WILLAMETTE LAW REVIEW

VOLUME 36 NUMBER 2 SPRING 2000

CONFRONTING CAPITAL PUNISHMENT: A FRESH PERSPECTIVE ON THE CONSTITUTIONALITY OF THE DEATH PENALTY STATUTES IN OREGON

Stephen Kanter

Reprinted from
WILLAMETTE LAW REVIEW
Volume 36, Number 2

CONFRONTING CAPITAL PUNISHMENT: A FRESH PERSPECTIVE ON THE CONSTITUTIONALITY OF THE DEATH PENALTY STATUTES IN OREGON

STEPHEN KANTER*

I. INTRODUCTION

Capital punishment is no longer an abstract issue in Oregon. Inmates Douglas Franklin Wright and Harry C. Moore were put to death by lethal injection within ten months of each other in 1996 and 1997.[1] Both of these individuals refused to allow post-conviction, habeas corpus, or other available legal proceedings to delay their executions and possibly overturn their death sentences.[2]

Oregon has had a long, ambivalent relationship with the death penalty. The State's voters repealed the death penalty in 1914, only to reinstate the ultimate punishment in 1920.[3] In November 1964, Oregonians voted again to amend the state consti-

---

* Professor of Law, Dean 1986-1994, Northwestern School of Law of Lewis & Clark College; Yale Law School, J.D. 1971. The author wishes to thank Tim Sullivan, John Belknap, and Jane McDowell for their assistance with this Article.

1. Ashbel Green & James Mayer, *Initiative to End Execution Falls Short,* OREGONIAN, Aug. 3, 2000, at A1, 16.

2. The Oregon Supreme Court affirmed Wright's death sentence on automatic and direct review. *See* State v. Wright, 913 P.2d 321 (Or. 1996). The defendant did not file a petition for reconsideration or certiorari, and he refused counsel and all further legal proceedings. *See* Bryant v. Thompson, 922 P.2d 1219 (Or. 1996) (discussing Wright's waiver of counsel and post-conviction remedies). The court issued its decision in *Bryant* on September 5, 1996, and Wright was executed the next day. Moore's death sentence was also affirmed on automatic and direct review. *See* State v. Moore, 927 P.2d 1073 (Or. 1996). He consistently expressed his desire to end all legal proceedings, and he was executed on May 15, 1997. *See* Phil Mazano, *Killer Clears Hurdle to Execution*, OREGONIAN, Jan. 9, 1997, at C3 (reporting that on receiving his death sentence, Moore vowed never to appeal); J. Todd Foster, *Judge Orders Mental Assessment of Inmate at Top of Execution List*, OREGONIAN, Jan. 22, 1997, at B9 (reporting that Moore had waived his legal appeals).

3. *See* OR. CONST. art. I, §§ 36-38 (abolishing capital punishment in 1914; restoring capital punishment in 1920).

tution to abolish capital punishment; but once more, voters reversed course and adopted new death penalty statutes in 1978 by initiative petition.[4] A unanimous decision of the Oregon Supreme Court in 1981 invalidated Oregon's death penalty statutes, which were modeled partially after the oft-criticized Texas statutes.[5] In 1984, two additional initiative measures were approved to amend the Oregon Constitution[6] and reinstate modified versions of the 1978 statutes.[7] The Oregon Legislature amended the 1984 death penalty statutes several times,[8] but the statutes continue to bear a troubling kinship to their Texas counterparts with nearly identical sentencing proceedings.

National and international doubts about the appropriateness of the death penalty have quickened as we have entered the twenty-first century.[9] The American Bar Association (ABA) was sufficiently disturbed about the lack of qualified representation for many defendants in capital cases that it called for a nationwide moratorium on all executions.[10] Illinois' governor,

---

4. Repeal of capital punishment was proposed by S.J.R. 3, 1963, and adopted by the people Nov. 3, 1964; Oregon Ballot Measure No. 8 (adopting death penalty statutes in 1978). See Green & Mayer, *supra* note 1, at A16 for a list of the seven times the death penalty issue has been on the ballot.

5. *See* State v. Quinn, 623 P.2d 630 (Or. 1981).

6. Ballot Measure 6 added Article I, Section 40 to the Oregon Constitution. This amendment provided that "[n]otwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law." OR. CONST. art. I, § 40 (adopted in 1984).

7. Oregon Ballot Measure No. 7 (1984).

8. *See* OR. REV. STAT. § 163.105 (1999) (amended 1987, 1989, 1991, and 1995); *see id.* § 163.150 (1999) (amended 1987, 1989, 1991, 1995, and 1997).

9. For international doubts about the appropriateness of the death penalty, *see* Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 439, ¶ 102 (1989) (quoting with approval Amnesty International's statement that there is "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice"); *see generally* William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797 (1998); Warren Allmand et al., *Panel Discussion: Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?*, 67 FORDHAM L. REV. 2793 (1999).

10. At its midyear meeting in 1997, the ABA passed a resolution calling on each jurisdiction imposing capital punishment to not carry out the death penalty until specific policies and procedures are in place to: ensure that death penalty cases are administered fairly and impartially in accordance with due process; provide competent counsel at each stage in capital cases; and minimize the risk that innocent individuals are executed. ABA Gov't Affairs Office, *Washington Letter Abstract* (March 1997),

George Ryan, a death penalty proponent, recently halted all executions in his state because of systemic problems in Illinois' justice system.[11] Illinois has put to death twelve inmates since 1976, and thirteen other death row inmates in the state have been exonerated and released, despite jury convictions and death sentences affirmed on direct appeal.[12] Against this backdrop, opponents of capital punishment in Oregon have begun a new campaign to qualify a measure for the ballot that asks Oregonians to reconsider the question. The initiative substitutes the punishment of life without parole in place of death for all persons convicted of aggravated murder.[13]

It is time to take a fresh look at the propriety and constitutionality of Oregon's current death penalty statutes. If this is not done by scholars and the courts, or by voters at the ballot box, Oregon inevitably will confront the prospect of executing an unwilling defendant for the first time in nearly four decades. The purpose of this Article is to re-energize the death penalty discussion by exploring two of the most salient constitutional issues relating to Oregon death penalty statutes that have not been adequately addressed.

Part II of the Article develops the nature of Oregon's constitutional requirement of proof beyond a reasonable doubt and demonstrates that one of Oregon's death penalty sentencing questions does not comport with this requirement. Part III considers the analytical relationship between two provisions of Oregon's Bill of Rights[14] and capital punishment. Combining the principles required by these provisions with established federal constitutional standards leads to the conclusion that Oregon's

---

<http://abanet.org/govaffairs/letter/mar97.html>; *see generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Dorean M. Koenig, *A Death Penalty Primer: Reviewing International Human Rights Development & the ABA Resolution for a Moratorium on Capital Punishment in Order to Inform Debates in U.S. Legislatures*, 4 ILSA J. INT'L & COMP. L. 513, 517-19 (1998).

11. *See* Stephen B. Bright, A *Smooth Road to the Death House*, N.Y. TIMES, Feb. 7, 2000, at A25.

12. *See id.*

13. *See* Staff Report, OREGONIAN, Feb. 10, 2000, at A6. The first attempt to secure the necessary signatures to place this measure on the ballot failed by a narrow margin. Ashbel Green & James Mayer, *Initiative to End Execution Falls Short,* OREGONIAN, Aug. 3, 2000, at A1.

14. *See* OR. CONST. art. I, §§ 13, 15.

current death penalty statutes are per se unconstitutional.

II. OREGON'S STATUTORY DEATH PENALTY SENTENCING PROCEDURES ARE CONSTITUTIONALLY DEFICIENT

"Ninety percent of this game is half mental."[15] Under Oregon's current death penalty statutes, a hypothetical excerpt from an aggravated murder sentencing proceeding might sound remarkably similar to this Yogi-ism.

A prosecutor's argument to the jury: "We are going to prove to your satisfaction that the defendant is definitely dangerous . . . maybe." A few words from baseball's "accidental" philosopher, Yogi Berra, capture the constitutional infirmity of one of Oregon's critical death penalty sentencing procedures.

A. Current Oregon Death Penalty Statutes and the Second Sentencing Question

Oregon's homicide statutes provide the option of the death penalty as a sentence for aggravated murder.[16] When there is a guilty verdict[17] for aggravated murder, a separate sentencing proceeding is held before the trial jury[18] to determine whether the convicted defendant should receive the death penalty or a lesser sentence: "life imprisonment without the possibility of release or parole" (known as "true life"), or "life imprisonment . . . with a minimum of thirty years without possibility of . . . release."[19] To make this determination, the jury must answer several sentencing questions. This Article focuses on the second sentencing question, which asks whether the state proved to the jury unanimously (that is, to the satisfaction of each and every juror), "beyond a reasonable doubt," that "there is a probability that the defendant would commit criminal acts of violence that

---

15. YOGI BERRA, THE YOGI BOOK: "I REALLY DIDN'T SAY EVERYTHING I SAID" 69 (1998).

16. *See* OR. REV. STAT. §§ 163.005-163.150 (1999).

17. The verdict may be by jury or by accepted guilty plea. Although Article I, Section 11 of the Oregon Constitution prohibits bench trials in capital cases, the Oregon Supreme Court has ruled that it does not preclude guilty pleas at the guilt phase of potentially capital aggravated murder prosecutions. *See* State v. Wagner, 752 P.2d 1136, 1146-50 (Or. 1988).

18. Or, in the event of a guilty plea, the sentencing procedure is held before a jury specially empaneled for the proceeding. *See* OR. REV. STAT. § 163.150(1)(a).

19. *Id.*

would constitute a continuing threat to society."[20] The jury answers this question "yes" or "no."

This future dangerousness sentencing question is one of only three aggravating circumstances[21] that must be found to convert the aggravated murder conviction[22] into truly capital aggravated murder.[23] Three keys must be turned to open the door from the room for life imprisonment for aggravated murder to the much smaller room for execution-eligible offenders: deliberation, future dangerousness, and lack of reasonableness in response to victim provocation.[24] In most cases, the second sentencing question is the determinative aggravating factor. This is because deliberation often adds only marginally to the mental state already found at the guilt/innocence stage of the proceedings,[25] and a reasonable response to provocation from the victim normally would reduce the conviction to manslaughter or result in an outright self-defense acquittal.

The crux of the argument that the second sentencing question is unconstitutional is that the relevant statutes afford the state a burden of proof of that question's critical ultimate fact[26] that is substantially less than proof beyond a reasonable doubt.[27] The statute gives the illusion of applying our most rigorous burden of persuasion, proof beyond a reasonable doubt, to the

---

20. *Id.; see also id.* §§ 163.150(1)(d) and (1)(b)(B).

21. *See* State v. Guzek, 906 P.2d 272, 277-78, 283 (Or. 1995) (demonstrating what an important role these three aggravating circumstances play in determining whether the defendant is sentenced to death or life).

22. An aggravated murder conviction subjects the defendant to life imprisonment.

23. A capital aggravated murder conviction subjects the defendant to execution.

24. Once in this last room, the only way out under the statute is through the mercy or mitigation of the fourth sentencing question. *See Guzek,* 906 P.2d at 277, 279, 283. The fourth sentencing question is "whether the defendant should receive a death sentence." OR. REV. STAT. § 163.150(1)(b)(D).

25. *See* State v. Quinn, 623 P.2d 630, 640 (Or. 1981) ("*The distinction between intentional deliberate murder and intentional nondeliberate murder may often be a fine one on the facts*, but the legal distinction is nevertheless a real one of long standing under Oregon law") (emphasis added).

26. The jury receives an instruction to consider the defendant's actual future dangerousness, i.e., "whether . . . the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *See* OR. REV. STAT. § 163.150(1)(b)(B) (1999).

27. The burden of persuasion is also below the "clear and convincing evidence" standard. Functionally, it even falls below "preponderance of the evidence" and impermissibly shifts the burden of persuasion to the defendant to disprove this critical life-or-death factor.

state's obligation to establish the crucial fact of the defendant's dangerousness, which so often determines life or death. Unfortunately, the statute does far less by requiring only that a "probability"—rather than the actuality—of the defendant's future criminal violence be established beyond a reasonable doubt. There is, in fact, "an inherent contradiction . . . in proving a *probability* beyond a reasonable doubt."[28]

To see that this is true, suppose that proof beyond a reasonable doubt means a Yogi-like ninety-five or ninety-eight percent confidence level that the fact to be proved has or will occur,[29] and that the word "probability" is equivalent to "more likely than not," or just barely over fifty percent likely.[30] Thus, proving beyond a reasonable doubt that there is a probability that the defendant would commit future criminal acts of violence leads to an overall standard of proof requiring less than a fifty percent certainty of future violence.[31] This is not to suggest that legal burdens of proof are reducible to exact probabilities[32] or that this is just a mathematical exercise of multiplication. Rather, it illustrates how the uniquely odd compound burden of proof in the second sentencing question falls far short of the constitutional mandates of our state and federal Constitutions.[33] *Riley Hill*

---

28. Stephen Kanter, *Brief Against Death: More on the Constitutionality of Capital Punishment in Oregon*, 17 WILLAMETTE L. REV. 629, 647 (1981) [hereinafter Kanter, *Brief Against Death*].

29. "Beyond a reasonable doubt means that the facts asserted are almost certainly true." Riley Hill Gen. Contractor v. Tandy Corp., 737 P.2d 595, 602 (Or. 1987); *accord* State v. Dameron, 853 P.2d 1285, 1290 (Or. 1993).

