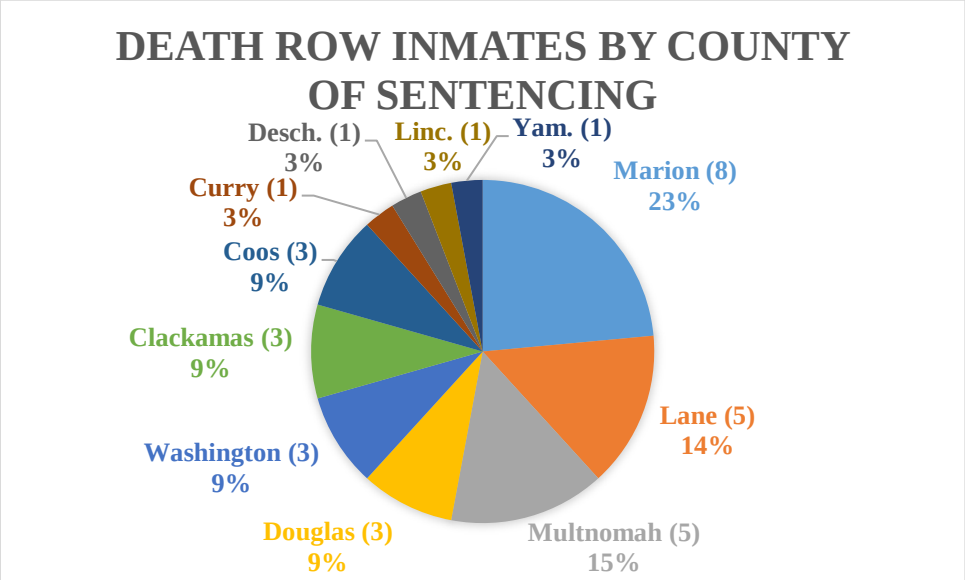
[285] OR. CAPITAL PUNISHMENT FACTS, *supra* note 47.
[286] OREGON DEATH ROW, *supra* note 53.
[287] *Id.*
[288] OR. CAPITAL PUNISHMENT FACTS, *supra* note 47.
[289] APPENDIX A.
[290] *Id.* Both Running and Bruce Aldon Turnidge are 65; Running was born in January 1951, and Turnidge was born in July 1951.
[291] *Id.* Of the two men in their 30's, Jesse Caleb Compton will turn 40 in December 2016.
[292] *Id.*
[293] *Id.*
[294] *Id.*

years,[295] and seven have been sentenced to death for the first time in the past decade.[296] Just one — David Ray Taylor — has been on death row for fewer than five years.[297]

Figure 2: [298]



B. Discussion of Crimes of Conviction for Oregon's Death Row Inmates

As discussed above, each death row inmate was convicted of at least one count of "aggravated murder," which is the only Oregon crime for which death is an authorized sentence. Aggravated murder requires that the murder feature some statutorily defined aggravating

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[295] *Id.*

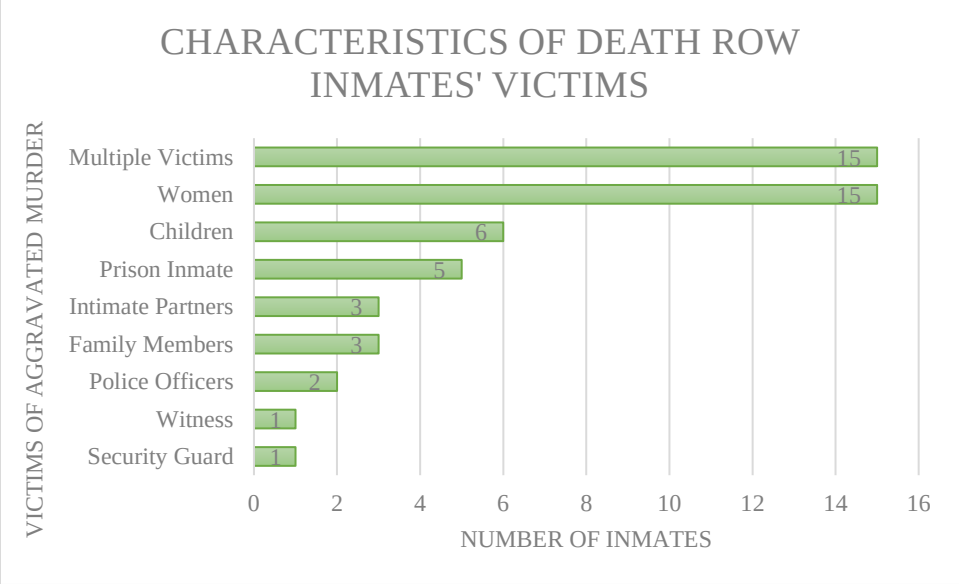
[296] *Id.* Two of those people were accomplices in the same crime – Bruce Aldon Turnidge and Joshua Abraham Turnidge were a father-son team who set off a bomb at a Woodburn bank in 2008, killing two police officers. Helen Jung, *Bruce and Joshua Turnidge Get Death Penalty in Woodburn Bank Bombing*, OREGONIAN (Dec. 22, 2010), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2010/12/post_7.html.

[297] *Id.* Taylor was convicted of killing a man in order to steal his car, in order to use it in a bank robbery. Associated Press, *David Ray Taylor Formally Sentenced to Death in Eugene*, OREGONIAN (May 21, 2014), *available at* http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/05/david_ray_taylor_formerly_sent.html.

[298] OR. CAPITAL PUNISHMENT FACTS, *supra* note 47.

factor.[299] The majority of Oregon's death row inmates — 21 — were convicted of multiple counts of aggravated murder.[300] Eleven had also been convicted of murder or attempted murder before being convicted of the crimes that resulted in their death sentence.[301]

Figure 3:[302]



Some types of aggravated murder are more common than others. Nearly half of the people on death row killed at least two victims.[303] Five of them previously had been convicted of murder and sentenced to life in prison, only receiving a capital sentence after they murdered a

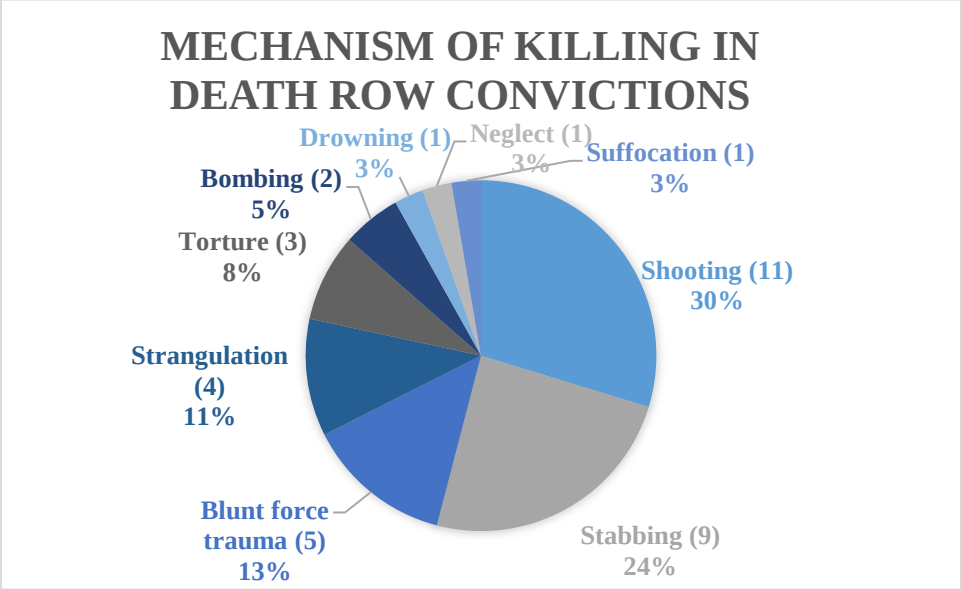
[299] OR. REV. STAT. § 163.095 (1991). *See also* Part I.E, *supra*.
[300] OFFENDER SEARCH, *supra* note 49.
[301] *Id.*
[302] *Id.* The numbers in this chart will not add up to 34; many death-row inmates' victims will fall into multiple categories. For example, Christian Longo killed his wife and three children, which fits his victims into multiple categories.
[303] *Id.* Fifteen of the 34 people on death row murdered two or more people, making "multiple victims" the most common subset of aggravated murder.

fellow inmate.[304] One of them killed someone after escaping from prison.[305] Six inmates murdered a child.[306] Four death-row inmates murdered someone connected to law enforcement or the legal system.[307]

Trends also emerge among these inmates' victims.[308] Six people on death row killed a family member or current intimate partner (although many more murdered someone with whom they had at least a tangential relationship).[309] Six inmates killed children, and 15 of them murdered women.[310] Six murders also included the commission of a sex-related crime.[311] Less than a third of death-row aggravated murder convictions resulted from shootings; stabbings and blunt force killings are more strongly represented on the row.[312]

[304] *Id.* One of these five – Robert Paul Langley – committed the murder that earned him a death sentence when he was a patient at the Oregon State Hospital.
[305] *Oregon Death Row*, *supra* note 53.
[306] OFFENDER SEARCH, *supra* note 49.
[307] *Id.* Two inmates murdered police officers, one killed a security guard, and one murdered a witness who had testified against him regarding a previous felony charge.
[308] The identity of a victim does not necessarily escalate a "murder" charge to "aggravated murder." Some groups are mentioned in the statute – e.g., police officers, children – while others are not.
[309] *Oregon Death Row*, *supra* note 53. Several of the intimate partners were actually *former* intimate partners; at least two murder victims were ex-girlfriends of the perpetrator, along with the victims' new boyfriends or partners.
[310] *Id.* In total, these inmates murdered nine children (six girls and three boys) and 24 women.
[311] Inmate records provided by the Oregon Department of Corrections to the Office of the Governor, Salem, Or., (Aug. 8, 2016) (on file with the Department of Corrections).
[312] *Id.*

Figure 4:



C. Daily Life on Oregon's Death Row

All death row inmates are housed in maximum security cells.[313] The death row cells at the Oregon State Penitentiary are separated into small "sections" that are housed close to one another, and the death row inmates interact amongst themselves during meals and other activities.[314] Inmates in each section are assigned as "orderlies," who are in charge of handing out meals, laundry, and cleaning common spaces such as the legal cell, showers, and rec room.[315] (Inmates clean their own cells.) Their clothing includes: underwear, pants, and shirts, changed three times per week, coats (for activities outside the cell), a knit cap, and one pair of shoes.[316]

[313] OR. ADMIN. R. § 291-024-0015 (2016).
[314] Interview with Theresa Olson, Corr. Officer, Or. State Penitentiary, in Salem, Or. (July 25, 2016) [hereinafter Olson Interview].
[315] *Id.*
[316] OR. ADMIN. R. § 291-093-0015(2).

