

# “GIVE ME DIGNITY BY GIVING ME DEATH”: USING BALANCING TO UPHOLD DEATH ROW VOLUNTEERS’ DIGNITY INTERESTS AMIDST EXECUTIVE CLEMENCY

NICOLE F. DAILO\*

## ABSTRACT

Oregon death row inmate Gary Haugen recently became the first criminal defendant to challenge a state governor’s exercise of the executive clemency power. By suing to expedite his impending execution amidst Governor John Kitzhaber’s decision to temporarily suspend the death penalty in Oregon, Haugen raised significant questions about the scope of a governor’s clemency power and the dignity interests implicated when death row inmates “volunteer” to die by foregoing further appeals of their cases. This Note proposes adoption of a balancing test to evaluate governors’ grants of clemency, arguing that state courts should uphold a death row inmate’s decision to “volunteer” for execution if the grant of clemency does not align with traditional clemency objectives recognized by the U.S. Supreme Court. This Note also suggests additional measures states can take to better protect and advance death row inmates’ dignity interests.

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"[W]ith adults I see absolutely no justification for setting other people's views of what is good for them above their own ideas of what is good for themselves."

"Not even if they themselves are happy about it later?"

"We're not talking about happiness, we're talking about dignity and freedom. Even as a little boy, you knew the difference. It was no comfort to you that your mother was always right."<sup>1</sup>

## I. INTRODUCTION

In 2012, death row inmate Gary Haugen sought to reclaim a right that he believed the State of Oregon had taken from him: the right to choose to die. "This is my free will. This is my constitutional right," he told

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<sup>1</sup> BERNHARD SCHLINK, *THE READER* 141-42 (Carol Brown Janeway trans., Pantheon Books 1997) (1995).

presiding Judge Timothy P. Alexander.<sup>2</sup> Haugen, who was convicted and sentenced to life in prison in 1981 for killing his former girlfriend's mother, was sent to death row in 2007 for killing a fellow inmate at the Oregon State Penitentiary.<sup>3</sup> Although his execution was initially set for December 6, 2011, Haugen found himself embroiled in a legal battle with Oregon Governor John Kitzhaber, who issued a blanket reprieve to all Oregon death row inmates shortly after Haugen's execution date was confirmed.<sup>4</sup> Lasting only for the remainder of Governor Kitzhaber's term, the reprieve temporarily halted all executions in the state.<sup>5</sup> Haugen and his attorneys refused the reprieve and argued that an inmate must accept it for it to be valid.<sup>6</sup> Although Judge Alexander agreed,<sup>7</sup> the Oregon Supreme Court did not. In ruling for Governor Kitzhaber on appeal, the court held, *inter alia*, that the governor's judgment in deciding to issue the reprieve was not subject to judicial review and that, in any event, acceptance by an inmate is not required to validate a reprieve.<sup>8</sup> Consequently, the reprieve remains in effect and Haugen's execution has once again, been postponed against his wishes.<sup>9</sup>

Haugen is not the only inmate seeking to expedite his execution. Since 2011, at least two other death row inmates, one in California and

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<sup>2</sup> Chris McGreal, *Oregon Governor in Wrangle with Death Row Inmate Suing for the Right to Die*, GUARDIAN (Sept. 14, 2012, 3:46 PM), <http://www.guardian.co.uk/world/2012/sep/14/oregon-governor-death-row-inmate>.

<sup>3</sup> Bill Chappell, *Death Row Inmate Fights for Right to Die in Oregon*, NPR (Mar. 14, 2013, 5:08 PM), <http://www.npr.org/blogs/thetwo-way/2013/03/14/174340080/death-row-inmate-fights-for-right-to-die-in-oregon>; Lynne Terry, *Gary Haugen Can Reject Gov. Kitzhaber's Reprieve, Judge Rules*, OREGONIAN (Aug. 3, 2012, 2:56 PM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/08/gary\\_haugen\\_can\\_reject\\_gov\\_kit.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/08/gary_haugen_can_reject_gov_kit.html).

<sup>4</sup> Terry, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> McGreal, *supra* note 2.

<sup>7</sup> Terry, *supra* note 3. Judge Alexander's ruling can be accessed online at [http://media.oregonlive.com/pacific-northwest-news/other/Judge\\_Alexanders\\_Haugen\\_Ruling.pdf](http://media.oregonlive.com/pacific-northwest-news/other/Judge_Alexanders_Haugen_Ruling.pdf).

<sup>8</sup> *Haugen v. Kitzhaber*, 306 P.3d 592, 609 (Or. 2013) (en banc) (explaining that the governor's judgment behind issuing the reprieve is not subject to review because the governor acted within the bounds of his constitutional authority); Helen Jung, *Oregon Supreme Court Denies Death Row Inmate Gary Haugen's Bid for Execution*, OREGONIAN (June 20, 2013, 10:47 PM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/06/oregon\\_supreme\\_court\\_decision.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/06/oregon_supreme_court_decision.html).

<sup>9</sup> Helen Jung, *Death Row Inmate Gary Haugen Vows to Keep Up Fight to Overturn Reprieve*, OREGONIAN (August 21, 2013, 2:21 PM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/06/death\\_row\\_inmate\\_gary\\_haugen\\_v.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/06/death_row_inmate_gary_haugen_v.html) [hereinafter Jung, *Fight*].

one in South Dakota, volunteered to hasten their sentences.<sup>10</sup> Haugen's case is noteworthy, however, because he was fighting not only against the state criminal justice system, but also against the state's chief executive. Despite the unsuccessful outcome for Haugen,<sup>11</sup> his case raises important questions about the protection of inmates' dignity and autonomy interests, and the scope of the executive clemency power.

This Note proposes a new legal standard for evaluating whether a competent<sup>12</sup> death row inmate's decision to volunteer for execution should be upheld against a grant of executive clemency, specifically when it takes the form of a blanket reprieve.<sup>13</sup> By combining the relevant legal doctrines into one balancing test, the proposed standard weighs an inmate's dignity interest against a state's interest in preserving its chief executive's clemency power. Essentially, this standard holds that a death row inmate's dignity interest, expressed through his or her autonomous decision to waive further appeals and volunteer for execution, should be upheld when a blanket reprieve is not narrowly tailored to serve its traditionally

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<sup>10</sup> Carol J. Williams, *Death Row Inmates' Desire to Die Renews Debate*, L.A. TIMES, Nov. 25, 2011, <http://articles.latimes.com/2011/nov/25/local/la-me-death-row-volunteers-20111126>.

<sup>11</sup> This Note recognizes that Haugen intends to continue to fight against the reprieve, but acknowledges that the Oregon Supreme Court's decision upholding it is the latest legal determination of its constitutionality.

<sup>12</sup> The proposed balancing test deals only with competent inmates' decisions to volunteer, primarily because the Supreme Court has held that competent criminal defendants have the right to make their own legal decisions, *see infra* Part II.C, and that, in any event, executing incompetent inmates who are unable to comprehend the proceedings and the ramifications of waiving their rights is unconstitutional. *See Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986). In September 2011, Marion County Circuit Judge Joseph Guimond determined that Haugen was competent to make his own decisions regarding the legal strategy in his case, including whether to dismiss his current counsel and whether to waive any further appeals. Helen Jung, *Judge: Death Row Inmate Gary Haugen Competent to Make Legal Decisions*, OREGONIAN (Sept. 27, 2011, 4:47 PM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/09/judge\\_death\\_row\\_inmate\\_gary\\_ha.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/09/judge_death_row_inmate_gary_ha.html). Judge Guimond's decision was based largely on the testimony of a Portland psychologist, who concluded, despite Haugen's apparent personality disorder and antisocial behavior, that Haugen understood his legal options and their consequences. *Id.* One month later, Judge Guimond also deemed Haugen competent to be executed, based on Haugen's answers to a series of questions gauging Haugen's "understanding of his legal options and the reasons for his execution." Helen Jung, *'I'm Ready,' Oregon Death Row Inmate Gary Haugen Tells Judge; May Face Execution Dec. 6*, OREGONIAN (Oct. 7, 2011, 8:31 PM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/10/im\\_ready\\_oregon\\_death\\_row\\_inma.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/10/im_ready_oregon_death_row_inma.html).

<sup>13</sup> *Ex parte United States*, 242 U.S. 27, 43–44 (1916); Molly Clayton, Note, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751, 754–55 (2013); *see also Solesbee v. Balkcom*, 339 U.S. 9, 11–12 (1950) (characterizing a postponement of execution based on an inmate's insanity as a reprieve), *abrogated on other grounds by Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion).

acceptable purposes.

Part II of this Note discusses the U.S. Supreme Court's jurisprudence on clemency, dignity, and waiver, which make up the pivotal components of the proposed balancing test. Part II.A provides a history of the Court's clemency cases that collectively set out three traditional, though not exhaustive, purposes of clemency, which serve as the basis for the proposed test's "narrowly tailored" requirement. Part II.B examines the Court's prior consideration of dignity interests and explains why the proposed test characterizes dignity as autonomy. Part II.C then traces the Court's waiver jurisprudence to show how allowing death row inmates to volunteer for execution by waiving their appeals can be authorized in some cases.

Next, Part III explains the proposed test in greater detail and demonstrates its flexibility. Part III.A revisits the Supreme Court jurisprudence discussed in Part II to clarify how the Court's decisions support the proposed test and to show why a "narrowly tailored" requirement is necessary. Part III.B then applies the proposed test to Governor Kitzhaber's reprieve, using Haugen's case as an example of circumstances that call for courts to uphold a death row inmate's dignity interest. As a comparison, Part III.C considers the moratoriums in Maryland and Illinois to demonstrate when the proposed test can lead to the opposite result of validating a state's blanket suspension of the death penalty.

Finally, Part IV presents additional measures that states can adopt to implement and enhance the proposed test's operations. Part IV.A argues for the addition of other voices and perspectives to the clemency process. Part IV.B then provides a framework for drafting legislation aimed at protecting death row inmates' dignity interests. Part V provides concluding thoughts on the topic.

## II. DEVELOPING A NEW LEGAL STANDARD THROUGH SUPREME COURT JURISPRUDENCE

The U.S. Supreme Court has yet to review a case in which a death row inmate's desire to volunteer for execution is in direct conflict with a state executive's exercise of the clemency power. Consequently, no defined standard exists for evaluating this issue. The Court has, however, confronted three related issues that provide some guidance: (1) the scope of the federal executive clemency power, (2) the interplay between an individual's dignity interest and government power, and (3) criminal defendants' right to control the progression of their cases. Each of these

lines of jurisprudence provides some insight, but none alone is sufficient to tackle the unresolved issue of death row inmates resisting grants of clemency. Nevertheless, they all bear on the question of whether an inmate's dignity interest should prevail over a state's clemency interest and thus provide the foundation for the new legal standard.

The proposed standard is a balancing test, premised upon the notion that courts reviewing a governor's blanket reprieve should weigh a death row inmate's dignity interest in volunteering for execution against the state's interest in upholding the reprieve. Under this standard, if the reprieve is not narrowly tailored to any of the traditional purposes of clemency suggested by the Supreme Court,<sup>14</sup> which seek to resolve matters of public rather than private concern, it should yield to the inmate's dignity interest. This part lays the foundation for the proposed balancing test by examining and contextualizing Supreme Court jurisprudence addressing the executive clemency power, individual dignity interests, and criminal defendants' autonomy rights.

#### A. LIMITING THE EXECUTIVE CLEMENCY POWER: THREE TRADITIONAL PURPOSES

The President's "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment"<sup>15</sup> allows the President to select one of several avenues when granting clemency.<sup>16</sup> Generally, under the U.S. Constitution and many state constitutions,<sup>17</sup> the executive clemency power permits the President or a governor to pardon a criminal defendant, grant a reprieve, or commute a criminal sentence.<sup>18</sup>

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<sup>14</sup> See *infra* Part II.A.

<sup>15</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>16</sup> *Ex parte Wells*, 59 U.S. 307, 309–10 (1855) (explaining that "pardon," as used in the Constitution, can take different forms).

<sup>17</sup> The Oregon Constitution, for instance, provides that the governor "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." OR. CONST. art. V, § 14. The constitutions of the other states specifically discussed in this Note, Maryland and Illinois, provide these states' governors with similar powers. Maryland provides that its governor "shall have power to grant reprieves and pardons, except in cases of impeachment," MD. CONST. art. II, § 20; Illinois allows its governor to "grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper," ILL. CONST. art. V, § 12.

<sup>18</sup> *Ex parte Wells*, 59 U.S. at 310, 314–15; see also Clayton, *supra* note 13 (explaining that the clemency power includes pardons, reprieves, and commutations of sentences); BLACK'S LAW DICTIONARY 288 (9th ed. 2009) (defining clemency as "[m]ercy or leniency; esp., the power of the President or a governor to pardon a criminal or commute a criminal sentence").