30. This is almost surely the working interpretation and definition of the term "probability" in the compound burden of proof for the second sentencing question. It is the meaning assigned to "probable" or "probability" elsewhere in Oregon's statutes. *See, e.g.*, OR. REV. STAT. § 131.005(11) (1999) (defining the quantum of proof for probable cause to be more likely than not). It is also the definition used by trial judges under the death penalty statutes with the Oregon Supreme Court's apparent acquiescence and approval. *See, e.g.*, State v. Montez, 789 P.2d 1352, 1381 (Or. 1990), wherein the trial judge instructed the jury with respect to the second sentencing question that probability "means that it is more likely than not that a certain event will occur in the future," *accord Wagner*, 752 P.2d at 1141, 1158-59.

31. Multiplying 90%, 95%, or 98% by 50% results in ultimate burdens of proof of only 45%, 47.5%, and 49%. If a probability were read instead to mean merely a possibility, the compound burden of proof (proof beyond a reasonable doubt of a mere possibility) would be even weaker, and the prosecution would only have to make the trivial showing of greater than a zero chance of the future event.

32. The preponderance of the evidence standard in ordinary civil cases is a possible exception to the probabilities of the burden of proof standard.

33. The Oregon Supreme Court firmly rejects an analogous compound burden of

Gen. Contractor v. Tandy Corp. is particularly instructive because of the court's careful treatment of burdens of persuasion in general and the history and meaning of the preponderance, clear and convincing, and proof beyond a reasonable doubt standards in particular.[34] That case firmly rejects the "legal double talk" of a compound burden of proof for deceit actions.[35] The Oregon courts should equally firmly reject the diluted compound standard of the second sentencing death penalty question (requiring the co-existence of proof beyond a reasonable doubt and a probability).[36]

The actual burden of proof afforded the state is the rough equivalent of proving a definite maybe, hardly the level of confidence we need to act upon the jury's decision of life or death for a person convicted of homicide. To make the problem even more evident, and to avoid the appearance of multiplying probabilities, assume that proof beyond a reasonable doubt was taken to require absolute mathematical and scientific certainty, which it does not. Even then, a jury merely would be finding that it was more likely than not that the defendant presented a future danger. The jury would be using the purely comparative civil law burden of proof by preponderance of the evidence.[37]

---

proof, reflected in a trial court instruction that mixed clear and convincing (rather than beyond a reasonable doubt) with preponderance standards. *Riley Hill*, 737 P.2d at 597-606 (involving civil fraud). In the criminal context, the compound burden of proof is far worse because the defendant's innocence, liberty, and life are at stake. This burden must be rejected for the reasons given in *Riley Hill:* the substantial risk that it leads the jury to rely on a lower standard than beyond a reasonable doubt. *See* State v. Castrejon, 856 P.2d 619-20 (Or. 1993) (finding error if the jury was misled into believing it could rely on a lesser degree of proof than proof beyond a reasonable doubt); State v. Williams, 828 P.2d 1006, 1018 (Or. 1992).

34. *See Riley Hill,* 737 P.2d at 598-606.

35. *See id.* at 603-04 ("We now overrule the . . . statements . . . which imply that a clear and convincing proof standard can co-exist with a preponderance standard on the issue of burden of persuasion.").

36. One clear demonstration that the Oregon Supreme Court has not recognized or resolved the actual burden of proof issue presented here is found in *State v. Moore*, 927 P.2d 1073 (Or. 1996). In speaking for the majority on the substantive fact finding contemplated by the second death penalty sentencing question, Chief Justice Carson gives a number of alternate versions within just a few pages of this one opinion: "whether a defendant will commit violent criminal acts"; or "will be dangerous in the future"; or has the "*capacity* for future dangerousness"; or "*might* engage in dangerous, criminal conduct in the future"; or has a "*propensity* to act dangerously in the future"; or simply the "defendant's future dangerousness" (emphasis added). *Id.* at 1086-88.

37. Functionally, it would be as if the sentencing question read: "The prosecution shall have the burden to prove by a preponderance of the evidence the aggravating cir-

This is far short of the moral certainty necessary to send a man to his death. The defect is that the second sentencing question requires only proof of the probability of the ultimate fact, rather than proof of the ultimate fact itself.

B. Burden of Persuasion and Proof Beyond a Reasonable Doubt in Oregon

The burden of proof or persuasion is one of the most important procedures for proper allocation of the risk of error in legal proceedings. It ensures fairness and the desired degree of reliability and certainty in particular legal decisions.[38] It is not surprising, therefore, that the burden of proof of a particular fact is carefully calibrated to meet the circumstances at hand and to further long-held values in our legal system. As the stakes expand, and the cost and risk of error against one party increase, the burden of proof necessarily becomes greater as well. To take a few well-known examples, the ordinary civil standard of preponderance of the evidence reflects our view that private plaintiffs and defendants come to our courts of justice on even footing, and there is no reason to worry more about errors against worthy plaintiffs or worthy defendants.[39] The preponderance standard is purely comparative; there is almost no minimum threshold of evidence beyond some admissible evidence of each element, because we must decide between two parties about whom the state is neutral. When the consequences in civil cases get more serious—where the plaintiff seeks punitive damages or the state seeks to involuntarily commit a mentally ill individual, for example—we naturally raise the standard of proof to reduce the risk of error against the defendant.[40]

In the criminal context, the standard of probable cause is deemed necessary and adequate to justify certain searches and arrest (and at least brief detention until a release decision can be

---

cumstance that the defendant would commit criminal acts of violence that would constitute a continuing threat to society in the future."

38. The burden of proof "represents the degree of confidence that our society thinks that a factfinder must have in the correctness of his or her factual conclusions." State v. Williams, 828 P.2d 1006, 1024-25 (Or. 1992) (Unis, J., dissenting).

39. Even here, we do make plaintiffs prove their cases more likely than not because they seek the court's help to alter the status quo.

40. *See infra* notes 82, 118 and accompanying text.

made) to initiate the criminal process.[41] For a grand jury in Oregon to indict, the standard rises to sufficient evidence, "if unexplained or uncontradicted," to warrant a conviction.[42] And to hold someone charged with murder or treason without bail or release before trial, the state must show that the proof is "evident" or "the presumption [of guilt] strong."[43]

The justice system's highest standard of proof—proof beyond a reasonable doubt—is necessary to convict and punish an accused. This ensures the appearance of fairness (as well as actual fairness) and satisfies the offender and the rest of the citizenry that the system is morally, if not mathematically, certain that the defendant deserves our obloquy, stigma, and the qualitative degree of punishment the court is about to inflict. A related and even more important reason is the humane recognition that conviction of the innocent, or inappropriately severe punishment and stigma of even the properly convicted individual, exacts an unacceptably large cost on both the punished individual and society as a whole. Proof beyond a reasonable doubt is therefore chosen as the proper standard of proof to minimize, as far as possible (without giving up the criminal sanction altogether), the risk of these sorts of errors.[44]

Even with this high burden of proof on the state, errors still occur too frequently. One need only read accounts of the many convicted individuals who subsequently have been cleared by irrefutable evidence, especially with the advent of advanced DNA techniques. These unfortunate cases include a chilling number of individuals convicted and sentenced to death and whose claims were rejected by one or more appellate courts—including some individuals who were actually executed.[45] To this list must

41. *See, e.g.,* OR. CONST. art. VII, § 5, cl. 5.

42. *See* OR. REV. STAT. § 132.390.

43. OR. CONST. art. I, § 14; *see also* State v. Douglas, 800 P.2d 288, 293 (Or. 1990) (stating that to hold a murder defendant pre-trial without bail, "the state must prove by clear and convincing evidence that the defendant is guilty of murder"); Collins v. Foster, 698 P.2d 953, 954, 957 (Or. 1985) (murder defendant had to be released like any other defendant 60 days after arrest without a finding that "the proof of murder is evident or the presumption strong that the defendant is guilty").

44. *See, e.g., In re* Winship, 397 U.S. 358 (1970).

45. See MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENSE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 282-356 (1992); THE DEATH PENALTY IN AMERICA—CURRENT CONTROVERSIES 344-50 (Hugo Adam Bedau ed. 1997); AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT,

be added others of whose innocence we are unaware, and many more who may be guilty but who are factually or legally inappropriate candidates for death sentences. It is this last risk that requires proof beyond a reasonable doubt of every critical aggravating ultimate fact in a case against a defendant facing the death penalty.

Proof beyond a reasonable doubt is seen as a consistent and essential bulwark of liberty and justice as a matter of common law throughout the pre-statehood period of Oregon, and ever since Oregon achieved statehood in 1859.[46] Oregon's current statutes reflect this clear requirement for proof beyond a reasonable doubt with respect to the important facts to be found before guilt may be determined;[47] the degree of criminal responsibility assigned;[48] or the qualitative degree of punishment meted out to a particular defendant.[49]

A major reason for insisting on our highest standard of proof in these instances is to ensure maximum reliability and to "safeguard offenders against excessive, disproportionate or arbitrary punishment."[50] Even the proponents/drafters of the death penalty statutes recognized the essential importance of proof beyond a reasonable doubt of the life-or-death issues. But the pro-

---

AND FUTURE OF THE ULTIMATE PENAL SANCTION 229-34 (James R. Acker et al. eds., 1998).

46. *See* State v. Thomas, 806 P.2d 689, 689-90 (Or. 1991).

47. *See* OR. REV. STAT. § 136.415 (1999)(the defendant in a criminal case presumed to be innocent and is to be acquitted whenever there is a reasonable doubt about whether guilt is proved); *id.* § 10.095(6) ("[I]n criminal cases a person is innocent of a crime or wrong until the prosecution proves otherwise, and guilt shall be established beyond reasonable doubt").

48. *See* OR. REV. Stat. § 136.050 (a defendant is to be acquitted of all but the lowest degree of offense if there is a reasonable doubt as to the proper degree of guilt).

49. *See* OR. REV. STAT. § 161.055 (the state has the burden of rebutting "raised" defenses by disproving them beyond a reasonable doubt); *see, e.g.,* State v. Dameron, 853 P.2d at 1290 (Or. 1993) (the only exceptions are the few "affirmative defenses" allowed by Oregon law that have no relevance here because they serve as mitigation or mercy from established culpability, rather than as the critical aggravating circumstances that severely increase the potential qualitative level of punishment); *and* OR. REV. STAT. § 132.557 (the state must prove each subcategory fact beyond a reasonable doubt to obtain a greater sentence than otherwise would be given, even in noncapital cases).

50. OR. REV. STAT. § 161.025(1)(g) (articulating some of the general purposes of the Oregon criminal justice system); *id.* § 161.025(1)(f) (citing other purposes, such as "[t]o prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders").

tection they appeared to give with one hand, statutory proof beyond a reasonable doubt,[51] they take away with the other by insinuating "probability" between proof beyond a reasonable doubt and its proper quarry, the ultimate fact of whether the defendant would commit further criminal acts of violence.[52]

The Oregon Constitution contains many provisions that bear on the proper burden of proof of the defendant's alleged future dangerousness before the defendant may be sentenced to death. It can hardly be *just* or a *perpetuation of liberty*[53] *or life* to send a man or woman to death on less than the most reliable findings and moral certitude. Nor can it be argued that it is *necessary*[54] to cut constitutional corners to maintain order, especially when the state has the power to impose life imprisonment without possibility of release. But the Oregon statutes purport to authorize just such unconstitutional dilution with their eroded compound burden of proof for the second sentencing question.

Various provisions of the Oregon Bill of Rights contribute to the conclusion that proof beyond a reasonable doubt is constitutionally mandated in Oregon,[55] and that only this standard of proof applied to the critical factors determining life or death could conceivably allow the imposition of the death penalty.[56] These provisions, taken together with the prominent role that proof beyond a reasonable doubt has always played in Oregon from the earliest pre-statehood days to the present, and with the fact that so many laws afford citizens and classes of citizens the safety and protection of their liberty and life by proof beyond a

---

51. *See* OR. REV. STAT. § 163.150(1)(d).

52. *See id.* § 163.150(1)(b)(B).

53. OR. CONST. preamble (asserting that justice be established, order maintained, and liberty perpetuated. . . .).

54. *See* OR. CONST. art. I, § 13 (forbidding unnecessary rigor); *see also* the discussion *infra* Part III.

55. *See* OR. CONST. art. I, § 1. Section 1 "declare[s] that all men, . . . are equal in right;" section 10 mandates that "justice shall be administered . . . completely . . . , and every man shall have remedy by due course of law for injury done him in his person"; section 20 states: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

56. This is especially noteworthy because the people have repeatedly expressed varying views through their constitution about whether the death penalty is ever proper. *See* OR. CONST. art. I, §§ 36, 37, 38, 40 (abolishing capital punishment in 1914; restoring capital punishment in 1920; abolishing it again in 1964; reinstating it most recently in 1984)).

reasonable doubt, lead to the ineluctable conclusion that only proof beyond a reasonable doubt is sufficient to establish a capital defendant's future dangerousness.[57] This follows because even persons duly convicted of aggravated murder—and thereby subject to the serious deprivation of liberty up to life imprisonment—still retain a substantial fundamental interest in preserving their life. This interest is at least as great as the interest that individuals accused of a noncapital misdemeanor or felony have in obtaining an acquittal and preserving their liberty.