The inmates eat breakfast at 6 a.m., lunch at 10 a.m., and dinner at 4 p.m.[317] Their food comes in from the dining hall on cafeteria trays, and the food orderly from each section hands out the trays to his section mates.[318] At every meal, they have a choice during meals of the standard meal and a vegetarian option (usually rice, beans, and vegetables in some combination), and they know the weekly menu in advance because they receive the Wall Street Bulletin — the inmates' newsletter.[319] The inmates eat of all their meals in their cells. The officers keep track of anyone who refuses a meal — a few have embarked on hunger strikes.[320]

Inmates on death row are allowed the same possessions and personal property that other inmates are allowed; those items include a television and/or a radio, reading materials, food, and other items that are not considered a security risk.[321] They are allowed to spend their time largely as they want to, and most choose quiet, individual pursuits.[322]

Reading is popular — the inmates can order books and magazines through a mail order service.[323] Some inmates play chess (cards are less popular), and two of them are writing a book together.[324] They follow sports very closely.[325] Many of them spend a lot of time working out.[326]

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[317] Olson Interview, *supra* note 314.
[318] *Id.*
[319] *Id.* The name of the newsletter is a play on words that references "The Wall," which is what prison officials and inmates call the concrete boundary surrounding the prison.
[320] *Id.*
[321] OR. ADMIN. R. §§ 291-093-0010, 291-093-0015.
[322] Olson Interview, *supra* note 314.
[323] *Id.* Death row inmates often donate reading materials to the mental health unit or elsewhere when they're done with them.
[324] *Id.*
[325] *Id.* The televisions in inmates' cells have cable, so they are able to watch network as well as cable stations.
[326] *Id.*

Inmates are allowed to buy snacks from the canteen.[327] They are allowed to talk amongst themselves between cells, and they are also allowed to talk with the general population when they walk through on their way to visits with attorneys.[328] They are also allowed to receive mail and to place collect telephone calls (on one shared telephone).[329] They are also entitled to at least 30 minutes of religious counseling per week[330] and educational materials, at their request.[331]

Per Oregon rules, each inmate is allowed at least 40 minutes of indoor exercise every day and one hour of exercise outdoors, at least five days per week.[332] In practice, they are usually allowed two 40-minute walks per day.[333] There is also a system in place that allows inmates to have walk "partners."[334] This must be approved by the administration, but if it is, it affords them extra time.[335]

For 90 minutes in either the morning or the afternoon, the inmates are also allowed in the general recreation yard, where they can work out, play basketball, or go for a walk.[336] Inmates

[327] *Id.* Often, inmates will buy extra ice creams for the men who do not have enough money for it. This is, again, technically against the rules but is usually allowed unless officers see a compelling reason to prohibit it.
[328] *Id.*
[329] OR. ADMIN. R. § 291-093-0015(4)–(5).
[330] OR. ADMIN. R. § 291-093-0015(7).
[331] OR. ADMIN. R. § 291-093-0015(8).
[332] OR. ADMIN. R. § 291-093-0015(3)(a)(b).
[333] Olson Interview, *supra* note 314. A "walk" is time outside the cells when inmates can shower, go outside, or visit each other out in the common area.
[334] *Id.*
[335] *Id.* For example: If Joe and Matt are walk partners, they get to go out for Joe's 40 min walk, and then they both get to go out again for Matt's 40 min walk. During the second round of walks, the duo gets another collective 80 minutes out of their cells.
[336] *Id.*

can choose whether they go out in the morning or the afternoon, and the group that goes early one week usually goes later during the next week.[337]

The death row unit tends to be one of the quietest in the penitentiary, but the yard is where incidents tend to happen.[338] In one incident, an inmate slipped a metal padlock into a sock and attacked another inmate with the weapon.[339] In another case, two inmates became drunk on "wine" they produced in their cells and one was so sick that he was sent to the infirmary before being sent to solitary confinement as punishment.[340]

D. Providing Medical Services to Oregon's Death Row

Medical care for death row inmates is fairly routine. Of the five categories of illness the state penitentiary medical team recognizes, 28 death row inmates fall into the two healthiest categories.[341] Of those inmates, 15 are categorized as having no chronic conditions, and 13 have no more than two.[342] Four death-row inmates at the state penitentiary are listed as having at least

[337] *Id.* The inmates enforce this arrangement organically; it is not a rule imposed by the officers, and it is not written down anywhere. However, Olson said the inmates use this system very consistently and attach real importance to it.
[338] *Id.* Olson said the stereotype of death row as a scary, violent place is inaccurate. The inmates value structure, routine, and quiet, and they tend to verbally enforce that culture amongst themselves if someone is acting out. In the seven years she worked in the unit, Olson witnessed just one violent event.
[339] *Id.*
[340] *Id.* The wine is called "pruno," which is made with some kind of fruit – usually oranges. The juice is mixed with bread, which has yeast, and the combination is fermented in a plastic bag. Pruno is far less common on death row than in general population, and this incident was the only time Olson knows of that the death row inmates completed a batch and drank it before getting caught.
[341] OR. DEP'T OF CORR., CATEGORIES OF MEDICAL ACUITY/NEED (July 2016) (on file with the Office of Governor Kate Brown). These numbers do not reflect the health conditions of the death-row inmates housed at Coffee Creek or Two Rivers Correctional Institutions.
[342] *Id.* The penitentiary does not give examples of chronic conditions, but it does give examples of *major* conditions – i.e. HIV/AIDS, coronary artery disease, type-1 diabetes, etc. Non-major chronic conditions would present some medical need of a lesser nature.

one major chronic disease.[343] This group of inmates is not, then, considered any sicker or less healthy than the general population of the state penitentiary and does not present any additional costs from that perspective.[344] However, their care does present an additional cost because they are not allowed to leave their cells to receive routine medical care.[345] Medical staff spend about two hours per week visiting death row; that extra time presents a cost of about $80,000 per biennium.[346] There is a small infirmary in the death row unit that that can handle small medical tasks, such as treating minor illnesses, giving insulin shots, and performing dental work.[347]

[343] *Id.*
[344] Interview with Elizabeth Craig, Office of Commc'ns Adm'r, Or. Dep't of Corr., in Salem, Or. (July 5, 2016).
[345] *Id.*
[346] *Id.*
[347] Olson Interview, *supra* note 314.

VI. THE DEBATE SURROUNDING CAPITAL PUNISHMENT

Capital punishment has been the subject of contentious debate in the United States since our nation's founding. The debate continues today, with weighty arguments on either side. What follows are brief summaries of the most popular policy arguments for and against capital punishment in the United States. This report does not advocate for any perspective or endorse any argument; these policy discussions are included as context for the issues discussed elsewhere in this document. Hundreds of books, papers, and articles are written every year on this topic; the below list is necessarily incomplete and abbreviated, and is intended to provide only a snapshot of the current state of the debate.

A. Arguments in Favor

1. PRO: The Death Penalty Effectively Deters Crime and Saves Lives

Supporters of the death penalty argue that it deters crime, especially murder, with a particular deterrent effect on people who have already been incarcerated under a life sentence and would have "nothing left to lose" absent the threat of capital punishment. The data and social science around this issue are mixed.

The debate over deterrence began its modern phase in 1975, when University of Chicago economist Isaac Ehrlich used a regression analysis to claim that each execution would save about eight lives due to the inherent deterrent effect of carrying out the death penalty.[348] It was the first time a serious scholar had applied a statistical analysis to the question of capital punishment's

[348] Isaac Ehrlich, *The Deterrent Effect of the Death Penalty: A Question of Life and Death*, 65 AM. ECON. EV. 397, 398 (1975).

deterrence effect, and it sparked years of studies in which researchers applied similar methodologies to try to either replicate or refute Ehrlich's results.[349]

In the last decade, several studies have reached similar results, asserting that capital punishment may save even more lives than previously thought. A 2003 study found that each execution reduced the number of murders by about five during the years between 1977 and 1997, while each death row commutation during that time increased the number of murders by about the same amount.[350] A second study published the same year found that each execution[351] prevents up to 18 murders.[352]

These results may not be as conclusive as they at first appear. A 2005 study suggested that the nationwide data used in these analyses may have skewed the results.[353] Only in six states where executions were relatively common between 1977 and 1996 did capital punishment have a deterrent effect.[354] In many other states, executions had no effect at all, and in several, it had a "brutalization" effect — that is, a statistically significant relationship to an *increase* in the

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[349] Jeffrey A. Fagan, *Capital Punishment: Deterrent Effects & Capital Costs*, COLUM. L. SCH., https://www.law.columbia.edu/law_school/communications/reports/summer06/capitalpunish.

[350] H. Naci Mocan & R. Kaj Gittings, *Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453, 456 (2003).

[351] The prominent statistical analyses of the death penalty's deterrent effect all consider the relationship between *executions* and deterrence; they do not address whether merely issuing a capital sentence has an effect on the homicide rate. The distinction is relevant in Oregon, where executions have been exceedingly rare and always voluntary in the post-*Gregg* era.

[352] Hashem Dezhbakhsh, Paul H. Rubin, & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data*, 5 AM. LAW & ECON. REV. 344 (2003).