Though each of these actions is a form of clemency, a reprieve's temporary nature sets it apart from the other two, both of which entail permanent changes.<sup>19</sup> A commutation substitutes a criminal defendant's original sentence for a less severe one,<sup>20</sup> and a pardon exonerates a criminal defendant entirely, partially, or with certain conditions.<sup>21</sup> By contrast, a reprieve merely postpones the carrying out of a defendant's sentence.<sup>22</sup> Because of its transient and revocable nature, a grant of a reprieve leaves many questions unanswered.<sup>23</sup> In the case of a pardon or a commutation, the grant of clemency is final and permanent, provided any accompanying conditions are met.<sup>24</sup> That is not the case with a reprieve: the original punishment remains intact, and the inmate is left wondering if and when the sentence will be carried out.<sup>25</sup>

This period of uncertainty should persist, if at all, only for the time necessary to allow clemency to achieve its desired purposes. Three appropriate purposes of executive clemency have emerged from the Supreme Court's jurisprudence on the matter: (1) correcting judicial error, (2) promoting the public welfare, and (3) exacting individualized justice.<sup>26</sup>

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<sup>19</sup> *Ex parte United States*, 242 U.S. 27, 43–44 (1916) (adopting Blackstone's distinction between reprieves and pardons, “whereof the former is temporary only, the latter permanent”).

<sup>20</sup> *Ex parte Wells*, 59 U.S. at 308 (using “commute” to refer to reduction of a death sentence to life imprisonment); see also BLACK'S LAW DICTIONARY, *supra* note 18, at 318 (defining commutation as “[a]n exchange or replacement”).

<sup>21</sup> *Ex parte Wells*, 59 U.S. at 310 (explaining that a pardon may be “general, special or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course”); see also BLACK'S LAW DICTIONARY, *supra* note 18, at 1221 (defining a pardon as including absolute, conditional, general, and partial pardons, among others).

<sup>22</sup> *Ex parte Wells*, 59 U.S. at 314–15; see also BLACK'S LAW DICTIONARY, *supra* note 18, at 1417 (defining a reprieve as the “[t]emporary postponement of the carrying out of a criminal sentence, esp. a death sentence”).

<sup>23</sup> See *Ex parte United States*, 242 U.S. at 43 (adopting Blackstone's description of reprieves granted before or after judgment as “arbitrary reprieves [that] may be granted or taken off by the justices . . . , although their session be finished, and their commission expired”).

<sup>24</sup> *Ex parte Wells*, 59 U.S. at 311–12.

<sup>25</sup> See *Ex parte United States*, 242 U.S. at 44 (explaining that reprieves were traditionally used to “temporarily suspend [an inmate's sentence or execution] for the accomplishment of a purpose contemplated by law”). The “purpose contemplated by law” referred to in *Ex parte United States* was often “the end that pardon might be procured, or that a violation of law in other respects might be prevented.” *Id.* Achieving either of those objectives could foreseeably take significant time, and attainment of either is not necessarily certain.

<sup>26</sup> The clemency cases highlighted in this part appear and are discussed further in Jonathan Harris & Lothlorien Redmond, *Executive Clemency: The Lethal Absence of Hope*, 3 AM. U. CRIM. L. BRIEF 2 (2007). Arguing, *inter alia*, that the executive clemency power should be interpreted and invoked as an exercise of mercy and not just as a means of correcting judicial error, Harris and Redmond provide a concise yet informative history of the executive clemency power, tracing its origins through English common law, the founding of the United States, and

Because the Court has historically been reluctant to limit the clemency power and has frequently upheld its largely discretionary nature,<sup>27</sup> lower courts should not interpret this list of acceptable purposes as exhaustive. Yet, the Court's consistent recognition of these three purposes renders them the most appropriate, at least at this time, for evaluating the propriety of a grant of clemency. Thus, only these three purposes have been incorporated into this Note's proposed balancing test.

It is important to note, however, that the Court's repeated acknowledgment of the above three purposes more generally suggests that a chief executive should exercise the clemency power to primarily, if not entirely, address public, rather than private, concerns.<sup>28</sup> Each of the above purposes seeks to improve the administration of justice for society at large instead of, for example, working only to allay personal morality considerations the chief executive may have. This elevation of public concerns over personal misgivings should serve as an overarching framework for the appropriate exercise of the clemency power, because it allows clemency to function effectively in its recognized role as a check on other branches of government, as the Framers of the Constitution envisioned.<sup>29</sup> Thus, by focusing on these traditional purposes, the proposed test better ensures that clemency functions as it was constitutionally intended.

This characterization of the clemency power as a tool for addressing public concerns took shape in the Court's more recent clemency cases,<sup>30</sup> suggesting that despite the Court's early and repeated characterization of the clemency power as a broad one, the construct of "public over private concerns" should still guide exercise of the power.

In the mid-nineteenth century, the Supreme Court made clear that the clemency power resides entirely in the executive branch and that the

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Supreme Court jurisprudence addressing both clemency and the death penalty.

<sup>27</sup> See, e.g., *United States v. Wilson*, 32 U.S. 150 (1833); *Ex parte Wells*, 59 U.S. at 307; *Ex parte Garland*, 71 U.S. 333 (1866).

<sup>28</sup> The Court has rejected the notion that the clemency power is a private act meant to address private concerns and, instead, has characterized a grant of clemency as a response to issues of public importance. See *Biddle v. Perovich*, 274 U.S. 480, 486 (1927). The Oregon Supreme Court in *Haugen v. Kitzhaber*, 306 P.3d 592, 608 (Or. 2013), also noted that "[a]s 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 envisioned by the framers."

<sup>29</sup> See *Harris & Redmond*, *supra* note 26, at 4.

<sup>30</sup> See, e.g., *Herrera v. Collins*, 506 U.S. 390, 413 (1993) (describing the broad nature of the President's pardon power (quoting *Wilson*, 32 U.S. at 160–61)); *Biddle*, 274 U.S. at 487 (holding that clemency includes the power to commute a death row inmate's sentence to life imprisonment (citing *Ex parte Wells*, 59 U.S. at 317)).

President or a governor may extend or limit grants of clemency independent of legislative or judicial review.<sup>31</sup> In *Ex parte Wells*, President Fillmore pardoned a capital defendant on the condition that he remain in prison for life.<sup>32</sup> The Supreme Court upheld the President's power to grant conditional pardons, explaining that "[t]he real language of the [C]onstitution is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known in the law as such, whatever may be their denomination. . . . [A] conditional pardon is one of them."<sup>33</sup> Similarly, in *Ex parte Garland*, the Court prevented Congress from limiting the President's power to grant pardons through legislative action.<sup>34</sup> In *Garland*, an attorney and former Confederate congressman received a presidential pardon, but was precluded from appearing before the Supreme Court due to a congressional mandate that required attorneys seeking admission to the federal bar to take an oath certifying that they had not committed any act of treason.<sup>35</sup> In holding that the congressional mandate could not prevent the attorney from appearing before the Court, Justice Field made clear that Congress could not limit the presidential clemency power, except in cases of impeachment: "This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."<sup>36</sup> The Court's early clemency cases thereby affirmed the broad nature of the executive clemency power.

In the early twentieth century, the Court continued to interpret the clemency power broadly, but began to shape the general contours of the clemency power and explain its purposes.<sup>37</sup> In *Ex parte Grossman*, the Court held that a presidential pardon could be applied even to criminal contempt of court and that "whoever is to make [the clemency power] useful must have full discretion to exercise it[, and the] Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."<sup>38</sup> However, the Court explained that the

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<sup>31</sup> See *Ex parte Wells*, 59 U.S. at 309; *Ex parte Garland*, 71 U.S. at 380.

<sup>32</sup> *Ex parte Wells*, 59 U.S. at 308.

<sup>33</sup> *Id.* at 314.

<sup>34</sup> *Ex parte Garland*, 71 U.S. at 380.

<sup>35</sup> *Id.* at 375–77.

<sup>36</sup> *Id.* at 380.

<sup>37</sup> *Ex parte Grossman*, 267 U.S. 87 (1925); *Biddle v. Perovich*, 274 U.S. 480 (1927); *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

<sup>38</sup> *Ex parte Grossman*, 267 U.S. at 120–21.

clemency power, despite the extensive uses to which it could be put, still had primary roles of serving as a check on the judicial branch and promoting the public welfare:

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments.<sup>39</sup>

Following *Grossman*, the Court continued to acknowledge acceptable purposes of the executive clemency power. In *Biddle v. Perovich*, the Court upheld the President's ability to commute a defendant's death sentence to life imprisonment.<sup>40</sup> Justice Holmes, writing for the Court, characterized the President's discretion as being properly exercised when it is used to benefit the public welfare:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When 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.<sup>41</sup>

After *Grossman* and *Perovich*, the Court repeatedly affirmed the clemency power as a limit on the judiciary, indicating that this objective, along with the objective of promoting the public welfare, is an appropriate use of clemency.

State governors are deemed to have clemency power as broad as that of the President, which includes the power to grant pardons as well as reprieves.<sup>42</sup> Furthermore, regardless of whether it belongs to a governor or the President, the executive clemency power has rarely been subject to judicial review because it has traditionally rested outside the bounds of

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<sup>39</sup> *Id.*

<sup>40</sup> *Biddle*, 274 U.S. at 480.

<sup>41</sup> *Id.* at 486 (internal citation omitted).

<sup>42</sup> See *Solesbee v. Balkcom*, 339 U.S. 9, 11–12 (1950), *abrogated on other grounds by Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion).

judicial process.<sup>43</sup> Executive clemency has thus been available as a “fail safe” for criminal defendants, particularly for those challenging their convictions or sentences based on newly discovered evidence.<sup>44</sup> Further, the Court has held that the broad, discretionary nature of a governor’s clemency power precludes the application of the traditional requirements of criminal procedure to state clemency proceedings because the due process guaranteed in judicial proceedings cannot properly be invoked in clemency proceedings, lest clemency cease to be a power belonging to the executive branch alone.<sup>45</sup>

Thus, the Court has determined that grants of clemency generally are not subject to judicial or legislative review.<sup>46</sup> However, by explaining what circumstances justify an exercise of the executive clemency power,<sup>47</sup> the Court suggested that the power is not absolute. The Court’s clemency cases indicate that a governor’s clemency power is similar to that of the President<sup>48</sup>—it is broad and discretionary—but it is intended to serve as a means of correcting judicial error and promoting the public welfare.<sup>49</sup> Further, the Court’s clemency cases suggest that the power should be invoked sparingly, on an individualized basis, taking into consideration the circumstances of a single defendant’s case: “it is a check entrusted to the executive for special cases.”<sup>50</sup> Fittingly, in each of the cases discussed above, the President extended a pardon to, or commuted the sentence of, only one criminal defendant.<sup>51</sup> The Court’s clemency cases thereby leave us with three traditionally acceptable purposes: any grant of clemency should aim to (1) protect the public, (2) correct judicial error, or (3) exact individualized justice whenever possible. While these three purposes are

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<sup>43</sup> *Id.*; see also *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 284–85 (1998) (explaining that the clemency power rests with the executive branch and thus is not subject to due process requirements governing the judiciary). However, as will become evident later in this Note, the Supreme Court has a history of reviewing governmental action that, though originating in and belonging primarily to one of the other branches of government, stands to change key provisions in the nation’s law. See *infra* Part II.B. Death penalty reprieves, originating in and belonging primarily to the executive branch of a state, often aim to have the same effect; thus, state courts can review their governors’ clemency decisions in this context.

<sup>44</sup> *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

<sup>45</sup> *Ohio Adult Parole Auth.*, 523 U.S. at 284–85.

<sup>46</sup> See *supra* notes 31–36, 43–45, and accompanying text.

<sup>47</sup> See *supra* notes 37–41 and accompanying text.

<sup>48</sup> See *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950), *abrogated on other grounds by Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion).

<sup>49</sup> See *supra* notes 39–41 and accompanying text.

<sup>50</sup> *Ex parte Grossman*, 267 U.S. 87, 121 (1925).

<sup>51</sup> See *supra* text accompanying notes 32–41.

the most prominent ones to have emerged from the Court's clemency jurisprudence, they are not the only possible justifications for a grant of clemency. Nevertheless, they highlight the Court's apparent focus on matters of public concern as the most appropriate target of executive clemency.

This definition of clemency, as a broad power that should be invoked primarily for public concerns, leads to the inevitable, though perhaps rare, conclusion that a chief executive's decision to grant a pardon or a reprieve cannot always be deemed *per se* reasonable or appropriate. The Court's decision in *United States v. Wilson*<sup>52</sup> underscores this point. In *Wilson*, a capital defendant, who was convicted of robbing the U.S. Mail and sentenced to death, received a presidential pardon.<sup>53</sup> However, the defendant refused the pardon.<sup>54</sup> On appeal, the Supreme Court acknowledged the broad nature of the executive clemency power, but held that a pardon was invalid unless the person to whom it was extended actually accepted it:

The constitution gives to the president, in general terms, "the power to grant reprieves and pardons for offences [sic] against the United States." . . . A pardon is an act of grace, proceeding from the power intrusted [sic] with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. . . . A pardon is a deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him. It may be supposed, that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors.<sup>55</sup>

Although the consent principle established in *Wilson* was rejected in *Perovich*,<sup>56</sup> it is worth noting that in both cases, the death row inmate received an alternate sentence as a result of the presidential grant of clemency. That is, the inmate's original death sentence was either

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<sup>52</sup> *United States v. Wilson*, 32 U.S. 150 (1833).

<sup>53</sup> *Id.* at 158.

<sup>54</sup> *Id.* at 158–59.

<sup>55</sup> *Id.* at 160–61.