Other provisions of the Oregon Bill of Rights address questions of burdens of proof in different contexts. Article I, section 9 sets probable cause, together with warrant and specificity protections, as the proper standard for reasonable searches, arrests, and the initiation of the criminal justice process.[58] Even with probable cause, however, the defendant is ordinarily entitled to pre-trial release and bail, except when the charge is murder or treason and "the proof is evident, or the presumption (of guilt is) strong."[59] To hold someone charged with the most serious crimes for the limited time prior to trial, the state must satisfy a burden of proof substantially greater than more likely than not.[60]

This also must be the case when the state seeks to exercise its ultimate power to execute a convicted offender who otherwise would receive a sentence of life in prison. As is developed more fully in Part III of this Article, article I, section 13 of the Oregon Constitution, forbidding unnecessary rigor, further supports the requirement of proof beyond a reasonable doubt. Even if the per se unconstitutionality argument of Part III is set aside, certainly the most reliable procedures (including the full application of proof beyond a reasonable doubt) are required to

---

57. This is especially the case because a contrary holding would result in the anomalous situation that noncapital defendants would be entitled to proof beyond a reasonable doubt of categorical sentence enhancing aggravating factors (subcategory facts), while capital defendants would not be entitled to proof beyond a reasonable doubt of the most important aggravating factor (the second sentencing question) enhancing the sentence category from life to death. *See supra* note 49. Such a result also would raise serious questions under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. U.S. CONST. amend XIV, § 1.

58. *See also* OR. CONST. art. VII, § 5(5) (amended 1999).

59. OR. CONST. art. I, § 14.

60. *See* State v. Douglas, 800 P.2d 288, 293 (Or. 1990) (holding that clear and convincing evidence is necessary); Collins v. Foster, 698 P.2d 953, 955 (Or. 1985) (requiring that proof is evident or the presumption of guilt is strong).

ensure that the death penalty with its significantly greater rigor and severity than lesser sentences is not imposed "unnecessarily."[61]

Oregon guarantees the accused a jury trial in all criminal prosecutions.[62] The framers understood the essence of a criminal jury trial to include the presumption of innocence and proof beyond a reasonable doubt.[63] One reason for this, among others, is to "impress on the jury the solemnity and importance of its decision."[64] An analysis of the detailed language of section 11 clarifies the requirement of the highest level of reliability and certainty before an accused may be subjected to the death penalty. In a noncapital case, the defendant may waive the right to a jury and be tried and convicted by a judge alone; but not in a capital case.[65] Enough proof to persuade ten of twelve jurors is adequate for a conviction and long prison sentence for serious felonies short of first degree murder.[66] However, the proof, and hence the effective burden on the prosecution, must be stronger in a capital murder case—enough to persuade all twelve jurors.[67] And the protection afforded the defendant against compelled self-incrimination[68] gives concrete meaning to the principles that

---

61. *See* OR. CONST. art. I, § 16 (recognizing the jury's "right" and responsibility to "determine . . . the facts," presumably with the highest degree of reliability possible in criminal cases, partly to assure that "all penalties are proportioned to the offense").

62. *See* OR. CONST. art. I, § 11, which provides in part:

> 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; . . . 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. . . .

Id.

63. *See, e.g.*, Brown v. Multnomah County Dist. Court, 570 P.2d 52, 55 (Or. 1977) ("proof beyond a reasonable doubt . . . may well be implicit in the concept of a 'criminal prosecution' as understood when the constitution was adopted in 1859").

64. State v. Castrejon, 856 P.2d 619, 621 (Or. 1993).

65. *See* State v. Smith, 872 P.2d 966, 968 (Or. 1994) (holding that trial by jury is compulsory in capital cases and that judges cannot permit defendants to proceed by bench trial).

66. *See* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

67. *See* OR. CONST. art. I, § 11.

68. *See id.* I, § 12.

(1) the defendant is presumed innocent (and presumed not to merit execution); (2) the entire burden of proof must therefore be placed on the prosecution; and (3) this burden must be high (i.e., proof beyond a reasonable doubt) to avoid putting improper pressure on the defendant to try to disprove guilt or eligibility for the death penalty.

This discussion brings us to article I, section 33 of the Oregon Constitution, which provides: "[t]his enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people."[69] This statement at first may seem simplistic and tautological, but it is actually a profound assertion of the primacy of individual human rights as trumps against the occasional excesses of the majority, including the natural tendency[70] to try to make it easier to convict, punish, and execute accused individuals. Section 33 is not a repository for rights that are not clearly textual. However, section 33 is an unambiguous assertion that such rights exist, and it is a signpost for the Oregon courts to use legitimate sources of law and methods of interpreting those sources to recognize and enforce cherished fundamental rights.[71] Whatever other such rights that constitutional text, precedent, history, tradition, principles of fundamental justice and fairness suggest might be found and enforced through article I, section 33, it is clear that among them must be that the most careful reliability is required before a person is sentenced to death—that is, proof beyond a reasonable doubt of all essential aggravating factors determining the issue of life or death.[72] The convicted aggravated murderer retains a fundamental right to continued life, even though liberty is justifiably taken away; this right can be overcome only by a compelling showing by the prosecution with the least risk of an erroneous deprivation of the

---

69. *Id.* § 33.

70. The majority relies on a false sense of security that only the guilty or executable will be caught in the net.

71. Justice Goldberg offers a similar construction of the Ninth Amendment to the federal Constitution. Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring). *See also* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people").

72. Several Oregon Supreme Court Justices have concluded that "proof beyond a reasonable doubt in a criminal prosecution is a right protected by Article I, Section 33, of the Oregon Constitution." *See, e.g.*, State v. Williams, 828 P.2d 1006, 1024 (Or. 1992) (Unis, J., dissenting).

defendant's life.

Even article I, section 40, drafted by proponents for the reinstatement of capital punishment in Oregon and adopted by initiative petition in 1984, supports the argument that the watered-down burden of proof for the second sentencing question violates the Oregon Constitution. Section 40 requires that death will be the penalty only "upon affirmative jury findings."[73] As already noted, the correct and collective understanding of a criminal jury, including its function in determining when an offender should be sentenced to death, is that it should err, if err it must, in favor of the defendant and act against the defendant only on proof beyond a reasonable doubt.[74] Under the poorly-crafted statutes at issue here, it is not proper to say that the jury makes an "affirmative" finding of the defendant's future dangerousness when the statutes leave the defendant with the effective burden of proving he or she is not dangerous.[75] Supporters of section 40, proposed by initiative as Ballot Measure 6, specifically assured the Oregon voters that this amendment to the constitution would "apply the death penalty only to cases of conviction for 'aggravated murder,' that murder which society deems the worst of worst cases, the most heinous and bloodthirsty; that which is committed by a felon, *who is deemed a continuing danger to Oregonians.*"[76]

Even more to the point, the proponents expressly promised the voters that "all decisions [would be] . . . 'beyond a reasonable doubt,'" and "unanimous jury decisions [would be required] . . . on the appropriateness of the death penalty instead of an alternate, long prison sentence."[77] This is important evidence of what the voters thought they were approving in amending the Bill of Rights by adding article I, section 40. Particularly on an initiative petition, the voter's intent should control where the text admits of more than one interpretation. More fundamentally, the proponents were right about what the Oregon Constitution,

---

73. OR. CONST. art. I, § 40.

74. *See supra* notes 62-67 and accompanying text.

75. *See supra* notes 26-31 and accompanying text.

76. DEDI STREICH, Concerned Oregonians for Justice, *Argument in Favor*, *in* OFFICIAL 1984 GENERAL ELECTION VOTERS' PAMPHLET 29 (Oregon Secretary of State, Salem, Or., for Nov. 6, 1984 election) (emphasis added).

77. *Id. See also* OR. CONST. art. I, § 40 (expressly requiring "unanimous affirmative jury findings" for death rather than life).

as amended, requires: proof beyond a reasonable doubt. They were simply wrong about whether the statutory provisions they supported complied with those constitutional mandates.

"Proof beyond a reasonable doubt is . . . a pervasive, historically ingrained requirement in criminal trials . . . uniformly required in Oregon near the time of statehood."[78] Modern cases reaffirm and strengthen the centrality of proof beyond a reasonable doubt as a bulwark against the state erroneously depriving an accused of liberty or life.[79]

In the ordinary noncapital case, the twin correlative guarantees of presumption of innocence and proof beyond a reasonable doubt of the offense elements protect the accused individual's liberty and reputational rights against undue risk of erroneous deprivation.[80] They give meaning to the fundamental proposition that we as a society must be cautious when the state arrays its awesome power against an individual for the purpose of imposing the stigma and punishment of criminal guilt and deprivation of freedom.

Both the Oregon and U.S. Constitutions, through these and other procedural means, nobly adhere to the proposition that it is "far worse to convict an innocent person than to let a guilty person go free."[81] The defendant, though, cannot justly complain

---

78: State v. Thomas, 806 P.2d 689, 689-90 (Or. 1991). For some relatively early cases strongly affirming the reasonable doubt requirement, *see* State v. Glass, 5 Or. 73, 81-84 (1873); State v. Ah Lee, 7 Or. 237, 242, 244 (1879); State v. Anderson, 10 Or. 448, 460 (1882); State v. Ching Ling, 18 P. 844, 849 (1888) ("It is not enough to show that the accused is *probably* guilty, but he must be proved guilty, not beyond a possible doubt, but beyond a reasonable doubt") (emphasis added). Additional constitutional and historical sources for the requirement are collected in *Thomas*, 806 P.2d 689 at 690 nn.2-3; State v. Williams, 828 P.2d 1006, 1016-22 (Or. 1992); *id.* at 1024-28 (Unis, J., dissenting); State v. Boots, 848 P.2d 76, 88-89 (Or. 1993) (Unis, J., dissenting).

79. *See* Lyons v. Pearce, 694 P.2d 969, 973 (Or. 1985) (guilt is to be established only by proof beyond a reasonable doubt or valid guilty plea); State v. Rainey, 693 P.2d 635, 639 (Or. 1985) (requisite "reasonable doubt standard requires that the prosecution prove each element of the crime beyond a reasonable doubt."); State v. Pratt, 853 P.2d 827, 836 (Or. 1993); State v. Castrejon, 856 P.2d 616, 618-20 (Or. 1993) (approving various reasonable doubt instructions, but making clear that any instruction that misled a jury into thinking it could convict on a diluted standard or lesser degree of proof than beyond a reasonable doubt would be error); *see also* Cage v. Louisiana, 498 U.S. 39 (1990))for a similar requirement under the federal constitution's due process clauses); U.S. CONST. amends. V and XIV.

80. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975).

81. *In re* Winship, 397 U.S. 358, 373 (1970) (Harlan, J., concurring); *see also* State v. Boots, 848 P.2d 76, 89 (1993) (Unis, J., dissenting).

about an appropriate loss of liberty once the state has shown its justifiable compelling reasons by overcoming the presumption of innocence with proof beyond a reasonable doubt for a particular level of offense. But in an aggravated murder case, while a proper guilty finding justifies a deprivation of liberty to the extent of life imprisonment, the defendant retains an important presumption of life.

This presumption is at least as important as the ordinary defendant's presumption of innocence at the outset of a criminal trial. Thus, proof beyond a reasonable doubt applies with the same or more force. The state seeking the convicted defendant's death must establish that the asserted factors arguably justifying this result are "almost certainly correct," not that they are probably correct.[82]

The following hypotheticals establish beyond any lingering doubt that Oregon's compound burden of proof for the second sentencing question permits death sentences where the determination that the defendant presents a future danger is at most probably correct. The prosecutor's actual burden amounts to

---

82. Of course, "probable cause is not certainty; 'there is a vast difference between proof of probable cause and proof [beyond a reasonable doubt] of guilt.'" State v. Goodman, 975 P.2d 458, 462 (Or. 1998) (quoting with approval *State v. Tacker*, 407 P.2d 851, 853 (Or. 1965)).

Even if proof beyond a reasonable doubt were not so clearly required with respect to the second sentencing question, the reliability concerns and constitutional need to reduce errors against defendants mandate at least clear and convincing evidence. This is especially true because the Supreme Court held that the Fourteenth Amendment due process clause requires that both an individual's mental illness and future dangerousness be established by clear and convincing evidence before that individual may be committed involuntarily under the police power. *See* Addington v. Texas, 441 U.S. 418 (1979). The basis for the court's ruling—concern about erroneous deprivations of liberty and stigma imposed on the individual to be involuntarily committed—applies with even greater force when a convicted defendant who otherwise would receive life imprisonment is to be executed.

The Oregon courts have required clear and convincing evidence with respect to many issues where the stakes are more important than the ordinary civil case, but not nearly as important or irrevocable as capital punishment. *See, e.g.*, Zockert v. Fleming, 800 P.2d 773 (Or. 1990). Some examples include: the termination of parental rights and contested adoption proceedings. *See id.* at 780 ("Absent federal court or state legislative direction" to the contrary, the Oregon Supreme Court will require clear and convincing evidence based on "the severity of the consequences to the litigant" in a civil case); claims for specific performance of certain contracts relating to the testamentary disposal of property, *see* Willbanks v. Goodwin, 709 P.2d 213, 216 (Or. 1985); and common-law actions for deceit, *see* Riley Hill Gen. Contractor v. Tandy Corp., 737 P.2d 595, 606 (Or. 1987).

proof of future dangerousness by less than a preponderance of evidence,[83] and substantially less than constitutionally mandated proof beyond a reasonable doubt:

1. Suppose that under an ordinary homicide scheme, the jury is instructed that the prosecution must prove beyond a reasonable doubt that "the defendant caused the victim's death." Now consider that, under a different hypothetical scheme, the jury is instructed that the prosecution must prove beyond a reasonable doubt that "there is a probability that the defendant caused the victim's death." Clearly it is only under the first scheme that the prosecution proves causation beyond a reasonable doubt. Under the second scheme, the jury could have a reasonable doubt, or could not even be convinced clearly and convincingly about causation, and still convict.

