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THE DEATH PENALTY SPECTACLE

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Capital punishment in the United States has a serpentine history. The death penalty was the presumed sentence for a large swath of crimes during colonial times (though often not imposed),[1] and it was not constitutionally limited to punishment for homicides until 1977.[2] The Supreme Court struck down the death penalty in 1972,[3] but, four years later, upheld the revised capital punishment schemes that numerous states had instituted in response to the 1972 decision.[4]

Since then, death penalty cases have produced plenty of spectacles. A ghastly example occurred in 1997, when Florida's electric chair malfunctioned, causing flames to burst from the condemned inmate's face mask.[5] The state Attorney General took the opportunity to warn future would-be killers, "better not do it in the state of Florida because we may have a problem with our electric chair."[6] An absurd example comes from that same year, when David Lee Herman slashed his throat and wrists with a prison razor in a suicide attempt; prison officials saved him only to continue with his execution two days later.[7]

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[1] *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 6-7 (2012).

[2] *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (striking down the death penalty as punishment for non-fatal rape). Notwithstanding *Coker*, Congress has continued to enact federal statutes authorizing capital punishment for crimes such as large scale drug dealing. 18 U.S.C. § 3591(b) (1994). In addition, espionage and treason continue to carry a potential death penalty. *Death Penalty for Offenses Other Than Murder*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder (last updated Feb. 14, 2013).

[3] Furman v. Georgia, 408 U.S. 238, 239-41 (1972) (per curiam).

[4] Jurek v. Texas, 428 U.S. 262, 270-77 (1976).

[5] Miraya Navarro, *Despite Fire, Electric Chair Is Defended In Florida*, N.Y. TIMES, Mar. 27, 1997, at A18.

[6] John Grogan, *Chair, Injection . . . How 'bout Guillotine?*, SUN-SENTINEL, Mar. 30, 1997, at 1B; Tim Padgett, *What's Wrong With Florida's Prisons*, TIME MAG., Oct. 17, 2007, http://www.time.com/time/nation/article/0,8599,1672366,00.html.

[7] Sam Howe Verhovek, *Halt the Execution? Are You Crazy?*, N.Y. TIMES, Apr. 26, 1998, § 4, at 4. Herman is one of many examples of inmates who have been saved after suicide attempts and still executed. *See, e.g.*, Jim Yardley, *Texan Who Took Overdose Is Executed*, N.Y. TIMES, Dec. 9, 1999, at A18 (quoting David Martin

No matter what one's ultimate feelings about the legality or desirability of capital punishment may be, it is difficult to find anything positive about Robert Alton Harris's last night. Harris was strapped into the lethal gas chamber only to be unstrapped and sent back to his cell due to a judicial stay, only then to have the stay lifted and to be strapped in again, with the process repeating itself no fewer than three times. Eventually, the Supreme Court got so fed up that it lifted the last stay of execution with a further order that "No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."[8] Harris was initially scheduled to die at 12:01 a.m., but his execution did not actually take place until after six in the morning.[9]

The Harris debacle is, of course, an extreme example of the typical situation in which capital punishment opponents, including obviously the death row inmate, take all manner of steps to try to mobilize public opinion against execution. Where there is a sympathetic defendant, the media may join in, adding fuel to the anti-capital punishment sentiment.[10] In these typical instances, the death row inmate quite understandably does not want to be put to death.

Occasionally, however, there are situations that transcend the usual spectacle of the inmate and abolitionists teaming up to try to stop the state from carrying out the execution.[11] For example, one newspaper reported that many California death row inmates, if not disenfranchised, would have voted against that state's Proposition 34, which sought to abolish the death penalty.[12] This counterintuitive assessment makes sense when one realizes that the ballot initiative would have the effect of eliminating the right to appointed counsel for post-conviction proceedings,[13] which are statutorily guaranteed only for death row inmates.[14]

But a 2011 case in Oregon goes beyond the theoretical into an actual absurdity.[15] In that case, an inmate who was condemned to death voluntarily waived his remaining appeals, clearing the way for execution.[16] His lawyers argued against his desired outcome, leading him to fire his attorneys.[17] Oregon's Governor then issued a reprieve, suspending the death sentence during his term in office—but not commuting it.[18] Enter the inmate's

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Long's lawyer as saying, "It seems like a pretty sick process when you jerk a guy out of intensive care on a ventilator. . . . What's the huge rush?").

[8] Vasquez v. Harris, 503 U.S. 1000 (1992); Charles M. Sevilla & Michael Laurence, *Thoughts on the Cause of the Present Discontents: The Death Penalty Case of Robert Alton Harris*, 40 UCLA L. REV. 345, 346, 374-78 (1992).

[9] *See* Sevilla & Laurence, *supra* note 8, at 346, 379.

[10] One example was Karla Faye Tucker, who, along with her boyfriend, broke into another friend's house to steal a motorcycle in 1983. While inside, they attacked the homeowner and his lover, killing both with repeated hammer and axe blows. Both assailants were convicted of murder and received the death penalty. Tucker later sought executive clemency on the ground that she had been under the influence of drugs at the time of the killing, and that she had since converted to Christianity and become reformed. The prison warden supported this latter contention. In part because she was scheduled to be the first woman to be executed in the United States since 1984, her case drew large media attention. She was executed in 1998 by lethal injection. Sam Howe Verhovek, *Divisive Case of Killer of Two Ends as Texas Executes Tucker*, N.Y. TIMES, Feb. 4, 1998, at A1.

[11] To be sure, many executions take place without any spectacle. *See* Bob Egelko, *Why Inmates Prefer to Keep Death Penalty; Proposition 34*, S.F. CHRON., Sept. 25, 2012, at A1.

[12] *Id.*

[13] *Id.*

[14] *See, e.g.*, Cal. Gov't Code § 68662 (West 2012).

[15] State v. Haugen, 266 P.3d 68 (Or. 2011).

[16] *Id.* at 71.

[17] *Id.*

[18] Haugen v. Kitzhaber, No. 12C16560, ¶ 4-6 (Or. Cir. Ct. filed Aug. 3, 2012).

new attorney, who brought suit to reject the Governor's reprieve, which the trial court decided to *grant*.[19] In other words, there is a strange spectacle where a death row inmate successfully sues a state Governor for interfering with the inmate's decision to be executed, only to have the Governor appeal that ruling.

This case is a fascinating commentary on, if nothing else, the fiscal waste of having the death penalty in a state that rarely sentences defendants to death (about one per year on average) and does not execute them unless they "volunteer" (only two have been executed since 1962, and both waived their remaining appeals).[20] On the other hand, while abolition of the death penalty sounds appealing, this inmate's case raises a tricky question: he was already serving a life without parole sentence when he murdered another inmate.[21] How should society punish someone like this? Another life sentence is meaningless, and even if one rejects retribution and deterrence as legitimate punishment rationales, incapacitation seems appropriate—executing him would prevent him from killing any other inmates (or guards).

There are, of course, other ways of protecting inmates from fellow inmates: maybe murderous inmates could be subject to solitary confinement for the rest of their lives. The direction of European courts, which have been ahead of our abolitionist movement, as well as the experience here in the United States with Ramzi Yousef, one of the deadliest terrorists in U.S. custody, suggests, however, that such conditions of solitary confinement may become the new Eighth Amendment battleground.[22]

I. THE DEATH PENALTY DEBATE

Currently thirty-two states, the federal government, and the U.S. military retain the death penalty as a potential punishment, almost exclusively for homicide with aggravated circumstances.[23] Debate over the legality and morality of capital punishment has existed at least since Socrates' death.[24] In the 1700s, English philosopher Jeremy Bentham launched one of the more enduring utilitarian-based arguments against the death penalty,[25] while his contemporary Immanuel Kant defended it in appropriate circumstances as just "dessert."[26] In 1972, *Furman v. Georgia* temporarily mooted the issue in the United States by holding that the death penalty, as rendered in the cases before the Supreme Court, violated the Eighth Amendment's prohibition of cruel and unusual

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[19] *Id.* at ¶ 26.

