NOT IN, BUT LARGELY ABOUT, THE APPELLATE COURTS IN THE STATE OF OREGON

In Re: A Publication of the Appellate Practice Section of the Oregon State Bar.

Volume 12

OREGON APPELLATE ALMANAC

2022

A Collection of Highly Specific Scholarship, Exuberant Wordplay, and Fond Memories from the Appellate Practice Section

Nora Coon, Editor

OREGON APPELLATE ALMANAC

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OREGON APPELLATE ALMANAC

Volume 12 (2022)

SUBMISSIONS

The Almanac welcomes submissions of approximately 500 to 2000 words in the following areas:

- Biographies, interviews, and profiles of figures in Oregon law and history
- Court history, statistics, and trivia
- Analysis of intriguing or obscure issues in Oregon appellate law and procedure
- Humor, wit, poetry, and puzzles

The annual submission deadline is **June 1**. In case of pandemic, natural disaster, or other forces beyond everyone's control, extensions will be granted liberally.

Submissions should be lightly footnoted as necessary. In deference to the fact that most contributors and readers are practitioners, citations should conform to the Oregon Appellate Courts Style Manual.

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Good Clean Fun

Introduction

Welcome to the 2022 edition of the Oregon Appellate Almanac! Thank you to all of our authors for their contributions, and to those who have already started thinking about next year's submissions (write early and write often!). We also greatly appreciate the past contributions of Davis Wright Tremaine LLP, Markowitz Herbold PC, Thomas Coon Newton & Frost, and Tonkon Torp LLP to the Appellate Practice Section of the Oregon State Bar, which made possible the printing of this year's edition.

Our 2022 edition of the Almanac is dedicated to the memory of former Justice William Riggs. This edition begins with a memorial written by his former clerk, Julia E. Markley, and his famous Caesar salad recipe.

The Oregon appellate courts have seen many changes during 2022—appointments, retirements, the advent of unpublished opinions, the re-opening of the Oregon Supreme Court courthouse, and a return to some in-person oral arguments. Look to the 2023 Almanac for full coverage and more!

We hope that you enjoy this edition of the Almanac, and we welcome your questions, feedback, and submissions for future editions at oregon.appellate.almanac@gmail.com.

—Nora Coon, Editor

In Memoriam: Justice R. William ("Bill") Riggs

Julia E. Markley[1]

I was scared of him at first. The silver-haired, impeccably dressed, kind-spoken man behind the desk in the "broom closet." As the newest justice to the court, he had the smallest office, hence the moniker "broom closet." Before joining the Oregon Supreme Court in 1998, he had served as a judge on the Oregon Court of Appeals from 1988 to 1998 and on the Multnomah County Circuit Court from 1978 to 1988—a pretty intimidating resumé to a new law school graduate.

Every weekday morning for two years, I traipsed up the curved marble staircase from the clerks' offices to the justices' offices. I carried a legal pad and maybe a draft petition memorandum or draft opinion, as we worked in hard copy those days. The morning routine started in the office of Judge Riggs's judicial assistant Julie Reynolds, through which all visitors passed to meet with the judge. Julie and I would discuss her work of the day, maybe compiling other justices' comments on circulated draft opinions or typing up remarks for an upcoming family law CLE. Then, she'd send me in to Judge Riggs's chambers for our daily meeting.

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[1] Julia E. Markley is a litigation partner in the Portland office of Perkins Coie where she represents businesses in complex business and intellectual property disputes. She clerked for Justice Riggs in 1999–2001 and recently followed his Caesar salad recipe, forgetting only the Grey Poupon. Julia thanks the talented Nora Coon and Lora Keenan for editing this piece; (she had not seen her writing edited so heavily since her clerkship days, and the experience was refreshing).

He set a cadence to our daily morning meetings. If it was Monday, he would insist I recount my weekend bike ride or long run. He might talk about the technique he used to cook the sturgeon he'd served guests over the weekend. And, no matter the day of the week, when we did get to legal matters, the discussion might drift to a trial over which he had presided or his views about lawyers against whom the Bar had initiated disciplinary proceedings. At first, I did not see how these topics were relevant to whatever legal issue we'd be working through.

Early on, my morning climb was even more fraught with nerves. The very first opinion I drafted for him drew a petition for reconsideration—one of the worst ways to start off a clerkship. It's a potential embarrassment for the judge, who has an ego just like anyone else, and I felt it was me as the clerk who was responsible if the opinion misstated the record or contained a similar issue. But the judge instructed me to review the petition thoroughly; give him my best recommendation how to rule; and if something needed to be fixed, why then, we would fix it. It was a great lesson in confronting tough issues head on, embracing a sound process, and recognizing mistakes when appropriate. The court ended up denying the petition, but Judge Riggs's calm integrity in approaching the petition stuck with me.

By the end of my clerkship, Judge Riggs had upgraded from the broom closet to the spacious corner "library" where one wall of windows faced the tracks. Our meeting cadence now included pauses whenever the train rolled through. I was no longer afraid of Judge Riggs, but fond of him. Thanks to his patient mentoring, I was a better writer and a more confident lawyer, and I knew the methodologies in *PGE v. BOLI* and *Priest v. Pearce* by heart.

But the most important thing I learned from Judge Riggs is to develop and to treasure relationships with your co-workers. That is what our personal conversations and his stories were all about. And that is what makes you want to work hard as a team when there is the pressure of a deadline or blowback from an unpopular opinion. These relationships can stand the test of time. More than 20 years after the first time I ascended the stairs, Julie and I met for lunch last week to reminisce about Judge Riggs and our time on his team.

In the spirit of Judge Riggs, I have two challenges for you, dear readers. And no, it is not to wear a striking shantung silk bowtie to your next court appearance or presentation. First, can you get to know your colleagues better? I know I can do better and commit to do so. Second, will you try one of Judge Riggs's personal recipes at your next group dinner? I pass on his Caesar salad recipe that his family made available at his celebration of life. I bet you will smile when you read Judge Riggs's commentary on lettuce spines and laziness, and the tableside preparation will bring a welcome change of cadence to your meal.

JUDGE BILL RIGGS CAESAR SALAD RECIPE

SERVES 6 - 8
STUFF YOU WILL NEED:

- **2 nice heads of romaine lettuce**
- **several cloves of garlic or 2 spoons of minced garlic**
- **Grey Poupon Dijon style mustard**
- **2 large fresh eggs**
- **freshly grated parmesan cheese**
- **4 cups croutons (see my separate crouton recipe)**
- **1 tin fillets of anchovies**
- **3 cups olive oil**
- **1 or 1 1/2 cups white wine vinegar (with or without tarragon)**
- **1 whole large fresh lemon, squeezed**
- **fresh ground black pepper**
- **maybe a little salt (preferably sea or kosher rock salt)**

Prepare the lettuce by pulling the leafy portions away from the woody spines. Discard the spines. Some cheap restaurants cut the lettuce and don't bother to remove the spines. This is much faster, but not quite as good a method. (But, sometimes I'm lazy and do the same). Wash in very cold water and spin dry. Lettuce must be dry and chilled until serving.

Put olive oil, vinegar and two tablespoons of mustard in a quart-sized jar and mix. Finely cut the anchovies and add to mixture. Add finely chopped or crushed garlic. The amount of vinegar, garlic and anchovies depends on taste. I like a lot of garlic, so I put in at least 3-4 cloves. I also like anchovies and use the whole can. If you prefer, you can skip the salt or use fewer anchovies, although I promise you will like them in this recipe.

Place 2 room-temperature large eggs in boiling water and cook ("coddle") for about 1 minute. (It helps to use an egg "prick" to keep the eggs from breaking in the boiling water). Remove the eggs from the water, rinse with cold water and set aside.

When time to serve, toss the lettuce with the mixture from the jar at table side. Then, add the squeezed lemon juice. Break eggs and put contents on top of the lettuce, being sure to scoop out and use all the slightly hardened white portions of the eggs. (I use the whole egg, but some prefer to use only the yolk). Toss again. Finally, add croutons and grated parmesan cheese and toss again. Serve the salad and separately offer guests fresh-ground pepper, additional croutons and extra parmesan cheese.

This salad dressing (without the eggs) can be kept refrigerated for a week or so. Extra croutons can be frozen and blocks of parmesan cheese keep well in a refrigerator for a long time.

ENJOY

> *The term "baggage" has been held to include a reasonable quantity of a watchmaker's tools; a dress pattern containing 12 yards of cloth, valued at $8.85, purchased en route to take home to a member of the family; a manuscript manual on Greek grammar prepared by a teacher with a view to ultimate publication, but carried about by him to aid in his work of teaching; a woman's fancywork and miscellaneous ornaments, a savings bank and contents, and a zither key; one dozen photographs carried by a passenger returning home; a tent in which the owner lived and the blankets in which he slept in pursuance of his business of traveling with fairs, circuses, and picnics to operate a shooting gallery; a sportsman's gun case and fishing apparatus; an artist's easel; a barber's razors; a surgeon's instruments; * * * opera glasses and compass; * * * a woman's jewelry, and every article pertaining to her wardrobe that may be necessary or convenient to her in traveling.*

Hamilton v. Baggage & Omnibus Transfer Co., 97 Or 620, 629–31, 192 P 1058 (1920) (extensive internal citations omitted).