[353] Joanna M. Shepherd, *Deterrence Versus Brutalization: Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 219−20 (2005). Shepherd co-authored the 2003 study (*supra* note 350) that concluded each execution could prevent as many as 18 murders. She went back and reexamined the data, reaching more nuanced results that found large discrepancies in how profound an effect capital punishment created across states.

[354] *Id.* at 234. The six states were: Delaware, Florida, Georgia, Nevada, South Carolina, and Texas.

homicide rate.[355] One of the states to experience "brutalization" was Oregon, where the 1996 execution of Douglas Wright bore a statistical relationship with 175 additional murders.[356] When these results were matched with past studies, the results remained consistent: removing certain states (such as Texas) from national data sets eliminated the overall deterrent effect.[357]

Opponents of the death penalty argue that the economic model used to show a deterrent effect relies too heavily on an assumption that people behave rationally, failing to account for the emotional impulses that often contribute to acts of violence.[358] Criminality responds to forces far more diverse than mere sentencing policies, they argue, and there is no evidence of the death penalty's deterrent effect in practice.[359]

A number of studies have concluded that the death penalty has no deterrent effect, or if it does, it is so small as to be undetectable.[360] For example, a 2003 study found that executions were so rare during the twentieth century — particularly following *Gregg* in 1976 — that their

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[355] *Id.*

[356] *Id.* at 241. Shepherd posits that the first execution a state performs has the most profound effect, which means subsequent executions in Oregon would almost certainly not produce such a dramatic result.

[357] *Id.* at 233.

[358] *See, e.g.*, Fagan, *supra* note 349; Adam Liptak, *Does the Death Penalty Save Lives? A New Debate*, N.Y. TIMES (Nov. 18, 2007), *available at* http://www.nytimes.com/2007/11/18/us/18deter.html?_r=0.

[359] Fagan, *supra* note 349; *see also* Ehrlich, *supra* note 348, at 416. Although Ehrlich's study became famous for establishing a statistical connection between capital punishment and lowered crime rates, he also found an equally substantial connection between the homicide rate and both unemployment rates and labor participation rates.

[360] *See, e.g.*, Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83, 91−93 (2013); Charles F. Manski & John V. Pepper, *Deterrence and the Death Penalty: Partial Identification Analysis Using Repeated Cross Sections*, 29 J. QUANTITATIVE CRIMINOLOGY 123 (2011); Lawrence Katz, Steven D. Levitt, & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318, 339 (2003); John J. Donohue, *Estimating the Impact of the Death Penalty on Murder*, L. & ECON. WORKSHOP, U. OF CAL. AT BERKELEY (Oct. 23, 2009); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, Discussion Paper, INST. FOR THE STUDY OF LAB. (Germany, Jan. 2006).

impact on the homicide rate would be nearly impossible to determine.[361] Researchers found that just two percent of men on death row were executed in 1997, a number so low that it was comparable to death rates nationwide among some groups of men generally.[362] In other words, a man considering murder in that year would not be facing a much higher risk of death than if he went about living his life normally, particularly if he were a young black man.[363] Researchers concluded it would be almost impossible to ascribe a deterrent effect in such circumstances.[364]

Nationwide, raw data does not appear to show any correlation between states with capital punishment and a lower homicide rate. [365] In fact, states with the death penalty had a *higher* murder rate than the national average, while states that do not allow capital punishment saw a lower average per capita homicide rate.[366] Of the 20 states with the highest rates of homicide, 15 were death-penalty states.[367]

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[361] Katz et al., *supra* note 360, at 319.
[362] *Id.* At the time, two percent was just twice the death rate of all American men and nearly identical to the accidental death rate for young black men. It was lower than the seven percent death rate found among some gang members involved in drug sales.
[363] *Id.*
[364] *Id.* at 320.
[365] NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, HOMICIDE MORTALITY BY STATE: 2014 (Feb. 3, 2016), http://www.cdc.gov/nchs/pressroom/sosmap/homicide.htm [hereinafter HOMICIDE MORTALITY].
[366] *Id.* The national average was 4.6 homicides per 100,000 people in 2014. In states without the death penalty, the average was 3.5 per 100,000; in states that allow the death penalty, the average homicide rate was 5.3 per 100,000.
[367] *Id.* The murder rate is not indicative of how many murders are committed each year. For example, 1,813 people were killed in California in an act of homicide, but the homicide rate in California was just 4.6 per 100,000 – the national average. Of the 20 states with the highest number of homicides, again, 15 allowed the death penalty.

Figure 5:[368]

HIGHEST HOMICIDE RATES BY STATE (2014)				
	STATE	**MURDER RATE (per 100,000)**	**NUMBER OF MURDERS**	**DEATH PENALTY**
10.)	Georgia	**6.6**	658	Yes
9.)	Oklahoma	**6.6**	250	Yes
8.)	Maryland	**6.7**	387	No
7.)	New Mexico	**6.8**	135	No
6.)	Missouri	**7.5**	441	Yes
5.)	South Carolina	**7.6**	363	Yes
4.)	Arkansas	**7.7**	217	Yes
3.)	Alabama	**8.1**	374	Yes
2.)	Mississippi	**11.4**	332	Yes
1.)	Louisiana	**11.7**	538	Yes

The inverse is also true. Of the 20 states with the lowest rates of homicide, less than half were death penalty states,[369] and just nine of the states with the 20 lowest number of homicides permitted capital punishment.[370] Overall, there is very little correlation between capital punishment and homicide rate.[371]

[368] *Id.*
[369] *Id.* Eight of the 20 allowed capital punishments.
[370] *Id.*
[371] *Id.* In fact, the state with the most murders in 2014 – California – also had the highest number of people confined to death row in 2013. STATISTICAL TABLES, *supra* note81.

2. PRO: A Public Majority Continues to Support Capital Punishment, but in Declining Numbers Locally and Nationally

Polling in Oregon and nationwide suggests that the public continues to support the death penalty. According to Gallup, about 61 percent of Americans supported capital punishment in 2015.[372] The Pew Research Center found in 2013 that 55 percent of Americans said they supported the death penalty.[373] A 2012 poll conducted Oregon Public Broadcasting found that 57 percent of Oregonians support capital punishment.[374]

Supporters of capital punishment argue that a governor or legislature should not circumvent the wishes of an overwhelming majority of people.[375] Clatsop County District Attorney Joshua Marquis, a prominent supporter of the death penalty, has argued that Oregon voters reinstated capital punishment in 1984 and continue to say they support it, facts that he says should dissuade opponents.[376]

However, while a majority of Americans supports capital punishment, the numbers tell a more nuanced story than one of unwavering support. Gallup shows a consistent downward trend in the public's support of the death penalty.[377] The 2015 61-percent majority is the smallest it has

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[372] GALLUP, IN DEPTH: TOPICS A TO Z (DEATH PENALTY) http://www.gallup.com/poll/1606/death-penalty.aspx.
[373] PEW RESEARCH CENTER, SHRINKING MAJORITY OF AMERICANS SUPPORT DEATH PENALTY (Mar. 23, 2014) http://www.pewforum.org/2014/03/28/shrinking-majority-of-americans-support-death-penalty/ [hereinafter PEW RESEARCH]
[374] Kristian Foden-Vencil, *Poll Shows Oregonians Still Support Capital Punishment*, OR. PUB. BROADCASTING (July 17, 2012, 1:02 AM), http://www.opb.org/news/article/poll-shows-oregonians-still-support-capital-punishment/ .
[375] *See, e.g.*, Joshua Marquis, *Death Penalty Opponents Ignore Facts and Voters' Opinions: Guest Opinion*, OREGONIAN (June 27, 2014), http://www.oregonlive.com/opinion/index.ssf/2014/06/death_penalty_opponents_ignore.html; Ian K. Kullgren, *Oregon District Attorney Puts Opposition to Capital Punishment at 25 Percent*, POLITIFACT OREGON (Dec. 6, 2011, 4:03 PM), http://www.politifact.com/oregon/statements/2011/dec/06/joshua-marquis/oregon-district-attorney-puts-opposition-capital-p/.
[376] Kullgren, *supra* note 375.
[377] GALLUP, *supra* note 372.

been since the mid-1970's, when the U.S. Supreme Court banned the practice entirely.[378] And the minority in opposition to capital punishment, 37 percent, is at a nearly all-time high.[379]

The Pew Research numbers show a similar trend. In 2011, Pew found that 62 percent of Americans supported capital punishment, and in 1996, it found that 78 percent did.[380] Additionally, Pew researchers found that a majority of both Hispanic and black Americans opposed the death penalty — 50 percent and 55 percent, respectively.[381] Fewer statewide polls are available for Oregon. However, the 57 percent support found in 2012, with 39 percent in opposition, tracks closely with the national trends found by Gallup and Pew.[382]

Also, although a majority of the public expresses support for the death penalty in principle, public opinion polling reveals some weakness in that support. Of the approximately 60 percent of the public that favors the death penalty, less than half of that group (28 percent) "strongly" favors it.[383] When asked to choose between the death penalty and life without parole, only 50 percent of the public prefers the death penalty.[384] About the same percentage — 52 percent — reports believing that the death penalty is administered fairly (which means that about ten percent of the public supports the death penalty despite lacking confidence that it is used

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[378] *Id.*
[379] *Id.* The highest proportion of Americans to oppose the death penalty was recorded in 1966, at 47 percent. Gallup has recorded opposition levels higher than 37 percent just six times since 1936.
[380] PEW RESEARCH, *supra* note 373. The Pew Research Center began tracking attitudes to capital punishment in 1996, decades later than Gallup began, and it therefore does not provide data across the entire twentieth and twenty-first centuries.
[381] *Id.*
[382] *Id.*; GALLUP, *supra* note 372. Oregon's support for the death penalty in 2012 falls squarely between the results Pew found in 2011 and 2013 (62 percent and 55 percent, respectively), and it is within four percentage points of the 2015 Gallup results.
[383] PEW RESEARCH CENTER (Nov. 9-14, 2011), http://www.pollingreport.com/.
[384] CNN/ORC POLL (Jan. 31-Feb. 2, 2014), http://www.pollingreport.com/. *See also* QUINNIPIAC UNIVERSITY POLL (April 25-29, 2013), http://www.pollingreport.com/ (showing 48 percent support).

fairly).[385] Relatedly, 72 percent of the public believes that in the last five years a person innocent of the crime for which he or she was convicted was put to death.[386] Only 32 percent of the public believes that the death penalty acts as a deterrent to other murders.[387]

3. PRO: The Death Penalty Is an Effective Prosecutorial Bargaining Tool

Supporters of the death penalty argue that its existence allows prosecutors to enter into plea deals that result in a "true life" sentence. If capital punishment were not on the table, supporters argue, prosecutors would lack this leverage and would be forced to offer life *with* the possibility of parole in every plea bargain offered in an aggravated murder case.[388] Prosecutors argue that the possibility of a death sentence creates a situation where violent offenders are kept in prison permanently (often without the risk of a trial), even if they are not actually sentenced to death.