[20] Cliff Collins, *Let the Debate Begin: Oregon Lawyers with a Stake in the Issue Weigh in on the Death Penalty*, 72 OR. ST. B. BULL. 18, 18-20 (2012). *See Summary of Death Row Inmates*, OR. DEP'T OF CORRECTIONS (June 16, 2011) http://www.oregon.gov/DOC/PUBAFF/Pages/cap_punishment/cap_punishment.aspx#List_of_Inmates_on_Death_Row.

[21] Jonathan J. Cooper, *Gary Haugen, Death Row Inmate, Can Reject Clemency, Judge Says*, HUFFINGTON POST (Aug. 3, 2012), http://www.huffingtonpost.com/2012/08/03/gary-haugen-death-row-inm_n_1739775.html.

[22] *See* United States v. Yousef, 327 F.3d 56, 163 (2d Cir. 2003). *See also* Christopher R. Brauchli, *From the Wool Sack*, 30 COLO. LAW. 35, 35 (2001) (citing European leaders asking the United States to abolish the death penalty).

[23] *Crimes Punishable by Death Penalty*, DEATH PENALTY INFO. CTR. (Dec. 2011), http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty#BJS. In May 2013, Maryland abolished capital punishment, becoming the eighteenth state. *See* Joe Sutton, *Maryland governor signs death penalty repeal*, CNN, May 2, 2013, http://www.cnn.com/2013/05/02/us/maryland-death-penalty.

[24] *See* Hugo Adam Bedau, *Bentham's Utilitarian Critique of the Death Penalty*, 74 J. CRIM. L. & CRIMINOLOGY 1033, 1036 (1983).

[25] JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT, 168-197 (1775).

[26] *See, e.g.*, IMMANUEL KANT, THE METAPHYSICS OF MORALS 140-45 (Mary Gregor trans., 1991).

punishment.[27] Now, forty years after *Furman* (and 36 years after the reinstatement of the death penalty), there is a slight trend toward slow abolition of the death penalty:

- In the past five years, six states have eliminated the death penalty from their laws, increasing the ranks of abolitionist states to 18, an increase of 50 percent;[28]
- Since peaking in 1999, the annual number of death row inmates who have actually been executed has shown an uneven but decreasing trend;[29]
- Over half of all executions in the United States since 1976 have taken place in Texas, Virginia, and Oklahoma (and over two-thirds with the addition of Florida and Missouri).[30]

This Part of the article briefly summarizes the primary arguments in opposition to capital punishment so as to provide relevant context for evaluating the thorny question of how to respond to prison inmates who kill other inmates or prison guards.[31]

Immorality: Some capital punishment opponents argue that the death penalty is "something absolutely evil which like torture, should never be used however many lives it might save."[32] A variation of this argument is that the State sends the wrong message when it kills someone as punishment for killing someone else.[33] The legal version of these morality-based arguments is that capital punishment constitutes cruel and unusual punishment in violation of the Eighth Amendment,[34] although since 1976, the Supreme

[27] 408 U.S. 238, 239-40 (1972) (per curiam).

[28] *See States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (2013), http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

[29] *See Executions By Year*, DEATH PENALTY INFO. CTR. (Jan. 17, 2013), http://www.deathpenaltyinfo.org/executions-year.

[30] *See Number of Executions by State and Region Since 1976,* DEATH PENALTY INFO. CTR. (Jan. 17, 2013), http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976.

[31] For an excellent discussion of the abolitionist arguments, see, *e.g.*, Aliza B. Kaplan, *Oregon's Death Penalty: The Practical Reality*, LEWIS & CLARK L. REV. (forthcoming 2013).

[32] *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 72 (1968) (setting forth the argument). Of course, since 9/11, there have been suggestions that in "ticking time bomb" situations, use of torture to extract actionable information to stop an imminent attack might be justified legally, if not morally. *See e.g.*, Alan Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L SCH. L. REV. 275, 277 (2003) (arguing that if torture is going to be used anyway to stop mass terrorism, it would be preferable to regulate it through judicial torture warrants); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 172-73 (2005) (quoting Sen. Charles Schumer as saying in a Senate hearing that "very few people in this room or in America . . . would say that torture should never, ever be used, particularly if thousands of lives are at stake").

[33] *See, e.g.*, Anna Quindlen, *The Failed Experiment: Last Year Only Four Countries Accounted for Nearly All Executions Worldwide: China, Iran, Saudi Arabia and the United States*, NEWSWEEK, June 26, 2006, at 64. In its snarkiest form, this is a facile argument; after all, if taken seriously, it would also mean that we should neither imprison convicted kidnappers nor fine convicted thieves. For a somewhat more sober version of the argument, see BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 70 (Richard Bellamy ed. 1995) ("The death penalty is not useful because of the example of savagery it gives to men.").

[34] *See, e.g.*, Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U.L. REV. 567 (2010) (summarizing arguments); John Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739, 1743 (2008).

Court has used that clause only to narrow the pool of convicted criminals who are eligible for the death penalty.[35]

Irrevocability: A second argument against the death penalty is that it is irrevocable; the execution of a wrongly convicted defendant cannot be undone even if the defendant's innocence is later established through, for example, DNA testing.[36] When former Illinois Governor George Ryan commuted all death sentences in the state shortly before leaving office in 2003, one of his stated reasons was concern about possibly executing an innocent person.[37]

Of course, society cannot replace the time that a wrongly convicted person loses when he spends years in confinement before being exonerated. Depending on the law of the state in which he was wrongly convicted, however, such a person might be eligible for financial compensation.[38] Money cannot replace lost years, but it is the standard measure of remedy for civil wrongs and can be used to compensate persons who have been wrongly incarcerated. To a person who has been wrongly executed, however, money is no use.

Fiscal irresponsibility: A third argument against the death penalty is that it is fiscally irresponsible. Studies have concluded that trying a defendant for capital murder, from start to finish, costs anywhere from $1 million to $2.5 million more than trying a defendant when the maximum sentence is life imprisonment.[39] It may seem counterintuitive that incarcerating a person for many more years would cost less than putting him to death, but capital cases involve more complicated trial proceedings, including a separate penalty phase, as well as a statutory right to appointed counsel for post-conviction proceedings.[40]

Of course, the fact that it costs at least $1 million more to try to execute a murderer than to incarcerate him for life does not necessarily mean that the extra money is wasted or destroyed. Some of the increased costs may reflect the results of judicial resistance to capital punishment. In addition, the legal costs and fees pay for services from defense lawyers, investigators, court reporters, and others involved in the legal system.[41]

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[35] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that it violates the Eighth Amendment to execute persons convicted of crimes committed as minors); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that it violates the Eighth Amendment to execute mentally retarded persons).

[36] Since 1984, eighteen death row inmates have been exonerated due to DNA evidence. *See Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO. CTR. (2013), http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

[37] *See* Eric Slater, *Illinois Governor Commutes All Death Row Cases; Ryan Reduces Terms of 167 Inmates to Life or 40 Years, Calling the State's Capital Punishment System 'Deeply Flawed'*, L.A. TIMES, Jan 12, 2003, at A1.

[38] *See* JIM PETRO & NANCY PETRO, FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT 52 (2011) (noting that slightly more than half of the states have some sort of compensation scheme for eligible wrongly acquitted persons, including Ohio's offer of $40,330 per year plus lost wages and other costs).

[39] *See, e.g.*, Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 14 (1995); Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. L. & SOC. CHANGE 711, 719 (1990/1991); David Erickson, *Capital Punishment at What Price: An Analysis of the Cost Issue in a Strategy to Abolish the Death Penalty* 10 (1993), *available at* http://www.deathpenalty.org/downloads/Erickson1993COSTSTUDY.pdf; GEN'L ADMIN. OFFICE, CRIMINAL JUSTICE: LIMITED DATA AVALABLE ON COSTS OF DEATH SENTENCES 5 (Sept. 1998), *available at* www.gao.gov/assets/220/211785.pdf (estimating cost of death sentence as 42% higher than a life sentence).

[40] *See, e.g.*, Judge Arthur L. Alarcon & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S65-S70 (2011) (dissecting the cost of execution in states like California and discussing whether the death penalty is truly benefitting the public).

[41] *Id.* at S74, S78, S93 n.187 (outlining some of the various costs).