2. In a theft charge, the degree of the crime and the amount of punishment depend on the value of the goods taken. Would it be sufficient for the legislature to allow the state to prove beyond a reasonable doubt that there was only a "probability" the goods were worth more than $200 in order to obtain a conviction for the greater crime and exact enhanced punishment on the defendant? The question answers itself with a resounding "No!" for the same reason as above. The legislature, under our constitutional systems, may choose $100, $200, or $500 as the substantive criterion for distinguishing misdemeanor from felony theft; but it may not tamper with constitutionally mandated procedural safeguards such as proof beyond a reasonable doubt of the substantive aggravating factors that the legislature chooses.[84]

The same defect occurs whenever "probability" or "more likely than not" is inserted into any element of a crime. It is a stealthy method of watering down the constitutionally mandated standard of proof and of shifting the burden of disproving each element's ultimate facts to the defendant—something the state manifestly cannot do.[85]

3. It also does not matter whether the element in question is

83. Requiring less than a preponderance of the evidence means that the real burden of persuasion falls unconstitutionally on the defendant to disprove his future dangerousness. *See infra* Part II.C.

84. *See generally* Apprendi v. New Jersey, 530 U.S. 466 (2000); Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); State v. Burrow, 653 P.2d 226 (Or. 1982).

85. *See, e.g., Castrejon,* 856 P.2d at 620-21; *Williams,* 828 P.2d at 1016.

purely backward-looking in the sense that it deals with a completed act and a completed harm, or whether it deals with a completed act that leads to future harm. Consider, for example, one type of arson under Oregon law.[86] The government must prove beyond a reasonable doubt that the defendant started a fire or caused an explosion intentionally damaging property (the backward completed act) that recklessly places another person in danger of physical injury (the future harm that could arise after the defendant has completed his act).[87] It would not be enough for the government to show that there was a probability a person might be placed in danger.

Burglary is another example of a crime with a future-oriented element. It consists of criminal trespass of a building (entering or remaining unlawfully) with the intent to commit a crime therein.[88] It would be constitutionally inadequate for the prosecutor to *prove beyond a reasonable doubt a probability* that the defendant intended to commit a future crime after his illegal entry.[89] As already discussed, the first three death penalty sentencing questions (especially the second/future dangerousness question at issue here) are the aggravating factors that raise the potentially capital aggravated murder conviction to a true capital offense. Just as the aggravating factors converting trespass to burglary must be proved beyond a reasonable doubt, so too must the aggravating factors creating a true capital offense.

4. Now consider Oregon's actual aggravated murder statute.[90] Insertion of the words "a probability" as a qualifier with respect to any of the "circumstances" elevating ordinary murder to aggravated murder would create an unconstitutional absurdity.[91]

---

86. *See* OR. REV. STAT. § 164.325(1)(b).

87. *See id.*

88. *See id.* § 164.215.

89. *See* State v. Hartfield, 624 P.2d 588, 594 (Or. 1981) ("To prove a burglary, the state must establish [beyond a reasonable doubt] a criminal trespass and *the aggravating factors* which raise the trespass to a burglary.") (emphasis added) (the defendant's conviction was reversed and remanded on other grounds).

90. *See* OR. REV. STAT. § 163.095 (1999).

91. *See, e.g., id.* § 163.095(1)(a) (the state would prove only that there was *a probability* that the defendant agreed to commit the murder for money, or that the defendant would *probably* receive money for the crime); *id.* § 163.095(1)(b) (similarly, the defendant *probably* agreed to pay another, or *probably* would pay, rather than requiring proof beyond a reasonable doubt that the defendant actually agreed to pay); *id.* §

State v. Brown[92] is instructive on this point. In that case, the defendant was convicted of aggravated murder based on the victim's status as a witness.[93] The trial judge properly instructed that the state had to prove beyond a reasonable doubt that the victim "was to be a witness in a criminal case"—not that there was a probability that she would be a witness.[94] With respect to the additional requirement of the defendant's mental state, it would not be enough to show there was a *probability* that the defendant knew that the victim was to be a witness, or that there was a *probability* that he killed her because she thus presented a "future danger" to him.

It is noteworthy that the court in *Brown* reversed the conviction despite the fact that the defendant had not objected to the trial court's erroneous instruction.[95] One reason articulated by the court in deciding to waive its normally stringent insistence that the defendant preserve exceptions at the trial level is directly apposite here: "The prejudice to defendant is profound, because the missing element makes the difference between life and death."[96] The second sentencing question, with its defective burden of persuasion, is similar because it is often the critical aggravating factor that makes the life-or-death difference.

5. Even in noncapital cases, in addition to statutory elements, the state must allege (and prove beyond a reasonable

---

163.095(1)(e) (*a probability* the victim was maimed or tortured); *id.* § 163.095(1)(f) (*a probability* that the victim was under the age of 14); *id.* § 163.095(2)(a) (more likely than not the murder was related to the performance of the victim's official duties); *id.* § 163.095(2)(e) (murder was committed *probably* to conceal the future discovery of the commission of a crime or the future discovery of the identity of the perpetrator, as opposed to proving beyond a reasonable doubt that this was the defendant's actual purpose).

92. 800 P.2d 259 (Or. 1990).

93. OR. REV. STAT. § 163.095(2)(a)(E) (increasing the level of offense from murder to aggravated murder).

94. Even so, the Oregon Supreme Court reversed the defendant's aggravated murder conviction because the trial judge failed to instruct further that the State also had the burden to prove beyond a reasonable doubt that the defendant killed the victim because of her status as a future witness. *See* Brown, 800 P.2d at 264 (citing with approval *State v. Maney*, 688 P.2d 63 (Or. 1984) ("If, for example, a person intentionally kills someone without knowledge that the victim was a member of one of the designated classes, or for a reason unrelated to that status, the requisite causal connection would not have been met and a charge of aggravated murder would not have been stated")).

95. *See id.* at 264.

96. *Id.* at 265.

doubt) subcategory facts that can result in enhanced punishment and stigma.[97] Oregon's sentencing guidelines enhancement statute provides: "The state must prove each subcategory fact beyond a reasonable doubt and the jury shall return a special verdict of "yes" or "no" on each subcategory fact submitted."[98] This holds even though the "only function of the [subcategory fact is] . . . to move up . . . (or enhance an offense) for sentencing purposes."[99] Plainly it would not suffice to prove beyond a reasonable doubt a "probability" or "more likely than not" the subcategory fact. The subcategory fact itself must be proved beyond a reasonable doubt. Subcategory facts come in two flavors: offense characteristics and offender characteristics.[100] In either case, the subcategory fact, rather than its probability, is pleaded and proven beyond a reasonable doubt.[101] To take an example, a subcategory fact for child abandonment is "whether 'the child victim was placed in immediate *danger*.'"[102] Proof beyond a reasonable doubt of a probability that the child would be placed in danger would not suffice. The parallels to the defective compound burden of proof with respect to the second death penalty sentencing question are evident.

Countless other examples could be given, but it has already been shown beyond peradventure that, under Oregon's death penalty statutes, the ultimate fact (whether the defendant would commit criminal acts of violence that would constitute a continuing threat to society) is not proved beyond a reasonable doubt, or by clear and convincing evidence.[103] In fact, under these statutes, the defendant effectively must shoulder the burden to show that he or she is not dangerous and will not commit future acts of violence.

C. What Must Be Proved Beyond a Reasonable Doubt, and What

---

97. *See* OR. REV. STAT. § 132.557.

98. *Id.* § 132.557(2).

99. State v. Ferrell, 843 P.2d 939, 942 (Or. 1992); *see generally* State v. Flanigan, 851 P.2d 1120 (Or. 1993) (failing to establish subcategory fact resulted in a lower sentence than that sought by the state); State v. Lark, 851 P.2d 1114 (Or. 1993) (finding that subcategory fact properly alleged and proved, and defendant's sentence therefore upheld).

100. *See Lark*, 851 P.2d at 1118.

101. *See id.* at 1116.

102. *Id.* at 1117 n.9 (emphasis added).

103. *See also supra* notes 26-31, 83 and accompanying text.

May Be Proved By a Lower Burden of Persuasion

Not everything relating to a convicted criminal defendant's punishment need be proven beyond a reasonable doubt by the state. To establish that Oregon's death penalty statutes are unconstitutional, it remains to demonstrate that the Oregon and U.S. Constitutions require that future dangerousness is one of the factors that must be proved by the prosecution (rather than disproved by the defendant) beyond a reasonable doubt.[104]

Under Oregon's traditional indeterminate sentencing system[105] or under our newer mandatory sentencing guidelines model,[106] the judge clearly has discretion to take account of information that has not been factually proven beyond a reasonable doubt. This discretion includes making judgments about remorse, rehabilitative potential, the severity of the particular criminal's conduct, and whether the offender has redeeming qualities.[107]

This leads some to an overly simplistic syllogistic system of burdens of proof—one where the state must prove everything beyond a reasonable doubt to the satisfaction of a jury until guilt is established, but where there is no comparable burden of proof at the sentencing phase. Under such a system, the sentencing authority has essentially unbridled discretion to choose a sentence.[108] Such a system misconceives the purposes of proof beyond a reasonable doubt (and other burdens of proof), and is demonstrably wrong in both directions.

First, there are some types of facts and issues relating to guilt and innocence that the state need not prove beyond a reasonable doubt, e.g., Oregon's few affirmative defenses.[109] In

104. Certainly, the prosecution must prove, at least, future dangerousness by clear and convincing evidence. *See supra* note 82.

105. Under this model, the sentencing judge could choose a sentence including incarceration up to the statutory maximum, but the parole board could reduce the actual time served.

106. Under this model, the judge has discretion to choose a sentence within the range specified in the appropriate grid-block.

107. Williams v. New York, 337 U.S. 241, 246 (1949).

108. It was precisely this sort of unbridled discretion in the sentencing phase of death penalty cases that led the U.S. Supreme Court to declare all then-existing death penalty statutes unconstitutional in 1972. *See* Furman v. Georgia, 408 U.S. 238 (1972).

109. *See* OR. REV. STAT. § 161.055.

State v. Burrow,[110] for example, a divided court upheld a former statute that contained an affirmative defense to felony murder, thereby placing the burden on the defendant at trial to prove, inter alia, his lack of personal involvement in the homicidal act, in order to reduce his conviction from felony murder to the underlying felony.[111] Significantly, the majority carefully clarified that this was constitutional only because the defendant would already have been guilty of traditional felony murder as an aider and abetter.[112] The affirmative defense was created to mitigate the degree of the defendant's punishment and stigma, rather than shifting the burden to the defendant to disprove an aggravating element of the offense. "The purpose of creating the . . . affirmative defense was to lessen the harshness of the felony murder doctrine."[113] By contrast, the question of whether an aggravated murder defendant will commit crimes of violence in the future is the crucial aggravating factor that takes an individual from a situation where the state may incarcerate for life to a situation where the state may execute.[114]

The fourth death penalty sentencing question ("[w]hether the defendant should receive a death sentence") is, on the other hand, for pure mitigation purposes.[115] Thus it is markedly different from the question of "whether the defendant will commit criminal acts of violence in the future."[116] For this reason, and

110. 653 P.2d 226 (Or. 1982).

111. *See id.*

112. *See id.*

113. *Id.* at 231.

114. *See* State v. Guzek, 906 P.2d 272 (Or. 1995).

115. *See id.* at 278; OR. REV. STAT. § 163.150(1)(b)(D).

116. The fourth question actually reinforces the conclusion that the capital defendant's future dangerousness must be proved beyond a reasonable doubt. It is a mercy question that "permits the jury to spare defendant's life if the jury believes [it] . . . appropriate." State v. Pinnell, 806 P.2d 110, 122 (Or. 1991). In fact, this standard requires a life sentence rather than death if even a single juror "believe[s] that the defendant should not receive a death sentence." Or. REV. STAT. § 163.150(1)(c)(B). Initially, only mitigating evidence was relevant and material to this question. *See* State v. Guzek, 906 P.2d 272, 277 (Or. 1995). Although the fourth sentencing question remains the same, legislative changes to other parts of the statute, adopted by the 1995 and 1997 legislative assemblies, purport to broaden the scope of evidence that may be introduced and considered by the jury: "[V]ictim impact evidence . . . and any [other] aggravating and mitigating evidence" that the trial judge deems "relevant" to the fourth sentencing question may now also be presented. *See* 1995 Or. Laws ch. 531, § 2 (amending OR. REV. STAT. § 163.150(1)(c)(B)); *id.* ch. 657, § 23. Furthermore, the trial judge is required to instruct the jury to consider any such evidence before deciding

this reason alone, the prosecution was constitutionally relieved from carrying a burden of proof with respect to the fourth question.[117]

Second, there are matters not even labeled criminal by the legislature that must be proved beyond a reasonable doubt.[118] And there are matters that are labeled death penalty sentencing questions that already have been held subject to the full panoply of criminal procedure protections, including jury trial and proof beyond a reasonable doubt.[119]

In *State v. Quinn* and *State v. Wedge*,[120] the Oregon Supreme Court distinguishes between "facts which constitute the crime

---

whether the defendant should receive a death sentence. *See* 1997 Or. Laws ch. 784, § 1 (amending OR. REV. STAT. § 163.150(1)(c)(B)). And in contrast with the three aggravating factors in the first three questions, "[there] is no burden of proof on the fourth question because it does not present an issue subject to proof in the traditional sense, rather it frames a discretionary determination for the jury." State v. Wagner, 786 P.2d 93, 100 (Or. 1990). By contrast, "the substantive law has declared [the defendant's future dangerousness] to be a provable fact." State v. Montez, 789 P.2d 1352, 1382 (Or. 1990).