A Legacy of Service: A Tribute to the Honorable Justice Lynn R. Nakamoto

Sara Ghafouri,[1] *Gabrielle Thompson,*[2] *and Merissa A. Moeller*[3, 4]

It goes without saying that Justice Lynn R. Nakamoto is a legal legend. We jumped at the opportunity to co-author this tribute in recognition of her retirement from the judiciary last year, yet capturing Justice Nakamoto's nearly 40-year career in fewer than 2,000 words proved to be daunting. What could we, three former law clerks, possibly say that hasn't already been said countless times over?

But as we prepared to write this piece, we were astounded to learn of some of Justice Nakamoto's professional accomplishments. Maybe we shouldn't have been surprised: Despite numerous high-profile recognitions of her outstanding contributions to the legal profession and community, Justice Nakamoto seeks to avoid the spotlight. She is deeply humble and truly embodies the values of public service to which all Oregon lawyers should aspire.

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[1] Sara is General Counsel at the American Forest Resource Council. She clerked for Justice Nakamoto at the Oregon Court of Appeals from 2011 to 2013.

[2] Gabby is Corporate Counsel at Roseburg Forest Products Co. She clerked for Justice Nakamoto at the Oregon Court of Appeals from 2013 to 2015.

[3] Merissa is a natural resources and land use attorney at Stoel Rives LLP. She clerked for Justice Nakamoto at the Oregon Court of Appeals in 2015 and at the Oregon Supreme Court from 2016 to 2017.

[4] The opinions asserted here belong to the authors and do not represent the opinions of their firms, organizations, or colleagues.

We also found ourselves reflecting on the profound personal impact Justice Nakamoto has had on each of our lives. Her legacy, we realized, lies not just in the barriers she has never stopped breaking or the influential opinions that she has authored. Perhaps as important, Justice Nakamoto has inspired generations of Oregon lawyers, including women, LGBTQ+ lawyers, and lawyers of color. We cannot possibly speak for all of their experiences, but we are honored by the opportunity to share our own.

As many Oregonians know, Justice Nakamoto was the first Asian Pacific American judge on any Oregon state or federal appellate court. Justice Nakamoto sought appointment to the Oregon Court of Appeals in 2011, electing to leave her 20-year career with Markowitz Herbold in part because of her strong belief that the judiciary should more accurately reflect the broader community. Her historic appointment broke a barrier for Asian Pacific Americans in the Oregon bar. Shortly thereafter, in 2015, Justice Nakamoto broke another barrier by becoming the first Asian Pacific American to serve on the Oregon Supreme Court. These two historic appointments in and of themselves have made Justice Nakamoto a trailblazer and beacon of hope for the Oregon legal community, where underrepresentation continues to be a significant problem.

Oregonians may be less familiar with Justice Nakamoto's substantial contributions to advancing diversity, equity, and inclusion in the legal profession and increasing access to justice throughout the state. As a woman of color, an open member of the LGBTQ+ community, and a first-generation college graduate, Justice Nakamoto has always exhibited a deep commitment to those principles. She was one of the founders of the Oregon

Minority Lawyers Association, served on the board of Portland's Q Center, and served on the Oregon State Bar's Affirmative Action Committee. Before joining the bench, Justice Nakamoto worked to advance the rights of the LGBTQ+ community through her pro bono work with the Oregon chapter of the American Civil Liberties Union (ACLU). For example, she represented the ACLU as *amicus curiae* in *Tanner v. Oregon Health Sciences University*,[5] which expanded equal benefits to Oregon same-sex domestic partners and their families, and was co-counsel for the ACLU when it challenged Oregon's statutes prohibiting same-sex marriages in *Li v. State of Oregon*.[6] During her time on the bench, Justice Nakamoto has consistently shown her support for organizations focused on advancing diversity, equity, and inclusion by attending numerous functions sponsored by the Oregon State Bar and various specialty bar associations. While serving on the Oregon Supreme Court, she was the chair of the Oregon Supreme Court's Council on Inclusion and Fairness, which works to ensure that everyone has equal access to Oregon state courts and advises on matters of systemic bias in the Oregon Judicial Department.

Justice Nakamoto has also long been involved with the Oregon Asian Pacific American Bar Association, an organization formed in 2009 focused on advancing Asian Pacific American attorneys. Justice Nakamoto's ongoing contributions were so substantial that, in 2013, she was honored at the association's inaugural gala for her diversity efforts and contributions to the organization with an award rightfully named in her honor.

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[5] 161 Or App 129, 980 P2d 186 (1999).

[6] 338 Or 376, 110 P3d 91 (2005).

Other state and national organizations have recognized Justice Nakamoto's professionalism and commitment to diversity throughout her professional career. At the state level, she received the Oregon Women Lawyers Mercedes Deiz Award and the Oregon State Bar Litigation Section's Owen M. Panner Professionalism Award. At the national level, she received the National Asian Pacific American Bar Association's Daniel K. Inouye Trailblazer Award, the organization's highest honor that recognizes the outstanding achievements, commitment, and leadership of lawyers who have paved the way for Asian Pacific American attorneys. She also received the American Bar Association's Margaret Brent Women Lawyers of Achievement Award, whose previous honorees include U.S. Supreme Court Justices Sandra Day O'Connor and Ruth Bader Ginsburg. And the Oregon community at large has celebrated Justice Nakamoto's contributions. In 2021, a new mural in downtown Portland entitled "Never Look Away" celebrated eight pioneers of the LGBTQ+ community. It includes Justice Nakamoto as one of those pioneers. Despite these towering recognitions, Justice Nakamoto continues to avoid the spotlight and, instead, is laser-focused on her role as a public servant, which further demonstrates her modesty and humility.

Justice Nakamoto brought this same commitment to service to her role as a judge. While she served on the Court of Appeals, Justice Nakamoto was regarded with great distinction and quickly earned the respect of her colleagues. Justice Nakamoto has a strong work ethic and has never taken her role as a public servant lightly, working tirelessly to provide timely resolution in a variety of complex appeals. She also gained the respect of the appellate practitioners who have appeared before her, treating everyone with courtesy and dignity while, at the same time, asking fair and

tough questions. Given Justice Nakamoto's superior intellect and methodical judicial reasoning, it came as no surprise when Governor Brown appointed her to the Oregon Supreme Court after serving only four years on the Oregon Court of Appeals.

During her 10 years on the bench, Justice Nakamoto authored almost 250 opinions, some that will have a long-lasting impact on all Oregonians. Her opinions reflect her thoughtful and pragmatic judicial approach, her awareness that the law affects the lives of real people, and her fervent belief that the judiciary should provide useful, practical guidance. Her opinions also reveal an impressive breadth of subject matter expertise, expanding beyond her deep experience as a complex civil litigator to include important matters of criminal law. The range of her jurisprudence demonstrates her acute analytical skills and her unique ability to pinpoint the pivotal issue in any case.

Beyond her official duties as a jurist, Justice Nakamoto approached her role as a mentor to the young lawyers clerking in her chambers with the same dedication as her work on the Court. As Justice Nakamoto's law clerks, she was our first "real" boss as lawyers. The importance of such a position was not lost on her. Though it would have been easy to focus solely on her enormous caseload, Justice Nakamoto viewed her role as a judge to be as much about resolving cases as it was about training new lawyers.

Justice Nakamoto set high expectations for us, but the brilliance of her approach to mentorship was that she didn't wield those expectations with an iron fist. Instead, she modeled those expectations for us on a daily basis. Through her own work she taught us that the solemnity of our task should never be taken for granted, that our

opinions had real impacts for the parties and the people of Oregon, that our work must always be exceptional and as judicious and efficiently prepared as possible, that we should articulate and dispense of arguments with respect and set aside the temptation of taking cheap shots, and that we should always endeavor to do justice. Put simply, she presented us with a roadmap of how to become remarkable attorneys and human beings.

Justice Nakamoto made it clear that she was genuinely interested and invested in our professional growth. The conversations we had with her moved past academic discussions about the law and into realistic discussions about practicing law and building our careers. Although at the time we had never worked in private practice, she looked for opportunities to teach us about the particular challenges that we would face once we left our clerkships. These conversations about legal strategy and the practical realities of litigation are lessons that we all continue to draw from today.