In a time where many law graduates have trouble finding work,[42] perhaps we should not be so quick to dismantle a legal architecture that provides some measure of work, albeit of a highly stressful and specialized nature, for lawyers and others. To the extent that this "lawyer employment" aspect of the death penalty spectacle is at all persuasive, however, its flaw is readily apparent. If we are simply interested in providing "work" for lawyers and we happen to have a spare $1 million lying around for such purposes, we could just as easily hire them to dig a bunch of holes and then fill them in again.[43] Obviously, a more societally productive way to provide publicly-funded "lawyer employment" would be to spend that $1 million per year on any combination of (1) paying lawyers to represent indigent criminal defendants challenging their convictions or their non-capital sentences; or (2) funding public interest law firms that serve the legal needs of the poor who otherwise must proceed *pro se* or forego their legal claims altogether.

To be sure, not all policy decisions are structured on the results of a pure cost-benefit analysis. It would be nearly impossible to quantify the value of retribution, yet retribution remains one of the central goals of punishment.[44]

Uncertain deterrence: The death penalty is supposed to deter would-be killers from carrying out their horrible crimes.[45] Even after decades of study, however, scholars and practitioners have yet to reach a consensus about whether capital punishment actually has a deterrent effect on potential murderers.[46]

Racial bias: A final argument is that, in the United States, the death penalty is administered in a racially discriminatory manner and there is no effective way to eliminate racial bias. David Baldus first confirmed the significance of the racial disparity in death penalty cases in his exhaustive study of over 2,400 homicide cases between 1973 and 2000 in Georgia.[47] Baldus found a race of the *victim* effect; that is, in murder cases with aggravating facts, a defendant who killed a white victim was 4.3 times more likely to be sentenced to death than one who killed an African-American victim.[48] Subsequent studies of the death penalties in other jurisdictions have found "a consistent pattern of white-victim disparities across the systems for which [researchers had] data."[49] There was,

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[42] *See generally* BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012).

[43] In many ways, this is not much of an exaggeration of what happens in states like Oregon, which retain and periodically impose the death penalty, but rarely, if ever, carry out an actual execution.

[44] HART, *supra* note 32, at 9 (defining retribution as "the application of the pains of punishment to an offender who is morally guilty"); MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 233-38 (1984); *see also* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) ("Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death").

[45] *See* Alarcon & Mitchell, *supra* note 40, at S168-S169 (using a California proposition as an example of applying more stringent penalties for felony crimes to deter would-be criminals).

[46] *See, e.g.*, MARK COSTANZO, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 103 (1997); HART, *supra* note 32, at 85; Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZ. ST. L.J. 335, 350 (1996) ("[N]o proof exists that general deterrence results from capital punishment as opposed to life imprisonment."); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 10 (1996) ("[T]he death penalty does, and can do, little to reduce rates of criminal violence."). *But see* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (arguing that other studies undervalue "saved" lives in calculations purporting to show no deterrent effect).

[47] *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS *passim* (1990).

[48] *See id.* at 401.

[49] David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 41 CRIM. L. BULL. 11 (2005).

however, no statistically significant disparity based on the race of the defendant,[50] with the exception of the United States armed forces, where race of the victim and of the defendant had effects.[51]

In *McCleskey v. Kemp*,[52] an African-American Georgia death row inmate relied on the first Baldus study in arguing that his death sentence violated the Equal Protection Clause.[53] He argued that he was 4.3 times more likely to receive the death penalty than someone who killed a black victim.[54] In a 5-4 decision, the Court affirmed McCleskey's death sentence, not because of methodological flaws in the study,[55] but because the study could not address whether McCleskey's specific jury, prosecutor, and judge were biased.[56] The court also reasoned that "discretion is essential to the criminal justice process, [so] we would demand exceptionally clear proof before we would infer that the discretion has been abused."[57] William Stuntz concisely summarized the effect of the decision: "*McCleskey* made discrimination impossible to prove."[58]

The persuasiveness of each individual argument against the death penalty obviously varies depending on the reader's sentiments but, collectively, the arguments are powerful. The arguments do not, however, address the problem of what to do with someone like Gary Haugen.

II. GARY HAUGEN AS A CASE STUDY

In 1981, Gary Haugen brutally raped and beat his ex-girlfriend's mother to death with fists, a hammer, and a baseball bat.[59] Apparently, he blamed the victim for causing the break-up of his relationship.[60] Because Haugen was indigent, the trial judge appointed a lawyer to represent him.[61] Haugen pleaded guilty and received a sentence of life imprisonment with a possibility of parole.[62]

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[50] *Id.*

[51] *See* David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1230-31 (2011).

[52] 481 U.S. 279 (1987).

[53] *Id.* at 291.

[54] *Id.* at 321.

[55] *But see id.* at 288-89 (noting district court's findings of methodological problems in the study and its holding that the study "fail[ed] to contribute anything of value"). On appeal, the Eleventh Circuit assumed the validity of the study but nevertheless affirmed the district court's denial of the habeas petition, and the Supreme Court likewise did not challenge the study. *Id.* at 291 n.7.

[56] *Id.* at 294.

[57] *Id.* at 297.

[58] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 291 (2011); *see also id.* at 120 ("The system as a whole may discriminate massively, but as no single decisionmaker is responsible for more than a small fraction of the discrimination, the law holds no one accountable for it.").

[59] *See, e.g.*, Helen Jung, *Gary Haugen, Death Row Inmate in Limbo After Oregon's Execution Ban, Religion*, HUFFINGTON POST, Dec. 10, 2011, http://www.huffingtonpost.com/2011/12/10/gary-haugen-oregon-execution-ban_n_1140197.html; *see also* Natalie Brand, *Family of Haugen's First Murder Victim Speaks Out*, KPTV FOX 12 NEWS, Nov. 28, 2011, http://www.kptv.com/story/16140959/family-of-haugens-first-murder-victim-speaks-out.

[60] *See, e.g.*, Natalie Brand, *Family of Haugen's First Murder Victim Speaks Out*, KPTV FOX 12 NEWS, Nov. 28, 2011, http://www.kptv.com/story/16140959/family-of-haugens-first-murder-victim-speaks-out.

[61] *See* Helen Jung, *Death Row Inmate Gary Haugen Gets Wish for New Attorney as Mental Evaluation Awaits*, OREGONIAN, July 15, 2011.

[62] Jung, *supra* note 59; Under current Oregon law, murder that does not rise to the level of aggravated murder (which is a death-eligible crime) carries a sentence of life imprisonment, except that after 25 years of

On September 2, 2003, Haugen and Jason Van Brumwell killed David Shane Polin, their fellow inmate at the Oregon State Penitentiary, by stabbing him 84 times and smashing his head with a chair.[63] Haugen and Brumwell believed, incorrectly as it turned out, that Polin was an informant who had reported illegal drug use by inmates to prison authorities so that drug tests could be administered in time to test positive.[64]

Haugen and Brumwell were each charged with aggravated murder, which carried a potential death sentence under Oregon law.[65] There were 18 statutory factors that qualified a homicide as an aggravated murder.[66] Polin's killing satisfied two of those factors: Haugen and Brumwell (a) were convicted murderers at the time of the killing[67] and (b) committed the homicide while in prison.[68] Both inmates were convicted and sentenced to death.[69]

After the Oregon Supreme Court affirmed his conviction and death sentence, Haugen wanted to waive his remaining post-conviction challenges.[70] His appointed lawyers, however, moved to have Haugen declared incompetent to waive those rights—at least, in the absence of a psychiatric evaluation—setting up a client-lawyer conflict.[71] In response, Haugen sent his own letter to the judge indicating that he wanted to fire his appointed lawyers.[72] The trial judge discussed the matter with Haugen directly and concluded that Haugen was competent to proceed *pro se*.[73] Haugen's former lawyers were appointed as standby counsel to assist him if he so desired.[74]

At this point, the non-profit organization Oregon Capital Resource Center got involved in the matter.[75] The Center sought review of the trial court's decision allowing Haugen to fire his lawyers "without a sufficient inquiry into Haugen's competence."[76] The State and Haugen both objected but the Oregon Supreme Court agreed that the trial judge had failed to follow the required procedures in capital cases.[77]

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confinement, the inmate can petition to have the sentence changed to life imprisonment with the possibility of parole. OR. REV. STAT. § 163.115(5) (2011). The law in effect at the time Haugen was convicted, however, provided for more lenient parole. OR. REV. STAT. § 163.105(3) (1979).