Assistant U.S. Attorney Byron Chatfield has argued that eliminating the death penalty would force more cases to go to trial in situations where prosecutors wish to seek life without parole but are no longer able to secure it through a plea bargain (because they have nothing left to trade away).[389] Counterintuitively, the death penalty often allows prosecutors to avoid lengthy

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[385] GALLUP POLL (Oct. 6-9, 2011), http://www.pollingreport.com/.
[386] CNN/ORC POLL (Sept. 23-25, 2011), http://www.pollingreport.com/.
[387] *Id.*
[388] A plea bargain necessarily requires the prosecutor to offer something less than the sentence that would be available at trial. Otherwise, there would be no incentive for the defendant to plead guilty and take the plea deal.
[389] Cliff Collins, *Let the Debate Begin: Oregon Lawyers with a Stake in the Issue Weigh in on the Death Penalty*, OR. ST. BAR BULLETIN (June 2012), *available at* https://www.osbar.org/publications/bulletin/12jun/deathpenalty.html.

and costly trials, he and others have argued, which would become virtually inevitable without the threat of capital punishment.[390]

Norm Frink, former chief deputy district attorney for Multnomah County, has made a similar argument.[391] The reintroduction of the death penalty in 1984 had the effect of increasing the severity of sentences overall: "It allowed more strict sentencing. The only reason (proponents) supported (life without parole) was because they wanted it as an alternative to the death penalty. There has been a decrease in the death penalty with the advent of lifetime conviction."[392]

Some prosecutors acknowledge that plea deals would be more difficult but still maintain that trials and appeals would be simpler and cheaper without capital punishment on the table. Tim Alexander, a former prosecutor and Washington County Circuit Court judge, practiced during a time when the death penalty was not legal in Oregon.[393] Not having it as an option "certainly reduces your plea bargaining but made trials less complicated or difficult."[394] True life sentencing would save "extraordinary sums of tax dollars that could be better used for other purposes."[395]

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[390] *Id.*; *see also* Joshua Marquis, *Eliminate the Death Penalty and You'll End Up with Killers Back on the Streets (Opinion)*, OREGONIAN (Oct. 3, 2015), *available at* http://www.oregonlive.com/opinion/index.ssf/2015/10/eliminate_the_death_penalty_an.html.

[391] Cliff Collins, *Continuing the Death Penalty Discussion: How Some Oregon Lawyers Are Grappling with Capital Punishment*, OR. ST. BAR BULLETIN (Nov. 2012), *available at* https://www.osbar.org/publications/bulletin/12nov/deathpenalty.html.

[392] *Id.* Before 1989, Oregon laws did not allow for a "true life" sentence. It was only after capital punishment was restored that it was added as a sentencing option, eliminating a situation where the only sentencing options for an aggravated murder case had been death or life with parole after 20 years.

[393] *Id.*

[394] *Id.*

[395] *Id.* The most extensive costs that arise from capital punishment do not come out of the initial trial but arise during the appeals process. Defendants sentenced to death in Oregon will have their sentence reviewed immediately by the Oregon Supreme Court and will then face a series of

B. Arguments Against

1. CON: The Death Penalty in Oregon (and Elsewhere) Is Applied Arbitrarily

Critics of the death penalty argue that it is applied arbitrarily and inconsistently, with too little relationship to the underlying crime. Critics in Oregon, in particular, point to this issue when arguing why capital punishment "doesn't work,"[396] largely because the state is one of only a handful that does not require its courts to practice proportionality review in regard to death penalty cases.[397]

Proportionality review requires a court to determine "whether a death sentence is consistent with the usual pattern of sentencing decisions in similar cases."[398] It is meant to ensure that "there is a rationally defensible basis for distinguishing those sentenced to die from those who are not"[399] and "that death sentences predicated on constitutionally impermissible factors . . . are overturned."[400]

Proportionality review arose out of the U.S. Supreme Court's concerns over how the death penalty was applied during the first half of the twentieth century.[401] Justice Potter

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civil appeals at the state and federal levels. The process usually takes years, and most defendants receive taxpayer-funded legal representation because they cannot afford their own lawyers. This process does not exist for defendants sentenced to life without parole or any lesser sentence.

[396] *See, e.g., id.* (quoting former Washington County Circuit Court Judge Tim Alexander arguing that the lack of proportionality review creates a system in which the same offense can bring the death penalty in one county but not in another); Collins, *supra* note 389 (quoting Jeff Ellis, director of the Oregon Capital Resource Center, as arguing that the lack of proportionality review makes Oregon's capital punishment apparatus excessively arbitrary, as it allows each county to determine unilaterally what constitutes a "death penalty case").

[397] Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 222−63 (1996).

[398] Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29 JUST. SYS. J. 257 (2008).

[399] *Id.* at 257−58.

[400] *Id.* at 258.

[401] Furman v. Georgia, 408 U.S. 238 (1972).

Stewart's concurrence in *Furman* compared being sentenced to death to being "struck by lightning" and characterized it as a "wanton" and "freakish" act.[402] The *Furman* decision prompted most of the states that authorized capital punishment to change their laws to require proportionality review as a safeguard against this kind of arbitrary application.[403]

Today, 17 states have statutes that require proportionality review for all death sentences.[404] Three states require proportionality review through judicial mandate.[405] One state — California — practices a limited review that compares the sentences of codefendants for the same crime.[406] Oregon is one of just 10 states that does not require or practice any type of proportionality review.[407]

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[402] *Id.* at 309−10 (Stewart, J., concurring) (footnotes, citations omitted) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").

[403] Kaufman-Osborn, *supra* note 398, at 259 (noting that it was this revision to its laws that allowed the State of Georgia to prevail in *Gregg v. Georgia*, which reinstated the death penalty after *Furman*).

[404] Bienen, *supra* note at 397, at 222−63. At the time the Bienen study was published, 19 states required proportionality review. Two of them – New York and New Mexico – have since abolished capital punishment.

[405] *Id.*

[406] *Id.*

[407] *Id.*; State v. Cunningham 320 Or. 47, 68 880 P.2d 431, 443 (1994) (holding that because the U.S. Constitution does not *require* proportionality review, Oregon defendants are not entitled to it under the Eighth Amendment). [In total, 17 states have a statutory requirement for proportionality review, three exercise it via judicial mandate, one employs a limited review, and 10 do not require any type of proportionality review.]

The result, critics argue, is a system in which some people end up on death row for crimes that resulted in non-death sentences in similar cases.[408] Officials and administrators in the Oregon Department of Corrections told the Governor's Office that one of their primary qualms with capital punishment is the knowledge that there are men in the general population of the Oregon State Penitentiary who have committed crimes "at least as bad" as those of death-row inmates. For example, DOC director Max Williams[409] cited the cases of Ward Weaver[410] (who entered a plea deal to avoid the death penalty) and Adam Criado[411] (who was sentenced to life without parole for killing his wife and four young children) as evidence of the arbitrary outcomes that land some people on death row and allow others a very different fate for very similar crimes. Criado's crime, in particular, bears a striking resemblance to the murder committed by Christian

[408] In Oregon, prosecutors charging someone with aggravated murder must decide whether to ask a jury for a death sentence or a sentence of life without parole. If the prosecutor does not ask for the death penalty, it is not on the table during trial, regardless of whether a jury may want to impose it. *See, e.g.*, Kyle Odegard, *No Death Penalty for Ferrero*, ALBANY DEMOCRAT HERALD (May 5, 2015), http://democratherald.com/news/local/no-death-penalty-for-ferrero/article_48f0ff58-3849-5bae-9dc8-e3372a80f2f4.html (explaining that prosecutors decided before trial not to ask for the death penalty in the case of a man accused of stabbing his father in the head and slicing his throat open in an apparent attempt to cover up the accused man's ongoing abuse of his elderly father).

[409] Williams Interview, *supra* note 110.

[410] Weaver murdered two of his daughter's young friends and buried their bodies under a concrete slab in Oregon City. Noelle Crombie, *Ward Weaver III Lived a Life of Cruelty and Rage, Reportedly Raped Son's Fiancée*, OREGONIAN (Oct. 6, 2002, reprinted Feb. 19, 2014, 1:07 PM), *available at* http://www.oregonlive.com/oregon-city/index.ssf/2014/02/ward_weaver_iii_like_his_fathe.html.

[411] Associated Press, *Medford Man Who Killed Family, Torched Home Gets Life Without Parole*, OREGONIAN (Apr. 5, 2013), *available at* http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/04/medford_man_who_killed_family.html; *Oregon Man Guilty of Killing His Family Gets Death Sentence*, N.Y. TIMES (Apr. 17, 2003), *available at* http://www.nytimes.com/2003/04/17/us/oregon-man-guilty-of-killing-his-family-gets-death-sentence.html.

Longo in 2001; Longo is on death row but Criado is not. Cases like this, Williams said, made it hard for him to accept his role as the administrator of Oregon's death penalty.[412]

2. CON: The Death Penalty Is Applied Disproportionately to Racial Minorities

Opponents of capital punishment argue that it is not applied equitably across cases and that a defendant who is a racial minority is far more likely to receive a death sentence than one who is not.[413] It is true that death row populations nationwide and in Oregon are disproportionately black and Hispanic.