117. *See Guzek*, 906 P.2d at 257, 263. To the extent that subsequent legislative amendments to the death penalty procedures in 1995 and 1997, 1995 Or. Laws c. 531 § 2; c. 657 § 23 (OR. REV. STAT. § 163.150(1)(a)) (1999); 1997 Or. Laws c. 784 § 1 (OR. REV. STAT. § 163.150(1)(c)(B)) (1999), may be construed to undermine the mercy or mitigation function of the fourth sentencing question, this would no longer be constitutionally permissible.

118. *See, e.g., In Re* Winship, 397 U.S. 358 (1970) (providing that proof beyond a reasonable doubt is required for the facts constituting the basis of a juvenile delinquency finding); Brown v. Multnomah County Dist. Court, 570 P.2d 52 (Or. 1977) (requiring the right to counsel and proof beyond a reasonable doubt for first drunk driving "conviction" despite legislative characterization of the charge as noncriminal); criminal contempt, which for a long time was provable by clear and convincing evidence or less, State *ex rel.* Hathaway v. Hart, 708 P.2d 1137, 1140-41 (Or. 1985), now must be proven beyond a reasonable doubt; Drevers v. Drevers, 781 P.2d 343, 343 (Or. 1989) (requiring proof beyond a reasonable doubt, relying on Hicks v. Feiock, 485 U.S. 624 (1988)); and theft, even when prosecuted as a violation without the possibility of incarceration, rather than as a misdemeanor, also requires proof beyond a reasonable doubt based on the Oregon Supreme Court's interpretation of Oregon statutes. *See* State v. Thomas, 806 P.2d 689, 689-91 (Or. 1991).

119. *See* State v. Quinn, 623 P.2d 630 (Or. 1981) (holding the 1978 death penalty statutes unconstitutional because death penalty sentencing question number one was to be answered by the judge, rather than by the jury, as required by OR. CONST. art. I, § 11). In *Quinn*, the statute already required proof beyond a reasonable doubt, as does the current statute relating to sub-category facts for the sentencing guidelines matrix; but it is clear that if it had not, the death penalty would have been held unconstitutional on that ground as well). *See id.*

120. 652 P.2d 773 (Or. 1982).

. . . and those which characterize the defendant."[121] But the distinctions between the sentencing enhancing factors that must be proven beyond a reasonable doubt are not so simple. *Quinn* involved only the jury trial right. Proof beyond a reasonable doubt is the more important procedural protection to ensure the reliability necessary in finding aggravated circumstances in a death penalty case.[122] And while *Wedge* was a noncapital case, the court required proof beyond a reasonable doubt of the aggravating factor.[123]

It is apparent, especially in Oregon, that the proper test of what must be proved beyond a reasonable doubt is a functional one, rather than a mere syllogistic labeling approach. The real reason the judge normally can rely on information outside of the confines of the stringent proof beyond a reasonable doubt protections in choosing a sentence of incarceration within a preset range is not that these "facts" or factors happen to be placed in the sentencing proceeding, or even that they are sentencing-factor-like rather than element-like (offender rather than offense characteristics).[124] Rather, it is because the state already has proved its compelling interest in taking away some of the defendant's liberty (up to the statutory or administrative maximum) and guarded against doing so erroneously by proving the defendant's guilt of legislatively graded conduct beyond a reasonable doubt. The defendant would prefer twenty months incarceration to twenty-four months, but this is at most a difference in degree and not in kind. The state has already amply

---

121. *Quinn*, 623 P.2d at 643; *Wedge*, 652 P.2d at 777. *Quinn* makes this point to reassure us that normal sentencing practices by judges, without juries, and other previously approved enhanced sentencing statutes, such as the habitual criminal statutes, are not being called into question.

122. *See* discussion *infra* notes 140-146 and accompanying text.

123. *See Wedge*, 652 P.2d at 778.

124. The jury's determination of whether the defendant will commit future acts of violence depends on a mix of offender and offense characteristics, as well as external factors, such as the defendant's perceived character, nature, rehabilitative potential, and nature of the crime. This is quite similar to the jury's determination of the defendant's deliberation under the first sentencing question, which the Oregon Supreme Court already has held must be subject to the full panoply of criminal procedure safeguards. *Quinn*, 623 P.2d at 777-78.

While the legislative power has considerable leeway concerning the substantive criteria for guilt/innocence, and even life/death, for a convicted offender, it has no power whatsoever over constitutionally prescribed procedures. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); Apprendi v. New Jersey, 530 U.S. 466 (2000).

demonstrated that the defendant deserves twenty-four months with proof beyond a reasonable doubt and a jury verdict. That is, the defendant's established and proven conduct fully justifies the extinguishment of the presumption of innocence and the deprivation of liberty up to the statutory/administrative maximum.[125]

This is not the case with respect to the death penalty because of the "difference in the magnitude of punishment between deprivation of liberty and deprivation of life"[126] or, as the U.S. Supreme Court has put it, "the qualitative difference between death and all other penalties."[127] When the defendant is convicted of aggravated murder, the state has overcome the presumption of innocence and established the defendant's culpability for very serious harm beyond a reasonable doubt, thereby justifying the state's power to incarcerate the defendant for life. That is why it is almost certainly constitutional to require the defendant to shoulder the burden of showing that he is a reasonable candidate for rehabilitation before he can be released from prison under a sentence of life with a minimum of at least thirty years before possibility of release.[128]

But everything about the death penalty, and virtually everything the courts have said for the last twenty-five years, indicates that just the opposite is the case when it comes to a sentence of execution.[129] That is, the defendant retains a powerful interest and right in life and liberty and to not receive the death penalty

125. As noted earlier, however, when the prosecution seeks to move the defendant up in the sentencing guidelines matrix because of the existence of subcategory factors, said factors must be specifically pled and proved beyond a reasonable doubt. This holds equally true whether the subcategory factors are offense characteristics or offender characteristics. Similarly, if a sentencing judge chooses to give a sentence in excess of (or, for that matter, below) the presumptive range in the defendant's correct grid-block, commonly referred to as a departure sentence, the judge must state "substantial and compelling reasons." State v. Davis, 847 P.2d 834, 836 (Or. 1993). For a discussion and analysis of Oregon's sentencing guidelines system, see State *ex rel.* Huddleston v. Sawyer, 932 P.2d 1145 (Or. 1997), and *Davis,* 847 P.2d at 835-36.

126. State v. Quinn, 618 P.2d 412, 414 (Or. 1980).

127. Harmelin v. Michigan, 501 U.S. 957, 995 (1991); Monge v. California, 524 U.S. 721, 732 (1998).

128. OR. REV. STAT. § 163.105(2). Likewise, all defendants had the burden to show they should be paroled prior to serving their full judicially imposed sentence within the legislative maximum under Oregon's previous indeterminate sentencing system. *See id.*

129. *See infra* notes 131-139 and accompanying text.

unjustly. This right is at least as important as a regular criminal defendant's right to the presumption of innocence and liberty unless and until the prosecutor can prove guilt beyond a reasonable doubt. The prosecutor retains the burden to justify the death penalty, even for a convicted aggravated murderer. The state must surely show it has a compelling interest beyond the defendant's guilt to execute the particular defendant, rather than settle for the very stringent, but lesser, penalty of true life. And of course, the state must meet all the procedural safeguards necessary to minimize the risk that an inappropriate individual will receive the ultimate sanction. A few quotations suffice to make this important point:

> [B]ecause the death penalty is uniquely severe and irrevocable, certainty, to the extent humanly possible, is essential to avoid the execution of an inappropriate individual.[130]
>
> The imposition of death by public authority is . . . profoundly different from all other penalties.[131]
>
> This Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.[132]

The Oregon Supreme Court agrees.[133]

The death penalty is unique in its severity and finality.[134] "In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases."[135] For these reasons, Chief Justice Burger points out in *Estelle v. Smith*[136] that just as the Fifth Amendment prevents a criminal defendant from being made "the deluded instrument of his own conviction," it also protects him from being made the "deluded instrument of his own execution."[137] These statements support

130. Kanter, *Brief Against Death, supra* note 28, at 640.

131. Lockett v. Ohio, 438 U.S. 586, 605 (1978) (Burger, C.J., plurality opinion).

132. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

133. *See* State v. Guzek, 906 P.2d 272, 284 (Or. 1995) (death is qualitatively different in kind rather than degree and therefore requires a higher level of reliability than that needed for the determination of other sanctions).

134. *See* Gardner v. Florida, 430 U.S. 349, 357 (1977).

135. Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring).

136. 451 U.S. 454 (1981).

137. *Id.* at 462.

the argument that many trial-like procedures are constitutionally mandated in death sentencing hearings, especially those that reduce errors against the defendant and ensure reliability, certitude, and fairness. Proof beyond a reasonable doubt is the quintessential procedure to protect these values. For example, "[f]undamental 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."[138] Similarly, the Oregon Supreme Court specifically has treated the bifurcated penalty phase of an aggravated murder prosecution as a part, and continuation, of the trial.[139]

It has already been amply demonstrated that the second sentencing question is a critical factor in determining whether a particular defendant receives the death penalty. It is therefore apparent that the highest degree of reliability is required in determining whether the defendant would commit criminal acts of violence in the future. By analogy to *Quinn*, it is unthinkable that this question could be left to the judge rather than the jury under the Oregon Constitution.

It is even more evident that the factual conclusion must be proved beyond a reasonable doubt. This is because, although many important values are served by the jury trial right,[140] proof beyond a reasonable doubt is even more vital to ensure reliability and reduce the risks of erroneous and inappropriate death sentences. This reflects our Constitutions' sound bias against erroneously or inappropriately executing an individual, despite the fact that some who arguably deserve the death penalty will "get off" with true life imprisonment.[141]

---

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

139. *See* State v. Stevens, 806 P.2d 92, 110 (Or. 1991) (holding that the prosecutor is entitled to rebuttal argument at the penalty phase just as at the guilt/innocence phase because certain procedures should "apply equally to the penalty phase").

140. *See* Kanter, *supra* note 28, at 657-62 (stating that the jury serves as an indicator of community values, performs an important ceremonial function, reflects shared responsibility for decisionmaking, and contributes to the appearance of fairness).

141. *Cf.* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (distinguishing proof beyond a reasonable doubt from jury trial on precisely the ground that proof beyond a reasonable doubt reduces errors against defendants, while both judges and juries are equally likely to make errors for and against defendants). *In Re* Winship, 397 U.S. 358 (1970), requires proof beyond a reasonable doubt in juvenile proceedings; but based on the above distinction, the *McKeiver* court refused to extend *Winship* and require jury trials for delinquency determinations. *McKeiver*, 493 U.S. at 1985-86.

Oregon constitutional law stands for the proposition that while juvenile delinquency proceedings are not "criminal prosecutions" requiring jury trial under article I, section 11, the juvenile's potential loss of liberty and the stigma of being labeled delinquent require all the procedures that ensure reliability—those that guard against unacceptable risks of erroneous determinations of delinquency against the juvenile.[142]

The constitutional importance in Oregon of the highest reliability burden of persuasion (beyond a reasonable doubt) compared with jury trial is further illuminated in *State v. Stewart*.[143] There the Oregon Supreme Court held that juvenile adjudications against the defendant (without benefit of jury) could be considered in subsequent adult criminal prosecutions to enhance the individual's sentence (in this case by at least four months) under Oregon's sentencing guidelines.[144] The court reasoned that such adjudications were made lawfully and reliably and therefore should be useable. Surely invalid adjudications or those without sufficient indicia of reliability (including proof beyond a reasonable doubt) could not constitutionally be used.[145]

As noted, the courts have held that a high degree of reliability is crucial before the state can label someone a delinquent and deprive that person of liberty, even if the deprivation is primarily for the individual's own good. The courts have thus re-

142. *See* State *ex rel.* Upham v. McElligot, 956 P.2d 179, 181 (Or. 1998) (finding that a juvenile is not entitled to jury trial under Article I, Section 11 to determine delinquency); State *ex rel.* Juvenile Dep't v. Reynolds, 857 P.2d 842, 843 n.2, 846, 847-50 (Or. 1993) (same result on the bases inter alia that juvenile proceeding is sui generis; that Oregon's juvenile proceedings were benevolent, generally lenient, rather than severe in comparison with adult criminal proceedings, and rehabilitative rather than punitive; and that it is possible to have fair, equitable, and reliable delinquency outcomes without a jury. Despite all these differences between criminal and juvenile delinquency proceedings, the Court concluded that "[m]any [other] procedural requirements of the adult system now are required in juvenile delinquency proceedings, some imposed by federal authority and others by state authority."); State *ex rel.* Juvenile Dep't v. Rogers, 836 P.2d 127, 130 (Or. 1992) (holding that the liberty interest of a juvenile facing delinquency determination is sufficiently important under the Oregon Constitution that the juvenile is entitled to the benefit of the exclusionary rule for unconstitutional searches under article I, section 9—presumably because such evidence often goes to whether there will be a deprivation of liberty, whereas there is no a priori reason to assume that juries or judges are more likely to tip one way or the other).

143. 892 P.2d 1013 (Or. 1995).

144. *Id.* at 1016-17.

145. *Cf.* City of Pendleton v. Standerfer, 688 P.2d 68 (Or. 1984); State v. Grenvik, 628 P.2d 1195 (Or. 1981).

quired proof beyond a reasonable doubt and other reliability safeguards, including counsel, notice, and hearing.[146] Certainly, even greater reliability is constitutionally demanded before we subject an offender to execution. Those facts, at least in a death penalty case, that serve as aggravating circumstances necessary to raise the sentence from life imprisonment to death must be proved beyond a reasonable doubt.