[63] State v. Haugen, 349 P.3d 174, 176-78 (Or. 2010).

[64] *Id.* at 178-79.

[65] *Id.* at 176.

[66] *See* OR. REV. STAT. § 163.095.

[67] *See id.* § 163.095(1)(c).

[68] *See id.* § 163.095(2)(b).

[69] State v. Haugen, 349 P.3d 174, 176 (Or. 2010).

[70] State v. Haugen, 266 P.3d 68, 70-71 (Or. 2011) [hereinafter *Haugen II*].

[71] *Id.* at 71. See Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 497 (2000), for an account of the conflicts between lawyer and client when the lawyer sees the overriding priority as avoiding the death penalty, but the client is willing to accept the possibility of a death sentence in exchange for litigating guilt.

[72] *Haugen II*, 266 P.3d at 71. Although conventional wisdom suggests that "a lawyer who represents himself has a fool for a client," an observation that would seem even truer when the client is not a lawyer, *Faretta v. California* held that the government cannot force an unwilling criminal defendant to be represented by an attorney. 422 U.S. 806, 807 (1975).

[73] *Haugen II*, 266 P.3d at 71.

[74] *Id.*

[75] *Id.* at 70.

[76] *Id.* at 71.

[77] *See id.* at 72 (discussing OR. REV. STAT. § 137.464 (West 2009), which calls for an evaluation of the defendant's competency by the state Health Authority where "the court has substantial reason to believe that, due

The matter returned to the trial court, which, on Haugen's request, appointed substitute counsel due to Haugen's allegation of a broken attorney-client relationship.[78] Haugen's originally appointed lawyers challenged their removal but were unsuccessful.[79]

Substitute counsel supported Haugen's bid to waive his remaining appeals by having a new psychiatrist perform a mental competency examination.[80] The new doctor concluded that Haugen was competent to waive his rights and so testified.[81] During a hearing on the matter, substitute counsel offered no contradicting evidence such as the opinion of the previous doctor who examined Haugen and concluded that he was not competent.[82] Following this hearing, the trial court found that Haugen was competent.[83] OCRC then filed another motion, asking the Chief Justice of the Oregon Supreme Court essentially to reverse the trial court's decision.[84] By a 4-3 vote, the Oregon Supreme Court denied the request, thus apparently clearing the way for the state to execute Haugen.[85] The trial judge set an execution date of December 6, 2011.[86]

On November 22, 2011, Governor John Kitzhaber acted on a request by various anti-capital punishment groups to stop Haugen's execution by granting a "temporary reprieve" for the "duration of term in office" on the grounds that the death penalty in Oregon was expensive, flawed, and broken:

> It is a perversion of justice that the single best indicator of who will and will not be executed has nothing to do with the circumstances of a crime or the findings of a jury. The only factor that determines whether someone sentenced to death in Oregon is actually executed is that they volunteer.[87]

Governor Kitzhaber did not, however, commute Haugen's sentence to life imprisonment.[88]

Initially, Haugen seemed pleased with the reprieve, saying that it was a victory for him.[89] Soon after, however, Haugen changed his view: "I'm in . . . limbo. . . . I didn't ask for this. I'm ready to go."[90] Perhaps Haugen was disappointed that he was still being

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to mental incapacity, the defendant cannot engage in reasoned choices of legal strategies and options" to be exercised at a death warrant hearing).

[78] *Id.* at 73.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 74.

[85] *Id.* at 79.

[86] *See* Death Warrant, State v. Haugen, No. 04C46224, Nov. 18, 2011 (copy on file with author).

[87] Press Release, *Governor Kitzhaber Issues Reprieve - Calls for Action on Capital Punishment* (Nov. 22, 2011), http://www.oregon.gov/gov/media_room/pages/press_releasesp2011/press_112211.aspx. The canceled execution had already cost the state over $57,000 in preparation expenses. Helen Jung, *State Spent $1.3 Million on Lawyers, Drugs and Preparation for Cancelled Execution*, OREGONIAN (Dec. 19, 2011), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/12/state_spent_13_million_on_lawy.html.

[88] Press Release, *supra* note 88 ("I did not [commute] because the policy of this state on capital punishment is not mine alone to decide. It is a matter for all Oregonians to decide."). Technically, the Governor issued a moratorium on all executions, not just Haugen's.

[89] Helen Jung, *John Kitzhaber Moratorium on Death Penalty Leaves Inmate Gary Haugen and Oregon lawmakers Wondering What's Next*, OREGONIAN (Nov. 24, 2011) http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/12/kitzhaber_moratorium_on_death.html.

[90] *Id.*

imprisoned in death row conditions. Not long after, Haugen found a new lawyer to challenge the validity of the reprieve.[91]

At this point, it is worth noting that Haugen's complaint is not devoid of support. If Governor Kitzhaber were to change his mind and lift the reprieve, or if his successor were to lift the reprieve, then Haugen would again face the possibility of execution. While it may seem counterintuitive to see any harm in delaying a death row inmate's execution—as the alternative would be to speed up the execution process—the European Court of Human Rights, among other courts and jurists, has recognized that prolonged stays on death row while awaiting execution can give rise to something known as "death row phenomenon."[92] According to the European Court of Human Rights, an inmate who has "to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death" would be subjected to torture or inhuman or degrading treatment.[93]

Haugen's new lawyer successfully argued that, under Oregon law, a valid reprieve—as distinguished from an outright commutation or pardon—required acceptance by the inmate; because Haugen refused to accept the reprieve, it could not block the execution.[94] At this point, the Governor could have abandoned the fight and let Haugen proceed to be executed, or could have exercised his plenary power to commute Haugen's punishment to a life sentence without the possibility of parole.[95] Instead, Governor Kitzhaber doubled down and appealed the trial court's ruling.[96] In other words, Oregon taxpayers have had and continue to have the privilege of paying for Gary Haugen's lawyer to argue that he should be executed, and for the state's lawyers to argue that he should not be executed—completely backwards from the normal spectacle.

Of course, taxpayers are used to funding both sides of litigation in criminal cases involving indigent defendants but, generally, the lawyer representing the state (*i.e.*, the prosecutor) is seeking to impose punishment, and the lawyer for the defendant is seeking to avoid punishment. The taxpayers' obligation to pay for the defense lawyer is a necessary consequence of the Sixth Amendment.[97] In a situation like Haugen's, however, the taxpayers are paying for the defense lawyer to argue in favor of letting the state do what the state prison officials are ready to do, while also paying for the state lawyers to interfere with the state itself.

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[91] *See Haugen II*, 266 P.3d 68, 79 (Or. 2011).

[92] Soering v. United Kingdom, Ser. A, No. 161, 11 EUR. HUM. RTS. RPTR. 439, 476 (1989).

[93] *Id.; see also* Barbara Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U.L. REV. 35, 38 (1986) (citing sources of distress); Singh v. Punjab, (1980) 2 S.C.R. 582, 582-83 (India) (recognizing death row phenomenon as basis for commuting death sentence to life imprisonment); Vatheeswaran v. Tamil Nadu, (1983) 2 S.C.R. 348, 360 (India) (also recognizing death row phenomenon as basis for commuting death sentence to life imprisonment).

[94] *See, e.g.*, Letter from Harrison Latto, attorney for Gary Haugen, to the Hon. John Kitzhaber, Governor of Or., regarding Gary D. Haugen (Mar. 12, 2012) (on file with author); United States v. Wilson, 32 U.S. 150, 160-62 (1833); Helen Jung, *Gary Haugen Reprieve Challenge: Judge Appears Receptive to Death Row Inmate's Argument*, OREGONIAN (July 24, 2012, 7:52 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/07/gary_haugen_reprieve_challenge.html.

[95] *See* Arthur B. LaFrance, Op-Ed., *Capital Punishment in Oregon Kitzhaber Should Commute All Death Sentences*, OREGONIAN, Nov. 27, 2011, *available at* 2011 WLNR 24583894.