In Oregon, three of the 34 inmates on death row are black, three are Hispanic, and one is Native American.[414] Proportionally, nine percent of death row is black, and nine percent is Hispanic, while three percent is Native American, and 79 percent is white.[415] This distribution is out of sync with Oregon's population as a whole. Just two percent of Oregonians are black, which means they present on death row at twice the rate as in the general population.[416] Native Americans are also overrepresented; they are just 1.8 percent of Oregonians.[417] Whites, who make up 88 percent of the Oregon population, are underrepresented on death row.[418] The only

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[412] Williams interview, *supra* note 110.
[413] Critics of capital punishment tend to focus on racial inequities, but others exist as well. For example, Men also are dramatically overrepresented on death row in Oregon and elsewhere. Just one woman sits on death row in Oregon, compared with 33 men (2.9 percent), and of the 2,979 people sentenced to death in America in 2013, just 56 were female (1.8 percent). *See* FACTS ABOUT THE DEATH PENALTY, *supra* note 80; STATISTICAL TABLES, *supra* note 81.
[414] MISC. CAPITAL PUNISHMENT FACTS, *supra* note 47.
[415] *Id.*
[416] QUICKFACTS, *supra* note 82.
[417] *Id.* It is worth noting that there is no number of Native Americans on death row that *could* be mathematically equitable. One inmate of 34 is 2.9 percent; it is therefore impossible to achieve a death row of 34 people with a Native American inmate that is actually representative of that racial group. The same problem arises with black members of death row – it is literally impossible to have any black death row inmate and achieve two percent representation. This problem is largely a function of Oregon's death row being so small.
[418] *Id.*

minority group that is present and underrepresented is Hispanics, who make up 12.5 percent of Oregon's population.[419]

Oregon's racial inequity on death row is largely consistent with national trends. For example, 43 percent of death row inmates and 34.5 percent of those executed in the U.S. are black.[420] About 13 percent of the American population in 2014 identified as black,[421] which means that death rows nationwide demonstrate an overrepresentation of black defendants of between 2.5 and four times — the same proportional inequity as seen in Oregon.

Nothing about these statistics suggests that application of the death penalty is any *more* racially inequitable in Oregon than is the state's criminal justice system as a whole. Across Oregon prisons, nine percent of inmates are black, 12.4 percent are Hispanic, 2.4 percent are Native American, and 74 percent are white.[422] The same proportion of inmates are black as are black on death row, white inmates are slightly more underrepresented in the general population than on death row, and Hispanic inmates are actually less likely to be sentenced to death row than to be sent to prison generally. The capital punishment apparatus appears to be producing a very similar outcome as is Oregon's criminal justice system overall, which may suggest inequities that lie somewhere deeper than in the specific public policies related to the death penalty itself.

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[419] *Id.*
[420] FACTS ABOUT THE DEATH PENALTY, *supra* note 80.
[421] QUICKFACTS, *supra* note 82.
[422] OR. DEP'T OF CORR., INMATE POPULATION PROFILE FOR 07/01/2016, https://www.oregon.gov/doc/RESRCH/docs/inmate_profile_201607.pdf.

3. CON: The Question of Innocence on Death Row

Opponents of the death penalty argue that it creates an unacceptably significant risk of executing an innocent person, particularly in light of highly publicized exonerations based on DNA evidence. The numbers in this area are relatively small: 116 death row inmates have been exonerated since 1989,[423] 20 of those were exonerated on the basis of DNA evidence.[424] Just 11 people in Oregon have been exonerated since 1991 for any crime of conviction, and none of those people had been on death row.[425]

These numbers give limited insight into the question of innocence. It is impossible to know how many innocent people are erroneously sentenced to death row; exonerations show only mistakes that have been caught and proven. There are almost certainly more mistaken convictions that have not been identified. It is impossible to know how many of these there are. The statistics on exonerations show, at the very least, the minimum error rate.

In 2013, there were 2,979 people on death row nationwide; an error rate of 116 people would be four percent.[426] However, over a longer period of time, it would be even lower: between 1977 and 2013, there were 8,124 people under a death sentence in the United States.[427] One hundred sixteen innocent people sentenced during this time amounts to an error rate of 1.4

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[423] U. OF MICH. L. SCH, NAT'L REGISTRY OF EXONERATIONS, EXONERATION DETAIL LIST, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Sentence&FilterValue1=Death. The registry includes exonerations that were granted based on criteria including DNA evidence but going beyond that as well, providing the most comprehensive list available.

[424] THE INNOCENCE PROJECT, EXONERATE THE INNOCENT, http://www.innocenceproject.org/exonerate/.

[425] EXONERATION DETAIL LIST, *supra* note 423, filter state as Or.

[426] STATISTICAL TABLES, *supra* note 371.

[427] *Id.*

percent.[428] Again, these are the minimum possible error rates during these time periods; the actual error rate is unknowable but almost certainly higher.

There is, unfortunately, no more accurate proxy for the number of innocent people erroneously sentenced to death, and even the justices of the U.S. Supreme Court use these numbers as a shorthand for talking about innocence. How they interpret the numbers, however, is usually a question of what policy point they are making.

For example, in *Baze v. Rees*, the Court debated the merits of the death penalty beyond the immediate question of whether lethal injection is a constitutional method of execution. Justice John Paul Stevens asserted that the error rate is unacceptably high: "Given the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive importance to me. Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses."[429]

Justice Scalia, on the other hand, viewed the same problem as endemic to the criminal justice system generally, from which capital punishment cannot be separated: "There is a risk that an innocent person might be convicted and sentenced to death — though not a risk that Justice Stevens can quantify, because he lacks a single example of a person executed for a crime he did not commit in the current American system. His analysis of this risk is thus a series of sweeping condemnations that, if taken seriously, would prevent any punishment under any criminal justice system. . . . The same could be said of any criminal penalty, including life

[428] The list of exonerated death row inmates includes people sentenced as long ago as 1977 and as recently as 2002, which makes the time frame between 1977 and 2013 an appropriate measure of the space of time during which these innocent people were convicted. The list is meant to include all exonerations current through the present day.
[429] Baze v. Rees, 553 U.S. 35, 85−86 (2008) (Stevens, J., concurring).

without parole; there is no proof that in this regard the death penalty is distinctive."[430]

[430] *Id.* at 92.

VII. GUBERNATORIAL CLEMENCY AUTHORITY

A. The Legal Foundation of the Oregon Governor's Clemency Authority

Oregon's governor enjoys the constitutional authority to (on behalf the state) forgive people of their crimes, or to reduce the legislatively created and/or judicially imposed consequences of those crimes. This power is generally referred to as "clemency" and it applies broadly to any act of leniency by the executive[431] toward people who have committed crimes. In Oregon's constitutional scheme, the authority to grant clemency was intended to serve as a check on the power of judiciary and the legislature.[432]

The governor's clemency powers flow from Article V, Section 14 of the Oregon Constitution, which reads in relevant part:

> **Section 14. Reprieves, commutations and pardons; remission of fines and forfeitures.** He shall have power to grant reprieves, commutations, and pardons, after conviction, for all offences [sic] except treason, subject to such regulations as may be provided by law. Upon conviction for treason he shall have power to suspend the execution of the sentence until the case shall be reported to the Legislative Assembly, at its next meeting, when the Legislative Assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a farther [sic] reprieve.—
> He shall have power to remit fines, and forfeitures, under such regulations as may be prescribed by law; and shall report to the Legislative Assembly at its next meeting each case of reprieve, commutation, or pardon granted, and the reasons for granting the same; and also the names of all persons in whose favor remission of fines, and forfeitures shall have been made, and the several amounts remitted[.]

[431] *Frequently Asked Questions Concerning Executive Clemency*, U.S. DEPT. OF JUSTICE, https://www.justice.gov/pardon/frequently-asked-questions-concerning-executive-clemency [hereinafter *Executive Clemency FAQs*]
[432] Haugen v. Kitzhaber, 353 Or. 715, 742–43, 306 P.3d 592, 608 (2013) (en banc).

B. Three Kinds of Clemency Authorized by the Oregon Constitution

The Oregon Constitution explicitly identifies three types of clemency actions the governor may take: pardons, reprieves, and commutations.[433] A pardon represents full forgiveness by the state of the convicted person for his or her crime. It absolves the convicted person of all of the legal consequences of his or her crimes, and "wipes the slate clean" by nullifying the very existence of the conviction.[434] A commutation replaces the original sentence with a lesser one (for example, for reducing the number of years of incarceration the convicted person must serve).[435] A reprieve provides a temporary hiatus in the execution of a criminal sentence; it does not eliminate or reduce any portion of a sentence or its consequences, it merely places the sentence on hold for the length of the reprieve.[436] Acts of clemency are not tied to findings of factual or legal innocence, nor do they imply innocence. Rather, they are discretionary acts a governor can take or not take at his or her sole discretion.[437]

C. The Scope of a Governor's Clemency Authority Is Virtually Unlimited

Article V, Section 14 of the Oregon Constitution states that the governor's clemency powers are "subject to such regulations as may be provided by law." It is an open question whether those "regulations" may limit the scope of the governor's clemency authority. But this question is merely academic: the regulations that have been enacted by the Oregon Legislature are procedural; they do not limit clemency authority substantively. Oregon's statutes provide a process for applying for clemency and require the governor to report to the Legislature all

[433] OR CONST. art. V § 14; *see also Executive Clemency FAQs*, *supra* note 431.
[434] *Ex parte* Wells, 59 U.S. 307, 310 (1855).
[435] Biddle v. Perovich, 274 U.S. 480, 486–87 (1927).
[436] *Haugen*, 306 P.3d at 598.
[437] *Executive Clemency FAQs*, *supra* note 431.

pardons, commutations, and reprieves.[438] Otherwise, the law allows the governor to apply "such conditions and such restrictions and limitations as [she] thinks proper" to reprieves, pardons, or commutations.[439]

Against this backdrop, Oregon's courts have sought to clarify what the governor can and cannot do with her clemency power. The consistent answer has been: the clemency power is practically unlimited.