<sup>56</sup> See *supra* text accompanying notes 40–41.

commuted to life imprisonment<sup>57</sup> or was eliminated entirely.<sup>58</sup> Uncertainty about the final punishment, which inherently accompanies a reprieve,<sup>59</sup> was not present in either *Wilson* or *Perovich*. Thus, it is easy to understand why the Court in *Perovich* ultimately deemed the inmate's consent irrelevant: the commutation or lifting of a sentence reflects a judgment that the inmate is either deserving of a lesser penalty because of the facts of the case or the trial court's error,<sup>60</sup> or because the government can sufficiently promote the public welfare without imposing the death penalty.<sup>61</sup> Fittingly, then, the inmate's consent figured little into the clemency calculus, because at least one of the traditional purposes of the clemency power was at work. However, when uncertainty is the immediate and primary result of a grant of clemency—as is the case with issuing a reprieve instead of a pardon or commutation<sup>62</sup>—it is unclear whether such a grant serves any traditionally acceptable purposes. Hence, consideration of an inmate's consent is appropriate and necessary not only to determine that the clemency power was properly exercised, but also to promote other important social objectives, particularly respect for the inmate's dignity interests.

#### B. DIGNITY INTERESTS DEFINED AS AUTONOMY IN THE DEATH PENALTY CONTEXT

Throughout history, philosophers, political theorists, governments, and religious authorities have defined dignity in a multitude of ways, including the ability to reason and exercise one's free will, which demands respect from external forces, especially the government<sup>63</sup>; an inherent quality that renders "all mankind . . . worthy of respect for the sole fact of its existence"<sup>64</sup>; or even "an acquired trait [that is] an indication of high social or political status."<sup>65</sup> Dignity has also been characterized as the

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<sup>57</sup> *Biddle v. Perovich*, 274 U.S. 480 (1927); see also text accompanying notes 40–41 (summarizing the Court's holding in *Perovich*).

<sup>58</sup> *Wilson*, 32 U.S. at 158–59.

<sup>59</sup> See *supra* notes 22–25 and accompanying text.

<sup>60</sup> See *supra* note 39 and accompanying text.

<sup>61</sup> See *supra* note 41 and accompanying text.

<sup>62</sup> See *supra* notes 19–25 and accompanying text.

<sup>63</sup> Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 75–76 (2011) (discussing the Second Vatican Council's and Immanuel Kant's similar definitions of dignity).

<sup>64</sup> *Id.* at 74 (characterizing, as the minority view, Cicero's definition of "dignitas" as an inherent quality).

<sup>65</sup> *Id.* (discussing the ancient Roman definition of "dignitas").

fundamental right underlying all constitutional rights<sup>66</sup>; as the basis of legal ethics<sup>67</sup>; and as a value worth protecting in international human rights law.<sup>68</sup> As a result of these varied definitions, dignity has assumed an almost paradoxical characteristic: although many people would acknowledge that the “dignity of the human person as a basic ideal is so generally recognized as to require no independent support,”<sup>69</sup> dignity remains a concept that “suffers from an inherent vagueness at its core” because it can be defined in so many ways.<sup>70</sup> Put another way, dignity is generally understood, but defining the term for use in legal analysis and application is difficult. The Supreme Court’s jurisprudence addressing dignity interests<sup>71</sup> reflects this challenge: the Court has used the term “dignity” in opinions dealing with the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments,<sup>72</sup> often defining dignity differently based on context.<sup>73</sup> Although critics may argue that a contextual definition makes the term incoherent<sup>74</sup> and susceptible to abuse by activist judges,<sup>75</sup> defining dignity based on its context allows courts to “speak about dignity more clearly,”<sup>76</sup> thereby facilitating the protection of a specific dignity interest under particular circumstances.

In the Eighth Amendment and death penalty context, the Supreme Court has typically defined dignity as what one scholar has termed “collective virtue,” which “is expressed when people behave and are treated in ways worthy of humans, not beasts. When society treats people

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<sup>66</sup> *Id.* at 68–69; see also Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006) (defining dignity as an American constitutional value and outlining categories of cases where the Supreme Court has expressly considered dignity interests).

<sup>67</sup> Glensy, *supra* note 63, at 73–74.

<sup>68</sup> *Id.* at 78–79.

<sup>69</sup> *Id.* at 68 (quoting Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 848–50 (1983)).

<sup>70</sup> *Id.* at 67.

<sup>71</sup> The dignity cases highlighted in this part appear and are discussed further in Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011). Henry posits that the Supreme Court has characterized “dignity” to mean at least five different concepts, two of which, “liberty” and “collective virtue,” *id.* at 207, 221, are discussed in this Note.

<sup>72</sup> *Id.* at 172–73.

<sup>73</sup> *Id.* at 189–90; see also Goodman, *supra* note 66, at 757 (identifying eight distinct contexts in which the Supreme Court has defined dignity interests).

<sup>74</sup> Henry, *supra* note 71, at 189.

<sup>75</sup> Glensy, *supra* note 63, at 70–71 (quoting John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 697 (2008)).

<sup>76</sup> Henry, *supra* note 71, at 189.

in ways that are in-humane, or when people engage in activities that are de-humanizing, collective virtue as dignity diminishes.”<sup>77</sup> The Court’s Eighth Amendment jurisprudence addressing prisoners’ rights<sup>78</sup> and the constitutionality of the death penalty for certain classes of offenders<sup>79</sup> reflects, on a very general level, this concept of dignity. Indeed, Chief Justice Warren, writing for the Court in *Trop v. Dulles*, declared, “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”<sup>80</sup> Despite the Court’s references to dignity, the crux of its reasoning in declaring the death penalty unconstitutional for insane, mentally retarded, and juvenile offenders turned on what the Court perceived as these defendants’ reduced culpability for their crimes.<sup>81</sup> Thus, dignity interests did not seem to be a primary consideration in the Court’s death penalty cases, and concerns for dignity have often failed to prevail over state governments’ interests in maintaining a death penalty scheme.<sup>82</sup>

Consequently, the Court’s treatment of dignity interests in the death

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<sup>77</sup> *Id.* at 221.

<sup>78</sup> *Id.* at 224–25 (citing *Hope v. Pelzer*, 536 U.S. 730, 738, 745 (2002) (holding that a prisoner was “treated in a way antithetical to human dignity” when, as punishment for disruptive conduct, he was handcuffed to a hitching post, deprived of water and bathroom breaks, and taunted for seven hours in the hot sun) and *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (holding that because “[p]risoners retain the essence of human dignity inherent in all persons,” they are entitled to basic necessities, including medical care)).

<sup>79</sup> See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (citing the Constitution’s “broad provisions to . . . preserve human dignity” as one reason for declaring the juvenile death penalty unconstitutional); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86 (1958)) (noting that “the dignity of man” protected by the Eighth Amendment underlies the evaluation of whether the death penalty is excessive for mentally retarded offenders); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (citing the Constitution’s “broad provisions to . . . preserve human dignity” as one reason for declaring the juvenile death penalty unconstitutional); *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986) (plurality opinion) (“[K]illing one who has no capacity to come to grips with his own conscience or deity . . . simply offends humanity. . . . [T]his Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.”).

<sup>80</sup> *Trop*, 356 U.S. at 100.

<sup>81</sup> See *Roper*, 543 U.S. at 569–71 (noting that the death penalty is unconstitutional for juvenile offenders, in part, because they “cannot with reliability be classified among the worst offenders” because of their “diminished culpability”); *Atkins*, 536 U.S. at 319 (“[T]he lesser culpability of the mentally retarded offender surely does not merit [the death penalty].”); *Ford*, 477 U.S. at 410 (explaining that exempting an insane offender from the death penalty “protect[s] the condemned from fear and pain without comfort of understanding”).

<sup>82</sup> Goodman, *supra* note 66, at 775–76 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)) (noting that the Court’s recognition of dignity concerns has not prevented it from upholding the death penalty as a punishment, provided the penalty is not excessive).

penalty context is at best confusing and at worst “meaningless,” because “the Court’s language regarding the Eighth Amendment belies the outcome. While expressly acknowledging human dignity as an underpinning of the Eighth Amendment, the Court has upheld most death penalty statutes, stating that public morality questions should be left to the legislature.”<sup>83</sup> For this reason, “the complex and unsettling question of whether inmates on death row have the same inherent dignity interest as individuals who are not on death row (or the rest of us)” remains unanswered.<sup>84</sup> Continuing to define dignity as merely “collective virtue,”<sup>85</sup> however, will not provide the answer to this question. Rather, to fully understand the dignity interests that death row inmates value most, and therefore, the dignity interests that the courts should protect, dignity in the death penalty context must also be defined as autonomy. Dignity in the death penalty context does not simply mean humane treatment<sup>86</sup>; it also means the government’s respect for an inmate’s personal decisions.

The eighteenth-century German philosopher Immanuel Kant is frequently credited as the first person to articulate the concept of dignity as autonomy,<sup>87</sup> which has “resonate[d] powerfully with the [Supreme] Court,” probably due in part to American values of individualism and freedom.<sup>88</sup> One scholar has termed the Kantian definition of dignity, “liberty as dignity”:

A person has liberty as dignity only insofar as he can make autonomous choices. Because it is capacity driven, dignity of this kind is contingent—one can gain or lose it over a lifetime. For example, young children and mentally incapacitated individuals do not qualify for liberty as dignity, but it is not foreclosed to them if and when they gain mental competence. Liberty as dignity commands respect at two levels: first, respect for individual choice, and second, respect for individuals because they have the capacity for choice. These two forms of respect are mutually reinforcing. Since exercising our free will is the mechanism through which we express our liberty as dignity, it is especially important that we encourage and support autonomous decisions. At the same time, because people have the unique ability to shape their future through their actions, they must not be treated strictly as objects of others’ needs or desires. . . . [L]iberty as dignity can be violated,

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<sup>83</sup> *Id.* at 778.

<sup>84</sup> *Id.* at 773.

<sup>85</sup> See *supra* text accompanying note 77.

<sup>86</sup> See *supra* notes 77–80 and accompanying text.

<sup>87</sup> Henry, *supra* note 71, at 206–07.

<sup>88</sup> *Id.* at 208.

diminished, or even destroyed by actions that fail to appropriately respect human self-determination.<sup>89</sup>

Although the Supreme Court has addressed dignity as autonomy primarily in cases involving abortion and private sexual activity,<sup>90</sup> the opinions in these cases turned on the Court's belief that the choice to engage in the relevant behavior was a deeply personal one, a decision that an individual made based on his or her own convictions and view of the world.<sup>91</sup> A death row inmate's decision to volunteer for execution involves the same considerations. Like women who have chosen to have an abortion or individuals who have chosen to express their homosexuality, a death row inmate who selects execution over further appeals has made an important decision about his or her body and the future course of his or her life, based on personal convictions. Thus, defining dignity as autonomy is the best means of conceptualizing the dignity interest triggered when a death row inmate decides to volunteer for execution. The Court's Fourteenth Amendment and substantive due process rights cases that conceptualize dignity as autonomy can therefore serve as a guide for how lower courts can protect and promote this particular concept of dignity in the death penalty context.

In *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>92</sup> the Court struck down certain provisions of the Pennsylvania Abortion Control Act<sup>93</sup> as unconstitutional due to the personal nature of a woman's decision to have an abortion.<sup>94</sup> In invalidating these provisions of Pennsylvania's abortion law, the Court "recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."<sup>95</sup> The Court did not expressly state what this "certain private

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<sup>89</sup> *Id.*

<sup>90</sup> See *infra* notes 92–106 and accompanying text.

<sup>91</sup> See *infra* notes 107–09 and accompanying text.

<sup>92</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), *overruled in part by* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

<sup>93</sup> 18 PA. CONS. STAT. §§ 3201–3220 (2012).

<sup>94</sup> *Thornburgh*, 476 U.S. at 766–67. The challenged provisions of Pennsylvania's abortion law failed to provide a medical emergency exception; contained physician reporting requirements that could subject a woman to harassment for her decision; promoted a post-viability abortion procedure that would invariably subject the woman to increased medical risk; and required physicians to inform the woman about all the medical risks of having an abortion, the procedure's physical and psychological effects, and the availability of medical assistance benefits and financial support from the father if she kept the child. *Id.* at 763–70.

<sup>95</sup> *Id.* at 772.

sphere" encompassed,<sup>96</sup> but its language tying autonomy to a woman's decision to have an abortion suggests that choices about what to do with one's own body are part of that sphere: "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental."<sup>97</sup>

Although it later overruled *Thornburgh* in part,<sup>98</sup> the Court continued to rely on the definition of dignity as autonomy to reaffirm the personal and private nature of a woman's decision to have an abortion. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Pennsylvania's newly amended abortion law came under scrutiny, this time for provisions involving parental consent for minors, spousal notification for married women, physician reporting requirements, and a mandatory twenty-four hour waiting period prior to an abortion procedure.<sup>99</sup> Despite upholding all of the contested statutory measures except for the spousal notification requirement, the Court's plurality opinion defined a woman's decision to have an abortion as a choice that not only implicated the privacy concerns of family life, but also rested on her own definition of humanity:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>100</sup>

The *Casey* plurality seems to suggest that respect for how a woman chooses to treat her body necessarily entails respect for how she defines the purpose and meaning of her own life. The two concepts are linked,

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<sup>96</sup> See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973). The Court's prior cases addressing personal decisions about "marriage, procreation, contraception, family relationships, and child rearing and education," *id.* (internal citations omitted), indicate that the "certain private sphere" referenced in *Thornburgh* generally includes what could be termed fundamental life choices. These choices involve, at their most basic level, individual decisions about how best to live physically, emotionally, socially, and spiritually.

