# BRIEF AGAINST DEATH: MORE ON THE CONSTITUTIONALITY OF CAPITAL PUNISHMENT IN OREGON†

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## INTRODUCTION

The Oregon Supreme Court, in *State v. Quinn*,[1] invalidated the death penalty statutes adopted by the voters in 1978 as Ballot Measure 8.[2] The statutes required that after a guilty verdict

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† This Article is adapted from two amicus curiae briefs prepared by the author on behalf of the Oregon American Civil Liberties Union in State v. Shumway, No. 26922, *petition for review allowed*, 289 Or. 337 (1980), and State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981). Additional bases for finding capital punishment unconstitutional in this state are presented in Kanter, *Dealing with Death: The Constitutionality of Capital Punishment in Oregon*, 16 WILLAMETTE L. REV. 1 (1979).

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1. 290 Or. 383, 623 P.2d 630 (1981). *See* note 135 and accompanying text *infra*.

2. Office of the Secretary of State for Oregon, General Election Proclamation (Dec. 7, 1978). Ballot Measure 8 is codified in ORS 163.115-.116 (1979). ORS 163.115 (1979) reads:

> (1) Except as provided in ORS 163.118 and 163.125, criminal homicide constitutes murder when:
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> (a) It is committed intentionally by a person who is not under the influence of an extreme emotional disturbance;
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> (b) It is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit arson in the first degree, burglary in the first degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree or sodomy in the first degree and in the course of and in furtherance of the crime he, is committing or attempting to commit, or the immediate flight therefrom, he or another participant if there be any, causes the death of a person other than one of the participants; or
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> (c) It is committed by a person, acting either alone or with one or more persons, who places or discharges a destructive device or bomb or who commits or attempts to commit aircraft piracy.
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> (2) For the purposes of paragraph (a) of subsection (1) of this section, a homicide which would otherwise be murder is committed under the influence of extreme emotional disturbance when such disturbance is not the result of the person's own intentional, knowing, reckless or criminally negligent act, and for which disturbance there is a reasonable explanation. The reasonableness of the explanation for the disturbance shall be determined from the standpoint of an ordinary person in the actor's situation under the circumstances as the actor reasonably believes them to be.

for murder the trial judge must conduct a separate sentencing

(3) It is an affirmative defense to a charge of violating paragraph (b) or (c) of subsection (1) of this section that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid in the commission thereof; and

(c) Was not armed with a dangerous or deadly weapon; and

(d) Had no reasonable ground to believe that any other participant was armed with a dangerous or deadly weapon; and

(e) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death.

(4) It is a defense to a charge of murder that the defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter or any other crime.

(5) Except when a sentence of death is imposed pursuant to ORS 163.116, a person convicted of murder shall be punished by imprisonment for life and shall be required to serve not less than 25 years before becoming eligible for parole.

ORS 163.116 (1979) reads:

(1) Upon a finding that the defendant is guilty of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to life imprisonment or death. The proceeding shall be conducted in the trial court before the trial judge as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Oregon. The state and the defendant or his counsel shall be permitted to present arguments for or against a sentence of death.

(2) Upon conclusion of the presentation of the evidence, the trial judge shall consider:

(a) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

(b) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. In determining this issue, the trial judge shall consider any mitigating circumstances offered by the defendant, including, but not limited to, the defendant's age, the extent and severity of his prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed; and

(c) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(3) The state must prove each issue submitted beyond a reasonable doubt, and the trial judge shall render a judgment of "yes" or "no" on each issue considered.

(4) If the trial judge renders an affirmative finding on each issue considered under this section, the trial judge shall sentence the defendant to death. If the trial judge renders a negative finding on any issue submitted under this

proceeding to determine whether the defendant receives life imprisonment or death. To impose the death sentence, the judge was required to find that the defendant's conduct was "deliberate."[3] The Oregon Supreme Court reasoned that this requirement compelled the trial judge to find a different and greater culpable mental state than found by the jury: the jury simply must have found that the homicide was committed "intentionally."[4] The court held that the trial judge's imposition of the greater penalty of death on the finding of this additional element of the crime deprived the defendant of the state constitutional guarantee to trial by jury.[5]

The court struck down the death penalty statutes on the basis of the jury trial guarantee alone, expressly declining to consider other grounds for declaring the statutes unconstitutional.[6] The continuing legislative interest in the subject,[7] however, makes it clear that the death penalty issue has not been resolved conclusively in Oregon. Following a brief review of the history of capital punishment in Oregon, this Article analyzes the death penalty statutes struck down in *Quinn* and presents five additional, independent bases for invalidation under the state and federal constitutions.

## I. History of Capital Punishment in Oregon

From prestatehood until 1914, Oregon law mandated that the punishment for those convicted of murder in the first degree would be death.[8] On November 3, 1914, the people by initiative

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section, the trial judge shall sentence the defendant to imprisonment for life in the custody of the Corrections Division.

(5) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court within 60 days after certification of the entire record by the sentencing court, unless an additional period not exceeding 30 days is extended by the Supreme Court for good cause. The review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court

3. ORS 163.116(2)(a) (1979).

4. ORS 163.115(1)(a) (1979).

5. 290 Or. at 407, 623 P. 2d at 630.

6. *Id.*

7. *See, e.g.*, H.B. 3052, 61st Or. Legis. Ass., Reg. Sess. (1981)(would provide for jury determination of special sentencing elements); H.J. Res. 30, 61st Or. Legis. Ass., Reg. Sess. (1981)(would submit constitutional amendment allowing capital punishment to voters).

8. "Every person convicted of murder in the first degree shall be punished with death." L. 1864; D. § 512; D. & L. § 516, H. § 1724; B. & C. § 1751; Lord's § 1903.

petition adopted a constitutional amendment abolishing capital punishment.[9] In 1920, the legislature proposed, and the people adopted, further amendments to the constitution explicitly reinstating the death penalty for murder in the first degree, but giving the jury discretionary power to make a binding recommendation of life imprisonment.[10] In 1964, the people adopted an amendment repealing the constitutional provision for capital punishment.[11]

Throughout this period, while the penalty for murder oscillated, the most serious level of murder was denominated murder in the first degree.[12] The distinction between the two degrees of murder remained constant: murder in the first degree required premeditation and deliberation, while murder in the second degree did not.[13] When Oregon completely revised its criminal code in 1971, the legislature included no death penalty provision. The distinction between murder in the first degree and murder in the second degree was abolished as well, eliminating the traditional requirements of premeditation, deliberation, and malice aforethought.[14] The penalty for the newly defined offense— *murder*—was set at life imprisonment, with no

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9. Initiative petition filed July 2, 1914, and adopted by the people November 3, 1914, as OR. CONST. art. I, § 36 (1914, repealed 1920)(capital punishment abolished).

10. Repeal of OR. CONST. art. I, § 36 (1914, repealed 1920), was proposed by S.J. Res. 8, 30th Legis. Ass., S.S. (1920), and adopted by the people May 21, 1920, as OR. CONST. art. I, §§ 37, 38 (1920, repealed 1964). Section 37 provided: "Penalty for murder in first degree. The penalty for murder in the first degree shall be death, except when the trial jury shall in its verdict recommend life imprisonment, in which case the penalty shall be life imprisonment."

11. OR. CONST. art. I, § 37 (1920, repealed 1964), provided the death penalty for murder in the first degree. Its repeal was proposed by S.J. Res. 3, 52d Legis. Ass., Reg. Sess. (1963), and adopted by the people November 3, 1964. The vote was 455,654 to 302,105. Bedau, *Capital Punishment in Oregon, 1903-1964*, 45 OR. L. REV. 1, 1 (1965). *See* Kanter, *Dealing With Death: The Constitutionality of Capital Punishment in Oregon*, 16 WILLAMETTE L. REV. 1, 63-64 (1979).

12. One earlier territorial law mandatorily punished murder with death without differentiating between murder in the first degree and murder in the second degree. Or. Laws, CRIMES & PUNISHMENTS §§ 1-5 (1849-1850). The splitting of murder into degrees developed and spread quickly throughout the nation as an ameliorative response to the harshness of imposing the death penalty on all murderers. A further ameliorative change, allowing discretion to impose life sentences even for murder in the first degree, followed.

13. *See, e.g.*, L. 1864; D. §§ 502, 503; D. & L. §§ 506, 507; H. §§ 1714, 1715; B. & C. §§ 1741, 1742; Lord's §§ 1893, 1894; O. L. §§ 1893, 1894; O.C. 1930, §§ 14-201, -202; O.C.L.A. §§ 23-401, -402; ORS 163.010, .020 (1953)(repealed by 1971 Or. Laws, ch. 743, § 432).

14. 1971 Or. Laws, ch. 743, § 88.

mandatory minimum sentence before parole eligibility.[15]

The 1977 legislature apparently was dissatisfied with a unitary statutory scheme that placed all murderers in a single category and that failed to provide more severe penalties to protect society from the most serious offenders. The legislature considered two remedial proposals. The first was House Bill 2321, cosponsored by sixteen legislators.[16] This bill, of which Ballot Measure 8 was in all substantive respects a verbatim duplicate, did not provide for the redefinition of murder or for the separation of the offense into distinct categories. Instead, it provided a sentencing proceeding before a trial judge, who alone would determine whether the defendant convicted of murder would receive the death penalty or life imprisonment.[17] Despite its numerous sponsors, the Bill remained in committee for over five months and died upon adjournment on July 5, 1977.[18] The Oregon Legislature thereby rejected capital punishment, as it has consistently since 1963.[19]

The second legislative proposal resulted in the adoption of ORS 163.095-.105, the aggravated murder statutes.[20] These statutes created a greater offense—a higher degree of murder—and provided for various mandatory minimum sentences without possibility of parole, the lengths of which depended on the aggravating factors involved in the homicide.