There are certain people you meet during your legal career that leave an indelible mark on you, your practice, your ethics, and your judgment. Luckily for us, Justice Nakamoto was one of those people. Particularly fortunate was the fact that she intersected our careers early on. Looking back on our clerkships, we can all agree that it was a defining experience in our lives and careers. We are among the lucky Oregon lawyers who had the opportunity to learn from and work with Justice Nakamoto, and we are grateful to her for the contributions she has made to the judiciary, the Bar, and our careers.

More than Meets the Eye: A Tribute to the Honorable Judge Rex Armstrong

Chris Page[1]

The career services employee advised me to make a list, after interviewing for a clerkship with the hiring judges on the Court of Appeals and Supreme Court, to memorialize what I perceived to be the best fit. Although uncommon, there was a chance that more than one judge would offer a position, so I should be prepared to make an immediate choice between offers. As I compiled my list, I reflected on my interactions with the judges and whether I felt that I would be a fit with each. In reflecting on my interactions with Rex (he'd take offense if I referred to him as Judge Armstrong), during which he explained to me his approach to resolving legal issues that was entirely foreign to what I had learned in law school and I dutifully listened without getting many words in edgewise, I concluded that I could not possibly be a match with him. In fact, my youthful hubris led me to question whether I'd rather do something other than clerking if I had an offer from Rex.

As fate would have it, I received a phone call shortly thereafter and was offered a clerkship with Rex. I accepted that offer—a decision that left me as nervous as a long-tailed cat in a room full of rocking chairs.

The apprehension was not felt only on my part. I was far from Rex's first choice of candidates to hire. He later confided (perhaps in a moment of exasperation in response to me pushing for the completion of a draft

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[1] Assistant Attorney General, Appellate Division, Oregon Department of Justice. Former clerk to the Honorable Rex Armstrong, 2010 to 2012.

opinion) that I was a "Brewer clerk"—then-Chief Judge Brewer had not so subtly guided Rex toward hiring me over Rex's preferred candidates.

So, Rex and I began our working relationship with more than a little doubt about our fit. But the ensuing two years could not have proved those doubts to be more unfounded. Little of what I have become as a lawyer cannot be traced to what I learned from Rex. And I am not referring to the writing, advocacy, and analytical skills honed through many debates and the exchange of draft opinions (although there was plenty of that). No: more importantly, Rex afforded me the space, and often demanded, that I trust my instincts to guide me to the best answer for a legal issue and that inevitably the authority for support of that answer would follow. I often resisted that latter point, but Rex would provide steady assurance that would prove him inevitably right (often to my chagrin having staked out my doubts).

Rex had such an unyielding faith in his convictions about the resolution of legal issues in a way that was fair and provided justice to the parties and advanced Oregon law to those ends. As in many things, former Chief Judge Haselton put it better than I could ever hope to by drawing the good-natured metaphor, during the resolution of a particularly thorny legal issue, that Rex's conviction in the correct result made him resemble an inflatable clown toy that can withstand any effort to floor it by bouncing back up, grinning all the while.

But therein lay the key lesson that Rex had sought to impart to me: the law must bend toward justice and fairness for everyone, and those values lead a person to form the instincts necessary to take the biggest step toward

answering a legal issue. From there, one could understand the direction indicated by legal precedent and insights into the legislature's intent, leading the journey to understand how the law should operate when faced with whatever unexpected nuances served as the root of the dispute.

Law school had trained me to be so dogmatic in my understanding of the law that I had never considered approaching legal issues from any place other than simply trying to marshal legal authority without any thought or imagination as to what a fair and just result would be, much less how the legal authority that I sought had those values at its core for resolving future issues. At the end of the day, the lessons that I learned from collaborating with Rex as his clerk wholly altered the way that I would practice law from that point forward.

Apart from learning how to be a lawyer, clerking provides an opportunity for a new lawyer to look behind the curtain and humanize judges. I have no insights to share about Rex's enviable intelligence or his significant contributions to Oregon law over his 27 years as an appellate judge that readers of this article do not already know. But clerking provided me an opportunity to appreciate Rex as a person. And he is an outstanding one at that.

Like any of us, Rex has his quirks. But I came to learn why he engenders such deeply loyal friendship—his quirks are manifestations of his virtues. Rex can enter a conversation with someone who he may barely know and display a passionate inquisitiveness about the person or a subject matter. That frank approach to interacting with others reflects his intense curiosity with learning about and from them. And despite his intimidating intellect, Rex has

never taken (and would never take) take offense to his ideas on a subject being challenged, creating a space in which honest positions can safely be tested without fear of even the slightest hint of personal animosity.

Rex has a deep empathy for others, especially those who have been dealt a bad hand in life. Not only does his empathy shine through in his legal opinions for all to see, but he also privately cares fiercely for his family and his friends. That leads me to the most important aspect of my clerkship with Rex. He became my friend. From sending messages about the greatest college basketball program of all time (Go Heels!) to frequently checking in with me after a terrible family tragedy, Rex has ensured that we have kept in touch after my clerkship. He would drop everything to be available to me as a friend and mentor.

Although Oregon law and the court will be worse for it, I am so happy that my friend has the time and space to pursue his myriad interests in retirement. And for everything that I have learned (and continue to learn) from Rex and for his friendship, this "Brewer clerk" considers himself so very lucky to have clerked for the judge at the bottom of his list.

A Legacy of Mentorship: A Tribute to the Honorable Judge Joel DeVore

Rachel Morris[1]

It was an honor to serve as one of Judge DeVore's law clerks, and I will always be deeply grateful for the opportunity to receive his mentorship and guidance at the start of my career. From the moment I met Judge DeVore during our interview, I was struck by his kindness, his compassion for others, and his genuine interest in collaborating with and getting to know his law clerks. It was clear that he had a tireless work ethic and valued hard work, but that he also sincerely cared about the well-being and work–life balance of his law clerks. Although my career goals were very specific and would likely lead me outside of Oregon, he was supportive from the start and understood how the valuable skills gained in an appellate clerkship could be an asset in any new lawyer's career.

None of this proved less true during my clerkship. Judge DeVore helped me to greatly improve my legal writing and analytical skills, while challenging me to think more critically and outside of the box. With his professionalism and collegiality, he demonstrated how to navigate when to reach consensus with colleagues and when to not be afraid to take the path less traveled. Judge DeVore was quick to remember his law clerks' career interests, for me being environmental and administrative law, and I have fond memories of putting our heads together on complicated administrative law issues. Along with all of our

[1] Attorney-Advisor, Northwest Section, National Ocean and Atmospheric Administration Office of General Counsel. Former law clerk to the Hon. Joel DeVore, Oregon Court of Appeals.

hard work, Judge DeVore was always one to help his law clerks embrace the special times away from our desks at the summer picnic, Weasel Cup game, and chili cook-off, often captured by his photography.

Not only did Judge DeVore set me up with the foundational legal and professional skills necessary to take the next step in my career, he provided exceptional support during my post-clerkship job search. Despite his busy schedule, Judge DeVore never hesitated to take the time to patiently discuss my career beyond the court. Now, nearly four years into that new career as an attorney–advisor with a federal agency, I cannot help but smile every time I have the chance to work on an administrative appeal. Although the legal standards are different under the environmental statutes and regulations I work on, the skills I learned from Judge DeVore remain a constant in my work.

While I imagine retirement is bittersweet for someone who works as tirelessly as Judge DeVore, I could not think of anyone more deserving after a long, successful career both in practice and as a judge. I wish Judge DeVore all of the best and thank him immensely for taking the time to shape my career.

A Conversation with Chief Judge Erin Lagesen

Erica Tatoian[1]

The Honorable Erin Lagesen became Chief Judge of the Oregon Court of Appeals effective January 1st, 2022. In April 2022, Chief Judge Lagesen kindly took time to share her thoughts on her first few months as Chief Judge, her goals for the court in the years to come, and how newer appellate practitioners can grow their practices.

Celebrating a Milestone

With Governor Brown's appointment of Judges Kristina Hellman and Anna Joyce in January 2022, the Court of Appeals—for the first time in its history—included a majority of female judges. Chief Judge Lagesen celebrated that milestone, as it took 53 years for the court's bench to reach this point. At the same time, Chief Judge Lagesen acknowledged that there was room for improvement in the court's geographic diversity. As an intermediate appellate court resolving appeals from circuit courts across the state, the judges of the Court of Appeals all currently reside between Eugene and Portland. Although the court has no say in the governor's appointments to the bench, Chief Judge Lagesen is hopeful that the increased use of remote technology (e.g., using WebEx for oral arguments) could allow the court to draw applicants from across the state.

[1] Erica Tatoian is an appellate lawyer practicing at Harrang Long Gary Rudnick PC. Before joining private practice, Erica externed for the Oregon Supreme Court and clerked for the Oregon Court of Appeals.