<sup>97</sup> *Thornburgh*, 476 U.S. at 772.

<sup>98</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 838 (1992) (plurality opinion) ("To the extent . . . *Thornburgh* find[s] a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, . . . [it is] overruled.").

<sup>99</sup> *Id.* at 833.

<sup>100</sup> *Id.* at 851.

with her bodily choices serving as a single, but nonetheless important aspect of her personhood; respecting her choices thus must be part of respecting her autonomy, which is protected under the Fourteenth Amendment. Defining dignity as autonomy, as the plurality did in *Casey*, thereby facilitates protection of individuals' chosen expressions of their personhood against the "compulsion of the State."<sup>101</sup>

The Court's later decision in *Lawrence v. Texas*,<sup>102</sup> though once again referencing privacy concerns, is arguably another instance where the Court has based its protection of a certain life choice on the dignity as autonomy construct.<sup>103</sup> In *Lawrence*, the Court struck down Texas's anti-sodomy statute, holding, *inter alia*, that the State may not control or criminalize certain expressions of personhood:

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.<sup>104</sup>

Writing for the majority, Justice Kennedy went on to quote the "mystery of human life" passage from *Casey*,<sup>105</sup> classifying an individual's choice to engage in sexual conduct as being within the same category as other autonomous life choices the Court has protected in the past.<sup>106</sup> As some commentators have argued,<sup>107</sup> the *Lawrence* Court's dignity as autonomy language could have a sweeping effect on the future protection of dignity interests, the most significant of which could be the prohibition of governmental interference into "any activity that is 'somehow connected with efforts to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"<sup>108</sup> Although it remains to be seen whether the Court will take

<sup>101</sup> *Id.*

<sup>102</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>103</sup> Henry, *supra* note 71, at 211 n.210.

<sup>104</sup> *Lawrence*, 539 U.S. at 567.

<sup>105</sup> *Id.* at 574 (quoting *Planned Parenthood of Southeastern Pa.*, 505 U.S. at 851).

<sup>106</sup> *See id.* at 573–74 ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . [T]he Constitution demands [respect] for the autonomy of the person in making these choices. . . .").

<sup>107</sup> Henry, *supra* note 71, at 211 nn.214–15.

<sup>108</sup> *Id.* at 211 (quoting Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial*

dignity as autonomy this far, the stage is certainly set for the Court to do so, even in contexts outside of family life,<sup>109</sup> including the death penalty context.

### C. AUTONOMY IN THE DEATH PENALTY CONTEXT: DEATH ROW VOLUNTEERISM AND THE RIGHT TO WAIVE APPEALS

Preserving the dignity of a defendant both before and after conviction is a constitutionally-based goal, as indicated by amendments prohibiting unreasonable searches and seizures,<sup>110</sup> providing a privilege against self-incrimination,<sup>111</sup> guaranteeing representation by counsel and the opportunity to confront witnesses at trial,<sup>112</sup> and prohibiting cruel and unusual punishment.<sup>113</sup> Thus, the protection of a defendant's dignity does not diminish merely because he or she is convicted of a capital crime. Rather, in the death penalty context, work should be done to meticulously define and protect dignity, not only to carry out humane treatment,<sup>114</sup> but also to protect the inmate's autonomy. This protection of death row inmates' dignity often comes in the form of permitting multiple appeals.<sup>115</sup> After all, inmates who face the most severe punishment should have various means to challenge that punishment because "death is different."<sup>116</sup> Yet, in some cases, protecting a death row inmate's autonomy means respecting the inmate's wishes, even if those wishes appear unwise.<sup>117</sup> It is in this subgroup of circumstances that death row volunteerism comes to the forefront.

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*Hubris*, 102 MICH. L. REV. 1555, 1583 (2004)) (internal quotation marks omitted).

<sup>109</sup> Goodman, *supra* note 66, at 776–77 (arguing that the Kantian definition of dignity as autonomy, or the ability to reason, would suggest that death row inmates who possess such an ability should have their dignity interests protected); Henry, *supra* note 71, at 212 (arguing that the Court's expansion of dignity as autonomy interests in *Lawrence* could prompt it to reexamine its physician-assisted suicide cases because terminally ill patients define their concept of existence by choosing to die).

<sup>110</sup> U.S. CONST. amend. IV.

<sup>111</sup> U.S. CONST. amend. V.

<sup>112</sup> U.S. CONST. amend. VI.

<sup>113</sup> U.S. CONST. amend. VIII.

<sup>114</sup> See *supra* notes 77–80 and accompanying text.

<sup>115</sup> See *Gregg v. Georgia*, 428 U.S. 153, 194 (1976) (explaining that "meaningful appellate review," such as that provided by Georgia's capital sentencing scheme, helps to prevent arbitrary and capricious death sentences).

<sup>116</sup> *Id.* at 188.

<sup>117</sup> See *infra* notes 128–43 and accompanying text (highlighting the Supreme Court's waiver cases).

A “death row volunteer,” a term coined by legal scholars to describe capital defendants accepting rather than appealing their death sentences,<sup>118</sup> can take multiple forms. Though perhaps not akin to volunteering in the conventional sense, a defendant can, in effect, volunteer for execution by pleading guilty to a crime for which the State is seeking the death penalty, by choosing not to present mitigating evidence during sentencing, by waiving the right to an appellate review of his or her conviction and sentence, or by deciding not to apply for post-conviction relief after receiving a death sentence.<sup>119</sup> These actions amount to volunteering for execution because the capital defendant has chosen to forego the legal steps needed to successfully fight the death sentence.<sup>120</sup> As drastic as this course of action may seem, the practice is fairly common and often successful.<sup>121</sup> From 1977 to 2013, 143 inmates volunteered for execution and received the death penalty.<sup>122</sup>

Despite the relative prevalence of death row volunteers, the Supreme Court has not addressed whether an inmate’s dignity interests compel state courts to uphold the inmate’s decision to volunteer.<sup>123</sup> Nevertheless, death row volunteers have come before the Court in various contexts<sup>124</sup> and, like other criminal defendants, have petitioned the Court for the right to waive certain procedural safeguards. Even though the Court has yet to provide explicit guidance to states about how to respond to inmates’ decisions to volunteer, it has addressed defendants’ general right to direct the

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<sup>118</sup> Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 76 n.2 (2002).

<sup>119</sup> *Id.* at 76–77.

<sup>120</sup> *See id.* at 76 n.1 (describing an Arizona Supreme Court case where the court implicitly acknowledged the volunteering phenomenon by noting that “[d]efendant is not the first, and likely not the last, person to plead guilty in a death penalty case”); *id.* at 77 n.9 (explaining that if a capital defendant refuses to present mitigating evidence, the jury will only consider aggravating factors presented by the prosecution, thereby making it more likely that the defendant will receive a death sentence).

<sup>121</sup> Kristen M. Dama, Comment, *Redefining a Final Act: The Fourteenth Amendment and States’ Obligation to Prevent Death Row Inmates From Volunteering to Be Put to Death*, 9 U. PA. J. CONST. L. 1083, 1083 (2007); Casey, *supra* note 118, at 76 n.1 (listing scholarly articles and state court decisions that have recognized the arguably commonplace practice of volunteering for execution).

<sup>122</sup> *Searchable Execution Database*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/views-executions> (last visited Jan. 5, 2014) (filter results using “volunteer” category).

<sup>123</sup> Casey, *supra* note 118, at 78.

<sup>124</sup> *See id.*

progression of their cases.<sup>125</sup> Implicit in this right is the assumption that the defendant has been deemed competent to make these types of decisions.<sup>126</sup> The relevant case law can therefore be divided into two bodies of jurisprudence, with one line of cases upholding defendants' right to waive various procedural safeguards and the other requiring that those defendants be competent in order to exercise that right.<sup>127</sup> Taken together, both bodies of law suggest that a death row inmate's decision to volunteer for execution can be upheld based on dignity as autonomy concerns.

The Supreme Court has generally accorded criminal defendants the right to direct the progression of their cases, both during and after trial.<sup>128</sup> In *Faretta v. California*, which instigated the doctrine governing this issue, the Court upheld a criminal defendant's right to refuse assistance of counsel.<sup>129</sup> The defendant in *Faretta* attempted to represent himself, but the trial court refused to continue without intervention from the local public defender's office.<sup>130</sup> The Supreme Court invalidated the trial court's decision, explaining that the Sixth Amendment inherently grants criminal defendants the right to represent themselves:

The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment.<sup>131</sup>

The Court's reference to "other defense tools guaranteed by the [Sixth] Amendment"<sup>132</sup> suggests that a criminal defendant may waive constitutional and procedural safeguards aside from the assistance of

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<sup>125</sup> See *Dama*, *supra* note 121, at 1085.

<sup>126</sup> See *id.* at 1086–87.

<sup>127</sup> *Id.* at 1085–87. The waiver and competency cases highlighted in this part appear and are discussed further in *Dama*, *supra* note 121. Arguing, *inter alia*, that death row volunteerism by competent defendants is permitted under the Fourteenth Amendment, *Dama* provides a concise history of Supreme Court jurisprudence relevant to the death row volunteerism debate.

<sup>128</sup> See *Faretta v. California*, 422 U.S. 806, 819 (1975).

<sup>129</sup> *Id.* at 852.

<sup>130</sup> *Id.* at 807–11.

<sup>131</sup> *Id.* at 819–20.

<sup>132</sup> *Id.* at 820.

counsel. Thus, it is hardly surprising that many lower courts have interpreted *Faretta* as upholding defendants' autonomy at different stages of their cases.<sup>133</sup> The Supreme Court does not appear to disapprove of lower courts' interpretation of *Faretta*, even in the death penalty context.<sup>134</sup> For instance, the Court denied certiorari in *Lenhard v. Wolff*, a Ninth Circuit case that affirmed a capital defendant's refusal to provide mitigating evidence at the sentencing phase of his trial.<sup>135</sup> Thus, despite the oft-repeated maxim of "death is different,"<sup>136</sup> it is clear that at least with respect to waiving certain procedural rights, capital defendants' ability to make such a choice is not that different.

Two cases involving capital defendants, *Gilmore v. Utah*<sup>137</sup> and *Whitmore v. Arkansas*,<sup>138</sup> underscore the idea that defendants facing the death penalty have the right to waive their post-conviction appeals and to direct the progression of their cases. Both of these cases present the issue of "next friend" standing, which refers to a third party's attempt to pursue a case on behalf of a party in interest, typically because the latter cannot appear due to mental incompetence, lack of access to the courts, or some other disability.<sup>139</sup> In *Gilmore*, the defendant's mother, acting as "next friend," filed a stay of execution against her son's death sentence after he waived his post-conviction appeals.<sup>140</sup> Similarly, in *Whitmore*, a capital defendant sought to challenge a death sentence imposed on another capital defendant who waived his right of appeal.<sup>141</sup> In both cases, the Court rejected the petitioners' attempts to intervene.<sup>142</sup> The competence of the death row inmates was central to the Court's analysis: the parties asserting "next friend" standing could not challenge the inmates' decision to waive their appeals because both inmates had previously been deemed competent to make their own legal decisions.<sup>143</sup>

The Supreme Court addressed the competency to waive appeals in *Rees v. Peyton*, where it declined to decide whether a capital defendant

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<sup>133</sup> See Dama, *supra* note 121, at 1085.

<sup>134</sup> *Id.*

<sup>135</sup> *Lenhard v. Wolff*, 443 U.S. 1306, 1312 (1979).

<sup>136</sup> *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

<sup>137</sup> *Gilmore v. Utah*, 429 U.S. 1012 (1976).

<sup>138</sup> *Whitmore v. Arkansas*, 495 U.S. 149 (1990).

<sup>139</sup> *Id.* at 162.

<sup>140</sup> *Gilmore*, 429 U.S. at 1013–17 (Burger, J., concurring).

<sup>141</sup> *Whitmore*, 495 U.S. at 153–54.

<sup>142</sup> *Id.* at 165; *Gilmore*, 429 U.S. at 1013.

<sup>143</sup> *Whitmore*, 495 U.S. at 165.

could withdraw his petition for certiorari and waive his appeals rights until a district court determined whether he was competent to make that decision.<sup>144</sup> In *Rees*, the Court set out a standard for competency, which required a trial court to consider “whether [the defendant] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation,” in which case the defendant could be deemed competent, “or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.”<sup>145</sup> After remanding the case to the district court on the issue of the defendant’s competency,<sup>146</sup> the Supreme Court stayed the defendant’s execution one year later based on the district court’s findings.<sup>147</sup>

In *Godinez v. Moran*, the Court refined the *Rees* competency standard by expressly defining what factors would deem defendants competent to waive their constitutional rights or to plead guilty.<sup>148</sup> The capital defendant in *Godinez* pleaded guilty to first-degree murder and decided to represent himself after two psychiatrists found him competent to stand trial.<sup>149</sup> Later, however, he challenged his conviction on due process grounds, claiming that he was “mentally incompetent to represent himself.”<sup>150</sup> The Ninth Circuit agreed, holding that the trial court applied the wrong standard because the competency standard required for waiving constitutional rights must be higher than that necessary for standing trial.<sup>151</sup> In reversing the Ninth Circuit, the Supreme Court determined that no heightened competency standard was needed for capital defendants to waive their constitutional rights.<sup>152</sup> Rather, the standard for waiving the right to counsel or pleading guilty has two parts: a trial court must find (1) that the defendant has a rational and factual understanding of the proceedings, and thus is competent to stand trial, and (2) that the defendant has knowingly and voluntarily waived his or her constitutional rights.<sup>153</sup> Only then can

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<sup>144</sup> *Rees v. Peyton*, 384 U.S. 312, 313 (1966).