The text of House Bill 2321, the capital punishment proposal defeated by the legislature, was then circulated by proponents of the death penalty. It appeared on the November 7, 1978, ballot by initiative petition as Ballot Measure 8. Proponents made no attempt to modify the proposal to account for the intervening adoption of the aggravated murder statutes or to apply the death penalty sentencing proceeding to aggravated murder rather than to simple murder. Ballot Measure 8 was adopted by the voters[21] and remained in effect until invalidated

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15. *Id.*

16. H.B. 2321, 59th Or. Legis. Ass., Reg. Sess. (1977).

17. *Id.* A life imprisonment sentence carried a 25 year minimum period of confinement before parole was possible.

18. H.B. 2321 was given its first reading in the House on January 21, 1977. On January 24 it was referred to the State Government Operations Committee. SENATE AND HOUSE JOURNAL 255-57, 59th Or. Legis. Ass., Reg. Sess. (1977).

19. Kanter, *supra* note 11, at 2 n.4, 61 n.255.

20. 1977 Or. Laws, ch. 370, §§ 1-2.

21. OFFICE OF THE SECRETARY OF STATE FOR OREGON, GENERAL ELECTION PROCLAMA-

in *Quinn*.

## II. CONSTITUTIONAL REQUIREMENTS FOR AGGRAVATING OR NARROWING CIRCUMSTANCES

### A. *United States Supreme Court Death Penalty Decisions*

Oregon's death penalty statutes were modeled in part on those of Texas, one of three states whose death penalty statutes have been held constitutional by the United States Supreme Court.[22] A fair reading of the Court's opinions in the death penalty cases suggests that the Texas statutes hover perilously close to unconstitutionality and set a benchmark against which other statutes can be measured. The drafters of Oregon's Ballot Measure 8 borrowed the worst and ignored the best provisions of the Texas statutory scheme, with the result that Oregon's death penalty statutes clearly fail to meet minimum constitutional requirements.[23]

An analysis of constitutional requirements must begin with *Furman v. Georgia*.[24] In *Furman*, the Court held that the procedure of allowing juries unfettered and unguided discretion to select from among the pool of convicted murderers those who would receive death and those who would receive life sentences violated the eighth amendment of the federal constitution.[25] Just one year earlier, in 1971, Mr. Justice Harlan, speaking for himself, Chief Justice Burger, and Justices Stewart, White, and Blackmun, expressed great skepticism about the possibility of developing meaningful guidelines for a sentencing authority in making this life or death decision.[26] Nevertheless, in *Gregg v.*

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TION (Dec. 7, 1978).

22. In addition to the Texas scheme, upheld in Jurek v. Texas, 428 U.S. 262 (1976), the Court has upheld the Georgia scheme in Gregg v. Georgia, 428 U.S. 153 (1976), and the Florida scheme in Proffitt v. Florida, 428 U.S. 242 (1976). For a variety of reasons, the Court has held unconstitutional all other capital sentencing schemes it has considered to date since 1972. *See, e.g.*, Beck v. Alabama, 100 S. Ct. 2382 (1980); Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Coker v. Georgia, 433 U.S. 584 (1977); Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

23. *See* notes 47-69 and accompanying text *infra*.

24. 408 U.S. 238 (1972).

25. *Id.* at 240.

26. "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority,

*Georgia* and its companion cases, the Court concluded that at least three states, Georgia, Texas, and Florida, had achieved this seemingly impossible goal in less than five years.[27] The views of the plurality composed of Justices Stewart, Powell, and Stevens in these cases are instructive.

In *Gregg*, the plurality noted that the Georgia sentencing authority could impose capital punishment on a convicted murderer only after the finding, beyond a reasonable doubt, of at least one of ten statutory aggravating circumstances. Even then, the sentencer must have *elected* to impose the death sentence.[28] For those sentenced to death, broad appellate review of death sentences and the possibility of executive clemency provided additional hope.[29] In Florida, the sentencing authority was also required to consider statutory aggravating circumstances and, if any were found, to weigh them against any statutory or other mitigating circumstances.[30] Broad appellate review and the potential for executive clemency are also available in Florida.[31] In Texas, at least one of five narrow categories of capital murder must have been found beyond a reasonable doubt.[32] Furthermore, the plurality construed the second Texas sentencing question to permit the sentencer "to consider whatever evidence of mitigating circumstances the defense can bring before it."[33] Broad appellate review and the possibility of executive clemency again were available in Texas.[34]

These cases suggest that if a capital sentencing scheme dispenses entirely with "aggravating or narrowing" circumstances or, alternatively, allows the sentencing authority to compile its own list of aggravating circumstances in each case, the scheme returns to the format of giving the sentencer unlimited discretion to select those upon whom to impose the sentence of death. Such an option is precluded by *Furman*. The necessary conclusion is that the sentencing scheme must incorporate meaningful

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appear to be tasks which are beyond present human ability." McGautha v. California, 402 U.S. 183, 204 (1971).

27. *See* note 22 *supra*.
28. 428 U.S. at 165-66 (1976).
29. *Id.* at 166-68.
30. Proffitt v. Florida, 428 U.S. 242, 248-50 (1976).
31. *Id.* at 250-53.
32. Jurek v. Texas, 428 U.S. 262, 268 (1976).
33. *Id.* at 265-66 n.1, 268-70, 273.
34. *Id.* at 276.

aggravating or narrowing circumstances, which must be specifically articulated and limited by the legislature.

Later cases such as *Lockett v. Ohio*[35] make clear that, for a capital sentencing scheme to pass constitutional muster, the sentencing authority must be allowed to consider all mitigating circumstances.[36] While a state's legislature may suggest certain mitigating factors for consideration, the sentencer must be free to expand that list to include any mitigating factor for which defense counsel can make a plausible legal and factual argument. In short, in determining mitigating circumstances, the sentencing authority must be allowed unlimited, if not totally unguided or unfettered, discretion.[37]

The seeming inconsistency between the Court's condemnation of unlimited discretion in *Furman* and its requirement of unlimited consideration of mitigating circumstances can be resolved. The Court requires a three-stage process before an individual may be sentenced to death: first, the defendant must be convicted of murder; second, the defendant must be found to be within that much smaller subclass of murderers who have exhibited one or more of a group of narrowly defined aggravating circumstances; and third, the sentencer must be given full discretion to consider individual mitigation.

Assuming *arguendo* that the death penalty ever is justified or deserved, the logic of this three-part funnel, with each stage radically reducing the number of candidates eligible for the death penalty, may be seen in another way. Under any death penalty scheme in this country, only a tiny fraction of convicted murderers will be executed. This was true in the discretionary pre-*Furman* days and even under mandatory death penalty pro-

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35. 438 U.S. 586 (1978).

36. Beck v. Alabama, 100 S. Ct. 2382 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). For example, in *Lockett*, Chief Justice Burger joined with the plurality and wrote "that the Eighth and Fourteenth amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604 (footnotes omitted).

37. The breadth of the *Lockett* principle is made clear when one considers that Ohio provided three statutory mitigating circumstances and that the Ohio courts construed the scope of these circumstances broadly, but that the United States Supreme Court nevertheless reversed Lockett's death sentence. 438 U.S. at 608-09.

visions.[38] This is quite understandable, considering the scope of discretion available in charging and plea bargaining, the full range of complete and partial mental defenses, and the vagaries of the jury system. Furthermore, additional exclusion results from the availability of compromise, lesser included offense verdicts, the demonstrable reluctance of people actually to impose the death penalty in a particular case regardless of their feelings on the issue in the abstract, the careful scrutiny and benefits of the doubt that death penalty cases traditionally have received from the appellate courts, and the total discretion of executive clemency. The Supreme Court has refused to forbid this discretionary mercy and, even if it tried, the discretion would reappear in some other form.

With these considerations as a background, it follows that, assuming anyone *deserves* the death penalty, many who deserve it will not receive it. The Supreme Court, therefore, found it faced only three basic choices when it confronted the death penalty cases. First, the Court could have concluded that the inevitable inequalities in imposition of the death penalty rendered it per se unconstitutional. This most compelling choice should have prevailed, but the Court implicitly rejected it in *Gregg*.

Second, the Court could have thrown up its hands and allowed the penalty to continue to be imposed arbitrarily, freakishly, and discriminatorily under the unbridled pre-*Furman* discretionary regime. The effect would have been not only to have the penalty imposed on only a few of those who deserved it, but also on many who did not deserve it. This alternative, thankfully, was firmly rejected in *Furman* and its progeny.

Third, it could have acknowledged that under our constitutional system it is not possible to ensure that everyone who deserves the death penalty receives it and, at the same time, guarantee that no one receives the death penalty who does not deserve it. Only under this option can the Court's post-*Furman* decisions be ordered logically. Requiring proof of guilt of murder is the first step. But since many murderers will not receive and do not deserve the death penalty, effective narrowing or aggravating circumstances also must be proven to select only the most

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38. *See, e.g.*, Beck v. Alabama, 100 S. Ct. 2382 (1980); Kanter, *supra* note 11, at 28 n.117, 57. *See generally* Beck v. Alabama, 100 S. Ct. 2382 (1980); Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

heinous crimes and criminals. At that point, requiring open ended mitigation surely will allow some who *deserve* death to receive life imprisonment; refusing to allow it increases the risk that someone who does not deserve to die will be precluded from receiving consideration of the unique mitigating facts and circumstances in his or her individual case.