In *Eacret v. Holmes* in 1958, the Court upheld Governor Robert Holmes's commutations of multiple death sentences because "it is not within judicial competency to control, interfere with, or even to advise the Governor when exercising his power to grant reprieves, commutations, and pardons. The principle of the separation of powers written in to the constitution by Article III, § 1 forbids it."[440] The Court noted that the constitution allows the clemency power to be "subject to such regulations as may be provided by law" — substantive regulations that did not exist then and do not exist now.[441] Absent such limits, the governor's clemency power is "unlimited" and "his [or her] discretion cannot be controlled by judicial decision," the Court held.[442]

The Oregon Supreme Court recently relied on *Eacret* in affirming the breadth of the governor's clemency authority. In *Haugen v. Kitzhaber*, the Court held that "the executive power to grant clemency flows from the constitution and is one of the governor's only checks on another branch of government. As part of the system of checks and balances, the governor's clemency power is far from private: It is an important part of the constitutional scheme

[438] OR. REV. STAT. § 144.660 (2016).
[439] OR. REV. STAT. § 144.649 (2016).
[440] 215 Or. 121, 125–26, 333 P.2d 741, 743 (1958) (en banc).
[441] OR. REV. STAT. § 144.660.
[442] *Eacret*, 333 P.2d at 744.

envisioned by the framers."[443] The primary check on the clemency power, the Court noted, is the electorate's ability to vote a governor out of office.[444]

When a governor has granted clemency in death cases, the most common mechanism has been a commutation that replaces a death sentence with life in prison without parole. Most recently, former Illinois Governor George Ryan commuted the death sentences of 160 inmates in 2003,[445] and former Maryland Governor Martin O'Malley commuted the capital sentences of four inmates in 2015.[446] In both states, prisoners previously on death row were given life sentences without eligibility for parole.[447] Two Oregon governors have done the same, and Governor John Kitzhaber issued a reprieve for the duration of his term in office.[448]

D. Arguments that a Governor's Clemency Power Is Limited in Death Cases Have Been Rejected or Would Very Likely Be Rejected

Executive clemency is a broad constitutional power with few constraints. Proponents of the death penalty have argued that limitations on a governor's clemency power would create unintended consequences if the governor used that power to commute sentences of death-row inmates to "true life" (i.e., life without the possibility of parole). Specifically, death penalty proponents refer to two limitations on the governor's clemency power. First, they argue that a governor cannot grant clemency on his or her own initiative; clemency, they say, must be requested and accepted by the recipient. Second, they contend that a commutation of death to

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[443] Haugen v. Kitzhaber, 353 Or. 715, 742–43, 306 P.3d 592, 608 (2013) (en banc).
[444] *Id.*
[445] *See* People *ex rel.* Madigan v. Snyder, 804 N.E.2d 546, 550 (Ill. 2004); Associated Press, *Text of Gov. George Ryan's Speech Announcing His Commutation of All of Illinois' Death Sentences*, SFGATE (Jan. 11, 2003, 3:55 PM), http://www.sfgate.com/nation/article/Text-of-Gov-George-Ryan-s-speech-announcing-his-2680319.php.
[446] GOV. OF MD., EXECUTIVE ORDERS 01.01.2015.03 – 01.01.2015.06 (2015).
[447] *Id.*; *Madigan*, 804 N.E.2d at 551.
[448] *Haugen*, 306 P.3d at 594.

true life is not possible for death row inmates whose crimes were committed at a time before true life was an available sentence. As a result, they say, if death sentences are commuted, death-row inmates will be eligible for parole and release. Addressing both arguments in turn, this section will explain why both arguments are without merit.

1. An Inmate's Objection to an Act of Clemency Does Not Restrict the Governor's Power to Grant Relief

In 2011, Governor John Kitzhaber issued a reprieve to all death row inmates, including Gary Haugen, who had given up trying to fight his capital sentence and thereby made himself eligible for execution as a "volunteer."[449] Mr. Haugen had not sought a reprieve; he challenged the reprieve in court, relying on state and federal cases that appeared to require an inmate's "acceptance" of an act of clemency in order for it be effective.[450] The Oregon Supreme Court rejected this argument.[451] The Court held:

> The Oregon Constitution does not provide the recipient of a Governor's act of clemency with a corresponding individual right to reject that clemency. In fact, in describing the Governor's power to grant pardons, commutations, and reprieves, the constitutional text does not refer to the recipient of the grant of clemency at all . . . . The constitution does not provide the recipient of an act of clemency with a . . . means of regulating the Governor's power, whether through a requirement of acceptance or some other means.[452]

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[449] *Id.* at 593–94 ("After this court affirmed Haugen's conviction and sentence, he decided not to pursue any further appeals. Following two death warrant hearings, the trial court set an execution date of December 6, 2011. Before that date, Governor Kitzhaber issued a reprieve . . . . In response, Haugen sent a letter to Governor Kitzhaber purporting to reject the reprieve. . . . Haugen then alleged that the Governor's action was beyond his constitutional authority because the reprieve did not last for a definite period of time, was not granted based on Haugen's particular circumstances, and suspended the operation of laws based on the Governor's moral opposition to those laws. Haugen also argued that the reprieve was ineffective because a reprieve must be accepted to be effective. The Governor responded that the reprieve was properly granted under Article V, section 14, and was effective regardless of Haugen's purported rejection of it.").
[450] *Id.*
[451] *Id.*
[452] *Id.* at 599–600.

The Court acknowledged that early decisions in American law appeared to require some form of "acceptance" by the recipient.[453] Federal courts discarded that view in the early twentieth century. According to the Court's ruling, the Oregon Constitution established that an act of clemency is not a "private" act that can be rejected by an individual;[454] rather, it is an act that "flows from the [C]onstitution" and is performed in the interest of the public welfare.[455] Thus, the Court explained:

> We conclude that the Governor's reprieve of Haugen's death sentence is valid and effective, regardless of Haugen's acceptance of that reprieve. We agree with Justice Holmes' comment in *Biddle* that the Governor's power to grant the reprieve that he did here is 'part of the Constitutional scheme. When (clemency is) granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done.'[456]

Accordingly, it is now settled that a governor may grant clemency on his or her own initiative.

2. The Ex Post Facto Clauses of the Oregon Constitution and the Federal Constitution Do Not Limit a Governor's Authority to Commute a Person's Sentence

It has been argued by some that a governor may not commute a condemnee's sentence to life imprisonment without possibility of parole if a true life sentence did not exist under Oregon law at the time the condemnee committed his crime. According to this position — which this

[453] *Id.* at 604–05 (citing United States v. Wilson, 32 U.S. 150 (1833), Burdick v. United States, 236 U.S. 79 (1915)).
[454] *Id.* at 608–09 (citing Eacret v. Holmes, 215 Or. 121, 333 P.2d 741 (1958), Biddle v. Perovich, 274 U.S. 480 (1927)).
[455] *Id.*
[456] *Id.* at 609 (quoting *Biddle*, 274 U.S. at 486).

memorandum will call the "Ex Post Facto Argument" — six Oregon death row inmates are ineligible for a commutation of their sentences from death to true life because Oregon had not yet authorized a "life without possibility of parole" sentence at the time of their offenses. The harshest available alternative to a death sentence for these defendants, then, would be a commutation to "life *with* the possibility of parole."[457] According to Clatsop County District Attorney Joshua Marquis (one proponent of this position), a commutation of these inmates' sentences would allow a grant of parole — causing murderers to be freed from prison.[458]

The Ex Post Facto Argument lacks merit for two reasons. First, the ex post facto clause restricts only judicial sentencings, not grants of executive clemency.[459] Second, a governor can attach conditions to a clemency grant, including the condition that the recipient never be eligible for parole, regardless of what state sentencing laws provided at the time of the offense. Indeed, a governor may even *revoke* a grant of clemency if a commuted person violates this condition by seeking parole.

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[457] Steve Duin, *Time and Justice at Odds on Oregon's Death Row*, OREGONIAN (Feb. 24, 2015, 5:30 PM), http://www.oregonlive.com/news/oregonian/steve_duin/index.ssf/2015/02/steve_duin_time_and_justice_at.html.

[458] *Id.*; Aimee Green, *Will Kitzhaber Empty Death Row? Oregonians Anxiously Wait as Governor's Resignation Looms*, OREGONIAN (Feb. 16, 2015, 4:39 PM), http://www.oregonlive.com/politics/index.ssf/2015/02/will_kitzhaber_empty_death_row.html ("Marquis said he doesn't think many people realize that if Kitzhaber took action, seven of the people on death row wouldn't necessarily be confined to prison for life. Because they committed their killings before July 1990, the state's parole board could cut short their life sentences and release them after 30 years.").