Improving the Court's Internal Processes

In the months since her elevation to Chief Judge, Judge Lagesen has taken steps to improve the efficiency and productivity of the court with at least three immediate goals in mind:

- Facilitate the administration of the appellate court by employing support staff;
- Begin the court's decision-making upon filing of briefs, instead of after oral argument and submission of a case; and
- Reduce, if not eliminate, the court's practice of affirming cases without opinion ("AWOP") by replacing them with nonprecedential and per curiam opinions.

Chief Judge Lagesen's first order of business: implementing internal changes to the court's administrative structure. Unlike the administrative structure of Oregon's trial courts, where a trial court administrator supervises nonjudicial employees and the presiding judge manages the court's workflow, in the Court of Appeals the Chief Judge had been performing both functions. Because of that, the Chief Judge was responsible for administrative tasks like reviewing and approving staff timesheets, handling personnel issues, and managing the office. Working closely with the Office of the State Court Administrator, Chief Judge Lagesen changed that administrative structure by hiring two people: a Chief Counsel who, among other things, supervises the court's 13 staff attorneys, and an office manager who supervises the court's administrative staff and runs the office.

Chief Judge Lagesen's next goal: implementing a front-loaded case management system with the eventual goal of eliminating the court's practice of AWOP-ing cases. Historically, the court's judges read the parties' briefs in preparation for oral argument, but did little other work on a case before it was submitted. Cases were then typically resolved in order of age. That practice is unlike most other intermediate appellate courts in the country.[2] Most intermediate appellate courts weigh cases to evaluate the complexity of the issues presented, estimate the time and resources needed to resolve of the case, and set expectations for staff assigned to work on those cases. Those weighted evaluations then allow those courts to better meet benchmarks like length of time to disposition. In addition, in the context of such management programs, many intermediate appellate courts do substantial work on matters before they are argued and submitted.

To evaluate how the Court of Appeals could shift to a front-loaded case management system, Chief Judge Lagesen applied for a grant from the State Justice Institute to work with the National Center for State Courts ("NCSC"). Chief Judge Lagesen asked the NCSC to help the court design a weighted case management system and evaluate the staffing resources that such a system would require. She also asked the NCSC to recommend a transition plan to allow the court to shift from its current system to a front-loaded, weighted system. In late March 2022, the Court of Appeals learned that it had been awarded the grant from the State Justice Institute, and the court began its work with

[2] For a comparison between the Oregon Court of Appeals and other state intermediate courts of appeal, *see* W. Warren H. Binford *et al.*, *Seeking Best Practices Among Intermediate Courts of Appeal: A Nascent Journey*, 9 J. App Practice & Process 37 (2007).

the NCSC project team in July 2022. Chief Judge Lagesen hopes to have the report from the NCSC in time to evaluate what, if any, additional staff resources the court may need to seek from the 2023 Legislative Assembly to execute any NCSC recommendations. Ultimately, the chief hopes, a more efficient system will allow the court to produce an opinion in every case.

Eliminating the AWOP

The Court of Appeals has been utilizing the AWOP to resolve cases practically since the court's formation.[3] Chief Judge Lagesen's reason for eliminating the AWOP is simple: "People deserve some sort of explanation for the court's decisions." That, too, is a reason that the court has adopted the rule allowing it to issue nonprecedential decisions.[4] Some litigants may be alarmed at the prospect that their case may be decided by a nonprecedential decision. Others may be alarmed that the idea for *improving* efficiency is to have the court issue more decisions. But practitioners should keep in mind that not all appeals must be decided by a 12-page opinion applying well-settled law to the facts presented. If the court is not announcing law, and the parties do not articulate a reason for the court to do write a precedential opinion, the court's error-correcting function can best be exercised by issuing brief decisions that efficiently resolve whether the trial court or administrative agency erred. Ultimately, the Court of Appeals' long-term goal is the same as that of the public and appellate practitioners—improve the efficiency of the

[3] *See State v. Herried*, 3 Or App 462, 474 P2d 358 (1970) (construing *former* ORS 19.180, *renumbered as* ORS 19.435 (1997), as "authorizing this court, in such instances as it sees fit, to decide cases without opinion").

[4] *See* ORAP 10.30 (2023).

Court of Appeals while providing the public with reasoned explanations for its decision in every case.

Advice for Newer Appellate Practitioners

For those interested in growing an appellate practice, Chief Judge Lagesen recommends specializing in an industry. "Start attending industry events, and both getting to know the people in the industry and developing some expertise in that area." For example, specialize in administrative appeals arising from contested case hearings like land-use disputes or professional licensing such as nursing or teaching. The judge also suggests making connections and building relationships with trial lawyers in order to participate in developing the legal strategy for a case at the trial level, from motions practice to jury instructions. And, for those who are interested in gaining more experience with writing and oral argument, Chief Judge Lagesen also recommends participating in the Oregon State Bar Appellate Pro Bono Program and/or the Ninth Circuit's Pro Bono Program.

> *We have felt constrained to give a liberal construction to our statutes in favor of the pauper, for we can scarcely conceive of a system of laws so inhuman and cruel that would consign the destitute and friendless to conviction and infamy, without affording full and ample means for investigation. Such a system would, in many cases, make poverty equivalent to crime; for without the means of procuring writs, witnesses and records, the innocent might, and frequently would be convicted; and that part of our constitution which provides that "justice shall be administered freely and without purchase, completely and without denial," would be an empty boast, and worse than mockery to the poor.*

Falkenburgh v. Jones, 5 Ind 296, 299 (1854)

City and County Home Rule Under the Oregon Constitution—What Does It Mean?

Denis Vannier[1]

Most lawyers—indeed, most Americans—are familiar with the concept of federalism that undergirds our nation's system of government. The idea that the national government is one of limited powers, and that the states enjoy considerable legislative, executive, and judicial autonomy from that national government, is so generally accepted that many of us might forget that it is not the norm globally.[2] While it is true that the enumerated powers of the federal government have been interpreted very broadly at times,[3] and that courts continue to grapple with the finer contours of where the line between federal and state authority should be drawn in particular cases, the fact remains that federalism at the national level is an uncontroversial concept that has been extensively fleshed out through more than two centuries of caselaw from the United States Supreme Court.

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[1] Senior Deputy City Attorney, Portland Office of the City Attorney, 2011 to present; Assistant Attorney General, Oregon Department of Justice, 2004 to 2011. The author wishes to thank Jerry Lidz for kindly reviewing and commenting on a draft of this article, and notes that Jerry and he recently collaborated on the 2022 edition of the home-rule chapter of the Oregon Constitutional Law treatise cited in this article. Readers interested in deepening their knowledge of home rule in Oregon are encouraged to read that chapter.

[2] Most of the world's countries (166 of the 193 United Nations member states), including most European democracies, have a unitary system of government. *See* Wikipedia, *Unitary State* (accessed July 14, 2022).

[3] *See, e.g.*, *Wickard v. Filburn*, 317 US 111 (1942).

What many may not realize, however, is that Oregon itself is a quasi-federal entity, in which cities (and, to a lesser extent, counties) enjoy significant constitutional autonomy from the state government. And just as our national federal system is not the norm globally, Oregon's approach to local government places it in the minority among states. Indeed, Oregon is, in many ways, unique in how it construes local governments' powers *vis-à-vis* those of the state government.[4]

To understand that uniqueness and what it means in practice, this article provides a historical overview of the law governing local governments in Oregon, summarizes current caselaw, and concludes with a few questions. It does not aim to be exhaustive, but, rather, to act as a primer on an often-overlooked aspect of Oregon constitutional law—albeit one with which all practitioners who interact with governmental bodies in Oregon should have at least a passing familiarity.

Early Statehood: From Dillon's Rule to Home Rule

Under the Constitution of the United States, local government entities are considered mere "convenient agencies" of their respective states.[5] As such, the powers of

[4] Out of 50 states, 39 construe the powers of local governments narrowly under the so-called "Dillon's Rule," discussed further below. *See* Jesse J. Richardson, Jr. et al., *Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management*, Brookings Institution Center on Urban and Metropolitan Policy (2003), https://www.brookings.edu/wp-content/uploads/2016/06/dillonsrule.pdf.

[5] *City of Corvallis v. State*, 304 Or App 171, 173–74, 464 P3d 1127 (2020) (*City of Corvallis*) (citing *Hunter v. City of Pittsburgh*, 207 US 161, 178–79 (1907)).

municipalities and other subdivisions of states, such as counties or special districts, are left to individual states to define. In most states, a principle known as "Dillon's Rule"—which refers to an influential 19th century treatise on municipal law—came to apply to the construction of those powers.[6]

Under Dillon's Rule, municipal corporations are held to "lack inherent authority and possess only those powers affirmatively granted by the state."[7] Consequently, they "can exercise no powers but such as are expressly conferred upon them by the act by which they are incorporated, or are necessary to carry into effect the powers thus conferred, or are essential to the manifest objects and purposes of the corporation."[8] The state ultimately retains "all power over local affairs," including the power "to adopt and amend city charters, to establish and alter municipal boundaries, and to grant and remove legislative authority."[9]

Furthermore, when faced with a legal dispute about the scope of a state's grant of power to a municipality or other local government entity under Dillon's Rule, "courts have inclined to adopt a strict rather than a liberal construction of such powers."[10] As Dillon explained in his treatise,

> "It is a well settled rule of construction of grants by the legislature to corporations,

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[6] *See id.*

[7] *Id.*

[8] *City of Corvallis v. Carlile*, 10 Or 139, 141 (1882) (*Carlile*).