<sup>145</sup> *Id.* at 314.

<sup>146</sup> *Id.*

<sup>147</sup> *Dama*, *supra* note 121, at 1086 (citing *Rees v. Peyton*, 386 U.S. 989 (1967)).

<sup>148</sup> *Godinez v. Moran*, 509 U.S. 389, 400–02 (1993).

<sup>149</sup> *Id.* at 391–92.

<sup>150</sup> *Id.* at 393.

<sup>151</sup> *Id.* at 393–94.

<sup>152</sup> *Id.* at 400–01.

<sup>153</sup> *Id.* at 400–02.

the defendant's waiver be accepted.<sup>154</sup>

The Court's holdings in *Rees* and *Godinez* establish not only that capital defendants who plead guilty or waive their post-conviction appeals or right to counsel are not *per se* incompetent as a matter of law,<sup>155</sup> but also that their decision to embark on any of these paths can be rational and intelligent.<sup>156</sup> Taken together with the Court's holdings in *Faretta*, *Gilmore*, and *Whitmore*, the Court's competency cases indicate that capital defendants who meet the *Godinez* competency standard should be allowed to direct the progression of their cases, even if that means volunteering for execution.<sup>157</sup> This decision to volunteer is a life choice akin to those made in the context of family life,<sup>158</sup> one that arguably is "connected with efforts 'to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"<sup>159</sup> Defined in this manner, it becomes clear that upholding a death row inmate's decision to volunteer for execution protects the inmate's autonomy. The conflict between an inmate's dignity interest and a state's reprieve thus becomes more apparent: the inmate is making a personal decision and the state is seeking to prevent the inmate from making that choice. This is a classic conflict between individual liberty and governmental interests, yet there is no clear standard to resolve this conflict. Consequently, a new legal standard that is tailored to the death penalty context and that addresses death row volunteerism is needed. The balancing test proposed earlier in this part and discussed further in Part III satisfies this need.

### III. BALANCING AUTONOMY AND REPRIEVE INTERESTS: DOCTRINE AND PRACTICE

Any balancing test, by its nature, acknowledges that the conflicting interests or goals it seeks to weigh are equally important on a normative

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<sup>154</sup> *Id.*

<sup>155</sup> *Dama*, *supra* note 121, at 1086–87.

<sup>156</sup> The Arizona Supreme Court in *State v. Brewer*, 826 P.2d 783, 792 (Ariz. 1992), recognized this idea: "Defendant is not the first, and likely not the last, person to plead guilty in a death penalty case. We cannot say he is incompetent or prone to self-destructive impulses simply because he desires to do so."

<sup>157</sup> See *Dama*, *supra* note 121, at 1087 (arguing that, if it were to consider the issue, the Supreme Court would first need to find capital defendants competent under *Godinez* before permitting them to waive their post-conviction appeals).

<sup>158</sup> See *supra* Part II.B.

<sup>159</sup> Henry, *supra* note 71, at 211 (quoting Lund & McGinnis, *supra* note 108) (internal quotation marks omitted).

level. What elevates one interest over another is the context in which the two interests are considered: under particular circumstances, it becomes more important to protect one interest at the expense of the other. The balancing test proposed in this Note recognizes this and thus requires protection of a death row inmate's dignity in some cases, but upholds a state's clemency interest in others.<sup>160</sup> Under this test, if a state's blanket reprieve is not narrowly tailored to traditional clemency objectives recognized by the Supreme Court,<sup>161</sup> a death row inmate's dignity interest should be upheld, because complying with these acceptable objectives helps to ensure that clemency addresses public rather than private concerns. Put another way, the state must show that it has implemented measures to accompany the reprieve that will work to correct judicial error, promote the public welfare, or exact individualized justice: this "additional measures" requirement renders a grant of clemency better equipped to address public concerns, and it comports with many of the Court's clemency cases, where suspension of a criminal defendant's sentence was often accompanied by an additional affirmative act, whether that be an alternative punishment or an official pardon.<sup>162</sup> If the State cannot make this showing, the death row inmate should be permitted to volunteer despite the reprieve. This part further explains this balancing test, along with its conditions, and applies the test to the reprieve in Oregon and the past moratoriums on executions in Illinois and Maryland.<sup>163</sup>

#### A. NARROW TAILORING AS A SCALE IN THE DEATH PENALTY REPRIEVE CONTEXT

Some commentators have expressed concern about death row volunteerism, often arguing that states should be wary of permitting a

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<sup>160</sup> Many factors aside from the Supreme Court's defined purposes of clemency can be considered in this analysis, including a state's history with the death penalty, concurrent or contrary actions of the state legislature or the states' citizens relevant to the grant of clemency, and the death row inmate's competency to make legal decisions.

<sup>161</sup> See *supra* Part II.A.

<sup>162</sup> See *supra* Part II.A.

<sup>163</sup> It is important to note that the proposed balancing test aims to address only the very narrow situation of a death row inmate challenging a governor's issuance of a blanket reprieve or moratorium on executions: although the test could conceivably be expanded to apply to other forms of clemency, that inquiry is not the focus of this Note. Moratoriums are frequently the clemency avenue many state governors invoke in order to examine their states' death penalty schemes, and since continuance of the death penalty is primarily a state issue, the proposed balancing test is limited to this form of clemency.

death row inmate to hasten execution by volunteering.<sup>164</sup> For instance, John H. Blume, who has researched death row inmates' possible motivations for volunteering, has argued that death row volunteerism should be characterized not as a matter of personal choice, but as a suicidal act, at least in some cases.<sup>165</sup> Although these objections are well taken for the concern they demonstrate for death row inmates' mental health and the protection of human life, death row inmates should be permitted to volunteer for execution under certain circumstances, especially if the inmate has been deemed competent to make legal decisions.<sup>166</sup> The problem in Oregon illustrates such a circumstance, where a questionable gubernatorial reprieve has threatened at least one death row volunteer's exercise of his autonomy interest. Based on what one scholar has termed the contemporary "moratorium movement"<sup>167</sup> and the increasing abolition of the death penalty among the states in recent years,<sup>168</sup> the problem in Oregon could become more prevalent over time.

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<sup>164</sup> John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 940 (2005) (citing Richard W. Garnett, *Sectarian Reflections on Lawyer's Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 801 (2002)) (noting that numerous death row inmates who expressed a desire to volunteer changed their minds later); Casey, *supra* note 118.

<sup>165</sup> Blume, *supra* note 164, at 942.

<sup>166</sup> There has been some criticism regarding determinations of competency, particularly with respect to what has been perceived as a much too lenient standard for declaring defendants competent to make their own legal decisions. *See id.*, at 953–54, 967–69 (proposing a heightened competency standard); Stephen Skaff, Comment, *Chapman v. Commonwealth: Death Row Volunteers, Competency, and "Suicide by Court,"* 53 ST. LOUIS U. L.J. 1353 (2009) (arguing that the *Godinez* competency standard, even if expanded to include consideration of a death row volunteer's motivations, is insufficient to address the concerns of volunteerism opponents). However, the requirements of the *Godinez* standard for competency, *see supra* text accompanying notes 152–54, are similar to the common law doctrine of informed consent, often discussed in the context of terminally ill patients who refuse additional medical treatment. "[T]he doctrine of informed consent requires physicians to inform patients of the risks of proposed treatment and obtain their consent before they may administer that treatment." Edward A. Lyon, Comment, *The Right to Die: An Exercise of Informed Consent, Not an Extension of the Constitutional Right to Privacy*, 58 U. CIN. L. REV. 1367, 1384 (1990). Informed consent mirrors the *Godinez* standard, which requires only that a defendant be informed of the risks of waiving appeals and other constitutional rights. Informed consent has been accepted as a valid doctrine, sufficient to protect patients, in tort law and in state legislation. Lyon, *supra*, at 1384, 1392. The *Godinez* competency standard is thus not per se insufficient to protect capital defendants, who arguably face death in a way similar to terminally ill patients. *See infra* Part IV.B.

<sup>167</sup> Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1 (2002).

<sup>168</sup> *See infra* Part III.C (discussing the moratoriums in Illinois and Maryland, which set the stage for abolition of the death penalty in both states). Additionally, at the end of March 2013, Delaware's senate passed a bill to repeal the death penalty in the state. *Delaware Senate*

Thus, a workable standard for evaluating a governor's blanket reprieve, in light of this view of death row volunteerism as an autonomy interest, is timely and necessary.

A balancing test that frames the conflict between a reprieve-granting governor and a death row volunteer as an individual liberty inquiry sets the stage to think of death row volunteerism not as a phenomenon that should be prevented at all costs, but rather as a circumstance that can allow a death row inmate to preserve his or her dignity. The proposed balancing test weighs a death row inmate's dignity interest in volunteering for execution against a governor's interest in issuing a blanket reprieve. If the reprieve is not narrowly tailored to (1) correct judicial error, (2) promote the public welfare, or (3) exact individualized justice, it should not prevent a death row inmate from volunteering for execution. In determining whether a blanket reprieve is narrowly tailored to traditional clemency objectives suggested by the Supreme Court, courts should look to any measures the governor has put in place to accomplish any of those objectives. Courts can determine the purpose of the reprieve based on the factual circumstances. If there are no additional measures in place to accomplish any of the suggested clemency objectives, or if the measures seem ill-fitted for accomplishing those objectives, the reprieve should be suspended until the state can narrowly tailor its measures to accomplish traditional clemency objectives focused on public concerns. Provided the death row inmate has been deemed competent to make legal decisions, the court should uphold the inmate's decision to volunteer for execution.

This balancing test, along with its conditions, finds support in Supreme Court jurisprudence<sup>169</sup> and in the basic definition of a reprieve.<sup>170</sup> Because a reprieve is a temporary grant of clemency that merely postpones execution,<sup>171</sup> requiring the reprieve to be narrowly tailored to at least one of the suggested clemency objectives—correcting judicial error,

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*Approves Repeal of Death Penalty*, ASSOCIATED PRESS (Mar. 26, 2013, 9:15 PM), <http://www.politico.com/story/2013/03/death-penalty-repeal-delaware-89363.html>. The Delaware House Judicial Committee tabled the bill at the end of April 2013, but its supporters are continuing their efforts to move the bill to the Delaware house floor. Shana O'Malley, *Supporters of Delaware's Death Penalty Repeal Bill Want a Rule Suspension and Floor Hearing*, NEWSWORKS (April 30, 2013), <http://www.newsworks.org/index.php/local/delaware-feature/54210-supporters-of-delawares-death-penalty-repeal-bill-want-a-rule-suspension-and-floor-hearing>; *Recent Legislative Activity: 2013—Proposed Legislation*, DEATH PENALTY INFO. CENTER, <http://deathpenaltyinfo.org/recent-legislative-activity#2013> (last visited Nov. 10, 2013).

<sup>169</sup> See *supra* Part II.

<sup>170</sup> See *supra* notes 19–25 and accompanying text.

<sup>171</sup> See *supra* notes 19–25 and accompanying text.

promoting the public welfare, or exacting individualized justice<sup>172</sup>—reduces the uncertainty that arises when a governor issues a blanket reprieve. Traditionally, clemency has been extended on an individualized basis: changing a single defendant’s criminal sentence and leaving the law intact for all others.<sup>173</sup> On the federal level, blanket clemency is rare,<sup>174</sup> which suggests that it is inherently suspect. Particularly in the death penalty context, courts should view a blanket reprieve with heightened suspicion because it may have far-reaching effects: it often prompts reconsideration of a state’s criminal law and could ultimately result in a drastic change in public policy if it leads to abolition of the death penalty.<sup>175</sup> This possibility makes the “narrowly tailored” requirement necessary to ensure that the blanket reprieve remains within the bounds of the clemency power and does not continue for longer than is necessary to address pressing public concerns.

The temporary nature of a blanket reprieve also justifies framing death row volunteerism as an autonomy interest that courts should protect. For death row inmates who have been deemed competent and can obtain an execution date, a blanket reprieve leaves them in a state of uncertainty.<sup>176</sup> Like Gary Haugen, these death row inmates have death sentences that their governor refuses to allow to go forward, so they remain on death row, waiting indefinitely. The ability to choose—to make autonomous legal decisions, which inevitably amount to making decisions about one’s life<sup>177</sup>—is often the only vestige of dignity left to death row inmates. If that choice is volunteering for execution, death row inmates are essentially “defin[ing] [their] own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>178</sup> The Supreme Court’s dignity as autonomy jurisprudence and cases upholding competent defendants’ right to direct the progression of their cases indicate that such

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<sup>172</sup> See *supra* Part II.A.

<sup>173</sup> See *supra* notes 50–51 and accompanying text.

<sup>174</sup> See *supra* notes 50–51 and accompanying text.