[459] An act of clemency is considered by courts to be the literal opposite of a new sentence. *See, e.g.*, *Haugen*, 306 P.3d at 610 (holding that the Eighth Amendment's prohibition on cruel and unusual punishment cannot apply to an act of clemency: "As Haugen himself argues, however, a reprieve is the temporary *suspension* of a criminal sentence, not the imposition of a criminal sentence. It is contrary to the very definition of a reprieve to classify it as punishment. Moreover, it makes little sense to require a penological justification for the *suspension* of a criminal sentence, and Haugen cites no authority for imposing (a proportionality) requirement.")

a. Because Grants of Clemency Are Wholly Executive Acts, the Ex Post Facto Clause Does Not Apply

The Oregon and U.S. Constitutions contain nearly identical clauses barring ex post facto laws. "Generally speaking, ex post facto laws punish acts that were legal at the time they occurred, increase the punishment for criminal acts, or deprive the defendant of a defense for those acts."[460] The U.S. Constitution provides: "No . . . ex post facto Law shall be passed." The Oregon Constitution, somewhat more emphatically, states: "No ex-post facto law . . . shall ever be passed[.]" The text and context of both clauses indicate their purpose as a limitation on the legislative branches of federal and state government, respectively. Both clauses refer to the "pass[age]" of "laws." And both clauses exist in sections of their respective constitutions that describe limitations on legislative action: the federal clause appears in Article I, which is about Congress; and the state clause appears in Article I, section 21, which is a list of constraints on the Legislature. For these reasons, courts have held that "[t]he constitutional prohibition against ex post facto laws . . . is directed to the legislative branch of government rather than to the other branches."[461] Accordingly, a prohibited ex post facto law is "*a statute* which punishes as a crime an act previously committed, which was innocent when done; [or] which makes more burdensome the punishment for a crime, after its commission[.]"[462]

The Ex Post Facto Argument begins from the premise that death row inmates cannot be subjected to a sentence that did not exist at the time of their crime. Because "true life" (i.e., life without the possibility of parole) was not a sentence available at the time that six Oregon death-

[460] State v. Wille, 317 Or. 487, 501–02, 858 P.2d 128, 137 (1993) (en banc) (quoting State v. Gallant, 307 Or. 152, 155, 764 P.2d 920, 921 (1988) (en banc)).
[461] Prater v. U.S. Parole Comm'n, 802 F.2d 948, 951 (7th Cir. 1986).
[462] Collins v. Youngblood, 497 U.S. 37, 42 (1990) (emphasis added) (citation omitted).

row inmates committed their crimes,[463] the Ex Post Facto Argument posits that these inmates' sentences can be reduced only to life *with* the possibility of parole, making them eligible for release after serving 30 years. As authority for this position, proponents cite *State v. Wille*, in which the Oregon Supreme Court held that applying the statute creating the true life sentence to someone who committed their offense before the sentence was available violates the constitutional prohibition on ex post facto laws.[464]

The Ex Post Facto Argument contends that executive commutations are subject to the same restriction: if the legislature cannot subject any of the six condemnees to a true life sentence, then neither can a governor by an act of clemency. This argument lacks merit.[465] The two actions — sentencing and clemency — are distinct, though they have similar effects. In either cases, a prisoner receives a new sentence that replaces the original punishment for the same crime. However, acts of clemency are not bound by the same rules that restrict sentences issued by courts.[466]

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[463] Prior to 1989, Oregon required a possibility of parole to be included in any life sentence. In 1989, the Oregon Legislature amended the statute to allow "life without parole" as an available alternative to the death penalty in cases of aggravated murder. *See* OR. REV. STAT. § 163.105.

[464] 858 P.2d at 139.

[465] A highly analogous argument has already failed elsewhere. In *Lomax v. Warden*, the Court of Special Appeals of Maryland held that the governor's refusal to allow parole for some inmates who had been sentenced to life did not create an ex post facto law, in spite of his decision having a retroactive effect of lengthening some sentences. 707 A.2d 395, 405 (Md. 1998) ("Neither the Governor nor any executive agency promulgated a rule or regulation in response to this pronouncement. The Governor merely stated how he intended to execute his statutory right to approve or disapprove parole for inmates sentenced to life imprisonment.").

[466] *See, e.g.*, *Ex parte* Wells, 59 U.S. 307, 310 (1855) (holding that the president may create a new sentence, *sua sponte*, to replace a death sentence); Schick v. Reed, 419 U.S. 256 (1974) (holding that the president may commute a death sentence to life without parole even where statutes do not provide for that as an allowable sentence); Green v. Teets, 244 F.2d 401 (9th Cir. 1957) (holding that a governor may a commute a death sentence to life without parole, in spite of state statutes requiring parole eligibility); Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955) (holding that a commuted sentence may allow a parole board to restart the clock on parole eligibility and discount 15 years of time served); Hagelberger v. United States, 445 F.2d 279 (5th

Where courts have addressed the Ex Post Facto Argument directly, they have rejected it.[467] In *Patrick v. Frost*, the New York Supreme Court held:

> There is no merit in the contention that the punishment of life imprisonment was ex post facto. If the power to commute existed at all at the time of the commission of the crime, then the punishment for murder in the first degree as prescribed by law was not only death as prescribed by statute, but such punishment as might be meted out by the power of commutation as expressed in the Constitution. The punishment as thus changed is as much a punishment prescribed by law as the punishment ordained by statute.[468]

Further, the *Patrick* court held that: "an act plainly mitigating the punishment of an offense is not ex post facto; on the contrary, it is an act of clemency."[469]

These cases are consistent with ex post facto doctrine generally, for several reasons. First, as previously mentioned, the ex post facto clause limits only legislative actions; it does not apply to acts of executive clemency.[470] Where the ex post facto clause does limit executive and judicial functions, this is only because those branches are implementing a prohibited statute enacted by the legislature.[471] Second, these cases are consistent with the separation of powers. Both the

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Cir. 1971) (holding that a commuted sentence need not incorporate time already served on the original sentence).

[467] *See, e.g.*, Stanley v. State, 490 S.W.2d 828 (Tex. 1972) (holding that the governor's commutation of death sentences to life without parole did not violate the ex post facto clause, in spite of the commutations being issued after the death penalty was ruled unconstitutional in *Furman v. Georgia*).

[468] People *ex rel.* Patrick v. Frost, 133 A.D. 179, 184–85 (N.Y. App. Div. 1909) (holding that a governor's commutation of a death sentence to life without parole did not constitute an ex post facto law, in spite of a statute that required criminal sentences to be "the same kind and degree" as the crime itself, which made death the only available sentence for murder).

[469] *Id.* (citing Commonwealth v. Wyman, 66 Mass. 237 (1853)).

[470] Prater v. U.S. Parole Com'n, 802 F.2d 948, 951–52 (7th Cir. 1986) (holding that "The constitutional prohibition against ex post facto laws . . . is directed to the legislative branch of government rather than to the other branches. This is apparent not only from the (identical) wording and placement of the two ex post facto clauses (one directed at Congress, the other against state legislatures) in Article I, which deals with the legislative power, but also from history") (construed in Lomax v. Warden, Md. Corr. Training Ctr., 707 A.2d 395 (Md. 1998)).

[471] *See, e.g.*, State v. Wille, 317 Or. 487, 501–02, 858 P.2d 128, 137 (1993) (en banc) (holding that the prosecution cannot seek, and the judiciary cannot impose, a sentence of "life without

federal and Oregon constitutions provide a separation between executive and legislative authority, particularly in regard to the clemency authority.[472] Clemency authority is a check on the power of the legislature and judiciary to prosecute and sentence criminal defendants.[473] It is an "emergency valve" on the criminal justice system whose importance was understood at the nation's founding: "The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."[474]

The Oregon Legislature *does* have the authority to restrict the clemency power to some degree, but all such applied restrictions have always been procedural in nature.[475] As a consequence, Oregon courts have held that the governor's clemency authority is unfettered by any existing law.[476] Courts across the country have decided similarly. In *Green v. Teets*, the

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parole" where doing so would apply the law retroactively); United States v. Ellen, 961 F.2d 462, 465–66 (4th Cir. 1992) (holding that the ex post facto clause cannot apply to agency decisions or policies that are merely interpretive). Specifically, ex post facto provisions apply only to *criminal* laws. State *ex rel.* Stadter v. Patterson, 197 Or. 1, 18, 251 P.2d 123, 131 (1952) ("Though retroactive, [the law] needs no citation of authorities to show that it is not ex post facto. The provisions relative to ex post facto laws apply only to criminal statutes.") Given that Oregon courts do not view acts of clemency as acts of sentencing or other penological purpose, Haugen v. Kitzhaber, 353 Or. 715, 745, 306 P.3d 592, 610 (2013) (en banc), they likely fall outside the purview of the ex post facto clause under *Stadter*, *even if* one were to argue an act of clemency required the enforcement of some Oregon law.

[472] Oregon's constitutional history shows that the framers considered additional checks on the clemency power but ultimately decided against it. *Haugen*, 306 P.3d at 601 (quoting Claudia Burton, *A Legislative History of the Oregon Constitution of 1857 – Part II* (Frame of Government: Articles III-VII), 39 WILLAMETTE L. REV. 245, 365 (2003)).

[473] *Id.*

[474] THE FEDERALIST NO. 74 (Alexander Hamilton).

[475] *Haugen*, 306 P.3d at 600 n.7 (noting that the statutes regulating the clemency authority actually *defer* to the governor's judgment in exercising that authority).

[476] The Oregon and U.S. Constitutions differ on this point. The federal constitution does not allow for *any* legislative control over the clemency power. *See*, *e.g.*, Schick v. Reed, 419 U.S. 256, 266–67 (1974) ("[T]he (clemency) power flows from the Constitution alone, not from any legislative enactments, and it cannot be modified, abridged, or diminished by the Congress. . . . We therefore hold that the pardoning power is an enumerated power of the Constitution and that

Ninth Circuit Court of Appeals (applying California law) held that an act of clemency bore no relation to sentencing laws — it was an independent act that did not infringe on the California Legislature's role in establishing penalties for crimes.[477]

Because the clemency authority is an enumerated power exercised wholly by the executive, courts have been reluctant to review most acts of clemency and have been highly deferential when they do. As the Oregon Supreme Court held in *Eacret*, "it is not within judicial competency to control, interfere with, or even to advise the Governor when exercising his power to grant reprieves, commutations, and pardons. The *principle of the separation of powers* written into the constitution by Article III, § 1 forbids it."[478] The Oregon Legislature's decision to not

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its limitations, if any, must be found in the Constitution itself."). The *Schick* court and others have interpreted substantive legislative control as a violation of the separation of powers, which is provided in both the Oregon and federal constitutions. *See* U.S. CONST. arts. I, II, III; Myers v. United States, 272 U.S. 52 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."); OR. CONST. art. III, §1. The Oregon Legislature has never attempted to exercise substantive control over the governor's clemency authority, so it is impossible to say exactly how the *Schick* doctrine would apply in an Oregon court. However, the directive from both state and federal courts has been – for slightly differing reasons – that the clemency power is unfettered by legislative control. *See also* Memorandum from Steven R. Powers, Deputy Legal Counsel, Office of Gov. John Kitzhaber to Curtis Robinhold, Chief of Staff, Office of Gov. John Kitzhaber (Apr. 18, 2011) (on file with the Office of Governor Kate Brown) ("[The Department of Justice's] preliminary advice is that the clause – "subject to such regulations as may be provided by law" – cannot be interpreted in a way that prohibits you from exercising your constitutional authority to grant a reprieve, commutation or pardon. That is . . . the legislature cannot enact a statutory framework that undermines or effectively negates the broad clemency powers provided to the Governor by the state constitution.").