Thus, a finding of guilt for simple murder can only be the first tentative stepping stone to a death sentence under the Supreme Court's analysis. The definition of mitigating circumstances may be vague, overbroad, and open ended so long as it allows the sentencer to err on the side of the defendant if error must occur. The Court's analysis compels the most effective and precise definition of aggravating or narrowing circumstances. Such a close definition insures:

a. that the broad class of murderers is reduced very substantially;

b. that the reduction is not accomplished arbitrarily, but in a rational way that generates confidence that all but the most heinous crimes and offenders are eliminated;

c. that lawmakers drafting and adopting death penalty legislation, and the sentencers imposing the ultimate penalty, carefully consider the ramifications of their actions and the comparisons between offenders;

d. that appellate courts can effectively review death sentences and reverse inappropriate ones; and

e. that the process and reality of imposing death sentences not only is fair, but appears fair to the community and the litigants.[39]

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39. Gardner v. Florida, 430 U.S. 349, 358 (1977).

Several portions of the Court's opinions give important support to the conclusion that the constitutional framework proposed herein is indeed the one regulating capital sentencing procedures. The key pluralities in these cases discussed the relative role of aggravating and mitigating circumstances as follows: Gregg v. Georgia, 428 U.S. 153, 196-97 (1976)(footnotes omitted):

> [Although Georgia did not narrow the scope of its murder definitions, it did] narrow the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. . . . The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court . . . , but it must find a *statutory* aggravating circumstance before recommending a sentence of death.

Jurek v. Texas, 428 U.S. 262 (1976):

> While Texas has not adopted a list of statutory aggravating circumstances

*Godfrey v. Georgia*[40] is an extremely important decision because the United States Supreme Court there squarely held that

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the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . So far as consideration of aggravating circumstances is concerned, therefore, the principle difference between Texas and the other two states is that the death penalty is an available sentencing option—even potentially—for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.

But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination . . . required by the Eighth and Fourteenth Amendments.

*Id.* at 270-71.

Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it.

*Id.* at 273.

We conclude that Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered.

*Id.* at 276.

Godfrey v. Georgia, 446 U.S. 420, 427-28, 433 (1980) (citations & footnotes omitted):

A capital sentencing scheme must, in short, provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.

This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." . . . It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

. . . .

. . . . But, as was said in Gardner v. Florida, 430 U.S. 349, 358, it "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

That cannot be said here. There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.

40. 446 U.S. 420 (1980).

finding a homicide "outrageously or wantonly vile, horrible and inhuman" was an insufficient aggravating or narrowing circumstance to justify the death penalty.[41] The standard was too vague, left too much invisible discretion and did not produce a sufficiently sharp reduction in the pool of murderers subject to the death penalty.[42] The *Godfrey* holding constitutes unimpeachable evidence that aggravating or narrowing circumstances are required: that these circumstances must be precise, that they must be effective in reducing the broad class of murderers to a few of the most heinous murderers, that they must be set out openly and in advance, and that they must enhance the ability of an appellate court to make a meaningful review of process and fact in every death penalty case.[43] In *Presnell v. Georgia*,[44] the Court explicitly held that principles of procedural fairness require that the defendant be notified in advance of the specific aggravating circumstances upon which the government intends to rely to justify an execution.[45]

The Supreme Court's insistence on the existence of aggravating circumstances for imposition of the death penalty finds support in at least three major policy arguments. First, because the death penalty is uniquely severe and irrevocable, certainty, to the extent humanly possible, is essential to avoid the execution of an inappropriate individual. Hence, narrowly specified aggravating circumstances are required to reduce substantially the pool of convicted murderers to a smaller subgroup, which is more likely to be deserving of death. This subgroup is reduced still further by requiring the broadest possible consideration of mitigating circumstances to excuse even aggravated murderers from the death penalty if even a glimmer of hope exists for their salvageability.

Second, for many reasons, society's intentional taking of one of its members' lives is an especially solemn act. This solemnity also demands a procedure that not only is fair but that appears fair to all reasonable individuals. No stone can be left unturned and no doubt allowed to remain that the defendant selected for execution is among the small group of aggravated offenders that

41. *Id.* at 433.
42. *Id.* at 432-33.
43. *Id.* at 427-33.
44. 439 U.S. 14 (1978).
45. *Id.*

most deserve it.

Third, the damage to society from *erroneously* failing to execute an individual, but instead imposing incarceration for life, is insignificant when compared to the damage of erroneously executing even a guilty offender.[46]

### *B. The Contrast Between the Oregon and Texas Statutes*

The Texas statutory scheme represents minimal compliance with constitutional standards.[47] Before subjecting anyone to a capital sentencing proceeding, Texas first limits capital offenses to murder committed with "malice aforethought" and further requires a jury finding that the murder was committed in one of the following five ways:

> 1. The person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;
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> 2. The person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;
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> 3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
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> 4. The person committed the murder while escaping or attempting to escape from a penal institution;
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> 5. The person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.[48]

The Oregon statute, on the other hand, considers all murders to be capital offenses and defines murder broadly. The Oregon definition encompasses: (1) [subsection (a)] all criminal homicides "committed intentionally by a person who is not under the influence of an extreme emotional disturbance;" (2) [subsection (b)] a number of criminal homicides that constitute felony murder; and (3) [subsection (c)] all criminal homicides "committed by a person acting either alone or with one or more persons, who places or discharges a destructive device or bomb

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46. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357-60 (1977); Kanter, *supra* note 11, at 27.

47. *See* notes 22, 23, & 39 and accompanying text *supra*.

48. TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974).

or who commits or attempts to commit aircraft piracy."[49]

Clearly, subsection (a), the intentional homicide category, requires no showing of malice and is not otherwise narrowed in any manner analogous to the five Texas categories. Moreover, the Oregon statute contains the broadest definition of murder subject to capital punishment in the nation.[50] It is the only death penalty statute that does not either substantially narrow the category of murderers eligible for a capital sentencing proceeding directly or accomplish the same result indirectly by requiring the sentencer to find at least one statutory aggravating circumstance before considering the death penalty.[51]

### C. *The Search for Aggravating or Narrowing Circumstances in the Oregon Statutes*

Once an individual is convicted of capital murder in Texas,[52] or of simple murder in Oregon,[53] the sentencer is required to focus upon the following three questions:

> (a) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result;
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> (b) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *In determining this issue, the trial judge shall consider any mitigating circumstances offered by the defendant, including, but not limited to, the defendant's age, the extent and severity of his prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed;* and,
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> (c) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[54]

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49. ORS 163.115(1) (1979).

50. Brief of Amicus Curiae, App. B, State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981).

51. *Id.*

52. TEX. CRIM. PRO. CODE ANN. tit. 3, § 37.071 (Vernon 1973).

53. ORS 163.116(2) (1979).

54. The emphasized language appears only in the Oregon statute, but it is clearly implied in the Texas statute as understood by the court in Jurek v. Texas, 428 U.S. 262, 272 (1976).

Because of the breadth of Oregon's murder statute, arguably including even some nonmalicious conduct that would have been voluntary manslaughter at common law, the only possible sources of aggravating or narrowing circumstances are the three sentencing questions set out above.

Subsection (c) deals exclusively with a mitigating circumstance and has no application to this present search for an adequate source of aggravating circumstances in the Oregon statutes. In any event, a defendant whose killing of the deceased was a reasonable response to the deceased's provocation should be acquitted on ground of self-defense or at least found guilty of a lesser offense than murder. If our system is working even marginally well, there would never be an intentional murder conviction after which the third question would arise in the death sentencing process.

The part of subsection (a) requiring that the defendant reasonably had foreseen the death of the deceased or a third party does not add anything or perform a narrowing function in intentional murder cases. It also is arguable whether the requirement in this same question that the defendant acted "deliberately" adds anything to the previous requirement that the defendant acted "intentionally."[55] The only conceivable difference between the two terms is that intent may form instantaneously, while deliberation theoretically requires some length of time for reflection.[56] The courts, however, almost uniformly have held that the time necessary for deliberation can be compressed into a single instant.[57] Even if deliberation adds something concrete to intent, it is clear that the vast majority of intentional murderers, those acting without extreme emotional disburbance, will also act with deliberation. Therefore, the term will not act as an effective aggravating circumstance since it will not reduce substantially the pool of those subject to the death penalty.

More fundamentally, all of the statutes and death sentences

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55. Professor Dix has concluded that "deliberation" adds nothing to "intent" under the Texas statute. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343, 1351 (1977). *Cf.* note 135 and accompanying text *infra*.

56. *See* State v. Quinn, 290 Or. at 401-02, 623 P.2d at 640-41 (1981), and cases cited therein; note 135 and accompanying text *infra*.

57. *See, e.g.*, State v. Ogilvie, 180 Or. 365, 374-76, 175 P.2d 454, 458 (1947); State v. Butchek, 121 Or. 141, 156-58, 254 P. 805, 805-06 (1927). *See generally* Dix, *supra* note 55.

upheld by the United States Supreme Court involved intentional *and deliberate* murders as the starting point, but with the addition of one or more specific aggravating circumstances.[58] The statute struck down in *Furman*[59] required deliberation for intentional murder convictions and, in *Godfrey*, the defendant was found to have committed an intentional and deliberate murder.[60] The Court, however, reversed both death sentences because of inadequate guidance of discretion through aggravating or narrowing circumstances. Clearly, then, deliberation cannot satisfy the Court's definition of purpose for an aggravating or narrowing circumstance.