[96] Helen Jung, *Gov. Kitzhaber Appeals Decision in Gary Haugen Execution Case*, OREGONIAN (Sept. 11, 2012, 3:05 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/09/gov_kitzhaber_appeals_decision.html.

[97] *See* OR. REV. STAT. §135.055 (1979); Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

III. PRISON KILLERS: WHAT SHOULD BE DONE WITH THEM?

Haugen's case presents an unusual but not unique situation that is largely overlooked by the conventional death penalty debate—what should be done with a prison inmate serving a life sentence who murders another inmate (or a prison guard)? Prison homicides by inmates are relatively rare, as one would expect given that violent criminals are typically housed in maximum-security facilities and under the watch of prison guards.[98] Yet, they are not unheard of. Polin was the fifth prisoner killed by another prisoner in the Oregon State Penitentiary between 1986 and 2004.[99] Nationwide, prisoner deaths due to homicide have remained relatively stable at low but non-trivial levels, around 1-2 percent of all prisoner deaths.[100] In absolute numbers, from 2001 to 2007, over 500 prisoners were murdered in state or local prisons or jails—about 70 per year.[101]

The government obviously owes a duty to protect imprisoned inmates from known harms;[102] according to the Supreme Court, it is "cruel and unusual punishment to hold convicted criminals in unsafe conditions,"[103] including where those unsafe conditions arise from violence inflicted by other inmates.[104] In fact, in *Helling v. McKinney*, the Court even concluded that a non-smoking inmate could proceed to a trial on his lawsuit alleging that prison officials violated his Eighth Amendment rights by forcing him to share a jail cell with a smoker;[105] to prevail ultimately, he would need to prove that he was being exposed to levels of secondhand smoke that "pose an unreasonable risk of serious damage to his future health," as well as "deliberate indifference" to that risk by prison officials.[106]

It is important to keep in mind that the danger the inmate was exposed to in *McKinney* was not a present harm but a future one.[107] The secondhand smoke might or might not have caused cancer or other health problems down the road, but it was not the same as, say, exposed electrical wiring,[108] where any injury would be immediate. A prison

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[98] *See* MARGARET E. NOONAN, U.S. DEP'T OF JUSTICE, NCJ 239911, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000-2010 – STATISTICAL TABLES (Dec. 2012).

[99] *See* Joseph Rose, *Inmates Charged With Murder in Convict's Beating Death*, OREGONIAN, June 16, 2004, at D10.

[100] *See* NOONAN, *supra* note 99.

[101] *Id.*

[102] Whatever else we may think about convicted felons, we have not yet descended to the point of dumping them into prison, slamming the door shut, and leaving them in something like the anarchistic and despotic fiefdoms depicted in movies like ESCAPE FROM NEW YORK (AVCO Embassy Pictures 1981) and NO ESCAPE (Columbia Pictures 1994).

[103] Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982).

[104] *See, e.g.*, LaMarca v. Turner, 995 F.2d 1526, 1535 (11th Cir. 1993); Young v. Quinlan, 960 F.2d 351, 361-62 (3d Cir. 1992); Cortes–Quinones v. Jimenez–Nettleship, 842 F.2d 556, 558 (1st Cir. 1988); Roland v. Johnson, 856 F.2d 764, 769 (6th Cir. 1988); Goka v. Bobbitt, 862 F.2d 646, 649-50 (7th Cir. 1988); Pressly v. Hutto, 816 F.2d 977, 979 (4th Cir. 1987); Morgan v. District of Columbia, 824 F.2d 1049, 1057 (D.C. Cir. 1987); Villante v. Dep't of Corr., 786 F.2d 516, 519 (2d Cir. 1986); Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986); Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir. 1986); Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984); Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980).

[105] Helling v. McKinney, 509 U.S. 25, 33 (1993); *cf.* Kathleen Knepper, *Responsibility of Correctional Officials in Responding to the Incidence of the HIV Virus in Jails and Prisons*, 21 NEW ENG. J. CRIM. & CIV. CONFINEMENT 45, 94 (1995) (arguing that prison officials might have "a duty to segregate inmates who are highly contagious for one or more of the opportunistic infections which are associated with [HIV]").

[106] *McKinney*, 509 U.S. at 35; *see also* Farmer v. Brennan, 511 U.S. 825, 837 (1994). In the end, McKinney's case became moot when the Nevada prison instituted a smoking ban. *See* Bob Twigg, *Smoke-Free Trend Enters Prison, Jails*, USA TODAY, Aug. 27, 1996, at 04A.

[107] *McKinney*, 509 U.S. at 33 ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition").

[108] *See, e.g.*, Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974).

inmate who demonstrates the capability and willingness to murder another inmate might not pose an *immediate* danger to any other inmate, but may well pose some *future* danger to all other inmates.

At the time that he killed Polin, Haugen was potentially eligible for parole.[109] The possibility of additional prison time (that is, a life sentence with no possibility of parole) or even the death sentence obviously did not deter him from committing his second murder.[110] Haugen's own statements to other inmates confirm as much, because he said a few days prior to the murder, "he was getting ready to do something kind of – kind of foolish and that he was probably getting more time and that we wouldn't be seeing him."[111] In other words, Haugen was aware that there could be severe consequences for killing Polin, yet he went ahead and did so anyway.[112]

More importantly, there is no reason to be confident that he would not kill another inmate in the future for similar reasons. Punishing Haugen for murdering David Polin isn't only about deterrence or retribution. Incapacitation is one of the purposes of punishment.[113] Incarceration of a convicted felon sufficiently incapacitates him from further harming society (assuming that escape from prison is not feasible), so any additional incapacitation from executing the inmate would be marginal—so long as we are talking about society. From the standpoint of other inmates, there is a world of difference between imprisonment and execution when it comes to incapacitating a fellow inmate. The Oregon State Penitentiary has thus far protected the rest of us from Gary Haugen, but it failed to protect David Polin.

Executing a prison inmate murderer like Haugen would thus protect other inmates, as it would remove the source of the threat. Sentencing a convicted prison inmate murderer but refraining from actually carrying out the execution falls short of providing absolute protection to other inmates. It does, however, provide a greater measure of protection than leaving the murdering inmate in the general prison population. Generally, conditions of confinement on death row are fairly restrictive.[114] One typical death row regime consisted of (1) a cell measuring approximately 9 feet by 7 feet; (2) just 6 to 7 1/2 hours of recreation per week; (3) limited visits to the law library or infirmary; (4) one hour per day out of the cell in a common area; and (5) handcuffing and shackling when prisoners move around the prison.[115] Even so, such restrictive conditions do not reduce the risk of intra-inmate killings to zero.[116] The federal Florence Supermax facility, for example, has seen two inmates murdered.[117] Indeed, the Seventh Circuit has admitted that

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[109] State v. Haugen, 243 P.3d 31, 47 n.15 (Or. 2010).

[110] *Id.* at 35 n.4.

[111] *Id.*

[112] *Id.* at 34.

[113] *See, e.g.*, 1 WAYNE LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.5, 38 (2d ed. 2003) (explaining theories of punishment, specifically incapacitation).

[114] *See generally* Dave Mann, *Solitary Men*, TEXAS OBSERVER, Nov. 10, 2010, at 6.

[115] Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 459 (1989) (describing conditions in a Virginia penitentiary); *see also* Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT'L L. REV. 1, 8-10 (2006) (describing conditions of solitary confinement).

[116] *See, e.g.*, *Death Penalty Sought in Supermax Killings*, UNITED PRESS INT'L, (Mar. 29, 2011), http://www.upi.com/Top_News/US/2011/03/29/Death-penalty-sought-in-Supermax-killings/UPI-73571301420385/.

[117] *Id.*

"[w]e know from cases in this court involving murders by prisoners in the control units of federal prisons . . . that such units cannot be made totally secure."[118]

Restrictive confinement conditions might therefore be seen as a viable though imperfect alternative to the death penalty if the primary concern is protecting other inmates. Yet, things are not so simple.