[477] Green v. Teets, 244 F.2d 401, 403 (9th Cir. 1957). *See also Ex parte* Collie, 240 P.2d 275, 276 (Cal. 1952) ("In the absence of a clear expression of such intent, the statutory provisions should not be considered as an attempt to interfere with the governor's power . . . . A commutation is in the nature of a favor which may be withheld entirely or granted upon such reasonable conditions, restrictions, and limitations as the governor may think proper.")

[478] Eacret v. Holmes, 215 Or. 121, 125–26, 333 P.2d 741, 743 (1958) (emphasis added).

enact substantive restrictions on the clemency authority[479] — even if it could — has led the court to hold that the governor's clemency power is unfettered by the legislature and is therefore essentially "unlimited."[480]

b. A Governor May Make a Grant of Clemency Conditional on a Convicted Person's Ineligibility for Parole

The clemency power includes the authority to place conditions or qualifications on grants of clemency.[481] These conditions need not conform to other sources of law (such as sentencing statutes). In fact, courts have held from early in American history[482] that presidents and governors may effectively invent a "new" punishment via commutation,[483] so long as it is "lesser" than the original sentence and does not facially violate the constitution.[484] The conditions that a governor may impose in granting clemency are limited only in that they must not be "illegal, immoral, or impossible of performance, and to enforce them [may] not deprive the [inmate] of any legal right."[485]

In cases where a death sentence is commuted to a true life sentence, the ineligibility for parole is viewed as an appropriate, executively-imposed *condition* of the new life sentence.[486]

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[479] OR. REV. STAT. § 144.660 (2016).
[480] *Eacret*, 333 P.2d at 744.
[481] *Schick*, 419 U.S. at 265.
[482] In *Schick*, the U.S. Supreme Court noted that the practice of attaching extra-statutory conditions to commuted sentences dated back to the British monarchy. "It was common for a pardon or commutation to be granted on condition that the felon be transported to another place, and indeed our own Colonies were the recipients of numerous subjects of 'banishment.' This practice was never questioned despite the fact that British subjects generally could not be forced to leave the realm without an Act of Parliament and banishment was rarely authorized as a punishment for crime." *Id.* at 261.
[483] *Ex parte* Wells, 59 U.S. 307, 309–14 (1855).
[484] Biddle v. Perovich, 274 U.S. 480, 487 (1927).
[485] *Ex parte* Houghton, 49 Or. 232, 234, 89 P. 801, 802 (1907).
[486] *See, e.g.*, *Schick*, 419 U.S. 267–68; Hagelberger v. United States, 445 F.2d 279, 280–81 (5th Cir. 1971) (construing *Bishop*, infra); Green v. Teets, 244 F.2d 401, 403 (9th Cir. 1957); Bishop

The U.S. Supreme Court approved of this construction in *Schick v. Reed*, and held that such a commutation is lawful even when "life without parole" does not exist as a sentencing option under the relevant statutory regime.[487] In *Schick*, a military officer had been sentenced to death but received a commutation from President Dwight Eisenhower to life without possibility of parole.[488] The relevant military code did not allow for a judicial sentence of life without the possibility of parole, but *Schick* nevertheless upheld the commutation as a valid exercise of the President's commutation authority:[489] "The pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute."[490]

Accordingly, under the authority of *Schick*, commutation of a death sentence to a true-life sentence is permissible on the theory that eliminating the option of parole is a permissible condition of reducing the sentence.

c. A Conditional Commutation May Be Revoked at the Will of the Governor if the Recipient Violates a Condition

Not only may a commutation be issued with conditions attached, but where prospective conditions are present, a commutation may be revoked if those conditions are violated. Courts have held that a governor may decide when and how to revoke a commuted sentence. In the scenario contemplated above — a death sentence commuted to life without parole — the condition is ineligibility for parole. A further safeguard against mistaken parole exists: the

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v. United States, 223 F.2d 582, 587–88 (D.C. Cir. 1955); People *ex rel.* Madigan v. Snyder, 804 N.E.2d 546, 550 (Ill. 2004) (holding that a commutation of the death penalty to life without parole was allowable even when issued prior to the initial sentencing by a judge).

[487] *Schick*, 419 U.S.at 264–65.

[488] *Id.* at 380–81.

[489] *Id.* at 382–84.

[490] *Id.* at 384.

commutation itself could be revoked if an inmate pursued parole notwithstanding this ineligibility. This would eliminate any risk that the Parole Board would mistakenly grant parole to an ineligible commutee.

Oregon's courts have long recognized the revocability of a pardon or commutation. In *Ex parte Houghton*, the Oregon Supreme Court held that "the pardoning power may attach to it any condition precedent or subsequent that is not illegal, immoral, or impossible of performance; and [the prisoner] will be bound to a compliance with the conditions imposed, and has no right to contend that the pardon is absolute."[491] Further, the *Houghton* Court held that the governor may "summarily determine whether the conditions have been complied with, and, if he finds they have not, may revoke the pardon."[492]

The Oregon Supreme Court has never retreated from this holding. In 1926, it expanded *Houghton* and held that the governor also had the authority to revoke a reprieve.[493] The Court has continued to rely on *Houghton* as relevant precedent through the present day, and used it to draw important distinctions in *Haugen v. Kitzhaber*.[494] Oregon is also not alone on this point of the law. Other state and federal courts have confirmed the revocability of conditional commutations.[495]

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[491] *Ex parte* Houghton, 49 Or. 232, 234, 89 P. 801, 801 (1907).
[492] *Id.* at 802; Letter from David Hicks, Deputy Chief Counsel, Or. Dep't of Justice, to David Reese, Gen. Counsel, Office of the Governor (Jun. 25, 2007) (on file with the Office of Governor Kate Brown).
[493] *Ex parte* Dormitzer, 119 Or. 336, 340, 249 P. 639, 640 (1926).
[494] Haugen v. Kitzhaber, 353 Or. 715, 738–39, 306 P.3d 592, 606 (2013) (en banc).
[495] *See, e.g.*, Kelch v. Dir., Nev. Dep't of Prisons, 10 F.3d 684, 687 (9th Cir. 1993) (holding that the constitutional power to issue a pardon creates an executive function that carries with it the authority to reconsider the decision); Makowski v. Governor, 852 N.W.2d 61, 74 (Mich. 2014) ("When a Governor has granted a conditional commutation, if the conditions are not fulfilled, the Governor may revoke the commutation."); *Ex parte* Costello, 157 P.2d 713 (Wash. 1945) (cited by *Application of Fredericks*, 211 Or. 312, 321–22, 315 P.2d 1010, 1014 (1957)).

Furthermore, even if a commutation of death to true life did constitute an impermissible ex post facto law (which, as explained above, it does not), a governor could grant the commutation on the condition that the defendant waive a challenge to the commuted true life sentence, including a challenge based on the ex post facto clauses of the federal and state constitutions. The Oregon Supreme Court has held that defendants can waive protection of the ex post facto clause.[496] Accordingly, granting a conditional commutation would eliminate any possibility that death-row inmates could someday be released.

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The commutation of a sentence flows directly from the enumerated powers of the executive, which are largely outside the purview of judicial review or legislative constraint. The authority to commute a sentence carries with it the power to attach conditions, including ineligibility for parole. Moreover, a governor may revoke a commutation entirely if a recipient were to seek parole despite being ineligible.

Thus, an argument that ex post facto restrictions would inhibit the governor's ability to commute death sentences is erroneous. The ex post facto clause governs acts of sentencing that arise from laws passed by the legislature. The act of clemency flows directly from the authority of the governor and bears no relation to the statutes or codes that govern routine acts of sentencing by judges and juries. Further, ineligibility for parole is, in this context, a condition of a commutation, not a new sentence. If the condition were ever violated — i.e. a parole board granting parole to a commuted death row inmate — the governor would be well within her

[496] State v. McDonnell, 329 Or. 375, 389, 987 P.2d 486, 494 (1999).

authority to revoke the commutation and reinstate the death sentence. There is, as a consequence, no discernible scenario in which a capital sentence commuted to true life would allow any prisoner to be released on parole at any time. And as *Haugen* teaches, such a commutation may be imposed on these terms even over the objection of the recipient.

APPENDIX A[497]

Name	Age	Years on Death Row	Race
Isaac Creed Agee	39	5	White
Gregory Allen Bowen	62	13	White
Jason Van Brumwell	40	9	White
Jesse Caleb Compton	39	18	White
David Lee Cox	51	16	White
Clinton Wendell Cunningham	48	24	White
Michael Andre Davis	60	11	Black
Randy Lee Guzek	47	28	White
Conan Wayne Hale	40	18	White
Gary Dwayne Haugen	54	9	White
Michael James Hayward	41	20	White
Jesse Lee Johnson	55	12	Black
Martin Allen Johnson	59	15	White
Robert Paul Langley	56	27	White
Christian Michael Longo	42	13	White
Ernest Noland Lotches	61	23	Native American
Angela Darlene McAnulty	47	5	White
Michael Martin McDonnell	64	28	White
Marco Antonio Montez	54	28	Hispanic
Billy Lee Oatney	54	18	White
Horacio Alberto Reyes Camarena	61	19	Hispanic

[497] *Oregon Death Row*, *supra* note 53; OFFENDER SEARCH, *supra* note 49.

Dayton LeRoy Rogers	62	28	White
Eric Walter Running	65	16	White
Ricardo Serrano	41	6	Hispanic
David Lynn Simonsen	48	27	White
Jeffrey Dana Sparks	60	17	White
David Ray Taylor	60	2	White
Karl Anthony Terry	42	21	White
Matthew Dwight Thompson	45	20	White
Jeffrey Dale Tiner	58	16	White
Joshua Abraham Turnidge	40	5	White
Bruce Aldon Turnidge	65	5	White
Mike Spencer Washington	43	6	Black
Jeffrey Ray Williams	55	27	White