<sup>175</sup> See *infra* Part III.C (describing the blanket moratoriums in Maryland and Illinois, which ultimately resulted in abolition of the death penalty in both states).

<sup>176</sup> See *supra* notes 19–25 and accompanying text (explaining that the temporary nature of a reprieve inherently means that it can be revoked at any time).

<sup>177</sup> Julie Levinsohn Milner, *Dignity or Death Row: Are Death Row Rights to Die Diminished? A Comparison of the Right to Die for the Terminally Ill and the Terminally Sentenced*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279, 313 (1998).

<sup>178</sup> Henry, *supra* note 71, at 211 (quoting Lund & McGinnis, *supra* note 108) (internal quotation marks omitted).

choices are insulated from governmental intrusion.<sup>179</sup> Granted, a death row inmate's decision to volunteer for execution is not solely a private choice.<sup>180</sup> Thus, the state's interest in issuing the reprieve and preserving human life must be considered more carefully. At the very least, the Supreme Court's dignity as autonomy jurisprudence indicates that the state's interest does not automatically prevail when this type of dignity interest is involved.<sup>181</sup> Accordingly, this Note's proposed balancing test accounts for circumstances that may justify upholding a death row inmate's autonomy interest over a state's interest in a blanket reprieve.

To be sure, balancing tests have their own share of problems, particularly because weighing a list of factors can lead to inconsistent decision making and overly subjective value judgments.<sup>182</sup> The proposed balancing test, however, which requires a governor's blanket reprieve to be narrowly tailored to achieve at least one of the suggested clemency objectives, is similar to a framework used in many other constitutional courts around the world. This method of balancing, known as proportionality analysis, is often used to evaluate issues like the one at issue here: a conflict between an individual's liberty interest and a legitimate governmental interest.<sup>183</sup> Simply put, proportionality analysis involves a preliminary review stage, during which a court determines whether a governmental interest burdens the exercise of an individual's constitutional right, and three subsequent tests to examine the government's action. If the action fails any of these tests, it is unconstitutional.<sup>184</sup>

Under proportionality analysis, the burden is on the government to show that its action does not unnecessarily infringe on a constitutional right or liberty interest.<sup>185</sup> Although a court must first determine that a claimed liberty interest has been legally recognized before proceeding to the three subsequent tests, "[n]o important claim will ever be rejected at this [preliminary] stage,"<sup>186</sup> suggesting that there is a presumption that the

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<sup>179</sup> See *supra* Parts II.B–C.

<sup>180</sup> The Supreme Court's dignity as autonomy cases primarily concern rights invoked in the context of private family life. See *supra* Part II.B.

<sup>181</sup> See *supra* Part II.B.

<sup>182</sup> Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 804 (2011).

<sup>183</sup> *Id.* at 802.

<sup>184</sup> *Id.* at 802–04.

<sup>185</sup> See *id.*

<sup>186</sup> *Id.* at 802.

claimed individual interest is a valid one. If the government does not overcome this presumption, it must show, under the first test, that “the relationship between the means chosen and the ends pursued is rational and appropriate, given a stated policy purpose,”<sup>187</sup> and, under the second test, that “the measure at issue does not curtail the right more than is necessary for the government to achieve its goals.”<sup>188</sup> Only after the first two tests are satisfied does the balancing even begin.<sup>189</sup> The third test, which has elements of the narrowly tailored requirement, forms “the heart of the analysis.”<sup>190</sup> The balancing of the narrowly tailored governmental measure against an individual right in the third test merely “‘complete[s]’ the analysis, in order to ensure that no factor of significance to either side has been overlooked.”<sup>191</sup> This approach has had “extraordinary success . . . in very different legal systems” because “it provides a doctrinal anchor for principled balancing as a mode of rights protection.”<sup>192</sup>

The balancing test proposed in this Note follows a similar line of reasoning, requiring courts to (1) acknowledge that dignity as autonomy interests exist in the death penalty context; (2) recognize a state governor’s interest in issuing a blanket reprieve or moratorium; (3) determine, based on traditional clemency objectives, whether the blanket reprieve is narrowly tailored to those objectives and, thus, to addressing public concerns; and (4) if the reprieve is found to be narrowly tailored to achieving one of the suggested purposes of clemency, balance the state’s interest against the death row inmate’s interest. Thus, this test can serve as a workable standard in the same way that proportionality analysis has in many constitutional courts.

#### B. AN INMATE’S AUTONOMY INTEREST PREVAILS: THE CASE OF OREGON’S BLANKET REPRIEVE

In applying this Note’s proposed balancing test to Oregon’s reprieve and the moratoriums issued in other states, it is important to remember that the Supreme Court has already recognized dignity as autonomy

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 803.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 801.

interests in other contexts<sup>193</sup> and has repeatedly affirmed a competent defendant's right to waive appeals and other constitutional safeguards, even on death row.<sup>194</sup> Thus, a death row inmate's dignity as autonomy interest has a basis in relevant case law. At the same time, however, it is important to acknowledge that states that use blanket reprieves and moratoriums to examine their death penalty schemes have a legitimate interest in preserving human life and in ensuring that the death penalty is administered humanely and free of arbitrariness. The conditions necessary for applying the proposed balancing test are thereby established<sup>195</sup>: in recognizing that two conflicting interests are at stake, courts examining a blanket reprieve or a moratorium should, first, affirm death row inmates' dignity interest as an inherent part of their autonomy interest and, second, determine whether the reprieve or moratorium is narrowly tailored to achieve at least one of the traditional clemency objectives.<sup>196</sup> If the reprieve or moratorium fails to satisfy the narrowly tailored requirement, the reviewing court should allow the inmate to volunteer for execution, provided he has been deemed competent.

Before comprehensively applying the proposed balancing test to Governor Kitzhaber's reprieve, Oregon's history with the death penalty provides some useful context. Generally speaking, Oregon has had an ambivalent relationship with the death penalty. The state first adopted the punishment in 1864, but repealed it by popular vote in 1914, only to have voters reinstate it in 1920 and repeal it again in 1964.<sup>197</sup> After the Supreme Court held the death penalty, subject to certain requirements, constitutional in *Gregg v. Georgia*,<sup>198</sup> Oregon voters reinstated the death

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<sup>193</sup> See *supra* Part II.B.

<sup>194</sup> See *supra* Part II.C.

<sup>195</sup> This portion of the analysis mirrors the preliminary review stage of proportionality analysis discussed *supra*, notes 183–86 and accompanying text.

<sup>196</sup> See *supra* Part II.A.

<sup>197</sup> *Oregon*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/oregon-1> (last visited Nov. 10, 2013).

<sup>198</sup> *Gregg v. Georgia*, 428 U.S. 153, 188, 206–07 (1976) (“We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it. . . . The new Georgia sentencing procedures . . . focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury’s discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* [*v. Georgia*, 408 U.S. 238

penalty again in 1978.<sup>199</sup> Most recently, in the face of a 1981 Oregon Supreme Court ruling that the death penalty was unconstitutional, the penalty was reinstated by popular vote in 1984.<sup>200</sup> Since then, Oregon has executed two inmates: one in 1996 and one in 1997, both during Governor Kitzhaber's first term in office.<sup>201</sup> Both of them volunteered for execution by declining to appeal their cases any further.<sup>202</sup> Gary Haugen made the same choice, maintaining that he had a right to volunteer for execution and to have his sentence carried out.<sup>203</sup> Haugen's dignity as autonomy interest, expressed through his decision to volunteer, is well grounded in the Supreme Court's abortion jurisprudence<sup>204</sup> and should have been recognized by lower courts. The conflict between Haugen's dignity interest and Governor Kitzhaber's reprieve can be evaluated under the proposed balancing test. Oregon's blanket reprieve fails this test. It fails to correct judicial error, promote public welfare, or exact individualized justice. Consequently, because a court previously deemed Gary Haugen competent,<sup>205</sup> he should have been permitted to volunteer for execution.

A November 2011 press release announcing Governor Kitzhaber's reprieve provides insight into what objectives may have driven the governor to grant clemency to all inmates on death row. Specifically, the execution of two death row volunteers during Governor Kitzhaber's first term appears to be an impetus for his decision to grant the blanket reprieve.<sup>206</sup> In the press release, the governor recounted the inner conflict he experienced when he permitted the death sentences of those volunteers to be carried out:

They were the most agonizing and difficult decisions I have made as

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(1972),] are not present to any significant degree in the Georgia procedure applied here.”).

<sup>199</sup> *Oregon*, *supra* note 197.

<sup>200</sup> *Id.*

<sup>201</sup> *Gov. John Kitzhaber of Oregon Declares a Moratorium on All Executions*, DEATH PENALTY INFO. CENTER (Nov. 22, 2011), <http://www.deathpenaltyinfo.org/gov-john-kitzhaber-oregon-declares-moratorium-all-executions> [hereinafter *Oregon Moratorium*]; *State by State Database*, DEATH PENALTY INFO. CENTER, [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited Nov. 10, 2013).

<sup>202</sup> *Oregon Moratorium*, *supra* note 201.

<sup>203</sup> McGreal, *supra* note 2 and accompanying text.

<sup>204</sup> *See supra* Part II.B.

<sup>205</sup> *See supra* note 12. Haugen's understanding of his legal options, their consequences, and the reasons for his execution, demonstrated through his answers to the trial court's questions and through a psychological evaluation, indicate that he (1) has a rational and factual understanding of the proceedings and (2) has knowingly and voluntarily waived his constitutional right to further appeals. The *Godinez* competency standard is therefore satisfied.

<sup>206</sup> *See Oregon Moratorium*, *supra* note 201.

Governor and I have revisited and questioned them over and over again during the past 14 years. I do not believe that those executions made us safer; and certainly they did not make us nobler as a society. And I simply cannot participate once again in something I believe to be morally wrong. . . . I refuse to be a part of this compromised and inequitable system any longer; and I will not allow further executions while I am Governor.<sup>207</sup>

The governor thereby ascertained his moral opposition to the death penalty and later iterated these views in a letter to the chairperson of Oregon's House Judiciary Committee,<sup>208</sup> which at the time was reviewing a bill that would repeal the state's death penalty.<sup>209</sup> Governor Kitzhaber makes clear throughout the press release that his personal beliefs greatly influenced his decision to extend a reprieve: the governor referenced his opposition to the death penalty multiple times, speaking about his "personal opposition to the death penalty," his "personal convictions about the morality of capital punishment," his "own deep personal convictions about capital punishment," his position in "favor of replacing the death penalty with life in prison without the possibility of parole," and his promise to "argue for that policy in any future debate over capital punishment in Oregon."<sup>210</sup> Granted, a governor's moral opposition to the death penalty does not automatically invalidate his or her decision to grant a blanket reprieve, but the reprieve does begin to deviate from clemency's suggested role of addressing matters of public importance, because personal morality is a private concern not encompassed by the Supreme Court's traditionally accepted clemency objectives.<sup>211</sup> Thus, a court must look to other portions of the governor's press release to determine if he may have issued Oregon's reprieve for any other purpose.

The governor did mention several perceived flaws in Oregon's death penalty scheme, which could presumably align with the Supreme Court's suggested clemency objectives. The governor discussed the arbitrariness of Oregon's death penalty scheme, the cost of maintaining death row in

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<sup>207</sup> *Id.*

<sup>208</sup> Letter from Governor John A. Kitzhaber to Rep. Jeff Barker, Chair of the Oregon House Comm. on Judiciary (Feb. 25, 2013), *available at* [http://media.oregonlive.com/politics\\_impact/other/Kitzhaber.pdf](http://media.oregonlive.com/politics_impact/other/Kitzhaber.pdf).

<sup>209</sup> Helen Jung, *Public Hearing Scheduled for Bill Asking Voters to Repeal Death Penalty*, OREGONIAN (Feb. 25, 2013, 1:38 PM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/02/public\\_hearing\\_scheduled\\_for\\_b.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/02/public_hearing_scheduled_for_b.html) [hereinafter Jung, *Public Hearing*].

<sup>210</sup> *Oregon Moratorium*, *supra* note 201.

<sup>211</sup> *See supra* Part II.A.

Oregon, the appeals process that leads to years of delay between sentencing and execution, and the regime's dependence on continually changing Supreme Court precedent,<sup>212</sup> all of which could point to some concern for promoting the public welfare through a less costly system. Arguably, some of the flaws that Governor Kitzhaber identified, such as arbitrariness or the inconsistency in case law inherited from the Supreme Court, suggest that he may have issued the blanket reprieve to correct judicial error or exact individualized justice, two other traditional clemency objectives described by the Supreme Court.<sup>213</sup> However, the governor's statement that he "had no sympathy or compassion for the criminals" in deciding to extend a reprieve<sup>214</sup> indicates that consideration of individual death row inmates' cases played little to no role in the governor's choice to exercise his clemency power. Thus, it is more likely that Governor Kitzhaber issued a blanket reprieve to promote the public welfare, which, again, is certainly an acceptable clemency objective.<sup>215</sup> In applying the proposed balancing test, the court must determine whether Governor Kitzhaber's reprieve is narrowly tailored to accomplish this presumed purpose.