For one example of a high-profile convicted defendant sentenced to a term of life imprisonment under extremely restrictive conditions and criticism thereof, one can look at the case of Ramzi Yousef.[119] Convicted in 1996 for leading the "Bojinka plot," an audacious but unsuccessful attempt to bomb eleven Transpacific flights simultaneously, and in 1997 for leading the truck bomb attack against the World Trade Center in 1993, Yousef was sentenced to life imprisonment for the first crime and 240 years imprisonment for the second.[120] Although the decisions regarding where to imprison a defendant, and under what conditions, are typically made by the Bureau of Prisons, district judges are free to make recommendations and, in Yousef's case, Judge Duffy said in open court:

> I recommend that your visitors' list be restricted to your attorneys. The prison should not permit friends, gawkers or media reporters to visit with you. While normally a prisoner in administrative detention might have some visitors from his family, in your case I would expect the prison to require proof positive that one is in fact a member of your family. We don't even know what your real name is. You have used a dozen aliases. Having abandoned your family name, I must assume that you have abandoned your family also.
>
> The restrictions I am imposing are undoubtedly harsh. They amount to solitary confinement for life. . . . Your treatment will be no different than that accorded to a person with a virus which, if loosed, could cause plague and pestilence throughout the world.[121]

The Bureau of Prisons incarcerated Yousef at the federal Florence Supermax facility in Colorado under conditions similar to those endured by death row inmates: 23 hours a day in a small cell, with soundproofing to prevent inmates from communicating with one another; one hour of exercise with "feet shackled together and his every move watched by at least two prison guards"; and "until December 1998[,] . . . no human contact other than that of the omnipresent guards."[122] To be sure, the special administrative measures were imposed on Yousef not merely because of the concern that he might attack others, but also due to the belief that he might be able to incite other

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[118] United States v. Johnson, 223 F.3d 665, 672-73 (7th Cir. 2000).

[119] *See generally Yousef*, 327 F.3d 56 (2d Cir. 2003) (extensively detailing convictions relating to 1993 World Trade Center bombing and an unsuccessful plot to bomb multiple airlines simultaneously); *see, e.g.*, SIMON REEVE, THE NEW JACKALS: RAMZI YOUSEF, OSAMA BIN LADEN, AND THE FUTURE OF TERRORISM 239-43 (1999).

[120] *See, e.g.*, REEVE, *supra* note 120, at 238-43.

[121] *Id.* at 243.

[122] *Id.* at 253. Interestingly, until 2009, Yousef had reportedly never left his cell, because he refused to submit to the strip search that would precede his daily hour of recreation. *60 Minutes: Supermax: A Clean Version of Hell* (CBS television broadcast Oct. 14, 2007, updated June 19, 2009), *available at* http://www.cbsnews.com/2100-18560_162-3357727.html (quoting former Supermax warden Robert Hood). Hood's account is contradicted by investigative journalist Simon Reeve, who reported that Yousef, after getting his confinement conditions relaxed, struck up a friendship of sorts with Ted Kaczinski (the Unabomber). REEVE, *supra* note 120, at 253-54.

prisoners if he were allowed to talk to them, or to pass messages to terrorists through visitors.[123]

Yousef's confinement conditions drew criticism from a variety of sources. Stuart Grassian, a Harvard Medical School psychiatrist, argued that solitary confinement is "a kind of mental torture. . . ."[124] The sensory deprivation causes enormous psychological suffering and mental illness."[125] Harvard law professor Philip Heymann, a former Deputy U.S. Attorney General, opined that long-term solitary confinement raised "substantial issue[s] of cruel and unusual punishment."[126] Amnesty International began to investigate Yousef's situation, which was possibly the catalyst that led the Bureau of Prisons to relax the confinement conditions slightly.[127] Even today, an attorney representing Yousef is trying to get a court to further relax the confinement conditions.[128]

No court has gone so far as to hold that solitary confinement is necessarily cruel and unusual punishment, but the issue has not been presented squarely concerning *permanent* solitary confinement.[129] In *Wolff v. McDonnell*,[130] Justice Douglas disagreed with the majority's holding regarding the amount of process due to a prisoner before being placed in solitary confinement; whereas the majority held that the prisoner need not be afforded an opportunity to confront accusers or to engage in cross-examination,[131] Douglas believed that the consequences of solitary confinement were so significant that the prisoner was entitled to those rights "absent any special overriding considerations."[132] Interestingly, despite acknowledging that solitary confinement can last "months or even years," Douglas did not indicate any substantive opposition to solitary confinement.[133]

In *Hutto v. Finney*,[134] prisoners had won injunctive relief that limited their solitary confinement to 30 days.[135] Prison officials argued that the district court had

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[123] REEVE, *supra* note 120, at 252-54; *see also* United States v. Sattar, 272 F. Supp. 2d 348, 354-56 (S.D.N.Y. 2003) (demonstrating the possibility of communicating through visitors). *Sattar* demonstrated that this concern was not mere fantasy. In *Sattar*, the defense lawyer for Omar Abdul-Rahman (aka the Blind Sheikh), the spiritual inspiration for the 1993 WTC attack, brought her translator to see her client during post-conviction meetings, but instead of translating her conversation with Abdul-Rahman, the translator spoke directly, bringing messages from the outside, and ultimately delivering a message from Abdul-Rahman to his overseas followers. The lawyer, Lynne Stewart, and the translator were both convicted of providing material support to a designated foreign terrorist organization by providing personnel in the form of Abdul-Rahman. *Id.*

[124] REEVE, *supra* note 120, at 253.

[125] *Id.* at 253-54. A former inmate at the Florence Supermax facility said that solitary confinement there "breaks down the human spirit. It breaks down the human psyche. It breaks your mind." *60 Minutes: Supermax: A Clean Version of Hell*, *supra* note 123. No commentator objects to solitary confinement, however. *Cf.* David McCord, *Imagining A Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 121-31 (1998) (arguing for imprisoning aggravated murderers in permanent solitary confinement, with full sensory deprivation on the birthday of the victims).

[126] REEVE, *supra* note 120, at 254.

[127] *Id.* at 253-54 (noting that prison officials apparently permitted Yousef to interact with fellow inmates Kaczynski and Oklahoma City bomber Timothy McVeigh).

[128] *See* Larry Neumister, *Lawyer Seeks to Ease Conditions for '93 WTC Bomber*, ASSOC. PRESS (Aug. 22, 2012 4:26 PM), http://origin.bigstory.ap.org/article/lawyer-seeks-ease-conditions-93-wtc-bomber.

[129] Angela A. Allen-Bell, *Perception Profiling & Prolonged Solitary Confinement Viewed Through the Lens of the Angola 3 Case: When Prison Officials Become Judges, Judges Become Visually Challenged, and Justice Becomes Legally Blind*, 39 Hastings Const. L.Q. 763, 770-72 (2012).

[130] 418 U.S. 539 (1974).

[131] *Id.* at 567.

[132] *Id.* at 595-96 (Douglas, J., dissenting).

[133] *Id.* at 593-94.

[134] 437 U.S. 678 (1978).

[135] *Id.* at 678.

erroneously ruled that indefinite solitary confinement was necessarily cruel and unusual punishment, but the Court held that the prison official's argument was based on a misreading of the lower court's decision:

> Read in its entirety, the District Court's opinion makes it abundantly clear that the length of isolation sentences was not considered in a vacuum. In the court's words, punitive isolation "is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof."
>
> . . .
>
> It is equally plain, however, that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of "grue" might be tolerable for a few days and intolerably cruel for weeks or months.[136]

Note the Court's recognition that the duration of solitary confinement is an important factor to consider in assessing its validity. Similarly, in *United States v. Johnson*, Judge Posner opined that:

> A prison's control unit is not intended as a punishment for the crime that got the prisoner into prison in the first place, like a sentence of imprisonment at hard labor. Its purpose rather is to deter and prevent violations of prison disciplinary rules and to protect prisoners, guards, and in some cases people outside the prison, or the society at large, against dangerous conduct by the prisoner. See 28 C.F.R. § 541.40(a) ("in an effort to maintain a safe and orderly environment within its institutions, the Bureau of Prisons operates control unit programs intended to place into a separate unit those inmates who are unable to function in a less restrictive environment without being a threat to others or to the orderly operation of the institution").[137]

The court examined applicable prison regulations requiring a warden to conduct a risk assessment before imposing any special administrative measures, including solitary confinement, on a disruptive or dangerous inmate, and to review the risk assessment no more than 120 days later.[138] Based on these regulations, the court concluded that "[t]he limitations in these regulations imply that the Bureau of Prisons could not assign a prisoner directly upon his admission to the federal prison system to spend the rest of his life in the control unit without the possibility of reconsideration."[139]

Because *Johnson*'s holding was based on the court's interpretation of the relevant statutes and regulations,[140] it does not directly address whether the government could, in fact, impose indefinite (i.e., life-long) solitary confinement as a punishment for lifers convicted of committing another murder while imprisoned.