All that remains is the second Oregon sentencing question, subsection (b), which requires consideration of "any mitigating circumstances offered by the defendant," in determining "whether there is a probability that the defendant would commit criminal acts of violence" in the future.[61] This question already has been stretched to its corners in *Jurek*[62] to accommodate the *Lockett* requirement for consideration of unlimited mitigating circumstances.[63] It cannot be interpreted as a shorthand symbol for a list of specific aggravating circumstances. First, no support exists for such an interpretation in the statutory language and no such list could be viewed as the product of calm and deliberate legislative consideration.[64] Second, the statute would not satisfy the *Presnell* notice requirement.[65] Most fundamentally, any such interpretation of subsection (b) would constitute an unbridled grant of discretion to the sentencer to

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58. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

59. GA. CODE ANN. § 26-1101 (1968).

60. 446 U.S. 420, 426 (1980).

61. ORS 163.116(2)(b) (1979).

62. 428 U.S. 262, 272 (1976).

63. *See* notes 35-37 and accompanying text *supra*.

64. The requirement for calm and deliberate legislative consideration is essential to the constitutionality of capital punishment under the Supreme Court's analysis. Without it, there would have been no basis for the Court's deference to the state legislatures on the critical questions of the deterrent efficacy of capital punishment and its moral acceptability to contemporary society. *See* Kanter, *supra* note 11, at 10, 12, 13, 14. *See also* Godfrey v. Georgia, 446 U.S. 420 (1980); Gregg v. Georgia, 428 U.S. 153 (1976) (both requiring careful legislative delineation in advance of the criteria to be used by the sentencer in capital cases); McGautha v. California, 402 U.S. 183, 204 (1971) (describing the arduous nature of this task).

65. Presnell v. Georgia, 439 U.S. 14, 16 (1978); *see* note 45 and accompanying text *supra*.

determine who should receive death, in direct contravention of *Furman*.[66] This follows necessarily because, under *Jurek*, the question must already accommodate all mitigating circumstances and if it is also forced to act as a set of aggravating circumstances it amounts to a general instruction to choose death or life imprisonment for whatever ad hoc reasons the sentencer thinks appropriate.

*Godfrey* provides further support for the conclusion that subsection (b) cannot serve as an adequate aggravating or narrowing circumstance. In *Godfrey*, the challenged statute imposed the death penalty for "outrageously or wantonly vile, horrible or inhuman" murders. The Court held that this could not be an aggravating or narrowing factor because "a person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' "[67] Similarly, an Oregon trial judge could fairly characterize almost every murderer as likely to commit future violent crimes.[68] The Oregon standard has the same constitutional defect as the Georgia standard because it does not substantially or rationally reduce the pool of murderers to those few who *deserve* death.[69]

Because the Oregon statutes do not provide for consideration of aggravating or narrowing circumstances as required by the United States Supreme Court, they are plainly unconstitutional under the eighth and fourteenth amendments.[70] More-

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66. 408 U.S. 238 (1972).

67. 446 U.S. 420, 428-29 (1980).

68. See notes 83-84 *infra*.

69. See notes 39-43 and accompanying text *supra*.

70. Commentators also have noted the Court's requirement that a constitutional capital sentencing scheme contain specific aggravating circumstances. *See, e.g.*, Dix, *supra* note 55, at 1367, 1387; Liebman & Shepard, *Guiding Capital Sentencing and Discretion Beyond the "Boilerplate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 771-77 (1978); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989, 1000 (1978).

A different but somewhat related species of argument can be made under Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York, 432 U.S. 197 (1977). For good general discussions of these fascinatingly complex cases, see Allen, *Mullaney v. Wilbur, The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

Prior to the adoption of Ballot Measure 8 in 1978, capital murder in Oregon always required "malice," "premeditation" and "deliberation." *See, e.g.*, State v. Henderson, 182 Or. 147, 191-93, 184 P.2d 392, 411-12 (1947); State v. Casey, 108 Or. 386, 409, 213 P. 771, 780 (1923); State v. Anderson, 10 Or. 448, 458-59, 463 (1882). Since these were the

over, the Oregon Bill of Rights should be construed more liberally than its federal counterpart. Hence, the unconstitutionality of Oregon's capital punishment statutes is established even more firmly under article I, section 16 of the Oregon Constitution.[71]

## III. THE PROBABILITY OF FUTURE DANGEROUSNESS TEST

The Texas statutes, even with their narrow and precise definitions of capital offenses, are criticized as the most troublesome and least justifiable, theoretically and practically, of the three capital sentencing schemes upheld by the United States Supreme Court.[72] Commentators take an even less charitable view of the Texas statutes than did the Court.[73] Much of the criticism stems from the requirement in Texas that the determination whether a defendant receives life imprisonment or death depends on a prediction whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[74] The Oregon statutes[75] contain the same language, and both Texas[76] and Oregon[77]

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most significant common-law elements differentiating murder in the first degree from murder in the second degree, since they were continuously required statutorily in Oregon for murder in the first degree, and since the difference between the death sentence and life imprisonment has been judicially determined to be so great, it may be that the present Oregon statute abolishing "premeditation," depriving the defendant of a jury trial on the issue of "deliberation," and not requiring explicit proof of "malice," runs afoul of the due process clause of the fourteenth amendment as interpreted in *Mullaney* and *Patterson*. *See also* Jackson v. Virginia, 443 U.S. 307 (1979); notes 78-80, 135-37 and accompanying text *infra*.

71. The conclusion that OR. CONST. art. I, § 16, should be construed more liberally than U.S. CONST. amend. VIII, is supported by constitutional theory, Kanter, *supra* note 11, at 33, 49, by the Oregon framers' intentions, *id.* at 37, 49, and by significant policy considerations. *Id.* at 54-55.

72. *See* note 23 and accompanying text *supra*.

73. *See, e.g.*, Black, *Due Process of Death: Jurek v. Texas and Companion Cases*, 26 CATH. U. L. REV. 1 (1976); Black, *Reflections on Opposing the Penalty of Death*, 10 ST. MARY'S L.J. 1 (1978); Davis, *Sentencing Procedures: The Role of the Jury and the Restraining Hand of the Expert*, 69 J. CRIM. L. & C. 300 (1978); Dix, *Constitutional Validity of the Texas Capital Murder Scheme: A Continuing Question*, 43 TEX. B.J. 627 (1980); Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343 (1977); Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boilerplate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757 (1978); Comment, *Crystal-Balling Death?*, 30 *Baylor L. Rev.* 35 (1978); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 71-72 (1976).

74. TEX. CRIM. PRO. CODE ANN. tit. 3, § 37.071(2) (Vernon 1973).

75. ORS 163.116(2)(b) (1979).

76. TEX. CRIM. PRO. CODE ANN. tit. 3, § 37.071 (Vernon 1973).

require that this *probability* be established beyond a reasonable doubt before an individual can be sentenced to death.

The test is beset with constitutional shortcomings. An inherent contradiction exists in proving a *probability* beyond a reasonable doubt. The result is that the standard of proof may actually become a preponderance of the evidence, a standard that violates the due process command of proof beyond a reasonable doubt in criminal cases.

To illustrate, suppose that proof beyond a reasonable doubt means a ninety-five percent certainty and that the word "probability" is roughly equivalent to "more likely than not," or approximately fifty percent certainty. Thus, proving this probability beyond a reasonable doubt involves multiplying ninety-five percent times fifty percent, leading to an overall standard of proof of slightly less than a fifty percent certainty of future violence.

Since the Oregon statute, unlike that of Texas, does not contain aggravating or narrowing circumstances to define and limit capital offenses, future dangerousness is the only factor that determines whether the Oregon defendant receives life imprisonment or the much more severe penalty of death. Under these circumstances, the failure to require proof beyond a reasonable doubt of future dangerousness, as opposed to a *probability* of future dangerousness, clearly violates the principles of *In re Winship*[78] and *Mullaney v. Wilbur*.[79] In *Mullaney*, the Supreme Court held that malice, the critical factor separating murder from manslaughter in Maine, must be proved beyond a reasonable doubt by the state.[80] Surely, future danger-

77. ORS 163.116(3) (1979).

78. 397 U.S. 358 (1970). In *Winship*, the Court held that when the state seeks to deprive a juvenile of liberty for conduct that would constitute a crime if committed by an adult, the state must prove the facts of delinquency beyond a reasonable doubt. The Court recognized that proof beyond a reasonable doubt reflects a constitutional policy that it is better to risk substantial error in the criminal justice system in favor of rather than against the defendant.

79. 421 U.S. 684 (1975).

80. *Id.* at 704. In *Mullaney*, the Court held Maine's homicide scheme unconstitutional under the due process clause. The defect was that malice was presumed for murder in the first degree and the burden was placed on the defendant to negate malice by establishing heat of passion on sudden provocation. The Court reasoned that malice must be proved by the state beyond a reasonable doubt since it was the single most important factor, historically and presently, distinguishing murder from manslaughter and since it made a substantial difference in stigma and penalty. The Court emphasized that the defendant had an important due process liberty interest in the level of offense

ousness, the critical and only factor separating capital murder from murder in Oregon, also must be proved beyond a reasonable doubt by this state.