D. Jones v. United States[147] *and the Reasonable Doubt Standard Under the U.S. Constitution*

The recent U.S. Supreme Court decision in *Jones v. United States* gives substantial support to the proposition that the ultimate fact in the second sentencing question must be proved beyond a reasonable doubt under the Sixth, Eighth, and Fourteenth Amendments to the federal constitution. That case involved the federal carjacking statute.[148] The issue was whether the victim's "serious bodily injury" had to be alleged and proved to the jury beyond a reasonable doubt, or whether it could be found by the sentencing judge by a preponderance of the evidence, before the defendant could receive an enhanced penalty of twenty-five years rather than the lesser penalty of fifteen years.[149] The Court resolved the issue in the defendant's favor as a matter of statutory construction,[150] but the justices made some provocative comments that bear on the constitutional issues here.

The Court started with a formalistic statement of the question presented as to whether the "fact is an element of an offense rather than a sentencing consideration,"[151] and concluded that it was more akin to an element requiring proof to the jury beyond a reasonable doubt. It reached this conclusion partly to avoid

---

146. *See, e.g., Reynolds*, 857 P.2d at 844-50; *Stewart*, 892 P.2d at 1015-17; *McKeiver*, 403 U.S. at 543-45; *In re Winship*, 397 U.S. at 365-67; *In re Gault*, 387 U.S. at 50-56.

147. 526 U.S. 227 (1999).

148. 18 U.S.C. 2119.

149. The court sensibly thought it "at best questionable whether . . . facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life," could be meant to avoid the defendant's due process safeguards including proof beyond a reasonable doubt. *Jones*, 526 U.S. at 233.

150. *See id.* at 251-52.

151. *Id.* at 232.

grave constitutional problems that otherwise might arise.[152] The Court's discussion of the constitutional issues, however, reflects a more functional and nuanced approach to the issue akin to what this Article demonstrates is the clear command of Oregon constitutional law. In this regard, the Supreme Court recognized the "potential constitutional significance of factfinding that raised the sentencing ceiling."[153] The court strongly suggested that the jury trial and due process protections of the federal Constitution require that "any fact (other than a prior conviction established by an official judgment order) that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt."[154] Justices Scalia and Stevens, in separate concurring opinions, go beyond the majority's strong suggestion and emphatically assert that the Constitution mandates that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed . . . must be established by proof beyond a reasonable doubt."[155]

The Court was not asserting that every factor "bearing on sentencing" must be found by a jury or proved beyond a reasonable doubt.[156] Like the Oregon courts, it reaffirmed that historical "recidivism increasing the maximum penalty" qualified as an exception.[157] Importantly, the Court justified this historical exception on grounds of tradition and on the vital functional fact that all the recidivist's prior convictions already had been "established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."[158] Neither is the case with respect to the death penalty question as to whether the defendant will commit future acts of violence, a novel aggravating factor added to the death penalty lexicon in the 1970s in the much-maligned Texas death penalty scheme.

For the *Jones* majority, the issue boils down to a question of whether aggravating facts merely represent a traditional "choice

152. *See id.* at 239.

153. *Id.* at 242.

154. *Id.* at 243 n.6. The Supreme Court has confirmed this suggestion as a matter of binding constitutional law in an important new decision, Apprendi v. New Jersey, 530 U.S. 466 (2000).

155. *Id.* at 252-53.

156. *See id.* at 248.

157. *Id.* at 235, 243 n.6, 248-49.

158. *Id.* at 249.

(within a justifiable legislative maximum) between a greater and a lesser penalty, or represent a process of raising the ceiling of the sentencing range available."[159] Most importantly, the majority notes that the legislature is left with substantial room to choose the substantive factors that make up a crime or determine the range of punishment, but is given no latitude to undermine constitutional procedural protections such as the burden of proof to establish these factors once chosen.[160]

> [The] rule would in no way constrain legislative authority to identify the facts relevant to punishment or to establish fixed penalties. The constitutional guarantees that prompt our interpretation bear solely on the procedures by which the facts that raise the possible penalty are to be found, . . . and what burden must be satisfied to demonstrate them.[161]

Oregon need not have chosen the defendant's future crimes of violence as the critical aggravating fact to increase the penalty from true life imprisonment to death. However, once having done so,[162] it cannot "manipulate its way out of" proof beyond a reasonable doubt of this ultimate fact.[163]

III. OREGON'S DEATH PENALTY STATUTES ARE PER SE UNCONSTITUTIONAL

As demonstrated in Part II of this Article, the federal and state courts agree that the death penalty is uniquely severe and irrevocable and is qualitatively different, in kind rather than just in degree, from all lesser penalties, including true life imprisonment.[164] Capital punishment does not better serve any legitimate penological purpose permitted under federal and state constitutions[165] in comparison with lesser penalties. This is especially

---

159. *Id.* at 251.

160. *See id.* at 243 n.6 ("The constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof"). *Id.* at 243 n.6.

161. *Id.* at 251-52 n.11.

162. *See* discussion *supra* parts II.A-B, demonstrating conclusively that Oregon has adopted this criterion.

163. *See Jones,* 526 U.S. at 243.

164. *See supra* notes 126-127, 131-134 and accompanying text.

165. The relevant federal provisions are the Eighth and Fourteenth Amendments; the pertinent sections under the Oregon constitution are article I, section 13, and the

true in view of the relatively recent availability of the lesser penalty of a true life sentence, "life without the possibility of release or parole."[166] The death penalty is significantly more "rigorous" than any other punishment available under Oregon law. This extra rigor is not "necessary" under article I, section 13 of the Oregon Constitution.[167]

The discussion in sub-part A, below, demonstrates that the issue of per se constitutionality is not foreclosed by the decisions of the Oregon Supreme Court or by article I, section 40 of the Oregon Constitution. Sub-part B describes the relevant death penalty jurisprudence of the U.S. Supreme Court. It then considers the proper construction and application of two provisions of the Oregon Constitution: article I, section 13 and newly-revised article I, section 15, and concludes that the death penalty is per se unconstitutional.

A. The Issue of the Per Se Constitutionality of Oregon's Death Penalty Statutes is not Foreclosed

Several events have occurred in the last two decades that affect the current discussion. In 1981, the Oregon Supreme Court struck down the 1978 statutes because they violated the jury trial provision of the state constitution.[168] *Quinn* left open the question whether the death penalty was per se unconstitutional in Oregon.[169] In 1984, the voters, by initiative petition, reinstated the death penalty and added article I, section 40 to the Oregon Constitution, exempting the death penalty from challenges under article I, section 15 (which has been subsequently revised) and article I, section 16.[170] Article I, section 40 states: "Notwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as

---

newly-revised section 15.

166. OR. REV. STAT. § 163.105.

167. OR. CONST. art. I, § 13.

168. *See* State v. Quinn, 623 P.2d 630, 644 (Or. 1981).

169. The issue of per se constitutionality was raised in detail. The argument relied on the original version of OR. CONST. art. I, §§ 15-16. *See* Stephen Kanter, *Dealing with Death: The Constitutionality of Capital Punishment in Oregon*, 16 WILLAMETTE L. REV. 1 (1979) [hereinafter Kanter, *Dealing with Death*].

170. *See* OR. CONST. art. I §§ 40, 15, 16.

provided by law." The Oregon Supreme Court thus concluded that it would "not consider . . . any argument [against the death penalty] . . . grounded in Article I, Sections 15 and 16."[171]

Next, the legislature added the sentencing option of life without possibility of release or parole.[172] This change provided an intermediate choice between death and life with possible release. Finally, by referendum in 1996, the people replaced the original language of article I, section 15, which read: "[l]aws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice,"[173] with: "[l]aws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation."[174]

None of these events preclude the issue of per se unconstitutionality of Oregon's death penalty statutes. The discussion does not rely on either of the provisions affected by article I, section 40: article I, section 16 or the no longer extant original article I, section 15. Principles of federalism and the supremacy clause of the federal constitution[175] make clear that article I, section 40 cannot dilute the federal protections of the Eighth and Fourteenth Amendments. Article I, section 40 does not exempt the death penalty from analysis under other pre-existing Oregon constitutional provisions,[176] such as article I, section 13. Nor could it be construed to make an exception to the new article I, section 15, which was adopted twelve years after article I, section 40. Article I, section 40 does purport to expressly authorize the death penalty for some offenses. The important point is that it does so only to the extent that any death penalty is also consistent with other operative state and federal constitutional principles.[177]

---

171. State v. Wagner, 752 P.2d 1136, 1152 (Or. 1988).

172. *See* OR. REV. STAT. §§ 163.105, 163.150 (1999).

173. OR. CONST. art. I, § 15.

174. OR. CONST. art. I, § 15 (Amendment proposed by S.J.R. 32, 1995, adopted Nov. 5, 1996); Ballot Measure 26, 1 OFFICIAL 1996 GENERAL ELECTION VOTERS' PAMPHLET, (Oregon Secretary of State, Salem, Or., for Nov. 5, 1996 election), at 4.

175. *See* U.S. CONST., art. VI, § 2.

176. Any broader interpretation of the scope of article I, section 40 would not only be inconsistent with its clear textual references to article I, sections 15 and 16, but also might raise serious constitutional questions about the validity of its enactment under the principles of *Armatta v. Kitzhaber*, 959 P.2d 49 (Or. 1998).

177. A similar issue arose under the federal Constitution. That constitution also

Brief comments in 1990 by the Oregon Supreme Court do raise more serious concerns about the applicability of one provision central to the discussion in this part of the Article: article I, section 13 of the Oregon Constitution. That section provides: "No person arrested, or confined in jail, shall be treated with unnecessary rigor." In *State v. Moen*,[178] the majority stated that "the possibility of a death sentence is not unconstitutionally rigorous *per se* because [a]rticle I, section 40 . . . *specifically* authorizes the imposition of the death penalty for aggravated murder."[179] In *State v. Guzek*,[180] the court made somewhat broader statements that article I, section 13 "is concerned with conditions within a prison" and the "death penalty is not such a circumstance" so that "[a]rticle I, section 13 is not relevant."[181]

To the extent that these statements stand for the proposition that article I, section 13 does not expressly or, without the combined analysis offered herein, automatically preclude the death penalty under all circumstances, they are correct and unremarkable. Similarly, the death penalty is not per se unconstitutional under article I, section 13 merely because of its severity or extreme rigor. A penalty does not fail under article I, section 13 simply because it is more rigorous than a lesser penalty, but only when it is qualitatively more rigorous by kind and when the additional rigor is unnecessary.[182] Any wider application of the court's statements would be a mistake for a number of reasons.

Defendants in *Moen*, *Montez*, and *Guzek* made only the most cursory arguments under article I, section 13.[183] In *Moen*,

---

expressly contemplated the death penalty ("capital, or otherwise infamous crime," U.S. CONST. amend. V). Appropriately, that did not prevent the U.S. Supreme Court from addressing the merits of the contention that the death penalty was per se unconstitutional as "cruel and unusual punishment," U.S. CONST. amend. VIII. *See* Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

178. 786 P.2d 111 (Or. 1990).

179. *Id.* at 142. Even more cryptically, the court in *State v. Montez*, 789 P.2d 1352 (Or. 1990), purported to reject an argument that the "death penalty statutory scheme violates Article I, [S]ection 13" solely because "an identical argument" was rejected in *Moen*. *Id.* at 1378.

180. 797 P.2d 1031 (Or. 1990).

181. *Id.* at 1035.

182. *See infra* notes 237-241 and accompanying text.

183. *See* Appellant's Supreme Court Brief at 86, State v. Moen, 786 P.2d 111 (Or. 1990) (No. S33952) (incorporating by reference Trial Memorandum at 34-35); Appellant's Supreme Court Brief at 12, 174-75, State v. Montez, 789 P.2d 1352 (Or. 1990)

the defendant's contention and only analysis offered under article I, section 13 related to psychological trauma and anxiety from pre-trial incarceration for a capital defendant. The defendant's brief did not refer to any evidence of the particular conditions of his confinement in support of this limited argument.[184] The court's conclusory statement necessarily related to this issue alone and not to the more complex analysis presented here.[185] In *Guzek*, the defendant again repeated the same argument used in *Moen,* but then added that the death penalty itself constitutes unnecessary rigor "because it is an excessive punishment serving no valid penological purpose."[186] Unfortunately, the only support given for this argument was one sentence citing minority positions of two U.S. Supreme Court Justices, together with the bare claim that: "[s]uch an excessive and needless penalty is, therefore, unnecessarily rigorous."[187] Given the defendant's minimal attention to article I, section 13 in an otherwise comprehensive brief, it is not surprising that the Oregon Supreme Court summarily rejected the argument.[188]

The analysis presented here, in contrast, relies on binding, majority views of the U.S. Supreme Court, combined with a proposed analytical approach for the proper construction of Article I, Section 13, and the newly adopted Article I, Section 15. Such a construction leads to the conclusion that the Oregon Supreme Court's broad assertion that section 13 "is not relevant"[189]—

(No. S35291); and Appellant's Supreme Court Brief at 6, and 111-12, State v. Guzek, 797 P.2d 1031 (Or. 1990) (No. S35051).

184. *See* Appellant's Supreme Court Brief at 86, State v. Moen, 786 P.2d 111 (Or. 1990) (No. S33952).

185. The *Montez* decision added no analysis whatever because the defendant offered nothing new and merely repeated the *Moen* argument. The fact noted by the court, *Moen*, 786 P.2d at 142, that the Oregon Constitution specifically authorizes capital punishment, does not immunize the death penalty from a per se constitutional challenge under the combined federal and state constitutional arguments presented here. Nor would it preclude such a challenge under appropriate provisions of the Oregon Constitution standing alone. *See* Kanter, *Dealing with Death, supra* note 169, at 41-42. This is the case especially because at the time of the enactment of article I, section 40, the death penalty may have been seen in Oregon as *necessary* for incapacitation. This is no longer a credible rationale because of the addition of true life as a sentencing option.