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[136] *Id.* at 685-87.

[137] United States v. Johnson, 223 F.3d 665, 673 (7th Cir. 2000).

[138] *Id.* at 672 (citing 28 C.F.R. § 501.3(c) (1997)).

[139] *Id.* ("The regulation requiring the bureau to review an inmate's control unit status 'at least once every 60 to 90 days . . . to determine the inmate's readiness for release from the [Control] Unit,' 28 C.F.R. § 541.49(d), points in the same direction.").

[140] *Id.* (citing 28 C.F.R. §§ 501.3(a), 501.3(c), 541.49(d) (1995)).

As noted earlier, legal and medical experts raised concerns about convicted terrorist Ramzi Yousef's extremely harsh conditions of confinement.[141] Though these conditions were nearly unique, empirical studies of prisoners in general solitary confinement have identified severe psychological and physiological harms that can afflict the confined prisoners with greater frequency than seen in the general prison population.[142] Symptoms include "anger, hatred, bitterness, boredom, stress, loss of the sense of reality, suicidal thoughts, trouble sleeping, impaired concentration, confusion, depression, and hallucinations."[143] Other studies have found that six months of solitary confinement can cause brain impairment on par with someone who has "incurred [] traumatic injury."[144]

Not surprisingly, these negative effects have led many to argue that long-term solitary confinement constitutes cruel and unusual punishment, or even torture.[145] One commentator notes that there is a trend in European countries toward reduced use of solitary confinement, with greater safeguards such as daily physical and mental evaluations by physicians.[146] European prison rules do not impose hard and fast limits on the duration of solitary confinement, but they do allow it "only in exceptional cases and for a specified period of time, which shall be as short as possible."[147]

Other commentators recommend limiting the maximum duration of solitary confinement to no more than two years (absent extraordinary circumstances) or less,[148] and importantly, offering the prisoner an opportunity to demonstrate an ability to behave in controlled settings and thus earn his way out of solitary confinement.[149] Atul Gawande, a medical school doctor, further argues that solitary confinement does not lead to predictable reduction in prison violence because much prison violence stems from overcrowding and conditions that "maximize[] humiliation and confrontation";[150] he points to England's experience in greatly reducing the number of prisoners in isolation by improving their conditions of confinement.[151]

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[141] *See* REEVE, *supra* note 120, at 251-54 (citing Sharon Walsh, *'Proud' Terrorist Gets 240 Years in N.Y. Bombing*, WASH. POST, Jan. 9, 1998, at A01).

[142] Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 476 (2006).

[143] *Id.* at 488; *see also* Bryan B. Walton, *The Eighth Amendment And Psychological Implications of Solitary Confinement*, 21 LAW & PSYCHOL. REV. 271, 277-81 (1997) (more summary of psychological effects); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 515-25 (1997).

[144] *See* Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is This Torture?*, NEW YORKER (Mar. 30, 2009), http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande#ixzz2AC9MaBCq.

[145] *See Haney & Lynch, supra* note 145, at 542-54; Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT'L L. REV. 1, 21-24 (2006).

[146] Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 93-95 (2005); Eur. Consult. Ass., *Recommendation Rec(2006)2 of the Comm. of Ministers to States on the European Prison Rules*, R. 43.2, https://wcd.coe.int/ViewDoc.jsp?id=955747.

[147] Eur. Consult. Ass., *Recommendation Rec(2006)2 of the Comm. of Ministers to States on the European Prison Rules*, R. 60.5, https://wcd.coe.int/ViewDoc.jsp?id=955747&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75#P6_138.

[148] Haney & Lynch, *supra* note 145, at 561; *see also* Hresko, *supra* note 147, at 25.

[149] Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 132 (2008).

[150] Gawande, *supra* note 146.

[151] *Id.*

The problem is that none of these suggestions that call for limiting or minimizing the use of solitary confinement actually address how to deal with an inmate like Gary Haugen. Over twenty years passed between when Haugen killed his first victim and when he killed David Polin.[152] Given an opportunity to show that he can "behave," he might be well able to do so simply to get out of solitary confinement. Once released back into the general population, who can say what he might do to the next inmate he were to suspect of being an informant?[153]

To be sure, the situation might be more complicated than it appears. Those twenty years of prison leading up to the day of Polin's killing may have hardened Haugen to the point that he became capable of doing something he otherwise wouldn't have done.[154] It may be that using smuggled drugs was the only way Haugen felt he could cope with enduring his life sentence, and that he believed it was necessary to stop Polin from informing on him. If so, the prison system could be seen as partially responsible for causing him to act the way he did. Still, even if one were to imagine a counterfactual in which the Oregon State Penitentiary implemented the improved prison conditions with which Britain found success, there would be no certainty that Haugen would not have killed Polin. The number of British prisoners in isolation is not zero.[155] Given that Haugen premeditated Polin's murder with the purpose of silencing a person that he believed was an informant, not someone who he felt unable to avoid a confrontation with, it seems questionable whether anything would have kept Haugen from killing Polin.[156] This argument is not to suggest that it would be a bad idea to experiment with improving conditions of confinement to determine whether less restrictive conditions reduce prison violence; it is only to say that we may at best reduce—but not eliminate—prison murders.

Ultimately, prison killers such as Gary Haugen highlight a three-way conflict among the goals of (1) eliminating the death penalty; (2) avoiding secure but restrictive prison conditions that demonstrably harm prisoners mentally as well as physically; and (3) protecting inmates from violence inflicted by other prisoners. Much as the push to reduce false positives will invariably result in an increase in false negatives, here too success in one or two goals will negatively impact the remaining goal. If the choice is between inflicting some unavoidable harm on an inmate murderer, or imposing substantial risk of harm on other inmates at the hands of that inmate murderer, it may be normatively just to choose the former: the harm is simply a by-product of the goal of protecting other inmates.[157]

If this reasoning is seen as unacceptable, it may be tempting to conclude that what we need is "outside the box" thinking. While it would be foolish to assert that no

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[152] *Haugen*, 243 P.3d 31, 34-35 (Or. 2010).

[153] Some "restorativists" may conclude that no one is beyond rehabilitation and redemption with appropriate treatment. *See, e.g.*, BIBAS, *supra* note 1, at 99 (discussing how some extreme restorativists believe that crime victims can be "healed by a cathartic conference, apology, and restitution," and by implication, that the criminals will present no more threat). In Haugen's case, of course, his victim could not be part of such a conference, since he's dead. More to the point, I suspect that the other inmates – and their relatives – would probably find little reassurance in any claimed rehabilitation of an inmate murderer.

[154] *Cf.* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (contrasting the harsh conditions of American prisons with the more lenient conditions in continental European prisons).

[155] Gawande, *supra* note 146.

[156] *Haugen*, 243 P.3d at 35.

[157] This is, of course, a variation of the typical deterrence-based debate about the death penalty: can capital punishment be justified if it is shown to save lives of future murder victims by deterring their would-be killers? One challenge is that the harm inflicted on the inmate is immediate and tangible (death), whereas the "saved" victims are speculative and unknown/unknowable.

solution is possible, a brief review of some fictional high-tech proposals depicted in movies suggests that technology is unlikely to be a neat savior.