Another problem is that the term "probability" is nowhere defined, and it is not clear how a judge should apply it or instruct a jury to apply it.[81] It would seem that the lack of standards connected with this critical term would run afoul of the eighth amendment mandate for specific and articulable standards in death penalty statutes.[82]

The prediction of future dangerousness test is also constitutionally suspect because voluminous empirical research shows predictions of future dangerousness are highly unreliable.[83] Not surprisingly, psychiatrists play a large functional role in this *prediction* in Texas. It is with respect to their ability to predict future violence that the empirical evidence is most damning.[84] Further, the United States Supreme Court apparently is now concerned enough about the role of psychiatric testimony in the Texas cases that it has taken certiorari in *Estelle v. Smith*[85] and

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and punishment as well as in the determination of guilt or innocence. Given the severity of capital punishment, it follows that defendants are entitled to proof beyond a reasonable doubt of the factors that lead to the death penalty.

81. Vagueness and overbreadth problems exist. *See* Godfrey v. Georgia, 446 U.S. 420 (1980); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); State v. Spencer, 289 Or. 225, 611 P.2d 1147 (1980); State v. Hodges, 254 Or. 21, 437 P.2d 491 (1969). The result is that defendants could be treated arbitrarily and discriminatorily by different sentencers and that defendants not deserving death might receive the death penalty.

82. *See* note 39 and accompanying text *supra*.

83. *See, e.g.*, Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24 (1971); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Wenk, Robison & Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQUENCY 393 (1972).

84. *See* authorities cited at note 83 *supra*. *See also* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony and Professional Ethics*, 5 AM. J. CRIM. L. 151 (1977); Sharpe, *The Death Penalty Punishment Hearing*, 41 TEX. B.J. 253 (1978).

85. 602 F.2d 694 (5th Cir. 1979), *cert. granted*, 445 U.S. 926 (1980). Smith was convicted of capital murder in Texas and sentenced to death. His sentence was ordered set aside in a federal habeas corpus action and the Fifth Circuit affirmed on the grounds that damaging psychiatric testimony, used against Smith at the sentencing hearing with respect to Texas sentencing question 2, was obtained and introduced in violation of several constitutional provisions. In reaching this conclusion, the Court noted serious difficulties with the reliance on psychiatric testimony to establish the probability of future dangerousness in Texas capital cases. *Id.* at 699 n.7. The Court also suggested that the Texas death penalty scheme may consequently be unconstitutional in practice, *id.* at 706, under United States Supreme Court decisions even though it had been declared facially constitutional in Jurek v. Texas, 428 U.S. 262 (1976).

may begin to grapple with some of the constitutional defects of the "future dangerousness" factor.

Proof beyond a reasonable doubt of future dangerousness would constitute the only conceivably constitutional basis for imposing the death penalty in Oregon since future dangerousness is the only factor separating life prisoners from death row in this state. Since proof beyond a reasonable doubt is not provided for by statute and perhaps is impossible to establish,[86] the Oregon capital sentencing statutes are unconstitutional.

## IV. Effect of Ballot Measure 8 on Oregon's Aggravated Murder Statutes

The adoption of Ballot Measure 8 in 1978 increased the possible sentence for murder to execution. This created an anomalous situation wherein Oregon's most serious offense, aggravated murder, carried a maximum penalty of life imprisonment,[87]

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86. In a different context, the Supreme Court has recently said:

> Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.

Addington v. Texas, 441 U.S. 418, 429 (1979).

87. ORS 163.095 (1977) provided:

> As used in ORS 163.105 and this section, "aggravated murder" means murder as defined in ORS 163.115 which is committed under, or accompanied by, any of the following circumstances:
>
> (1)(a) The defendant committed the murder pursuant to an agreement that he receive money or other thing of value for committing the murder.
>
> (b) The defendant solicited another to commit the murder and paid or agreed to pay the person money or other thing of value for committing the murder.
>
> (c) The defendant committed murder after having been convicted of murder as defined in ORS 163.115.
>
> (d) The defendant committed murder by means of bombing.
>
> (2)(a) The victim was one of the following and the murder was related to the performance of the victim's official duties in the justice system:
>
> (A) A police officer as defined in subsection (5) of ORS 181.610;
>
> (B) A correctional, parole or probation officer or other person charged with the duty of custody, control or supervision of convicted persons;
>
> (C) A member of the Oregon State Police;
>
> (D) A judicial officer as defined in ORS 1.210;
>
> (E) A juror or witness in a criminal proceeding;
>
> (F) An employe or officer of a court of justice; or
>
> (G) A member of the State Board of Parole.
>
> (b) The defendant was confined in a state, county or municipal penal or correctional facility or was otherwise in custody when the murder occurred.
>
> (c) There was more than one murder victim.
>
> (d) The defendant personally committed the homicide in the course or in

while the lesser included offense of murder could result in the significantly more severe penalty of death. The death penalty for murder, therefore, is unconstitutional under the express proportionality requirement of the Oregon Constitution, article I, section 16, because it is disproportionate when compared with the lesser penalty for aggravated murder.[88] This conclusion could be

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the furtherance of the crime of robbery in any degree, kidnapping or arson in the first degree, any sexual offense specified in this chapter, or in immediate flight therefrom.

(e) The defendant committed murder after having been convicted of manslaughter as defined in ORS 163.118.

ORS 163.105 (1977) provided:

Notwithstanding the provisions of ORS chapter 144, ORS 421.165 and 421.450 to 421.490:

(1) When a defendant is convicted of murder defined as aggravated murder pursuant to subsection (1) of ORS 163.095, the court shall order that the defendant shall be confined for a minimum of 30 years without possibility of parole, release on work release, temporary leave or employment at a forest or work camp.

(2) When a defendant is convicted of murder defined as aggravated murder pursuant to subsection (2) of ORS 163.095, the court shall order that the defendant shall be confined for a minimum of 20 years without possibility of parole, release on work release, temporary leave or employment at a forest or work camp.

(3) At any time after 20 years from the date of imposition of a minimum period of confinement pursuant to subsection (1) of this section or at any time after 15 years from the date of imposition of a minimum period of confinement pursuant to subsection (2) of this section, the State Board of Parole, upon the petition of a prisoner so confined, shall hold a hearing to determine if the prisoner is likely to be rehabilitated within a reasonable period of time. The sole issue shall be whether or not the prisoner is likely to be rehabilitated within a reasonable period of time. The proceeding shall be conducted in the manner prescribed for a contested case hearing under ORS 183.310 to 183.500 except that:

(a) The prisoner shall have the burden of proving by a preponderance of the evidence that he is likely to be rehabilitated within a reasonable period of time; and

(b) The prisoner shall have the right, if he is without sufficient funds to employ an attorney, to be represented by legal counsel, appointed by the board, at state expense.

(4) If, upon hearing all the evidence, the board finds that the prisoner is capable of rehabilitation and that the terms of his confinement should be changed to life imprisonment with the possibility of parole, or work release, it shall enter an order to that effect. Otherwise, the board shall deny the relief sought in the petition.

(5) Not less than two years after the denial of the relief sought in a petition under this section, the prisoner may petition again for a change in the terms of his confinement. Further petitions for a change may be filed at intervals of not less than two years thereafter.

88. Cannon v. Gladden, 203 Or. 629, 281 P.2d 233 (1955).

avoided only if Ballot Measure 8 repealed aggravated murder. But, as shown below, it did not.

First, no language in Ballot Measure 8 even remotely suggests an explicit repeal of ORS 163.095-.105.[89] Second, while the rules of statutory construction set forth in Oregon law recognize that a statute may be repealed by implication,[90] a strong presumption is raised against implicit repeals.[91] Unless the intent to repeal is clear, all statutes are given continued effect.[92] When statutes conflict, a particular provision usually prevails over a more general one,[93] and an interpretation favoring a natural right prevails over one disfavoring it.[94] Moreover, merely because failure to find implicit repeal would lead to a finding that a statute is unconstitutional does not constitute sufficient justification for implicit repeal.[95]

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89. 39 Op. Or. Att'y Gen. 419 (1978); State v. Shumway, 44 Or. App. 657, 661, 607 P.2d 191, 193 (1980). Both the attorney general and the court of appeals, however, erroneously concluded that Ballot Measure 8 implicitly repealed aggravated murder. Neither presented an analytical justification for this conclusion or considered the material presented herein. *See* notes 90-118 and accompanying text *infra*.

The Oregon Supreme Court has accepted review of the court of appeals decision in *Shumway*. 289 Or. 337 (1980).

90. ORS 174.080 (1979).

91. ORS 174.010 (1979).

92. *Id.*

93. ORS 174.020 (1979).

94. ORS 174.030 (1979).

95. General Elec. Credit Corp. v. State Tax Comm'n, 231 Or. 570, 373 P.2d 974 (1962). This case involved the question of whether G.E. was a business corporation taxable at 6% under ORS 317.070 or a financial corporation taxable at 9% under ORS 317.060. The Tax Commission urged the court to find G.E. taxable at the higher rate to avoid unconstitutionality of the state taxing scheme because of the otherwise potential conflict with the federal constitutional immunity, waived only partially, for federal banks from state taxation. The Tax Commission also urged the court to hold that ORS 317.030(10), defining financial corporations in a way making it unlikely that G.E. could be considered to be one, had been repealed by implication when the legislature subsequently adopted the split rate tax scheme at issue. The court rejected both arguments. *Id.* at 590, 592-93, 373 P.2d at 983, 984. What the court said with respect to repeal by implication is directly apposite to the issue at hand:

> In any event, we do not believe that repeal by implication is to be inferred when there is no repugnancy between sections of the code. *ORS Chapter 317 may be unconstitutional,* depending upon facts not within the evidence before this Court, *but its provisions are not inconsistent taken one with another. Repugnancy, not unconstitutionality, is the decisive factor in a repeal by implication.*

*Id.* at 592-93, 373 P.2d at 984 (emphasis added).