[9] *City of Corvallis*, 304 Or App at 173–74.

[10] *Carlile*, 10 Or at 141; *see also Burt v. Blumenauer*, 299 Or 55, 59–62, 699 P2d 168 (1985).

> whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature, must be resolved in favor of the public. The principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities."[11]

This is the rule that, with some local variations, still prevails in most states today.[12] It was also the rule that Oregon followed for the first 50 years of statehood.

Thus, until 1906, all Oregon cities were incorporated by special act of the state legislature and derived their powers from charters adopted by that same legislature.[13] Those charters generally "enumerated the cities' powers in considerable detail."[14] Because those powers were narrowly construed, however, "[i]f a city wished to do something—repair its streets, appoint a public-works commission, acquire land for a park—that was not specifically authorized in its charter, it had to wait for the next legislative session to seek a charter amendment."[15] Aside from the delays this entailed, persuading the legislature to pass amendments could be difficult, since "the farmers of Klamath county

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[11] *Carlile*, 10 Or at 141 (quoting Dillon on Municipal Corporations § 55 & nn).

[12] *See* Richardson, *supra* n 4.

[13] *Oregon Constitutional Law* § 10.2-2 (2d ed 2022).

[14] *Id.* (citations omitted).

[15] *Id.*

might not be interested in a law which applied only to Portland, and the Columbia River fishermen might not be concerned in the charter or ordinances of Lakeview[.]"[16] There was also the risk that, "at the request of a private interest, the legislature might order a city to do something" for which there was no local interest, "such as paving a street to undeveloped property or buying land for a park it did not need."[17]

Indeed, legislatively granted city charters "often included provisions wholly at variance with the will of the people governed thereby."[18] Public frustration slowly mounted, combined with a growing feeling that the system favored corruption and self-dealing. As the *Oregonian* put it in 1906, "Political tricksters, proficient operators in high finance and franchise grabbers, are the chief beneficiaries of the present system[:]

> "The practice under the constitution in its present form is for the members of the Legislature from the county in which a city is located to draft a charter, introduce it in the Legislature, have it referred to themselves as a special committee, report it favorably, and secure its passage upon their assertion that it is satisfactory to them. * * * A charter bill may be introduced in the Legislature one day and be passed through both houses and signed by both presiding officers before the

[16] *Rose v. Port of Portland*, 82 Or 541, 561, 162 P 498 (1917), *overruled in part on other grounds by State ex rel Heinig v. City of Milwaukie*, 231 Or 473, 373 P2d 680 (1962).

[17] *Oregon Constitutional Law* § 10.2-2.

[18] *City of Portland v. Welch*, 154 Or 286, 295, 59 P2d 228 (1936).

> close of the next day. The people of the city to which it applies know nothing of its contents, and if they did, they have, as a rule, no time or opportunity to make their wishes known."[19]

In sum, "[t]his pre-1906 situation caused much discontent," and "[m]any people perceived the legislature and those who could influence it as politically self-interested rascals and not as statesmen truly concerned with the needs of the people of Oregon."[20]

For those reasons, "[i]n 1906, riding a wave of home-rule amendments in other states, Oregon voters amended the Oregon Constitution to endow cities with home-rule authority and limit the power of the state legislature over local matters."[21] Specifically, Article XI, section 2, was amended to bar the state legislature from enacting, amending, or repealing "any charter or act of incorporation for any municipality, city or town," and to grant municipal voters the "power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon." The voters also amended Article IV, section 1, to reserve the initiative and referendum powers "to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district."

Together, those home-rule amendments fundamentally altered the relationship between state and

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[19] *Oregonian*, May 28, 1906, at 6, col. 2.

[20] *Mid-County Future Alternatives Comm. v. City of Portland*, 310 Or 152, 158, 795 P2d 541 (1990).

[21] *City of Corvallis*, 304 Or App at 173.

city governments in Oregon. Perhaps unsurprisingly, they also "laid the foundation for what has now been over a century of legal disputes regarding the scope of local government authority *vis-à-vis* state authority."[22]

Home Rule from 1906 to *La Grande/Astoria* and *Haley*

The most immediate effect of the home-rule amendments was "to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature[.]"[23] But the amendments also gave home-rule municipalities the power "to enact substantive policies, even in areas also regulated by state law," subject only to the Constitution and state criminal laws.[24] Even among home-rule states, Oregon's home-rule amendments "are unique in implying that municipal powers are not subject to civil statutes."[25] That implication has challenged courts ever since.

Indeed, for nearly 70 years after 1906, the Oregon Supreme Court swung between narrow and expansive

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[22] *Id.* at 174 (citing *State v. Port of Astoria*, 79 Or 1, 17, 154 P 399 (1916)).

[23] *La Grande/Astoria v. PERB*, 281 Or 137, 142, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978). Since the passage of the amendments, every Oregon city has adopted a home-rule charter—effectively the city's "constitution." The vast majority of those charters are "general powers" charters, which grant the city all powers allowed by the Oregon and United States constitutions. *Oregon Constitutional Law* § 10.3-7.

[24] *Gunderson, LLC v. City of Portland*, 352 Or 648, 659, 290 P3d 803 (2012).

[25] *Oregon Constitutional Law* § 10.2-2.

interpretations of municipal and state power.[26] In a 1962 decision, *State ex rel Heinig v. City of Milwaukie*, the court attempted to reconcile its conflicting precedent by holding that home-rule cases should be decided based on which interest—state or local—is "paramount" in each matter.[27] But that decision, which applied a balancing test to decide whether state or local law prevailed in any particular case, provided little guidance to lower courts, let alone to state and local governments trying to understand the scope of their respective powers.

Then, in 1978, the Supreme Court decided two companion cases that have defined home rule in Oregon to this day. Both decisions, written by Justice Hans Linde, returned to first principles and attempted to provide a definitive construction of the home-rule amendments.

In the first of those decisions, *La Grande/Astoria v. PERB*, the court rejected the proposition—embraced only a few years earlier in *Heinig*—that the home-rule amendments had "divide[d] areas of substantive policy between [state and local] governments."[28] As the court put it, "these constitutional provisions are concerned with the structural and organizational arrangements for the exercise of local self-government"—that is, they generally "address

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[26] *Compare, e.g.*, *Kalich v. Knapp*, 73 Or 558, 579, 145 P 22 (1914) (on rehearing) (holding that the legislature "was impotent" to legislate "in a matter of acknowledged local concern such as the regulation of traffic over the streets of [Portland]"), *with Burton v. Gibbons*, 148 Or 370, 378, 36 P2d 786 (1934) (stating that "a statute of general application throughout the state [will] supersede the provision of any charter or any ordinance in conflict therewith").

[27] *State ex rel Heinig v. City of Milwaukie*, 231 Or 473, 373 P2d 680 (1962).

[28] 281 Or at 143.

the manner in which governmental power is granted and exercised, not the concrete uses to which it is put."[29] The court also noted that trying to balance state and local interests, and deciding which one was "paramount" in any case, was largely a fool's errand: Such balancing "often involve[s] a choice among values that have no common denominator either in or outside the constitution"—and "[t]here is no agreed common measure to 'weigh' or 'balance,' for instance, an esthetic environment against commercial profit, or the prevention of caries against strongly felt objections to fluoridation of the water supply, if state and local policy should differ on such matters."[30] Instead, the court observed, the two principal concerns that had led to the adoption of the home-rule amendments were "the desire of local communities to enact their own charters and ordinances without having to secure action from the state legislature," and "to take from the legislature the power" to make or amend a city's charter and local laws "by a special law."[31]

Reading the text of the home-rule amendments in light of those concerns, the court formulated a new test to assess the constitutionality of state and local laws. That test differentiates between "the structure and procedures" of local governments—with which the state generally may not interfere—and general substantive laws, in which state and local governments have overlapping authority:

> "When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the

[29] *Id.* at 142–43.
[30] *Id.* at 148 (citations omitted).
[31] *Id.* at 144–45 (quoting *Heinig*, 82 Or at 561–62).

> powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
>
> "Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization."[32]

In a companion case decided the same day, the Supreme Court illustrated how that new test applied in practice. In *State ex rel Haley v. City of Troutdale*, the city had adopted a local ordinance requiring new homes to be built to a design known as "double wall construction."[33] The state building code, however, required only single-wall construction and stated that its provisions "shall be applicable and uniform throughout this state and in all municipalities therein," and that "no municipality shall enact or enforce any ordinance, rule or regulation in conflict therewith."[34] The state argued that the building code preempted the City of Troutdale's ordinance, while the city

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[32] *Id.* at 156.