186. Appellant's Supreme Court Brief at 6, 111-12, State v, Guzek, 797 P.2d 1031 (Or. 1990) (No. S35051).

187. *See id.* at 6, 112; *Guzek*, 797 P.2d at 1034.

188. *Guzek*, 797 P.2d at 1034.

189. *Id.* at 1034.

which was not required for its decision on the argument presented—is inconsistent with a proper interpretation of article I, section 13. Therefore, the issue of per se constitutionality discussed in this Article has not been given full consideration or resolved definitively by the Oregon courts.

B. The Relevant Death Penalty Jurisprudence of the U.S. Supreme Court and an Analytical Model for Article I, Sections 13 and 15 of the Oregon Constitution

Standing alone, the U.S. Supreme Court's conclusion that the death penalty is not per se unconstitutional under the federal constitution depends on the Court's determination that retribution, revenge, and retaliation are permissible penal purposes.[190] If such a penal purpose were excluded for other reasons, or if the

---

190. *See generally* Kanter, *Dealing with Death, supra* note 169 (fully developing this result through analysis of the U.S. Supreme Court's death penalty decisions. The principal elements of the relevant analysis from *Dealing with Death* may be summarized as follows: (1) The penalty of death is uniquely severe, even in comparison with life imprisonment without possibility of release or parole. Kanter, *Dealing with Death, supra* note 169, at 11 n.47, 13, 27, 51, 57, 60; Harmelin v. Michigan, 501 U.S. 957, 995 (1991); Monge v. California, 524 U.S. 721, 732 (1998); (2) The Eighth and Fourteenth Amendments to the U.S. Constitution prohibit severe punishments that are excessive—that is, punishments that do not have a realistic chance of enhancing one or more of a list of legitimate penological purposes, Kanter, *Dealing with Death, supra* note 169, at 11, 19, 53, 57-63; 3). The U.S. Supreme Court has concluded that the only legitimate purposes to which the death penalty could possibly make even a marginal contribution beyond that already made by the lesser penalty of life imprisonment are general deterrence and retribution/revenge/retaliation, *see id.* at 11 n.47; (3) This follows because the death penalty does not (a) reform or rehabilitate; (b) allow the defendant to make restitution; (c) provide specific deterrence, since the executed defendant has no choice whether to commit a subsequent crime; (d) prevent private retaliation or blood feuds any better than life imprisonment; (e) serve as a eugenic function—in the unlikely event that such a function would be considered permissible—any better than the lesser penalty of sterilization; (f) save money, *see id.* at 29 n.121, 59; Justin Brooks & Jeanne H. Erickson, *The Dire Wolf Collects His Due While the Boys Sit by the Fire: Why Michigan Cannot Afford to Buy into the Death Penalty,* 13 T.M. COOLEY L. REV. 877, 904 (1996) ("The evidence is overwhelming that the death penalty comes at a substantial economic cost to the public").

The U.S. Supreme Court also considered, but rejected, incapacitation. *See* Kanter, *Dealing with Death, supra* note 169, at 11 n.47, 29 n.120. Of course, the death penalty incapacitates permanently when actually carried out; but the point is that, overall, it does not do any better at incapacitation than life without parole. *Id.* 5) The U.S. Supreme Court accepted retribution/revenge as a permissible penological justification under the Federal Constitution. Gregg v. Georgia, 428 U.S. at 183. The Supreme Court even felt that "'some crimes are so outrageous that society insists on [the death penalty] because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.'" *Id.* at 184.

death penalty had to withstand a necessity analysis, it could no longer be constitutionally justified under the Eighth Amendment.[191] Therefore, retribution/revenge is essential to the Supreme Court's constitutional acceptance of the death penalty under the federal Constitution, and it would be equally essential to any other rational argument supporting the death penalty, given current constitutional facts and circumstances.[192]

---

191. Amendment Eight of the U.S. Constitution provides in pertinent part: "... nor cruel and unusual punishments inflicted." This clause has been fully incorporated as a limitation on the states through the Fourteenth Amendment. U.S. CONST., amend. VIII. *See* Robinson v. California, 370 U.S. 660 (1962). The Supreme Court's cruel and unusual punishment jurisprudence therefore is fully binding on Oregon. The following points establish that the death penalty could not pass federal constitutional muster without retribution/revenge/retaliation: (1) With respect to general deterrence, the Supreme Court recognized that the evidence is inconclusive and that there is simply no proof that the death penalty serves as a significantly better deterrent than does life imprisonment. *Gregg*, 428 U.S. at 184-85. In fact, life sentences with a substantial mandatory minimum and true life may provide more general deterrence than the previously available maximum sentence of indeterminate life with parole; these sentences serve to educate the public by changing the previously commonly-held misconception that many convicted murderers were getting paroled in just a few years. The finding that no conclusive proof exists of the death penalty's marginal deterrent value is binding on Oregon. Our courts are free to go further, of course, and should make an affirmative finding on the available evidence in our state that the death penalty has not been shown to deter or incapacitate better than true life imprisonment. (2) Given the inconclusive nature, at best, of the claim that the death penalty provides marginal general deterrence, the U.S. Supreme Court did not and could not conscientiously have permitted the death penalty—one that is unique in its severity and irrevocability—solely on the policy of general deterrence. Kanter, *Dealing with Death, supra* note 169, at 13, 28, 29. (3) For the U.S. Supreme Court, "retribution and deterrence ... form an interrelated package, and ... without retribution the package would lose its constitutional luster." *Id.* at 13. (4) The U.S. Supreme Court eventually rejected arguments that the death penalty was invariably per se unconstitutional under the Federal Constitution. Gregg v. Georgia, 428 U.S. 153 (1976). The Court could reach this conclusion only by presuming the constitutionality of capital punishment and placing a heavy burden on its attackers to disprove its efficacy. *Id.* at 173, 175. This procedural adjudicative device, essential to the Court's decision upholding the death penalty, requires the allowance of retribution/revenge/retaliation and cannot be explained on any other set of assumptions. *See* Kanter, *Dealing with Death, supra* note 169, at 13, 14, 14 n.59, 26-30, 60. If these were not permissible purposes, the State would shoulder a heavy burden of justifying the death penalty and, as noted, could not do so. *See* Kanter, *Dealing with Death, supra* note 169, at 14 n.59, 26. 28. *See supra* Part II of this Article for the notion that the State must show compelling reasons to justify the death penalty.

192. There is a strong positive correlation between one's views about retribution/revenge and one's analytical and emotional views about the death penalty. This holds remarkably true whether the individual is a Supreme Court Justice, a philosopher, a criminologist, a law professor, or an average American citizen. *See* Kanter, *Dealing with Death, supra* note 169, at 23-26. For a detailed and somewhat similar dis-

Of course under the Supremacy Clause of Article VI of the federal Constitution, these constitutional conclusions are binding on Oregon as minimum protections of individual rights.[193] Oregonians are free to go further to protect individuals from severe punishments in this state and to impose more stringent constitutional hurdles[194] before such penalties may be imposed.[195]

The Supreme Court rejected Justices Brennan's and Marshall's contentions that the death penalty should be subjected under the federal Constitution to a utilitarian *necessity* analysis to determine its constitutionality. For example, the four dissenters in *Furman v. Georgia*,[196] in what ultimately became the Supreme Court's majority position on the per se constitutionality of capital punishment,[197] concluded that the Eighth Amendment did not mandate that courts consider the "efficacy," "social utility," "enlightened principles of penology," or "necessity" of capital punishment.[198] Although acknowledging that as a policy matter the death penalty might not be necessary "to achieve legitimate penal aims," they found it "apparent" that "the necessity approach" involves matters outside the purview of the Eighth Amendment."[199] By contrast, the necessity approach is not only within the purview of the Oregon Constitution, but article I, section 13 expressly mandates it.[200]

The text of article I, section 13 provides: "No person arrested, or confined in jail, shall be treated with unnecessary rigor."[201] The term "unnecessary rigor" is subject to the circumstances of a particular situation and proper judicial construction. It is clear from the unambiguous text that all persons arrested or confined are protected against unnecessary rigor, whatever those

---

cussion of this issue, see generally Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

193. U.S. CONST. art. VI.

194. *See* OR. CONST. art. I, §§ 13, 15 (amended 1996).

195. This is an "important tenet of federalism." Stephen Kanter, *Our Democracy's Balancing Act: American Federalism Reexamined*, VII OR. HUMAN., No. 1 at 2, 8 (1995).

196. 408 U.S. 238 (1972).

197. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

198. *Furman*, 408 U.S. at 258-62 (Burger, C.J., with whom Justices Blackmun, Powell, and Rehnquist joined, dissenting).

199. *Id.*

200. *See infra* notes 238-241 and accompanying text.

201. OR. CONST. art. I, § 13.

terms are ultimately construed to mean. A person who is executed is subjected to the most extreme form of physical rigor—being killed while confined. Obviously, an inmate who was being killed by a rogue guard without any lawful authority would be entitled to claim the protection of article I, section 13. A convicted criminal being executed is exposed to the same rigor and is entitled to have the sentence of death evaluated under the necessity requirements of article I, section 13.

To demonstrate that this provision must apply to statutory punishments, as well as to ad hoc rigorous prison conditions, suppose that a prisoner was being regularly beaten by guards or that a convicted thief's hand was surgically removed. Neither of these treatments could conceivably be exempt from evaluation under article I, section 13 even though statutes authorized the beatings or permitted hand removal as a penalty for theft. The determining factor in all such claims is whether the rigor is legally justifiable on the ground that it is *necessary*.[202]

Oregon case law, although somewhat sparse, provides some assistance in developing the proper analytical framework for the phrase "unnecessary rigor."[203] In *State v. Tucker*,[204] the Oregon Supreme Court affirmed defendant's burglary conviction and approved the legislative power to dispense with grand jury indictment in felony cases.[205] It concluded, however, that other protections, like those against "unnecessary rigor while in confinement," were more fundamental in character.[206] The legislature could "never abridge [these] rights vouchsafed to *every individual*. . . ."[207] It is justified to arrest and temporarily confine a defendant on probable cause who may turn out to be innocent, but only "insofar as these restraints are necessary . . . and not need-

202. *See id.*

203. *Id.*

204. 61 P. 894 (Or. 1900).

205. *See id.* at 897-98.

206. *Id.* at 897.

207. *Id.* (emphasis added). *Benson v. Gladden*, 407 P.2d 634 (Or. 1965), adds little to the analysis because the court rejected on the merits the defendant's claim that he was innocent of forgery. However, it is interesting that the defendant listed article I, section 13 among a string of constitutional provisions that would protect him from punishment if he were innocent. *See id.* at 635. This does seem sound, as it would be unnecessarily rigorous to impose any punishment of incarceration on an innocent defendant. That it also would be unnecessarily rigorous to impose the death penalty on an inappropriate individual further supports the argument in Part II, *supra*.

lessly 'rigorous.'"[208] It is not just the manner or conditions of the confinement, but the confinement itself, that is subjected to necessity analysis under article I, section 13.[209] Similarly, it should not just be the manner of execution, but the death sentence itself that must be justified as *necessary* to a lawful purpose.

Weidner v. Zenon[210] and *State ex rel. Juvenile Department v. Orozco*,[211] two court of appeals decisions, are also somewhat helpful. In *Weidner*, the court held that the prisoner could obtain habeas corpus relief if he could show that he was denied proper medical attention for severe health problems, including those that have "life-threatening implications."[212] The prisoner relied on article I, sections 13 and 16.[213] The court did not specify whether the substantive claim was available under both sections, but that is the only reasonable conclusion. It certainly would constitute "unnecessary rigor" to subject a prisoner to medical neglect with life-threatening consequences.

Orozco involved a juvenile delinquency proceeding wherein the juvenile was found to have committed the acts of rape in the first degree.[214] The defendant was ordered confined in a juvenile facility, and further ordered to give a blood sample for DNA testing.[215] Although the majority analyzed and approved the blood sample order under search and seizure protections, their conclusion applies equally to the necessity analysis required under article I, section 13. The court held that searches of prisoners without probable cause are reasonable only when based on a legitimate penological or law enforcement purpose.[216] Just as "reasonable," to be a meaningful limit, must be to serve a legitimate purpose, "necessary" too must further a legitimate penal purpose. In a concurring opinion, Judge Rossman concluded persuasively that "the blood draw should be viewed as one aspect of a juvenile's disposition, or as one component of an adult offender's sentence; as such, it must comport with the constitu-

208. State v. Lowery, 667 P.2d 996, 1002 (1983).
209. *See* OR. CONST. art. I, § 13.
210. 862 P.2d 550 (Or. Ct. App. 1993).
211. 878 P.2d 432 (Or. Ct. App. 1994).
212. *Weidner*, 862 P.2d at 552.
213. *See id.* at 551.
214. *See Orozco*, 878 P.2d at 433.
215. *See id.*
216. *Id.* at 434-35.

tional protections relating to sentencing," including article I, section 13, that the defendant "may not be treated 'with unnecessary rigor.'"[217] The blood draw was authorized by statute, as is Oregon's particular death penalty. Both are subject to the "unnecessary rigor" analysis.[218]

Cleveland v. Goin[219] held in the prisoner's favor that he could not be confined in the Clatsop County jail pre-trial, rather than in Linn County where he was charged, because the sheriff could not carry the burden to show the "confinement . . . in Clatsop County [was] necessary."[220] While the majority decided the case under statutory law,[221] its necessity analysis parallels the analysis required by the constitutional provision. Justice Campbell's dissent, joined by Chief Justice Peterson, did reach the article I, section 13 argument[222] and applied an identical test, but disagreed on the result solely because in his view the sheriff had "amply justified" Cleveland's transfer "by necessity."[223]

State v. Farrar[224] held that the trial court did not err in granting the state's motion to restrain the defendant with leg cuffs during his capital murder trial because the state carried its evidentiary burden showing that "restraints were necessary."[225] The court did not specifically identify the issue as one coming under article I, section 13, but this is the same sort of necessity analysis contemplated by section 13. Notably, the court found sufficient evidence of "necessity" only because the evidence established that the defendant "posed an immediate and serious risk of danger and disruption or escape."[226]

---

217. *Id.* at 439 (Rossman, J., concurring).