A strong policy argument militates against applying to repeals by implication the general "rule of statutory construction" that statutes should be construed to avoid unconstitutionality. This follows since the purpose for construing statutes to avoid uncon-

Set against these rules, Ballot Measure 8 clearly did not implicitly repeal the aggravated murder statutes. Murder and aggravated murder are related, but separate offenses with separate penalties. A side-by-side comparison of ORS 163.095 and ORS 163.115 demonstrates that aggravated murder is a greater offense than murder, and that murder is, therefore, a necessarily lesser included offense of aggravated murder. This follows since the elements of aggravated murder are specifically defined as the elements of murder plus at least one additional aggravating element.[96] Ballot Measure 8 increased the sentence for murder beyond that authorized for aggravated murder, but it did not change materially the elements of either offense. Merely changing the sentence for the lesser included offense of murder could not itself repeal the greater offense of aggravated murder.[97]

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stitutionality is to refrain from eliminating the entire aim of the people or the legislature in a particular statute, unless that result is unavoidable. No such consideration is present with repeals by implication. If the court avoided unconstitutionality by finding repeal, the legislative aim in the aggravated murder statute would, by that construction, itself be abrogated. Unconstitutionality, of course, also abrogates the momentary aim of the people to have the death penalty. It abrogates this aim appropriately, however, because the Constitution is supreme to any statute. Furthermore, it abrogates—as between the death penalty and aggravated murder—the more hastily drawn, more general, less well considered, and independently constitutionally suspect sentencing provision. At the same time, it retains both murder and aggravated murder and an appropriately graduated penalty scale.

96. ORS 163.095 (1977).

97. *See* Cannon v. Gladden, 203 Or. 629, 281 P.2d 233 (1955).

The issue in *Cannon* is virtually indistinguishable from the issue at hand. That case involved a petition for habeas corpus alleging that Cannon's sentence was unconstitutional. He had been charged with rape, convicted by the jury of assault with intent to commit rape and sentenced to life imprisonment. The rape statute in effect at the time of Cannon's offense had remained unchanged since its enactment in 1864 and carried a maximum sentence of 20 years in prison. Assault with intent to commit rape had also been made criminal statutorily in 1864. From 1864 until 1919, it carried a maximum penalty of ten years. *Id.* at 630, 281 P.2d at 234. In 1919, without changing the elements of rape or assault with intent to commit rape, the legislature increased the penalty of assault with intent to commit rape to life imprisonment or in the discretion of the judge to not more than 20 years. *Id.* at 631, 281 P.2d at 234. The supreme court held that rape contained all of the elements of assault with intent to commit rape; that it also required additional elements; and that, therefore, assault with intent to commit rape was a necessarily lesser included offense of rape. *Id.* The court correctly reached this result despite the fact that the amended penalty for assault with intent to commit rape was greater than the penalty for the more serious offense of rape.

Concerning the 1919 amendment the court said:

> When the legislature amended the law . . . increasing the penalty for an assault to life imprisonment, it undoubtedly did not have in mind the penalty for the graver offense of rape which carried a sentence of up to 20 years. Otherwise, it would not have created such an absurdity.

Further, the legislative history of Ballot Measure 8 supports the argument against implicit repeal. In a 1978 opinion, the Oregon Attorney General correctly noted that Ballot Measure 8 "does not repeal, amend, or in any way take note" of the pre-existing aggravated murder statutes, and that the drafters of Measure 8 "overlooked" and "did not consider" the aggravated murder statutes.[98]

Additional evidence suggests that the voters had no intention of repealing aggravated murder when they enacted Ballot Measure 8. The full text of Ballot Measure 8 was contained in the voters pamphlet, but was omitted from the ballot.[99] The official explanation of Ballot Measure 8, required by ORS 254.222, stated: "Under current law, the penalty for murder is life in prison without any statutory requirement that some minimum period of time be spent in prison."[100] This statement was inaccurate because Oregon already had an aggravated murder statute,

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*Id.* at 633, 281 P.2d at 235.

The Court went on to hold that Cannon's life sentence violated the express proportionality requirement of OR. CONST. art. I, § 16, when compared with the lesser maximum penalty for the greater offense of rape. 203 Or. at 633, 281 P.2d at 235.

The court did not use the words "implicit repeal" in the *Cannon* opinion. Nonetheless, Cannon's sentence would presumably not have been unconstitutional if the amended increased penalty for assault with intent to commit rape had implicitly repealed the greater offense of rape or had implicitly amended and increased the penalty for rape. Neither proposition was worthy of serious attention. It would have been ludicrous to conclude that the Oregon legislature intended to abolish the crime of rape by amending upwards the penalty for a lesser offense, and it would have been equally unthinkable and intolerable for a defendant convicted of rape to have been punished more severely than the statutes expressly notified him was the maximum penalty of rape. There was no repugnancy between rape and assault with intent to commit rape; there was merely a disproportionately high sentence for the lesser offense.

An exactly analogous situation exists with the murder and aggravated murder statutes. Murder and aggravated murder have coexisted since 1977 with murder as the necessarily lesser included offense of aggravated murder. There has been no material change in the elements of either offense, but in 1978 the penalty for murder was increased beyond that authorized for aggravated murder. No new repugnancy has developed between the elements of the two offenses. Since aggravated murder was a greater offense in 1977, it is still a greater offense today. It is identically unthinkable, as it was with rape in *Cannon*, that aggravated murder, the crime classifying the most serious offenses in this state, could be repealed by an amendatory increase in the sentence for the lesser included offense of murder or that one charged with aggravated murder could receive a sentence in excess of the expressed statutory maximum. Therefore, Ballot Measure 8 did not implicitly repeal aggravated murder.

98. 39 Op. Or. Att'y Gen. 419, 420, 422 (1978).

99. Kanter, *supra* note 11, at 59.

100. OREGON SECRETARY OF STATE, OFFICIAL 1978 GENERAL VOTER'S PAMPHLET 50 (1978).

which provided that the most serious murderers serve a substantial minimum period of incarceration before becoming eligible for parole.[101] More precisely, the voters pamphlet, as an official state document and a critical part of the legislative history of Ballot Measure 8, misled the voters into believing that the statutes lacked an aggravated murder provision. The preelection press coverage of Ballot Measure 8 was brief and generally of poor quality.[102]

Under these circumstances, it would be strange indeed to conclude that the voters intended to abolish aggravated murder. This is especially true considering that a simple yes or no vote for capital punishment at the ballot box may be entitled constitutionally to significantly less deference than the reasoned and deliberate judgment of the legislature on the degrees of murder and appropriate penalties.[103] A statute adopted by initiative petition is not entitled to a privileged or entrenched position under Oregon law.[104]

Ballot Measure 8 was denominated "an act relating to murder; creating new provisions; and amending ORS 163.115."[105] Section 3 of Ballot Measure 8 "is *added to and made a part of* ORS 163.005 to 163.145."[106] Sections 5, 6, and 7 "are added to and made a part of ORS 137.310 to 137.450."[107] Thus, Ballot Measure 8 repealed nothing. It *added* new sections to the code and amended only ORS 163.115, but it did not affect ORS 163.095 to 163.105, the aggravated murder provisions. Furthermore, the official compilers of Oregon Revised Statutes, Legislative Counsel Committee and Legislative Counsel, in their published revision incorporating the provisions of Ballot Measure 8, continued to show ORS 163.095 to 163.105 as a current part of Oregon's statutory law.[108]

Finally, when the attorney general wrote his opinion in

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101. Kanter, *supra* note 11, at 59. *See also* ORS 144.780, .785 (1979).

102. Kanter, *supra* note 11, at 59.

103. *Id.* at 48 n.196, 58-59.

104. Patton v. Withycombe, 81 Or. 210, 213-14, 159 P. 78, 79 (1916).

105. OREGON SECRETARY OF STATE, OFFICIAL 1978 GENERAL VOTER'S PAMPHLET 48-49 (1978).

106. *Id.* (emphasis added).

107. *Id.*

108. For description of the authority of Legislative Counsel Committee and Legislative Counsel when compiling the ORS, see ORS 173.111-.250 (1979).

1978,[109] the opportunity to respond to the adoption of Ballot Measure 8 by explicitly repealing or amending ORS 163.095 to 163.105 had not yet been given to the Oregon Legislature. The legislature had that opportunity during the 1979 session. Its discussions and failure to act add further weight to the conclusion that Ballot Measure 8 did not repeal aggravated murder.