Further examination indicates that the reprieve is not narrowly tailored to promote the public welfare because Governor Kitzhaber failed to put additional measures in place to ensure that the reprieve accomplishes his purported objectives. It is clear that Governor Kitzhaber wants change, or at the very least, debate to result from his grant of clemency. In his press release, he called on Oregon's legislature "to bring potential reforms before the 2013 legislative session" and on the state's citizens "to engage in the long overdue debate that this important issue deserves."<sup>216</sup> Although one representative in the Oregon legislature introduced a bill proposing a constitutional amendment to repeal the death penalty,<sup>217</sup> the bill died in committee in April 2013.<sup>218</sup> The drafting of this

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<sup>212</sup> *Oregon Moratorium*, *supra* note 201.

<sup>213</sup> *See supra* Part II.A.

<sup>214</sup> *Oregon Moratorium*, *supra* note 201.

<sup>215</sup> *See supra* Part II.A.

<sup>216</sup> *Oregon Moratorium*, *supra* note 201.

<sup>217</sup> Helen Jung, *Oregon Legislator Prepares Death-Penalty Repeal Bill, as Anniversary of Execution Moratorium Approaches*, OREGONIAN (Nov. 20, 2012, 5:31 PM), [http://www.oregonlive.com/politics/index.ssf/2012/11/oregon\\_legislator\\_prepares\\_dea.html](http://www.oregonlive.com/politics/index.ssf/2012/11/oregon_legislator_prepares_dea.html).

<sup>218</sup> Helen Jung, *Bill to Repeal Oregon's Death Penalty Dies in Committee*, OREGONIAN (April 18, 2013, 5:15 PM), [http://www.oregonlive.com/politics/index.ssf/2013/04/bill\\_to\\_repeal\\_oregons\\_death\\_p\\_1.html](http://www.oregonlive.com/politics/index.ssf/2013/04/bill_to_repeal_oregons_death_p_1.html).

bill, known as House Joint Resolution 1,<sup>219</sup> was the only real action taken since the governor issued the reprieve,<sup>220</sup> and even then, this legislator acted independently, without any additional directive from the governor.<sup>221</sup> Though Governor Kitzhaber's call to action engendered some result, the governor took no affirmative steps to ensure that the reprieve would ultimately lead to a more searching examination of Oregon's death penalty scheme<sup>222</sup> and, as a result, promote the public welfare. Although the legislature and the voters arguably should serve as the ultimate source of a change in Oregon's criminal law, the governor's call to action, with nothing more, makes it more likely that his blanket reprieve will continue indefinitely while serving none of the traditional clemency purposes suggested by the Supreme Court. This leads to uncertainty about the status of Oregon's criminal law, without any means of ensuring that this uncertainty persists only as long as is necessary to evaluate Oregon's death penalty scheme. Thus, the blanket reprieve is not narrowly tailored to promoting the public welfare, and it must fail. Haugen's dignity interest must take precedence, and because he was deemed competent, he should have been permitted to volunteer for execution.

#### C. A STATE'S BLANKET MORATORIUM PREVAILS: THE CASES OF MARYLAND AND ILLINOIS

Comparing Oregon's reprieve with gubernatorial action related to the death penalty in other states is instructive here, particularly to show that

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<sup>219</sup> *Id.*

<sup>220</sup> See Jung, *Fight*, *supra* note 9 (describing Gary Haugen as questioning why Governor Kitzhaber has not established a committee to examine Oregon's death penalty or taken other similar action to evaluate the state's capital sentencing scheme).

<sup>221</sup> *Id.*; see also Jung, *Public Hearing*, *supra* note 209 (citing Governor Kitzhaber's support for the death penalty repeal bill, but providing no additional information about any other measures the governor may have taken since issuing the reprieve in 2011).

<sup>222</sup> See Helen Jung, *Gov. John Kitzhaber's Reprieve of Gary Haugen's Execution Goes Before Oregon Supreme Court*, OREGONIAN (Mar. 13, 2013, 3:52 PM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/03/gov\\_john\\_kitzhabers\\_reprieve\\_o.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/03/gov_john_kitzhabers_reprieve_o.html); Jung, *Fight*, *supra* note 9; Jung, *Public Hearing*, *supra* note 209. The first and last of these news stories, published shortly before the Oregon Supreme Court heard oral argument in Haugen's case in March 2013, cite Governor Kitzhaber's opposition to the death penalty, but mention no independent action he may have taken since issuing the reprieve in 2011. Similarly, the second news story, published after the Oregon Supreme Court ruled in favor of Governor Kitzhaber in June 2013, cites Haugen as questioning why the governor has not taken any action to better examine Oregon's death penalty scheme and quotes Governor Kitzhaber as saying he is only "'renew[ing] [his] call for a re-evaluation of [Oregon's] current system that embraces capital punishment.'"

under the right circumstances, a blanket reprieve, whether official or de facto, may be upheld under this Note's proposed balancing test. Specifically, states where executions were on hold and where a governor recently or previously established a moratorium on the punishment serve as the best points of comparison due to their similarity to Oregon's situation.<sup>223</sup> Maryland and Illinois fit this description. In Maryland, the current governor recently signed a death penalty repeal bill into law,<sup>224</sup> halting all executions because of a challenge to the state's lethal injection law,<sup>225</sup> but a de facto moratorium on the death penalty was also previously in place in the state.<sup>226</sup> In Illinois, the death penalty was recently abolished following a ten-year moratorium, originally established by Governor George Ryan in 2000.<sup>227</sup> Though these states' experiences with the death penalty are not identical to Oregon's, their moratoriums, which can be characterized as de facto blanket reprieves because of their identical effect of suspending the death penalty, serve as examples of gubernatorial action that is narrowly tailored to achieve traditional purposes of the executive clemency power.<sup>228</sup> Under the proposed balancing test, the moratoriums in Maryland and Illinois, both of which were accompanied by proactive measures on the part of the governors to examine the state's administration of the death penalty, were valid. Thus, if a death row volunteer had asserted a dignity as autonomy interest in either of those states, the state's interest would have taken precedence.

As discussed previously, death row volunteers have a dignity as autonomy interest that the Supreme Court has recognized in other contexts.<sup>229</sup> Thus, the question remaining is whether the moratoriums in Maryland and Illinois are narrowly tailored to accomplish at least one of

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<sup>223</sup> See *Death Penalty in Flux*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-penalty-flux> (last visited Nov. 10, 2013).

<sup>224</sup> *Martin O'Malley Signs Maryland Death Penalty Repeal*, ASSOCIATED PRESS (May 2, 2013, 12:53 PM), <http://www.politico.com/story/2013/05/maryland-death-penalty-martin-omalley-signs-repeal-90863.html>; see also Michael Dressler, *Maryland Death Penalty Repeal: State Senate Votes to Abolish Executions*, BALTIMORE SUN (Mar. 6, 2013, 5:44 PM), [http://www.huffingtonpost.com/2013/03/07/maryland-death-penalty-repeal\\_n\\_2821023.html](http://www.huffingtonpost.com/2013/03/07/maryland-death-penalty-repeal_n_2821023.html) (describing the bill's provisions in greater detail).

<sup>225</sup> *Death Penalty in Flux*, *supra* note 223.

<sup>226</sup> *History of the Death Penalty in Maryland*, MD. CITIZENS AGAINST ST. EXECUTIONS, <http://www.mdcase.org/node/40> (last visited Nov. 10, 2013).

<sup>227</sup> *Illinois*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/illinois-1> (last visited Nov. 10, 2013).

<sup>228</sup> See *supra* Part II.A.

<sup>229</sup> See *supra* Parts II.B, III.B.

the clemency objectives suggested by the Supreme Court.<sup>230</sup> As this subpart demonstrates, the moratoriums in Maryland and Illinois are narrowly tailored to achieve at least one of the clemency objectives and therefore would prevail over a death row inmate's dignity interest under the proposed test.

In Maryland, Governor Parris Glendening declared a moratorium on executions in May 2002, but he expressed suspicion regarding the state's sentencing procedures years earlier. In 1996, he empanelled a taskforce, which ultimately identified racial bias in capital sentencing, and recommended a study on the issue.<sup>231</sup> The study received state funding, began in September 2000, and continued even after the governor officially declared the moratorium.<sup>232</sup> Similarly, in Illinois, Governor Ryan declared a moratorium on executions in 2000, vowing that it would remain in effect until he could be sure that the state did not execute any innocent people.<sup>233</sup> Moreover, prior to establishing the moratorium, the governor frequently criticized the state's administration of the death penalty, taking issue with the fact that by 2000, Illinois had exonerated thirteen death row inmates, but executed twelve.<sup>234</sup> For Governor Ryan, this statistic suggested that the state's death penalty regime was arbitrary and, in some cases, erroneous.<sup>235</sup> Fittingly, when he declared the moratorium, Governor Ryan established a committee to study Illinois' death penalty regime, to uncover any flaws, and to make recommendations for reform.<sup>236</sup>

The due process concerns underlying these governors' decisions to suspend the death penalty were present even prior to their taking such action.<sup>237</sup> Therefore, it is very likely that the moratoriums in both states were, in fact, motivated by at least one of the traditional purposes of executive clemency suggested by the Supreme Court. Both governors had early concerns about their respective states' administration of the death

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<sup>230</sup> See *supra* Part II.A.

<sup>231</sup> *History of the Death Penalty in Maryland*, *supra* note 226.

<sup>232</sup> *Id.*

<sup>233</sup> Rob Warden, *30 Years of the Death Penalty*, CHI. TRIB., Jan. 12, 2003, [http://articles.chicagotribune.com/2003-01-12/news/0301120012\\_1\\_penalty-illinois-supreme-court-illinois-death-row](http://articles.chicagotribune.com/2003-01-12/news/0301120012_1_penalty-illinois-supreme-court-illinois-death-row).

<sup>234</sup> Joseph N. Rupcich, *Abusing a Limitless Power: Executive Clemency in Illinois*, 28 S. ILL. U. L.J. 131, 140 (2003) (characterizing Governor Ryan's decision at the end of his term to commute all death row inmates' sentences to life imprisonment as an abuse of the clemency power).

<sup>235</sup> *Id.* at 141.

<sup>236</sup> *Id.*

<sup>237</sup> See *supra* text accompanying notes 231–35.

penalty. Governor Glendenning suspected racial bias in death sentencing as early as 1996,<sup>238</sup> and Governor Ryan believed from the start of his term that his state imposed the punishment arbitrarily.<sup>239</sup> This leads to the conclusion that each state's moratorium was based, at least in part, on those preexisting concerns, which, broadly speaking, involve a desire for judicial accuracy and consistent, individualized punishment. Thus, assuming the moratoriums in Illinois and Maryland were established to address these concerns, they satisfied at least two traditional clemency purposes: correcting judicial error and exacting individualized justice. Further, because a sentencing scheme based on fairness is always socially beneficial, the moratoriums in both states reflected a desire to promote the public welfare by providing an opportunity to reform what were arguably flawed systems. The studies that accompanied both moratoriums evaluated each state's death penalty scheme and reflected traditional clemency objectives, reducing uncertainty by ensuring that the moratoriums would continue only as long as was necessary to determine whether the death penalty should be kept as a punishment.<sup>240</sup> Therefore, the moratoriums in Illinois and Maryland were narrowly tailored to the suggested purposes of correcting judicial error, exacting individualized justice, and promoting the public welfare.<sup>241</sup> If this Note's proposed balancing test were applied, both moratoriums would have been upheld.

This result demonstrates that the proposed balancing test does not evince a preference for one interest over the other. Whether the government interest in suspending the death penalty or the death row inmate's dignity as autonomy interest will prevail depends on the factual circumstances. Although some may argue that a bias for individual liberties is evidenced by the burden placed on the state, the test requires that the claimed dignity interest be recognized in relevant case law before a court can engage in a searching analysis of a state's blanket reprieve. If the dignity interest has not been upheld in any context, it is more difficult for an individual to legitimately claim that his interest should prevail over

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<sup>238</sup> See *supra* text accompanying notes 231–32.

<sup>239</sup> See *supra* notes 233–35 and accompanying text.

<sup>240</sup> Indeed, Illinois eventually abolished the death penalty in 2010, *Illinois*, *supra* note 227, as did Maryland in 2013, *Martin O'Malley Signs Maryland Death Penalty Repeal*, *supra* note 224.

<sup>241</sup> See FRANK MCGARR ET AL., REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT: RECOMMENDATIONS ONLY 1–5 (2002), available at [http://www.chicagojustice.org/foi/relevant-documents-of-interest/illinois-governor-george-ryans-commission-on-capital-punishment/report\\_of\\_the\\_commission\\_on\\_capital\\_punishment\\_rec](http://www.chicagojustice.org/foi/relevant-documents-of-interest/illinois-governor-george-ryans-commission-on-capital-punishment/report_of_the_commission_on_capital_punishment_rec); Warden, *supra* note 233; *History of the Death Penalty in Maryland*, *supra* note 226.

the state's reprieve, which is assumed to embody a legitimate interest in preserving human life and promoting fairness and certainty in criminal law. Therefore, the benefit of the doubt given to the state offsets the higher burden placed on it by the "narrow tailoring" requirement. These considerations lead to the following conclusion: this proposed balancing test provides a workable and flexible means of resolving the unique questions that arise in the context of death row volunteerism. Since it is conceivable that Gary Haugen will not be the last death row inmate to challenge a governor's blanket reprieve,<sup>242</sup> courts should apply this balancing test and begin examining such conflicts from a dignity as autonomy perspective.