[33] 281 Or 203, 205, 576 P2d 1238 (1978).

[34] *Id.* at 210 (quoting *former* ORS 456.775(1) (1977)).

responded that the home-rule amendments empowered it to adopt its own building standards.

Relying on the test announced in *La Grande/Astoria*, the court sided with the city. It first noted that the uniformity and "in conflict therewith" clauses in the state building code could plausibly be read in either of two ways: (1) broadly, to bar any local building standards stricter than those set by state law; or (2) narrowly, to bar only local standards truly "incompatible with" the state building code (that is, where complying with local standards would violate the state building code).[35] The court noted that the record could support either reading.[36]

The court further explained, however, that because the home-rule amendments created overlapping authority between cities and the state, state substantive law will not preempt local law unless that intention is "unambiguously expressed":

> "It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent."[37]

Applying that approach to the state building code, the court held that, by preempting local laws "in conflict"

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[35] *Id.*

[36] *Id.*

[37] *Id.* (quoting *La Grande/Astoria*, 281 Or at 148–49).

with the code, the legislature did not "unambiguously express[]" the intent to preempt "additional safeguards" that went beyond the "basic" and "minimum" standards set by state law.[38] Although the state's and the city's interpretations were both plausible, the court concluded that the city prevailed because of a presumption against preemption implicit in the home-rule amendments:

> "We are reluctant to assume that the legislature meant to confine the protection of Oregon residents exclusively to construction standards which it described as 'basic' and which the administering agency describes as 'minimum,' and to place these beyond the power of local communities to provide additional safeguards for themselves. Certainly, that intention is not unambiguously expressed. Until it is, we conclude that local requirements compatible with compliance with the state's standards are not preempted[.]"[39]

Together, *La Grande/Astoria* and *Haley* represent an attempt by the Supreme Court to find a middle path that recognizes and preserves broad municipal autonomy while eschewing prior attempts to carve out separate substantive spheres for local and state authority. Under the approach adopted in *La Grande/Astoria* and *Haley*, the state cannot interfere with cities' structure and procedures, but it and cities otherwise have overlapping authority. Resolving potential conflicts between state and local substantive law is therefore largely a matter of preemption, analogous to

[38] *Id.* at 211.
[39] *Id.*

addressing potentially conflicting state and federal statutes. Hence this article's earlier reference to Oregon as a quasi-federal entity.

City Home Rule in Oregon Today

For almost half a century, the basic analysis announced in *La Grande/Astoria* and *Haley* has been the rule in Oregon, and decisions since have mostly served to clarify its contours and application. The Supreme Court has thus explicitly held that the home-rule amendments embody a "presumption against preemption" that can be overcome only by showing that "the legislature 'unambiguously expresse[d] an intention to preclude local government from regulating' in the same area governed by an applicable statute."[40] Rebutting that presumption is "a high bar to overcome."[41] It is not sufficient to show that preemption is "plausible" given the text, context, and legislative history of a statute, but rather that preemption is "the only inference that [is] plausible."[42]

Relatedly, even when the legislature clearly expresses the intent to preempt some local civil legislation by statute, the scope of that preemption must itself be unambiguous for state law to trump local legislation. In *Owen v. City of Portland*, the court applied that principle to hold that a statute barring cities from "'enact[ing] any ordinance or resolution which controls the rent that may be charged for the rental of any dwelling unit'" clearly preempted "ordinances that * * * directly prescribe or

[40] *Rogue Valley Sewer Servs. v. City of Phoenix*, 357 Or 437, 454, 353 P3d 581 (2015).

[41] *Id.* (citing *Gunderson*, 352 Or at 663).

[42] *Gunderson*, 352 Or at 662–63.

prohibit rent amounts," but did not unambiguously preempt local laws that merely "may affect the amount of rent that a landlord charges or may discourage a landlord from raising its rents."[43] The court emphasized that "the state must be particularly clear when preempting local legislative authority" in order "[t]o protect the constitutional interests of municipalities in exercising their home-rule authority."[44]

Finally, the Supreme Court has fleshed out somewhat how the home-rule amendments affect legislation in the criminal arena, recalling that the amendments gave "the people of a municipality (acting through their local government) the right to pass laws, and restrict their own individual freedom and the freedom of others within their jurisdiction, subject only to the 'Constitution and the criminal laws of the State of Oregon.'"[45] In *City of Portland v. Dollarhide*, the court explained that the presumption against preemption that applies in the civil context is reversed in the criminal context, and that a city cannot "prohibit[] an act which the state permits, or permit[] an act which [a state] statute prohibits."[46] How to decide whether state criminal law "permits" certain conduct, as opposed to not addressing it at all, has proved challenging for courts, however.[47] Even after

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[43] 368 Or 661, 663, 678, 97 P3d 1216 (2021) (citing ORS 91.225(2)).

[44] *Id.* at 667.

[45] *City of Portland v. Jackson*, 316 Or 143, 149, 850 P2d 1093 (1993).

[46] 300 Or 490, 501–02 , 714 P2d 220 (1986).

[47] *Compare, e.g.*, *Jackson*, 316 Or at 154 (holding that, by criminalizing only sexually motivated public nudity, the legislature did not intend thereby to "permit non-sexually motivated public nudity"), *with State v. Tyler*, 168 Or App 600,

more than a century, the caselaw reveals only "some significant, if indistinct, limitations on cities' powers to define criminal conduct."[48]

Oregon Counties: Latecomers to Home Rule

Unlike cities, Oregon counties have had limited autonomy for most of the state's history. Before 1958, they were purely creatures of the state legislature, which defined them and set their powers by statute.[49] In 1958, however, the voters approved an amendment to the Oregon Constitution referred to them by the legislature and granting counties significant home-rule powers:

> "The Legislative Assembly shall provide by law a method whereby the legal voters of any county, by majority vote of such voters voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter. A county charter may provide for the exercise by the county of authority over matters of county concern. * * * [County] officers shall among them exercise all the powers and perform all the duties, as distributed by the county charter or by its authority, now or hereafter, by the Constitution or laws of this state, granted to or imposed upon any county officer. * * *"[50]

603, 7 P3d 624 (2000) (holding that, by "decriminaliz[ing] all minor traffic infractions, including pedestrian violations," the state had preempted a city's ability to make jaywalking a crime).

[48] *Oregon Constitutional Law* § 10.4-3.

[49] *See id.* § 10.5-1.

[50] Or Const, Art VI, § 10.

Unlike the city home-rule amendments, the county home-rule provisions contain a substantive limitation—a county may exercise powers only "over matters of county concern."[51] Moreover, counties also remain partial state agents, in that county officers are required to "perform all the duties" assigned to them by the "laws of this state."[52]

To date, however, only nine of Oregon's 36 counties have adopted a home-rule charter.[53] This may be due in part to the effort required under the statutory provisions adopted by the legislature for doing so.[54] It may also be due to the legislature having enacted, in 1973, statutes granting counties a form of "statutory home rule" broadly similar to what they would enjoy if they adopted a home-rule charter:

> "Subject to subsection (3) of this section, the governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state, as fully as if each particular power comprised in that general authority were specifically listed in ORS 203.030 to 203.075."[55]

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[51] *Id.*

[52] *Id.*

[53] *See County Government in Oregon*, https://sos.oregon.gov/blue-book/Pages/local/counties/about.aspx (accessed July 14, 2022).

[54] *See Oregon Constitutional Law* § 10.5-3 (citing ORS 203.710–.760).

[55] *See* ORS 203.035(1).

So long as the legislature does not repeal or substantially amend those provisions, counties have little need to adopt their own home-rule charters to exercise significant governmental powers.

Perhaps because few counties have adopted a home-rule charter, and perhaps also because counties remain partial state agents, very little caselaw on county home rule exists. In one of the only cases addressing the scope of a home-rule county's power, *State v. Logsdon*, the Court of Appeals struck down a Josephine County charter provision that restricted police searches of private property to a greater extent than the Oregon and United States constitution.[56] The court concluded that so constraining police activity went "well beyond any matter that legitimately may be regarded as a 'county concern.'"[57] What may or may not constitute legitimate "matters of county concern" under Article VI, section 10, remains very much an open question, however.

Parting Thoughts

This article is but an overview of city and county home rule in Oregon, without pretention to comprehensiveness. Like the concepts of "state's rights" or federalism at the national level, home rule is an evolving concept with many nuances and exceptions that cannot be summarized easily. Many questions also remain unanswered, and Oregon courts continue to grapple with the implications of the state's quasi-federal structure.

[56] 165 Or App 28, 995 P2d 1179, *rev den*, 330 Or 362 (2000).
[57] *Id.* at 32–33.