The 1979 legislature's consideration of three bills, House Bill 2707,[110] House Bill 2297,[111] and Senate Bill 474,[112] is relevant to the question of implicit repeal. Section 49 of House Bill 2707 purported explicitly to repeal ORS 163.095, 163.105, and other statutes. The bill received its first reading on February 27, 1979, was referred to the House Judiciary Committee on March 1, and was tabled in committee on May 29.[113] Both the drafters' inclusion of explicit repealing language and the legislature's failure to adopt the bill evidences a legislative belief and desire that ORS 163.095 and 163.105 continue in effect.[114]

House Bill 2297, receiving significantly more attention, explicitly proposed to amend ORS 163.095 and to repeal ORS 163.105. If ORS 163.095 had been repealed implicitly by Ballot Measure 8, it could not subsequently be amended. Also, no reason to repeal ORS 163.105 would have existed if it already had been repealed. The House Judiciary Committee spent substantial time on House Bill 2297, and the Bill eventually was passed on May 30, 1979, by the full House by a vote of thirty-two to twenty-four.[115] On June 1, 1979, it was given a first reading in the Senate and referred to the Senate Judiciary Committee, where it died upon adjournment.[116]

Substantively, House Bill 2297 would have relabeled aggravated murder as murder in the first degree and relabeled murder as murder in the second degree. The sentencing provisions of Ballot Measure 8 would have been engrafted onto murder in the first degree, and murder in the second degree would have carried a life sentence with a mandatory minimum sentence of fifteen

109. 39 Op. Or. Att'y Gen. 419 (1978). *See* note 89 *supra.*
110. H.B. 2707, 60th Legis. Ass., Reg. Sess. (1979).
111. H.B. 2297, 60th Legis. Ass., Reg. Sess. (1979).
112. S.B. 474, 60th Legis. Ass., Reg. Sess. (1979).
113. SENATE AND HOUSE JOURNAL H-103, 60th Legis. Ass., Reg. Sess. (1979).
114. *Cf.* 1 A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 23.11 (4th ed. 1972).
115. SENATE AND HOUSE JOURNAL H-50, 60th Legis. Ass., Reg. Sess. (1979).
116. *Id.*

years. The legislature's extensive consideration of this measure indicated its awareness that problems surrounded the sentencing for aggravated murder and for murder after the adoption of Ballot Measure 8. Consequently, the legislature must be considered to have intended the continued unmodified existence of ORS 165.095, 163.105, and Ballot Measure 8.

In the meantime, Senate Bill 474 was introduced. Substantively, this Bill would have abolished the death penalty by explicitly repealing the provisions of Ballot Measure 8. Section 3 of the B-Engrossed version explicitly indicated that "ORS 163.095 and 163.105 shall continue in effect and shall not be considered to have been repealed by approval of Ballot Measure 8."[117] Senate Bill 474 was to be referred to the people if adopted by the legislature. The Bill was passed by the Senate on June 25, 1979, by a vote of sixteen to fourteen, but failed in the House on July 3, 1979, by a vote of twenty-seven to thirty-two.[118] The foregoing legislative history indicates that the 1979 Oregon Legislature was aware that Ballot Measure 8 did not repeal the aggravated murder statutes. The legislature, however, declined to repeal those statutes as a means of resolving the problem.

Since aggravated murder has not been repealed expressly or implicitly, the penalty for the lesser included offense of murder is more severe than the penalty for the greater offense of aggravated murder. This disparity violates the express proportionality requirement of article I, section 16 of the Oregon Constitution.[119] Oregon statutes also prohibit disproportionate penalties.[120] Therefore, the sentencing provisions of Ballot Measure 8

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117. S.B. 474, 60th Legis. Ass., Reg. Sess. (1979).

118. SENATE AND HOUSE JOURNAL S-100-01, 60th Legis. Ass., Reg. Sess. (1979).

119. OR. CONST. art. I, § 16; Roberts v. Collins, 544 F.2d 168, 170 (4th Cir. 1976)("[T]he Constitution does not sanction the imposition of a greater punishment for a lesser included offense than lawfully may be imposed for the greater offense."); State v. Collis, 243 Or. 222, 230, 413 P.2d 53, 57 (1966)("[A] sentence for an attempt greater than the penalty provided for the crime attempted is unconstitutional because of the provisions of Art. I, Sec. 16 . . ."); Cannon v. Gladden, 203 Or. 629, 632-33, 281 P.2d 233, 234-35 (1955).

120. ORS 161.025(1)(f), (g) (1971); ORS 138.040 (1977); ORS 138.050 (1977); *see* State v. Martin, 282 Or. 583, 588, 580 P.2d 536, 539 (1978).

Further, the murder defendant is denied equal protection of the laws since the legislation that classifies that defendant, presumptively a less serious offender than the aggravated murderer, as a candidate for a more serious sentence is irrational. *See, e.g.*, State v. Pirkey, 203 Or. 697, 281 P.2d 698 (1955).

Moreover, a death sentence subjects the murder defendant to "cruel and unusual punishment" since there is a legislative judgment that a lesser sanction is adequate to

are unconstitutional under this ground as well.

## V. Jury Participation in the Capital Sentencing Process

The adoption of the death penalty statutes made Oregon one of only five death penalty states giving the jury no formal role in the capital sentencing scheme.[121] In each of these other states, however, unlike Oregon, the jury arguably plays an indirect role. Juries in those states must find the defendant to be a capital offender, a term defined much more narrowly than under Oregon's unusually broad murder statute.[122] The other states permit the jury at least to reduce substantially the pool of individuals subject to the capital sentencing scheme.

The signals from the United States Supreme Court have been far from clear whether a capital defendant is entitled to jury consideration in the sentencing process under the sixth, eighth, or fourteenth amendments. For example, in *Witherspoon v. Illinois*,[123] the Court explained that the jury expresses "the conscience of the community on the ultimate question of life or death"[124] and that without this "link between contemporary community values and the penal system" the imposition of the death penalty could hardly reflect the requisite "evolving standards of decency."[125] In *Gregg v. Georgia*,[126] while requiring that the jury's discretion be guided appropriately, the Court reiterated that "[j]ury sentencing has been considered desirable in capital cases."[127] Furthermore, because the death penalty is unique in its severity and finality,[128] the Court has required that

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satisfy society's legitimate needs for the more serious offense of aggravated murder, so that the imposition of the greater sentence on the defendant, as a less serious offender, constitutes the gratuitous infliction of additional and unnecessary pain and suffering. *See, e.g.*, Cannon v. Gladden, 203 Or. 629, 632-33, 281 P.2d 233, 234-35 (1955); Kanter, *supra* note 11, at 11, 53-63.

121. The others are Arizona, Idaho, Montana and Nebraska. *See* Brief of Amicus Curiae, App. B., State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981).

122. *Id.*

123. 391 U.S. 510 (1968). Earlier cases had also recognized the importance of the jury's role in selecting those upon whom the death sentence would be imposed. *See, e.g.*, Andres v. United States, 333 U.S. 740, 746-49 (1948); Winston v. United States, 172 U.S. 303, 310-12 (1899).

124. 391 U.S. at 519 (1968).

125. *Id.* at 519 n.15.

126. 428 U.S. 153 (1976).

127. *Id.* at 190.

128. Gardner v. Florida, 430 U.S. 349, 357 (1977).

"fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt determining phase of any criminal trial."[129] In *Proffitt v. Florida*,[130] however, the Court said that while "jury sentencing in a capital case can perform an important societal function . . . it has never [been] suggested that jury sentencing is constitutionally required."[131] The Florida procedure ruled on in *Proffitt* does not completely exclude the jury from the capital sentencing process. Rather, the jury recommends either life imprisonment or the death penalty, and the trial judge can only overrule a recommendation of mercy if exceedingly strong evidence shows that the death sentence is warranted.[132] Therefore, the implication in *Proffitt* that no constitutional provision mandates jury participation in a capital sentencing scheme should be read as dictum.

Subsequently, the waters were muddied still further in *Lockett v. Ohio*,[133] in which, after reversing the defendant's death sentence, the Court specifically stated that it was not addressing or deciding defendant's contention that she was constitutionally entitled to jury participation in the capital sentencing process.[134]

To assess the strength of a defendant's constitutional claim to jury participation in his or her capital sentencing decision, therefore, it is necessary to consider more fully the purposes of a capital sentencing proceeding, the potential function or functions performed by juries in capital sentencing cases, and the question whether adequate constitutional alternatives exist.

At least five policies support the notion that the jury should be involved in the capital sentencing decision. First, the jury is an essential continuing barometer of society's willingness to al-

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129. Presnell v. Georgia, 439 U.S. 14, 16 (1978).

130. 428 U.S. 242 (1976).

131. *Id.* at 252.

132. *Id.* at 248-50.

133. 438 U.S. 586 (1978).

134. *Id.* at 609 n.16. Recent language in Beck v. Alabama, 100 S. Ct. 2382 (1980), implies that the Court is persuaded that capital sentencing by a judge is not a panacea:

> The State's second argument is that, even if a defendant is erroneously convicted, the fact that the judge has the ultimate sentencing power will ensure that he is not improperly sentenced to death. Again, we are not persuaded that sentencing by the judge compensates for the risk that the jury may return an improper verdict because of the unavailability of a "third option."

*Id.* at 2393.

low a death penalty statute to remain in effect. Presumably, if all juries quit voting for capital punishment, the continued use of the death penalty would violate contemporary community values even if the legislature or the people continued to vote for capital punishment measures. Since the Supreme Court has relied repeatedly on juries in capital cases as a most significant indicator of contemporary community values, it would seem that the Court's decision that capital punishment is not per se unconstitutional would be thrown into grave doubt if juries were removed from the capital sentencing process on a nationwide basis. The Court, of course, could easily continue to rely on its present result if only a few states eliminated the jury's function, since the Court would still have sufficient empirical evidence for its per se conclusion from other states. It would be improper, however, for the Oregon Supreme Court to hold capital punishment per se constitutional under the state cruel and unusual punishment clause, unless an adequate alternative indicator of Oregon's contemporary community values is developed. No adequate alternative indicator seems at hand and none is likely to be forthcoming because individuals may be quite willing to support capital punishment in the abstract but unwilling actually to impose it.