Implanted pain/control devices: In the science-fiction thriller *Fortress*,[158] prisoners in a maximum-security prison facility are forced to swallow an "intestinator," which is a device that causes instantly disabling stomach pain upon command of the ever-watchful computer system.[159] The nearest analogue in today's world would be "stun belts," which are devices that can deliver approximately 50,000 volts in an eight-second jolt to paralyze the wearer temporarily.[160] Courts have generally upheld the use of stun belts as an alternative to physical restraints of potentially dangerous prisoners during court proceedings.[161] Challenges to use of the belts, however, have focused on the prejudicial impact at trial of being forced to wear the belt, and not the pain inflicted.[162] As with solitary confinement, a shorter duration of being forced to wear a stun belt—such as during court proceedings—may be tolerable, whereas a permanent requirement to do so may be inhumane. In any event, it is far from clear that the stun belt is an improvement, especially given that accidental triggerings, while rare, are not unheard of.[163] Even a low rate of accidental triggerings would result in a substantial number of unintended shocks over a 20-year period.[164]

Long-term freeze: In the world of *Demolition Man*,[165] prisoners are sentenced to the CryoPrison, where they are "frozen" (*i.e.*, placed in suspended animation) to be thawed out at the end of their prison term.[166] Presumably, the advantage of this approach is that the prisoner is incapacitated for the duration of the sentence, unable to harm anyone else, but without suffering from the harmful effects of solitary confinement.

Cryonics is currently far from being a viable and reliable procedure,[167] but perhaps it can be developed into one. Speculation about its effects raises concerns that it both fails to exact adequate punishment, and yet may also be cruel and unusual in its own way.[168] If indeed the prisoner is frozen for 30 years and then is thawed, and feels no passage of time, then it is somewhat hard to see the retributive value of punishment. On the other hand, the world will have changed in 30 years, and family and friends will have aged or even died, perhaps leaving the prisoner feeling isolate and alone.[169] It's also worth noting that, in the movie at least, Sylvester Stallone's character (who had been frozen as part of a prison sentence) reported that he in fact did experience the passage of time,

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[158] *See, e.g.*, FORTRESS (Dimension Films 1993).

[159] *See id.*

[160] *See, e.g.*, United States v. Durham, 219 F. Supp. 2d 1234, 1238 (N.D. Fla. 2002).

[161] *See, e.g.*, Gonzalez v . Pliler, 341 F.3d 897, 901 (9th Cir. 2003).

[162] *Cf.* Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions*, 30 ST. MARY'S L.J. 239, 242–243, 246–247 (1998) ("[A]ctivation of the belt causes immediate immobilization and may result in defecation and urination. . . . [T]he belt's metal prongs may leave welts on the victim's skin . . . [requiring] as long as six months to heal").

[163] *Durham*, 219 F. Supp. 2d at 1238.

[164] *Id.* at 1239.

[165] DEMOLITION MAN (Warner Bros. Pictures 1993); *see also* MINORITY REPORT (Twentieth Century Fox Film Corporation 2002).

[166] DEMOLITION MAN, *supra* note 167.

[167] *See* Ryan Sullivan, *Pre-Mortem Cryopreservation: Recognizing a Patient's Right to Die in Order to Live*, 14 QUINNIPIAC HEALTH L.J. 49, 60-70 (2010) (recapping the current state of cryonics).

[168] *See, e.g.*, J.C. Oleson, Comment, *The Punitive Coma*, 90 CALIF. L. REV. 829, 861-63, 886 (2002).

[169] *See* ALIENS (Twentieth Century Fox Film Corporation 1986) (considering the isolation that Ellen Ripley, who was not a prisoner, felt upon discovering that she spent 57 years in cryogenic sleep).

making the entire experience sound like solitary confinement combined with sensory deprivation.[170] This, too, seems an unpromising alternative to conventional solitary confinement.

Concentration of the dangerous prisoners in one location: In the movies *Escape From New York* and *No Escape*,[171] society has essentially given up on managing prisons for extremely dangerous prisoners.[172] The prisoners are instead dumped onto savage islands with no guards and no rules other than any prisoners attempting to escape will be fired upon.[173] Within the island, however, it is survival of the fittest.[174]

Although the federal prison on Alcatraz Island in the San Francisco Bay held dangerous inmates,[175] much as the current federal Supermax facility in Florence, Colorado, does, our society has not abandoned the idea of managing the prisoners and attempting at least to prevent them from being able to run their own fiefdoms based upon the rule of the strongest. The obvious flaw in this approach is that we would be forsaking our duty to protect inmates from foreseeable harm. About the only thing that could be said to justify such an approach would be to depersonalize the inmates on the theory that anyone put into such a situation would necessarily be someone like Haugen. This too does not seem like a good idea.

Metal boots with magnetizable floor: In *Face/Off*,[176] society has built a high-tech prison called Erehwon (read it backwards) where inmates are forced to wear metal boots at all times.[177] This way, if there is a riot or other physical disturbance, prison officials can activate powerful magnets in the floor, thus immobilizing all prisoners.[178] The movie itself, however, demonstrates that these boots are likely insufficient to prevent an inmate from killing another inmate, either before they can be activated, or if the victim is still within grabbing/punching distance.[179]

Behavioral modification: In *A Clockwork Orange*,[180] a violent young man is arrested after a vicious crime spree that includes beating a man and raping his wife, and beating another woman to death.[181] After receiving a lengthy prison sentence, he agrees to volunteer for an experiment in rehabilitating criminals by modifying their behavior.[182] The procedure consists of forcing him to watch violent movies while being fed drugs that induce severe nausea.[183] Subsequently, violent impulses trigger feelings of nausea.[184]

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[170] *See* DEMOLITION MAN, *supra* note 167.

[171] ESCAPE FROM NEW YORK (AVCO Embassy Pictures 1981); NO ESCAPE (Columbia Pictures 1994).

[172] *Id.*

[173] *Id.*

[174] One could also look to the third season of the television serialized drama *Prison Break*, in which the main character found himself in a fictional Panamanian prison run by the inmates, with the guards outside the facility entirely and charged with keeping anyone from escaping. *Prison Break* (Fox 2005).

[175] Haney, *supra* note 145, at 488.

[176] FACE/OFF (Paramount 1997).

[177] *Id.*

[178] *Id.*

[179] *See id.*

[180] A CLOCKWORK ORANGE (Warner Bros. 1971).

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

Assuming that such behavioral modification could work, it would raise a host of issues not dissimilar to those involved in chemical castration: use of "mind-altering drug[s] purely for purposes of incapacitation (as opposed to medical treatment)."[185] If solitary confinement raises concerns because of its effect on the mental health of prisoners, it is difficult to see how the use of mind-altering drugs to change behavior would be an improvement.

IV. CONCLUSION

The Gary Haugen saga is without doubt unusual, but it does highlight the fiscal insanity of the current death penalty situation—especially in a state like Oregon, which does not execute death row inmates unless they volunteer for it (and for now, under the present Governor, not even then). One can easily imagine more societally productive uses of the money that Oregon has poured into this case since Haugen was convicted of killing David Polin, and yet, without the death penalty, one must wonder, who would be the next David Polin?

Limiting capital punishment to convicted murderers of prison inmates or guards would not answer all criticisms of the death penalty, but it would dramatically narrow the number of people on death row. As a result, some death penalty critics seem willing to accept the death penalty in such circumstances.[186] For those who insist on complete abolition, however, if the abolitionist drive to eradicate the death penalty is an irresistible force, then the ongoing move to limit (if not ban) solitary confinement is an irresistible force with an opposing vector, leaving the safety of other inmates as the immovable object. Something has to give.

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[185] *See* John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 597 (2006) (arguing that state laws permitting chemical castration of convicted sex offenders violate the Eighth Amendment).

[186] *See, e.g.*, Alarcon et al., *supra* note 40, at S182-S183 (noting the narrowness of the federal death penalty in practice, with 11 of 58 on federal death row for murdering other inmates, guards, or during escape); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 138-39 (Gerald Uelmen ed., 2008), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf (recommending the retention of the death penalty for a narrow set of cases, including murdering another prisoner). Admittedly, restriction of the death penalty to such a purely incapacitation-based pool of murderers is unlikely to garner public support, as it would mean that killers of convicted prisoners are punished more harshly than killers of police officers, children, or even the United States President. *Cf.* Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 444 (1988) (noting the result of the Baldus study that "[w]hen flexible juries use their discretion to impose the ultimate penalty, the lives of victims who happen to be black are simply worth less").