For example, *La Grande/Astoria* held that the state cannot interfere with the "structure and procedures" of city governments.[58] But it offered little guidance on what those "structure and procedures" include. While the makeup of a city council or the mode of election of councilors, for example, are clearly beyond the state's power to regulate, what of matters like hiring, pay and benefits, or city officials' access to counsel? In a recent decision, the Supreme Court concluded that the state could, by statute, require cities to disclose their privileged attorney–client communications, holding that doing so "has no effect on the 'structure and organization' of the city's government" under the home-rule amendments.[59] The court reached that conclusion despite the importance of legal counsel and the attorney–client privilege to local governments' ability to operate.[60] What is and is not included in the "structure or procedures" with which the state cannot interfere remains very much an open question.

Other open questions have been alluded to previously. What constitutes a "matter of county concern" under the county home-rule provisions? How are conflicts of law between home-rule governments with partially overlapping jurisdiction—a city and the county in which it is located, for example—resolved? How is a local

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[58] 281 Or at 156.

[59] *City of Portland v. Bartlett*, 369 Or 606, 625, 468 P3d 980 (2022).

[60] *See id.* at 613 (recognizing that "the attorney–client privilege promotes broader public interests in the observance of law and administration of justice" and is "a foundational principle of our legal system"); *see also In re Grand Jury Investigation*, 399 F3d 527, 534 (2d Cir 2005) (explaining that the attorney–client privilege is "crucial" and "indispensable" to the operation of government).

government to determine when the state has "permitted" certain conduct so that it is preempted from enacting criminal ordinances? Those questions and others will continue to provide fodder to lawyers and judges for years to come.

Automatically Moot? Probation Revocation, Expungement, and Felony Reduction

Nora Coon[1]

The grim specter of mootness stalks every appellate case, waiting to strike if the appellate court's decision "will no longer have a practical effect on the rights of the parties."[2] The question of what constitutes a "practical effect" can be hotly disputed,[3] and can boil down to whether a possible collateral consequence of the appellate court's decision (or lack thereof) is "probable" to occur. [4]

This article focuses on two collateral consequences when a person serving a sentence of probation is revoked from that probation: the loss of eligibility for felony reduction under ORS 161.705, and a longer waiting period before becoming eligible for expungement under ORS 137.225. The person cannot apply to receive the benefit of those statutes, which are meant to ameliorate the damage of

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[2] *State v. K. J. B.*, 362 Or 777, 785, 416 P3d 291 (2018). Sometimes it's very clear—for example, when a litigant dies or a case settles. *E.g.*, *State v. Hemenway*, 353 Or 498, 302 P3d 413 (2013) (vacating opinion because defendant had died before court issued it); ORAP 8.45 (listing circumstances).

[3] The party moving for dismissal always bears the burden of establishing the lack of a practical effect of a decision in a particular case. *K. J. B.*, 362 Or at 785. That burden "includes the burden of establishing that any collateral consequences either do not exist or are legally insufficient." *Id.* at 786.

[4] *State v. Lomack*, 307 Or App 596, 599, 477 P3d 1222 (2020).

a criminal conviction after someone has completed their sentence. Loss of eligibility for relief under one or both statutes should be considered a legally sufficient collateral consequence that prevents mootness on appeal from probation revocation.

Beginning with expungement—officially known as setting aside the record of conviction—ORS 137.225 allows a person to move to set aside the record on very specific timelines.[5] For a Class B felony, a person must wait until seven years for the date of conviction or release from imprisonment, *whichever is later*.[6] For a Class C felony, a person must wait five years. And, for a Class A misdemeanor, a person must wait three years. Lesser offenses—B or C misdemeanors, violations, and contempt findings—are eligible after one year.

The felony-reduction statute, ORS 161.705, describes the circumstances under which certain convictions can be reduced to A misdemeanors. When a defendant "has successfully completed a sentence of probation," they are eligible for reduction if "[t]he court, considering the nature and circumstances of the crime and the history and character of the defendant, believes that a felony conviction

[5] ORS 137.225(5) allows expungement for Class B felonies (except person or firearm crimes), Class C felonies, felonies "punishable as a misdemeanor pursuant to ORS 161.705," misdemeanors, violations, and contempt. However, subsections (6) and (7) exclude from eligibility traffic offenses (including DUII), the vast majority of sex crimes, and a few other crimes such as the mistreatment of children or elderly persons. All of the provisions of ORS 137.225 discussed here were the result of major revisions that took effect on January 1, 2022.

[6] Probation does not constitute "imprisonment" under ORS 137.225, but qualifies as "supervision."

would be unduly harsh." Those qualifying felony convictions include class C felonies; "possession or delivery of marijuana or a marijuana item" or "possession of a controlled substance" that is a class B felony; or A felony racketeering.[7] In other words, any of those crimes can be reduced to a Class A misdemeanor if a person is sentenced to and completes probation and the court finds them worthy.

The interplay between a criminal conviction, expungement, and felony reduction is best demonstrated by example.

Suppose that in 2020, Hannah was convicted of an expungable Class B felony and sentenced to 36 months of probation. Under ORS 137.225, Hannah will be eligible to set aside the record of that conviction seven years later, in 2027. But, if she successfully completes her 36-month sentence of probation, she can apply in 2023 to reduce that conviction to an A misdemeanor under ORS 161.705 and subsequently expunge the conviction itself before the original 2027 deadline.

However, Hannah may not complete probation successfully. Suppose that her probation sentence includes the common condition that she may not associate with or be in the presence of known drug users.[8] The state alleges

[7] ORS 161.705(1)(a)(B).

[8] The Oregon Court of Appeals has noted that such a restriction "is a significant burden to impose on individuals, especially for those from low-income or marginalized communities who often have very few housing options and may have no choice but to live with persons who may be suffering from drug addiction or have drug-related associations." *State v. Flores*, 317 Or App 288, 299, 505 P3d 507 (2022).

that she violated that condition, and the court revokes her probation in 2022. At that point, her conviction becomes ineligible for felony reduction, no matter how long she waits.[9]

As part of the probation revocation, the court sentences her to 12 months in prison. When she's released in 2023, she therefore has to wait seven years from the date of release to expunge her conviction—meaning that she now is ineligible until 2030.[10] In other words, the probation revocation—however erroneous it may have been—now prevents Hannah from ever reducing her felony to a misdemeanor, and from having the record of her conviction set aside for a minimum of three additional years.

During that time, Hannah will face significant legal disabilities. With a felony conviction on her record, she can be denied housing, even under Portland's generous renter protection ordinances.[11] Although a potential employer can't require her to disclose her criminal conviction *before* an initial interview for a paid job, the employer can reject her application based on that conviction after an interview.[12] She cannot serve on a jury in a criminal case.[13] If she ever testifies in a case, the conviction can be

[9] ORS 161.705(1)(a)(B).

[10] ORS 137.225(1)(e).

[11] *E.g.*, Portland City Code 30.01.086(E)(1)(a) (preventing landlord from rejecting rental application of person based on an expunged conviction).

[12] ORS 659A.360(1)–(3).

[13] ORS 10.030(3)(a)(E), (F).

introduced to impeach her credibility.[14] And, of course, she cannot possess a firearm.[15]

Returning now to the issue of mootness, Hannah can of course appeal from the 2022 revocation of her probation. But, with a 12-month prison sentence, she will be released from prison before the Court of Appeals resolves her case—at which point the state will move to dismiss her appeal as moot, arguing that any collateral consequences are speculative at best.

But as shown, some consequences are not speculative. Indisputably, revocation of probation automatically makes a person ineligible for felony reduction. And, just as indisputably, revocation of probation extends by *at least* three years the period during which a person is legally ineligible to seek to expunge a conviction. *Those* consequences exist in statute, independent of any discretionary or fact-based determination that a future trial court, employer, or government agency might make. When an appellate court considers whether the collateral consequences of probation revocation will have a "practical effect," the question should not be whether a person would have been likely to obtain some kind of relief *if* they were eligible; the question should be whether a person's *eligibility* for a legal benefit has been lost.

Beyond that, even taking into account the likelihood of relief, there is a presumption in favor of granting

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[14] Oregon Evidence Code 609(1)(a). Once a conviction has been set aside, it cannot be used for impeachment. OEC 609(3)(b).

[15] ORS 166.470.

expungement whenever a person is legally eligible.[16] A court's authority to deny a motion to set aside a conviction under ORS 137.225 is sharply circumscribed by statute. If a defendant is otherwise legally eligible, "the court *shall* grant the motion and enter an order" unless it "makes written findings, by clear and convincing evidence, that the circumstances and behavior of the person * * * do not warrant granting the motion due to the circumstances and behavior creating a risk to public safety."[17] The court can *only* consider circumstances and behavior "from the date of the conviction the person is seeking to set aside to the date of the hearing on the motion."[18] And, when making the risk-to-public-safety determination, a court "may *only* consider criminal behavior, or violations of regulatory law or administrative rule enforced by civil penalty or other administrative sanction that relate to the character of the conviction sought to be set aside."[19] (Revocation from probation would presumably weigh heavily against a defendant in such a determination.)