Second, if the elements that must be found by the sentencer to impose the death penalty actually constitute a greater offense, then clearly the defendant is entitled to a jury trial at least on those elements. This would seem to be the case in Oregon, at least in connection with the *deliberation* element, if that term means anything in addition to *intent*.[135] Even if the circumstances in a particular capital sentencing scheme do not amount to elements constituting a greater offense, a strong argument exists that the defendant is entitled to jury consideration of these circumstances since they constitute, a fortiori, the factors that make the difference between life imprisonment and the death sentence. Generally, the difference to the defendant between life

135. The Oregon Supreme Court unanimously adopted this position in State v. Quinn, 290 Or. at 403, 623 P.2d at 642. The court concluded that Ballot Measure 8 "restore[d] deliberation as an additional element of murder for which a greater penalty, death, may be imposed. . . ." Therefore, the court held the death penalty statutes unconstitutional under OR. CONST. art. I, § 11, since the statutes deprived the defendant of jury determination of this additional element. Given unanimity on this procedural aspect of state constitutional law, the court properly found it unnecessary to consider or decide other questions relating to the death penalty in Oregon.

imprisonment and execution is more significant than the difference between a murder and manslaughter conviction. This argument relies, by analogy, on *Mullaney v. Wilbur*[136] and *Patterson v. New York*.[137] The analogy, of course, is not perfect since proof beyond a reasonable doubt goes directly to the degree of reliability of a fact finding decision against the defendant, while a jury in a capital sentencing proceeding may be considered to be performing a more ceremonial function.[138]

Third, the imposition of the sentence of death is such a solemn act for a society that even the jury's ceremonial function becomes especially critical. Connected with this, some benefit probably accrues in dispersing among a group of twelve people the responsibility for sentencing an individual to death rather than placing it on the shoulders of a single judge.

Fourth, related to the solemnity of capital punishment, the jury arguably is presumed to be capable of dispensing greater fairness (or at least mercy) *and* the appearance of greater fairness than a member of the judiciary. Therefore, given the enormity of the penalty of death, involvement of the jury in the process of legitimizing the imposition of this sanction is essential.

Last, the historical prevalence of the jury in capital sentencing decisions in Oregon and in this country, taken together with the jury's functional role, is strong evidence that juror input in capital sentencing is fundamental to the Oregon and American schemes of ordered liberty. Juror input, therefore, is required under the Oregon Constitution, article I, section 11,[139] the Ore-

136. 421 U.S. 684 (1975). *See* note 80 *supra*.

137. 432 U.S. 197 (1977).

138. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

139. In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

gon Constitution, article I, section 16,[140] and independently under the sixth and fourteenth amendments to the United States Constitution.[141]

Arguably, a judge familiar with the criminal justice system and other cases would more likely impose this most severe penalty more evenly than would a diverse group of juries. This argument, however, is unpersuasive. If the issue is the defendant's interest in even-handedness, he or she may be given the choice of having a jury or a judge. If, on the other hand, the concern is that the jury may dispense too much mercy and sentence to life imprisonment some individuals that the judge would send to death, then the argument is foreclosed by the Supreme Court's rejection of the notion that the death penalty is unconstitutional because some offenders wrongfully "get away" with life imprisonment.

Furthermore, no one judge will sentence all murderers. Instead, there will be a diverse cross section throughout the state, some lenient, some strict, each with individual predilections and foibles. With a jury, it is hoped that the diversity of individual jurors will result in a balanced sentencing authority. But with a single judge, no balance exists; the chance for skewing to one side of the scale or the other increases. The defendant who draws the strict judge and is sentenced to death will receive little solace merely because another defendant drew the lenient judge and balanced the overall statistics.

All of these policy considerations combined create a strong argument under the sixth and fourteenth amendments and under the eighth and fourteenth amendments that a defendant is entitled to a least some jury participation in the capital sentencing process.

Until *State v. Quinn,* the precise question whether juror

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OR. CONST. art. I, § 11.

140. Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.—In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.

OR. CONST. art. I, § 16.

141. *See* Duncan v. Louisiana, 391 U.S. 145 (1968), which sets out the modern due process test for whether a particular criminal procedure is mandated for the states under the federal constitution, and holds that the sixth amendment right to jury trial is fundamental and binding on the states.

participation is constitutionally required in a capital sentencing case had never arisen in Oregon, since the jury always was included and acted as the ultimate arbiter of the final sentence. This unbroken tradition, the application of the liberal intentions of the framers of Oregon's Bill of Rights, and the interpretation of the Oregon Constitution, Article I, sections 11 and 16 to give defendants significantly greater rights to jury trial than they enjoy under the federal constitution,[142] all are powerful arguments for jury participation as a constitutional right in Oregon capital sentencing. Finally, the language of the Oregon Constitution explicitly recognizes the special importance of jury participation in capital cases by prohibiting waivers of jury trials by capital defendants and by requiring unanimity for a guilty verdict of murder in the first degree.[143]

## VI. APPELLATE REVIEW

Unlike the jury sentencing question just treated, the United States Supreme Court clearly has addressed the question of the role that state reviewing courts must play to validate a capital sentencing scheme.[144] The Supreme Court has concluded that the appellate court must be free to perform a detailed factual and legal review of every death sentence and to reverse those sentences in cases in which other similarly situated defendants are not being sentenced to death.[145] Theoretically, two questions concerning this constitutional requirement remain: first, is the Oregon Supreme Court constitutionally and legally permitted to carry out this broad ranging review function under state law; and second, do the Oregon capital sentencing procedures generate the necessary data to allow the court to carry out meaningfully this function in practice. If a negative answer to either of these questions results, the state's death penalty procedures are unconstitutional.

Traditionally, Oregon appellate courts have shown little inclination, and presumably have felt a concomitant lack of legal authority, to review sentences within statutory limitations unless they were "so disproportionate as to shock the conscience of fair

142. *See, e.g.*, Brown v. Multnomah County Dist. Ct., 280 Or. 95, 98, 570 P.2d 52, 55 (1977).

143. OR. CONST. art. I, § 11.

144. *See* notes 28-39 and accompanying text *supra*.

145. *Id.*

minded men."[146] Under this standard, Oregon's capital sentencing scheme would be plainly unconstitutional because the courts routinely ignore individualized consideration of particular offenders.

Interestingly, even if the Oregon Supreme Court concluded that the limitations on sentence review, in the past, have been statutory and institutional rather than constitutional,[147] the court would still be barred by Oregon Constitution, article I, section 16 and Oregon Constitution, article VII, section 3 from performing the requisite review. This is because the jury must be allowed to participate in capital sentencing[148] and because the court is not permitted to reevaluate the jury's fact finding and substitute its own judgment.[149]

Whatever the outcome of these general considerations, it seems apparent that the Oregon Supreme Court is precluded from performing the requisite appellate function under the particular provisions of the death penalty statutes. The Oregon statutes do not provide aggravating or narrowing circumstances and, consequently, do not require, and may not permit the sentencer to specify the factors that led to the imposition of the death sentence or of life imprisonment. Therefore, the Oregon Supreme Court would not possess adequate information to compare accurately the results of different capital cases throughout the state. Consequently, the court would be unable to determine whether a particular defendant's death sentence was excessive compared with the sentences of similarly situated defendants.

The failure of the Oregon statutes to permit jury participation in the capital sentencing process, therefore, renders the statutes unconstitutional.

## CONCLUSION

Nearly 400 years ago, in 1595, the dog Provetie was convicted of biting the finger of a child of Jan Jacobsz van der Poel while trying to get a piece of meat from the child's hand. The child died from the injury and fright. L. H. Gael sentenced the

146. Kanter, *supra* note 11, at 62 n.259.

147. *See* State v. Garcia, 288 Or. 413, 430-33, 605 P.2d 671, 680-82 (1980); State v. Cloutier, 286 Or. 579, 592-94, 596 P.2d 1278, 1284-86 (1979).

148. *See* text accompanying notes 121-43 *supra*.

149. *See* Van Lom v. Schneiderman, 187 Or. 89, 210 P.2d 461 (1949).

dog Provetie to death by hanging as an example to other dogs.[150] A related story recently appeared in *The Oregonian* newspaper under the headline: "Panel orders dogs' deaths." The pertinent part of the story reads:

> In the first case of its kind before Marion County commissioners, . . . two dogs were ordered put to death because they killed a neighbor's sheep near Aurora.
>
> . . . .
>
> . . . . A 1975 state law requires that county commissioners decide the fate of dogs found to be *dangerous*.[151]

A pessimistic historian might well conclude from this, and countless other examples, that humankind has not progressed very far from its unenlightened, vindictive, retributive past. But, "any reasonably optimistic view of political theory or history posits an evolutionary increase in the recognition of and respect for individual rights as a society matures."[152] The Oregon Supreme Court need not opt for the rosier view as an idealistic article of faith. Rather, progress in recognizing these rights is commanded by our constitutional law and the processes of constitution making in the United States and, more particularly, in Oregon.[153] Our constitutions, our people's respect for them, and our courts' courage in interpreting them even against the popular will of the moment constitute the final bulwarks against our baser selves.

150. 24 S. AFR. L.J. 232 (1907).
151. The Oregonian, Dec. 27, 1979, § D, at 6; *id.* § C, at 4 (emphasis added).
152. Kanter, *supra* note 11, at 33.
153. *See, e.g.*, Kanter, *supra* note 11, at 33 n.132, 37 n.152, 37-38, 50.