#### IV. ADDITIONAL REMEDIES TO PROTECT DIGNITY INTERESTS OF DEATH ROW VOLUNTEERS

Although the proposed balancing test is the most effective way to protect death row volunteers' dignity interests, states could implement other measures as well. Specifically, states could reform their clemency procedures or enact legislation to address death row inmates' dignity interests in the same way that some states, like Oregon, have enacted physician-assisted suicide laws. When combined with the proposed balancing test, these two additional remedies would give death row volunteers a voice and serve to counter improper exercises of the executive clemency power, even if only one of these additional remedies is implemented. Although these proposed remedies would be particularly effective in Oregon, they could easily apply in other states currently facing, or that may have faced, similar conflicts between a governor's decisions and an inmate's dignity interest. Thus, these additional remedies, like the proposed balancing test, have a reach far beyond Oregon.

##### A. REFORMATION OF CURRENT CLEMENCY PROCEDURES

Clemency procedures that vest the power to pardon, reprieve, and commute criminal sentences entirely in the governor inherently provide fewer procedural safeguards to ensure that the clemency power is exercised in the way that the Supreme Court has suggested is appropriate. Thus, providing additional steps of review for the clemency process would not only better align blanket reprieves with traditional clemency objectives, but would also facilitate further consideration of death row

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<sup>242</sup> See Kirchmeier, *supra* note 167, at 4-5; O'Malley, *supra* note 168; *supra* Part III.C.

volunteers' dignity interests. Applying these principles to Oregon's clemency procedures as an example, it becomes clear that adding more voices to the clemency review process enhances a state's ability to incorporate the proposed balancing test and its underlying principles.

Currently, Oregon is one of thirteen states where the clemency power rests entirely in the hands of a governor,<sup>243</sup> but the state could reform its clemency procedures to facilitate consideration of death row inmates' dignity interests and to restrict the executive clemency power. Dividing the responsibility for clemency decisions between the governor and a professional clemency advisory board would serve these purposes by providing an additional level of review for grants of clemency.<sup>244</sup> Ideally, the advisory board would make recommendations to the governor both on inmates' individual requests for clemency and on the governor's unprompted decisions to extend grants of clemency similar to that in place in Oregon. Although these recommendations do not have to be binding in order to be helpful to the governor, assembling an advisory board whose recommendations were binding would certainly do more to prevent future abuses of the clemency power. Assuming the board made such binding recommendations independent of the governor's influence and in accordance with traditionally acceptable clemency objectives, the board's decisions would help to ensure that a death row inmate's dignity interest is not automatically subordinated to the state's clemency interest in every circumstance. Were its recommendations not binding, the board's role in clemency decisions could more easily be reduced to an ineffectual advisory position, present merely for the appearance of additional review. At least with binding recommendations, the board could act to affirmatively protect death row inmates' dignity in appropriate situations.

Further, if the advisory board were comprised of professionals well versed in issues of culpability and punishment, like attorneys, mental health professionals, criminologists, parole officers, and even religious leaders, the state's clemency decisions would likely be more informed,

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<sup>243</sup> *Clemency*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/clemency#process> (last visited Nov. 10, 2013).

<sup>244</sup> Currently, seventeen states incorporate recommendations from a clemency board or advisory group into their governors' clemency decisions. In eight of these states, these recommendations to the governor are binding. *Id.* Other states, however, have taken a different approach, allowing a clemency board or advisory group to make clemency decisions without the governor or requiring the governor to sit on the clemency or advisory board that makes clemency decisions. NINA RIVKIND & STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* 840–41 (3d ed. 2009).

consistent, and even correct.<sup>245</sup> As Daniel T. Tobil explained in his article *How to Grant Clemency in Unforgiving Times*, “Few executives have any training in, or give much thought to clemency matters prior to taking office, so they are often ill-prepared for making such weighty, potentially volatile decisions. . . . Moreover, even conscientious executives can make mistakes in using clemency.”<sup>246</sup> Thus, if the governor were bound by decisions of a professional advisory board with expertise in the issues surrounding clemency, there would not only be increased dialogue regarding potential grants of clemency, but any approved extension of clemency would more readily align with traditional clemency purposes.<sup>247</sup> Such a circumstance would promote the “narrow tailoring” requirement of the proposed balancing test and more thoroughly incorporate application of the test into the state’s clemency procedures.

#### B. NEW LEGISLATION MODELED ON PHYSICIAN-ASSISTED SUICIDE STATUTES

Currently, four states—Oregon, Washington, Vermont, and Montana—have legalized physician-assisted suicide.<sup>248</sup> Although these states’ attitude toward the practice presents a prime circumstance for drafting similar legislation for death row volunteers, other states should consider doing the same. Protecting death row inmates’ dignity as autonomy interest by enacting a statute modeled on physician-assisted suicide laws would provide an additional source of positive law for state courts to consider in evaluating death row volunteers’ dignity interests. Furthermore, application of the proposed balancing test would gain additional momentum because the claimed dignity interest would be recognized not only in Supreme Court jurisprudence, but also in the state’s own positive law.

As an example, the Oregon legislature could draft a law to protect death row volunteers’ autonomy interests, similar to the state’s current law authorizing physician-assisted suicide. Because Oregon has a comparable framework on which to base legislation protecting the dignity interest of death row volunteers, and because Oregon voters approved the physician-

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<sup>245</sup> Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 231 (2003) (citation omitted).

<sup>246</sup> *Id.*

<sup>247</sup> See *supra* Part II.A.

<sup>248</sup> *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG (Mar. 28, 2013, 3:49 PM), <http://euthanasia.procon.org/view.resource.php?resourceID=000132>.

assisted suicide law by a sixty percent margin,<sup>249</sup> it is plausible that a right-to-die law for death row inmates could be enacted in the state.

Oregon's physician-assisted suicide law, called the Death With Dignity Act,<sup>250</sup> was enacted in 1997 and allows terminally ill patients to voluntarily end their lives through self-administration of lethal drugs prescribed for that purpose.<sup>251</sup> The process is as follows:

In Oregon . . . patients must first make two requests of their doctor for medication, fifteen days apart. The patient then has to make the request in writing. In order to prevent potential abuses, patients are required to sign consent forms in the presence of two witnesses, to at least one of which they are not related. Once approved, patients must self-administer the drugs. Typically, it's a deadly dose of Seconal, a barbiturate often prescribed by doctors to treat insomnia or to calm patients before surgery. The contents of the capsules are stirred into a glass of water or a serving of applesauce, to dull the taste. Statistics compiled and released annually by the Oregon Department of Health show that in the majority of cases, people lose consciousness within five minutes of swallowing the drugs. It can take anywhere between one minute and four days to die, but for most people death comes in just 25 minutes.<sup>252</sup>

The Death With Dignity Act addresses many of the concerns surrounding death row volunteerism, namely, that an inmate's desire to volunteer is ill informed or is not the inmate's true intention.<sup>253</sup> Specifically, the Act's requirement that the patient make a written request and later sign consent forms in the presence of two witnesses ensures that the patient's decision to die is indeed voluntary, while the Act's requirement that the patient make two requests for medication, fifteen days apart, ensures that the patient's decision is the result of careful, informed deliberation. Oregon could thus apply similar provisions to death row inmates who wish to volunteer for execution, and since these inmates have often undergone a competency hearing,<sup>254</sup> legislation modeled on the

<sup>249</sup> Milner, *supra* note 177, at 334 n.286.

<sup>250</sup> Oregon Death with Dignity Act, OR. REV. STAT. § 127.800–127.995 (1996).

<sup>251</sup> *Death With Dignity Act*, OR. HEALTH AUTHORITY, <http://public.health.oregon.gov/ProviderPartnerResources/Evaluationresearch/deathwithdignityact/Pages/index.aspx> (last visited Nov. 10, 2013).

<sup>252</sup> Jaime Joyce, *The Evolving State of Physician-Assisted Suicide*, ATLANTIC, July 16, 2012, <http://www.theatlantic.com/health/archive/2012/07/the-evolving-state-of-physician-assisted-suicide/259862/>.

<sup>253</sup> See Milner, *supra* note 177, at 291–97.

<sup>254</sup> Patricia Cooper, *Competency of Death Row Inmates to Waive the Right to Appeal: A Proposal to Scrutinize the Motivations of Death Row Volunteers and to Consider the Impact of Death Row Syndrome in Determining Competency*, 28 DEV. MENTAL HEALTH L. 105, 110

Death With Dignity Act would provide an additional level of review to ensure that they have not made their decisions lightly.

The Supreme Court has previously upheld a person's right to refuse medical treatment as long as he is competent,<sup>255</sup> and the Court has expressly left states with the option to enact physician-assisted suicide laws,<sup>256</sup> even though it has refused to find a constitutional right to have the aid of a doctor in ending one's life.<sup>257</sup> Thus, if we assume that terminally ill patients and death row inmates are similarly situated—and indeed, both arguably have nearly identical autonomy and dignity concerns, spend their days in sterile and dehumanizing environments, and worry about the burden they may be placing on family members<sup>258</sup>—then we should be prepared as a society to uphold the right to die for both.<sup>259</sup> “Otherwise, being sentenced to death may mean the additional loss of dignity in not being able to receive punishment when psychologically prepared for it.”<sup>260</sup> A state like Oregon, which has already recognized a terminally ill patient's right to die, serves as the ideal environment for enacting legislation to protect a death row volunteer's right to die. Drafting a new law for this purpose would, in effect, legally recognize death row volunteers' dignity interests, which would help to support application of this Note's proposed balancing test in the state's courts.

## V. CONCLUSION

By itself, death row volunteerism inevitably presents courts, states, and the public with difficult questions, but when the phenomenon arises in the context of a blanket reprieve, those questions become even more challenging. The key to resolving these issues—to affirming the

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(2009).

<sup>255</sup> *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (“The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.”); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 871 (4th ed. 2011).

<sup>256</sup> *Vacco v. Quill*, 521 U.S. 793, 802–08 (1997) (endorsing states' ability to permit terminally ill patients to both refuse life-saving treatment and to take palliative drugs, administered by their physicians, that may foreseeably hasten their deaths); CHERMERINSKY, *supra* note 255, at 872–73.

<sup>257</sup> *Washington v. Glucksberg*, 521 U.S. 702, 725–26 (1997) (“[W]e certainly gave no intimation that the right to refuse unwanted medical treatment could be some-how transmuted into a right to assistance in committing suicide.”); CHERMERINSKY, *supra* note 255, at 872–73.

<sup>258</sup> Milner, *supra* note 177, at 312–22.

<sup>259</sup> *Id.* at 282.

<sup>260</sup> *Id.*

importance of both a death row volunteer's dignity interest and a state's interest in granting a blanket reprieve—is to adopt a new legal standard that recognizes the need to promote one interest over the other depending on particular circumstances. The proposed balancing test accomplishes this objective. Taking its cue from the success of proportionality analysis in other constitutional courts,<sup>261</sup> the test requires a state's blanket reprieve to be narrowly tailored to accomplish at least one traditional clemency objective<sup>262</sup> in order for the reprieve to prevail over a death row inmate's dignity interest, which is well recognized in Supreme Court jurisprudence.<sup>263</sup> By requiring a blanket reprieve to be narrowly tailored to correcting judicial error, promoting the public welfare, or exacting individualized justice, the proposed balancing test provides courts with a means of reigning in executive power when it is appropriate to do so. Yet, the balancing test's requirement that the inmate's claimed dignity interest have some basis in relevant case law allows for the possibility of upholding a state's reprieve interest under the right conditions. Thus, as application of the test to the suspension of the death penalty in Oregon, Maryland, and Illinois demonstrates,<sup>264</sup> the proposed balancing test is workable and flexible, making it the ideal legal standard for tackling the conflict between death row volunteerism and the executive clemency power that could arise more prevalently in the future.

Ultimately, this Note's proposed balancing test, along with Gary Haugen's case, speaks to larger issues that transcend the situation in Oregon. These death row volunteerism cases are, first and foremost, about human dignity: an inmate's decision to volunteer forces society to examine how much it values the autonomy of the individual, no matter who that person happens to be. Death row inmates, though convicted of perhaps the worst crimes imaginable, deserve to have their choices respected, particularly because an assertion of their dignity, expressed through their autonomous legal decisions, is often all they have left. Further, if our society values life as much as it claims, it must necessarily respect any individual's assessment and decision about the quality and direction of his or her life. For death row volunteers, this means providing them with the means to carry out their sentences, especially when a state's blanket reprieve or moratorium is problematic. "The goal of any executive clemency scheme should be to allow clemency to serve its purpose, which

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<sup>261</sup> See Mathews & Sweet, *supra* note 182, at 801–04 nn.10–11 and accompanying text.

<sup>262</sup> See *supra* Part II.A.

<sup>263</sup> See *supra* Part II.B.

<sup>264</sup> See *supra* Parts III.B–C.

is allowing the executive to change a sentence under appropriate circumstances, while eliminating or reducing as much abuse as possible.”<sup>265</sup> This Note’s proposed balancing test, which recognizes the equal importance of both a state’s reprieve interest and a death row inmate’s autonomy interest, accomplishes this goal while responding to one of the most pressing issues of its time.

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<sup>265</sup> Rupcich, *supra* note 234, at 144.