If the automatic ineligibility that results from probation revocation is insufficient to prevent an appeal from being dismissed as moot, the question arises whether a defendant could take some additional step to establish the probability that they will suffer a "practical effect" from that collateral consequence. For example, could a defendant submit an affidavit that they intended to seek felony

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[16] *State v. Singleton*, 317 Or App 49, 51, 503 P3d 499, 500-01 (2022) ("[T]he legislature chose a policy in favor of setting aside the convictions of qualified applicants rather than leaving the decision to judicial discretion." (quoting *State v. Langan*, 301 Or 1, 8, 718 P2d 719 (1986))).

[17] ORS 137.225(3)(a) (emphasis added).

[18] *Id.*

[19] *Id.* (emphasis added).

reduction or expungement upon the resolution of their case? Would the state, as the party moving for dismissal, have to then establish—somehow—that a court would not find the defendant deserving of felony reduction or expungement? What of the evidentiary hearing to which a defendant is entitled in an expungement proceeding?[20]

As discussed above, the need to establish a collateral consequence, and thus a practical effect, is central to mootness. Much of Oregon's caselaw regarding mootness and collateral consequences stems from a 1993 case, *Brumnett v. Psychiatric Security Review Board*.[21] It's worth examining how, exactly, the holdings in *Brumnett* and *Department of Human Services v. A. B.*, a 2018 juvenile dependency case, interact with the automatic statutory consequences discussed here.[22]

To summarize as briefly as possible: In *Brumnett*, the petitioner was confined to the Oregon State Hospital. He sought release, which was denied, and he appealed that denial. Meanwhile, he was released "unconditionally after new hearings."[23] The state moved to dismiss the appeal as moot, but Brumnett identified two consequences from his allegedly wrongful confinement: his "statutory obligation to pay all or part of the costs of his care" and the fact that "a lien for those costs could be placed on his property" if the state sought to collect those costs within three years of release.[24] In other words, the allegedly wrongful extension of confinement meant that the state could collect *additional*

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[20] ORS 137.225(3)(a).

[21] 315 Or 402, 848 P2d 1194 (1993).

[22] *Dept. of Human Servs. v. A. B.*, 362 Or 412, 412 P3d 1169 (2018).

[23] *Brumnett*, 315 Or at 404.

[24] *Id.* (citing ORS 179.620 and 179.653).

money from him for the cost of his care during that period of extension.

The court rejected Brumnett's argument, holding that "[t]he mere possibility" that the state would try to recover those costs "at some future date is not sufficient to make dismissal inappropriate."[25] It noted that the repayment statute "provide[d] for waiver of collection of any amount payable" and that the amount he could be required to pay had to "be determined according to the person's ability to pay."[26] The court did not address whether Brumnett would be able to challenge the legality of his previous extended confinement if the state *did* seek an order for repayment of the costs.[27]

Later, in 2018's *A. B.*, the Supreme Court again confronted the issue of collateral consequences. There, the question was whether a mother's appeal from a jurisdictional judgment, which had placed her child under the jurisdiction of the Department of Human Services (DHS), was rendered moot after DHS terminated jurisdiction. The mother argued that the appeal was not moot, because, among other reasons, there might be "legal limitations on her options for employment or volunteer work" due to background check requirements that would consider DHS abuse findings.[28] The court rejected her assertion, but emphasized that its "reasoning is *not* based

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[25] *Id.* at 407.

[26] *Id.* (citing ORS 179.620(2)).

[27] Regarding the continuing viability of *Brumnett*, the Supreme Court observed in *K. J. B.* that "[t]here is some question whether *Brumnett* was correctly decided," but declined to overrule *Brumnett*, focusing instead on the petitioner's argument about social stigma. 362 Or at 787.

[28] 362 Or at 429.

on the fact that mother has yet to be turned down for such a position; a party need not demonstrate that a collateral consequence already has occurred to maintain an appeal."[29] Indeed, the court wrote, "[i]f the law clearly limited mother's options for paid or volunteer work, we would be persuaded of the judgment's continuing practical effects."[30] The court simply did not interpret the law as clearly doing so.

The rationales of *Brumnett* and *A. B.*, as well as the cases following them, support this article's theory of collateral consequences under ORS 137.225 and ORS 161.705. The legal consequences of probation revocation are certain. As soon as a defendant's probation is revoked, they are categorically ineligible for felony reduction. And they will be ineligible for expungement for at least three years longer than before, with all the attendant consequences of a criminal record. There is no question of whether the state might take further actions that would, only then, create a legal consequence. That is consistent with the mootness holding in *Brumnett*, where the state would have had to take some additional affirmative step for Brumnett to be actually required to pay his costs of care.[31] That is also consistent with the mootness analysis in *A. B.*, in which the court interpreted the legal disability that the mother had identified—ineligibility for certain employment or

[29] *Id.* (emphasis added).

[30] *Id.*

[31] The court in *Brumnett* called it "speculative" that the state would seek to collect costs, but, as the court more recently noted in *K. J. B.*, "it certainly could be argued that the state could not defeat the petitioner's existing statutory liability [in *Brumnett*] with an absence of evidence of an intention to collect (which is different from affirmative evidence that the state did not intend to collect)." 362 Or at 787.

volunteer work—and concluded that the judgment on appeal did not itself trigger such a disability. As a result, the appellate courts should treat the loss of eligibility for felony reduction and delay in eligibility for expungement as collateral consequences that have a practical effect on a defendant and thus prevent mootness. [32]

As a final alternative, if a probation-revocation appeal is indeed moot, a defendant may still argue that the court should review their erroneous probation revocation because the legal issue is capable of repetition yet evading review under ORS 14.175. And the Court of Appeals has sometimes applied ORS 14.175 to criminal and criminal-justice-adjacent cases that it has determined are otherwise moot.[33] However, because ORS 14.175 is discretionary, identifying a legally sufficient collateral consequence that

[32] There are, of course, circumstances in which revocation of probation does not affect the defendant's rights under ORS 161.705 or ORS 137.225—primarily, when the underlying criminal conviction is categorically ineligible for reduction or expungement. There may still be other practical consequences, particularly regarding the stigma of probation revocation, but further development of that argument is beyond the scope of this article, which is already too long.

[33] *See, e.g.*, *State v. Preston-Mittasch*, 319 Or App 507, 509, 510 P3d 931, *rev den*, 370 Or 212 (2022) (exercising discretion to review the imposition of a jail sentence upon revocation of probation, although defendant had completed the sentence); *Matter of J. R.*, 318 Or App 21, 27, 507 P3d 778 (2022) (exercising discretion to review youth's placement in detention, although youth had been released; parties agreed that a decision under ORS 14.175 was appropriate); *Penn v. Board of Parole*, 365 Or 607, 614, 451 P3d 589 (2019) (exercising discretion to consider whether post-prison supervision condition had been lawful when it was imposed, although post-prison supervision had already ended).

prevents mootness will always give the appellant a broader range of options.

Ultimately, the loss or delay of eligibility under ORS 137.225 and ORS 161.705 is not a collateral consequence that prevents mootness in every case. But in many cases, it *is* such a collateral consequence: an automatic and guaranteed result of probation revocation that cannot be remedied except through the reversal of that probation revocation. The appellate courts should treat it as such when determining whether probation-revocation appeals are moot.

"You check in your rule book, but you won't find anything in there that says a dog can't play."

"He's right—ain't no rule says the dog can't play basketball!"

Air Bud (1997)

FUNGO Word Puzzles[1]

Erik Blumenthal

Each puzzle consists of three clues that all point to the same answer. For example, the answer to "crafty card player," "gang from West Side Story," and "Jaws" would be "shark." The answer to each puzzle pertains to Oregon law and appellate courts.

Category One	Category Two
○ A yo-yo ○ Macbeth's victim ○ What America runs on	○ All-time majors champion ○ Woo ○ Convenient spot for an Orange Julius
○ A man in tights ○ Ferb Fletcher's brother ○ Razzle Dazzler	○ Pedesis ○ Type of picture ○ Sickness
○ Bygone chevalier ○ Leopold's creator ○ Royal translation	○ Neutral, park ○ Psychology ○ Right to left
○ Venus's originator ○ Teller's frequent companion ○ Patriotic home	○ A model ○ Capital, for one ○ Tide's competitor

See next page for answers!

[1] Editor's note: the name "FUNGO" comes from the name of a series of word puzzles published in a defunct sports newspaper, *The National*.

Answers

Category One	Category Two
Duncan	Court
Flynn	Motion
James	Reverse
Gillette	Gain(es)