218. *Cf.* State *ex rel.* O'Leary v. Jacobs, 669 P.2d 1128, 1130, 1132 (Or. 1983) (leaving open the possibly that too much punishment, i.e., continued incarceration after rehabilitation, might be vulnerable under article I, section 13's "unnecessary rigor" standard; but concluding that this determination would be for the parole board, not the trial judge, once the defendant was committed to the corrections department under Oregon's previous indeterminate sentencing system).

219. 703 P.2d 204 (Or. 1985).

220. *Id.* at 205.

221. *See id.*

222. *See id.* at 207.

223. *Id.*

224. 786 P.2d 161 (Or. 1990).

225. *Id.* at 178-79.

226. *Id.* at 179.

Sterling v. Cupp[227] is the Oregon Supreme Court decision containing the most thorough analysis of article I, section 13's meaning and analytical significance. The court started with the observation that the "United States Constitution's concern with penal principles" is limited to bills of attainder and cruel and unusual punishments.[228] By contrast, Oregon has a number of provisions with "no federal parallel" dealing with penal principles, including article I, section 13[229] and article I, section 15.[230] The court then proceeded to a useful contextual and historical analysis of state constitutional "unnecessary rigor" provisions,[231] concluding that they represent a commitment to "humanizing penal laws and the treatment of offenders" that go well beyond anything in the federal Constitution.[232] To this may be added the additional history of the Oregon framers' reasons for relying on Indiana's Bill of Rights[233] and their express desire to reflect progress from the time of the framing of the federal Bill of Rights to the mid-nineteenth century, and thereby eliminate some of the "blots" that remained on the national escutcheon.[234]

The *Cupp* court concludes that, unlike some federal constitutional rights that may be extinguished upon conviction, "there can be no argument that rights under this guarantee, [article I, section 13], are forfeited by conviction of crime or under lawful police custody."[235] This is precisely the argument made at several points in Part II of this Article—that even one convicted of aggravated murder in Oregon retains a substantial interest in life that is protected by the Oregon Constitution. The *Cupp* court went on to state that article I, section 13 "is not directed specifi-

227. 625 P.2d 123 (Or. 1981).

228. *Id.* at 127-28. This explains why the U.S. Supreme Court has been unwilling to subject the death penalty to a "necessity" analysis.

229. This section "understakes to confine 'rigorous' treatment of prisoners within constitutional bounds of necessity." OR. CONST. art. I, § 13.

230. *See* OR. CONST. art. I, § 15 (amended 1996) (revised 15 years after the *Cupp* decision).

231. *See Cupp*, 625 P.2d at 128-29.

232. *Id.*

233. The Oregon framers believed that the Indiana Bill of Rights was an improvement on the first ten amendments to the U.S. Constitution, that they were "gold refined." CHARLES CAREY, THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 at 101, 102 (C. Carey ed., 1926).

234. *See* Kanter, *Dealing with Death*, *supra* note 169, at 35-38.

235. *Cupp*, 625 P.2d at 129.

cally at methods or conditions of 'punishment,'" that it "extends to anyone who is arrested or jailed;" and that it is not "confined only to such historically 'rigorous' practices as shackles, the ball and chain, or to physically brutal treatment or conditions."[236] As the court states repeatedly, the touchstone under article I, section 13 is whether the imposition beyond the justified deprivation of liberty (life imprisonment in the case of aggravated murder) on the prisoners' remaining interests in the "residuum of dignity" and life meet the test of necessity.[237] The core concern of article I, section 13 is to minimize needless "harsh, degrading, or dehumanizing treatment of prisoners,"[238] of which the death penalty is the extreme cognizable example in our society.

Rather than limiting the group of confined individuals to whom article I, section 13 applies, the limit of the application of that section is the test of necessity. The section affords protection to all confined individuals, including those who potentially may be made death penalty-eligible and subsequently executed, but does not prohibit such rigorous punishments that can be justified as necessary.[239] Therefore, the per se constitutionality of the death penalty in Oregon turns on the question of whether the penalty can be justified as necessary to one of the legitimate penal purposes that is not foreclosed by either the federal Constitution or the state constitution.

The combination of text, history, precedent, context, and logic leads to the proper analytical construction of article I, section 13. That provision protects all arrested and confined individuals from the imposition of cognizably substantial additional rigor,[240] beyond that which has already been justified, unless the additional rigor can be shown in its own right to be necessary. As already noted, the death penalty can be justified constitutionally in Oregon only if it can be demonstrated to make an ad-

---

236. *Id.* This language shows clearly why the language in *State v. Guzek*, 797 P.2d 1031, 1035 (Or. 1990), discussed *supra* part III.A, was too broad and incorrect.

237. *See Cupp*, 625 P.2d at 130.

238. *Id.* at 1331.

239. *Id.* ("[B]y contrast, [A]rticle I, [S]ection 13, itself makes necessity the test of the practices it controls."). *Id.*

240. In order to be judicially cognizable, and subjected to the necessity test, of course, the additional rigor generally must be different in kind, not only in degree, from lesser rigor that already has been justified adequately by a showing of necessity. This is precisely the case with respect to the death penalty.

ditional contribution to one or more of the legitimate utilitarian penal purposes. Lest there be any doubt about what these purposes are in Oregon, article I, section 15 spells them out: protection of society, personal responsibility, accountability for one's actions, and reformation.[241]

In addition to the clear, unambiguous text of revised section 15, the *Official Voters' Pamphlet* gives the best evidence of the people's intent in replacing the original article I, section 15 with the new version in 1996. The Ballot Title, after informing voters that Measure 26 would repeal part of section 15, explains in the summary section that the measure "would insert language stating that laws for the punishment of crime must be based on [the above] principles." The Explanatory Statement makes clear that the measure "deletes" article I, section 15 of Oregon's original Bill of Rights, "and provides instead that laws for the punishment of crime must be based on protection of society, personal responsibility, accountability for one's actions and reformation."[242]

One of the arguments in favor of the measure makes the point that "personal responsibility" is the antithesis of "VINDICTIVENESS."[243] Another argument in favor was submitted by the chief proponents of legislative referral of Measure 26 to the people. This argument states that Measure 26 is "a cornerstone upon which we may build a more civil society. Great care was taken . . . to reflect desired values. We see Measure 26 as the yardstick against which statutory legislation will be tested."[244] The proponents then repeat that they do not mean to authorize vindictive laws.[245] In the next argument in favor, the same proponents quoted a program manager of a youth services organization, who stated in support of Measure 26: "'I feel unequivocally that these changes for our Constitution would be helpful, not hurtful to the treatment of offenders. Accountability is the cornerstone of treatment.'"[246] A legislator was also quoted as testi-

241. *See* OR. CONST. art. I, § 15.

242. OFFICIAL 1996 GENERAL ELECTION VOTERS' PAMPHLET at 4 (Oregon Secretary of State, Salem, Or., for General Election, Nov. 5, 1996).

243. *See id.* at 5 (Bartlett Field Cole, Argument in Favor).

244. *Id.* at 6 (Bob and DeeDee Kouns and Crime Victims United, Argument in Favor).

245. *Id.* at 6-7.

246. *Id.* at 7 (Rick O'Dell, Argument in Favor).

fying, "'The intent is that there can be no justice that is vindictive.'"[247] Finally, the Speaker of the House submitted the last argument in favor. She said: "While reforming the criminal should be one goal of our criminal justice system, it should not be our highest and only priority."[248] The Speaker went on to say, "At every stage of the criminal justice system—*in the courts*, in the parole system, *in the sentencing process*—we would have a new base for how we treat criminals, and law abiding citizens."[249] The opponents of the ballot measure agreed that the penal principles in Measure 26 are "sound," and merely objected to deleting the prohibitory language from one of Oregon's original Bill of Rights provisions.[250] Nowhere in the Oregon Constitution or law is there any suggestion that retaliation, revenge, or retributive feelings against the defendant are permissible.

It has already been demonstrated that analysis of the U.S. Supreme Court decisions binding on Oregon rejects the possibility that general deterrence alone, or in conjunction with incapacitation, could be necessary to justify the substantial additional rigor of the death penalty.[251] And even if the state could claim at the time of the enactment of article I, section 40 that the death penalty provided necessary assurances of permanent incapacitation in comparison with the less rigorous penalties of life imprisonment with possibility of release, this is no longer the case in view of the institution by the legislature of the true life penalty.[252] Therefore, the substantial additional rigor of the death penalty cannot be shown to be necessary to protect society, compared with the perfectly adequate less rigorous penalty of true life imprisonment. Similarly there has been be no credible case made that true life is inadequate to bring about an offender's personal responsibility and accountability for his or her actions, no matter how horrible they may have been. The burden would be on the state to make such a showing. And, of course, the death penalty extinguishes all possibility of reformation, while true life does not.

---

247. *Id.* (Lisa Naito, Argument in Favor).

248. *Id.* (Bev Clarno, Speaker of the Oregon House of Representatives, Argument in Favor) (emphasis added).

249. *Id.*

250. *See id.* at 8 (ACLU, Argument in Opposition).

251. *See generally supra* notes 190-195.

252. *See* OR. REV. STAT. §§ 163.105, 163.150 (1999).

IV. CONCLUSION

This Article has demonstrated two serious constitutional defects with Oregon's death penalty scheme. First, the statutory procedure in the second sentencing question for assessing a convicted aggravated murder defendant's future dangerousness falls far short of the bedrock safeguard of proof beyond a reasonable doubt. The full application of proof beyond a reasonable doubt is needed to reduce the risk of erroneous verdicts and sentences against capital defendants. This constitutional flaw becomes ever more patently unacceptable as national evidence mounts that there are a significant number of innocent, and otherwise inappropriate, candidates for the death penalty who have been sentenced to death and have had their sentences affirmed on appeal.[253]

Second, sections 13 and 15 of Oregon's Bill of Rights sensibly reject outmoded penal policies, still accepted in some jurisdictions, that rely on retributive or retaliatory vindictiveness. Stripped of these archaic props, Oregon's death penalty statutes must fall because they inflict "unnecessary rigor" and do not serve any of the more enlightened penal policies permitted in Oregon.[254] The immediate task for Oregon lawyers is to effectively raise these issues, and for the Oregon Courts to carefully resolve them.

The discussion in this Article has applicability beyond Oregon. A number of other jurisdictions also allow the probability that the defendant would commit future crimes of violence to serve as a sufficient aggravating circumstance or essential sentencing question that can result in a defendant's death sentence.[255] Other jurisdictions have state constitutional provisions

253. Concerns about the rising number of such documented cases recently led U.S. Senator Patrick Leahy (D. Vt.) to introduce the Innocence Protection Act, S.B. 2073, 106th Cong. (2000).

254. Oregon's penal policies are: "protection of society, personal responsibility, accountability for one's actions, and reformation." OR. CONST. art. I, § 15 (amended 1996).

255. *See, e.g.*, IDAHO CODE § 19-2515(h)(8) (1999) (listing as an aggravating factor whether defendant "has exhibited a propensity to commit murder which will probably constitute a continuing threat to society"); OKLA. STAT. ANN. tit. 21 § 701.12(7) (West 1999) (enumerating as an aggravating factor whether there is "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); TEX. CRIM. CODE P. ANN. 37.071(b)(1) (West 1999) (listing as an issue to be presented to the jury upon a finding of guilty "whether

analogous to Oregon's unnecessary rigor prohibition.[256] Attention now should be given in these respective jurisdictions to the proper scope of their own proof beyond a reasonable doubt requirements in capital sentencing, and to the further development and application of constitutional necessity analysis to their capital punishment statutes. Done conscientiously, this should lead to a fresh perspective on the constitutionality of the death penalty in jurisdictions beyond Oregon.

---

there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); VA. CODE ANN. § 19.2-264.2(1) (Michie 1999) (requiring the "court or jury [to] find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society"); WYO. STAT. ANN. § 6-2-102(h)(ix) (Michie 1999) (listing as an aggravating circumstance whether "defendant poses a substantial and continuing threat of future dangerousness *or is likely* to commit continued acts of criminal violence") (emphasis added).

256. *See, e.g.,* IND. CONST. art. I, § 15 ("No person arrested or confined in jail, shall be treated with unnecessary rigor"); TENN. CONST. art. I, § 13 ("No person arrested and confined in jail shall be treated with unnecessary rigor"); UTAH CONST. art. I, § 9 ("Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or confined in jail shall not be treated with unnecessary rigor"); WYO. CONST., art. I, § 16 ("No person arrested and confined in jail shall be treated with unnecessary rigor. The erection of safe and comfortable prisons and inspection of prisons, and the humane treatment of prisoners shall be provided for"); GA. CONST. art. I, ¶ XVII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison"). For a brief survey of judicial treatment of these provisions, see James G. McLaren, *The Meaning of the "Unnecessary Rigor" Provision in the Utah Constitution*, 10 BYU J. PUB. L. 27 (1996).