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Once upon a time, long, long ago, there lived in a valley, far far away in the mountains, the most contented kingdom the world had ever known. It was called Happy Valley, and it was ruled over by a wise old king called Otto. And all his subjects flourished and were happy. And there were no discontents or grumblers because Wise King Otto had had them all put to death, along with the trade union leaders many years before. And all the good happy folk of Happy Valley sang and danced all day long. And anyone who was for any reason miserable or unhappy, or who had had any difficult personal problem was prosecuted under the Happiness Act.

(A typical courtroom scene:)

Prosecutor: I put it to you that on February 5 of this year, you were very depressed with malice aforethought, and that you moaned quietly, contrary to the Cheerful Noises Act.

Defendant: I did.

Defense Counsel: May I just explain, M'Lord, that the reason for my client's behavior is that his wife had died that morning.

(Unrestrained laughter fills the courtroom until it is temporarily gavelled down.)

Lord Chief Justice: I sentence you to be hanged by the neck until you cheer up.[1]

INTRODUCTION

On November 7, 1978, Oregonians adopted Ballot Measure 8 by a vote of 573,707 to 318,610,[2] thereby modifying several homi-

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1. A Fairy Tale, Side B, Monty Python's Previous Record, 1972 Buddah Records, Inc. (all rights controlled by R & M Music Productions, Inc.). Other satirical musings about the purposes for the imposition of criminal sanctions in general, and the death penalty in particular, may be readily drawn from literature. Perhaps the most engaging example is the scrupulously fair trial described in Samuel Butler's *Erewhon*, wherein the defendant is convicted of the offense of pulmonary consumption over his claimed defense that he was merely simulating consumption to defraud an insurance company. S. BUTLER, EREWHON (1872).

2. OFFICE OF THE SECRETARY OF STATE FOR OREGON, GENERAL ELECTION PROCLAMATION (December 7, 1978).

cide statutes[3] and reinstating the death penalty for the first time since 1964.[4] Oregon thus became the thirty-third state to authorize capital punishment for murder,[5] and its trial judges[6] will undoubtedly add to the present national death row population.[7]

Moral, religious, legal, political and philosophical discourse about the propriety and efficacy of capital punishment has been with us since ancient times, with periodic emphasis on one or another factor and with a general ebb and flow in the intensity of the debate. The issues have heated dramatically during the last decade and a half, creating a spate of national activity in legal decision-making, empirical analysis and general legal scholarship.[8]

Three factors, however, have coalesced to keep Oregon jurists and legal scholars quiescent for almost the entire century.[9] First, Oregon's original death penalty statute,[10] held constitutional in 1909,[11] remained in effect only until 1914, when it was

3. Ballot Measure 8 amends ORS 163.115 (1977) and adds new sections to ORS 163.005-.145, 137.310-.450 (1977).

4. OR. CONST. art. I, § 37 (1920, repealed 1964), provided the death penalty for murder in the first degree. Its repeal was proposed by S.J. Res. 3, 52d Legis. Ass., 52d Sess. (1963) and adopted by the people November 3, 1964. The vote was 455,654 to 302,105. Bedau, *Capital Punishment in Oregon, 1903-1964*, 45 Or. L. Rev. 1, 1 (1965).

5. National Coalition Against the Death Penalty, Death-Row Census (November 8, 1978).

6. Oregon's new law provides for a sentencing proceeding whereby the trial judge alone determines whether the sentence will be life imprisonment or death. Ballot Measure 8, Section 3(1) (November 7, 1978).

7. On November 8, 1978, there were 464 individuals under sentence of death. *See* National Coalition Against the Death Penalty, *supra* note 5. On November 5, 1979, John Wayne Quinn became the first person sentenced to death under the new Oregon statute. Multnomah County Circuit Judge William Dale imposed the sentence, holding the statute "minimally constitutional," and reversing his earlier ruling that it was unconstitutional. State v. John Wayne Quinn, Multnomah County Circuit Court #C-79-02-30576 (November 5, 1979).

8. Rudolph v. Alabama, 375 U.S. 889 (1963), kindled the debate and the bellows of Furman v. Georgia, 408 U.S. 238 (1972); and Gregg v. Georgia, 428 U.S. 153 (1976), blew it white hot.

9. The few notable exceptions include the Oregon Supreme Court's early decision upholding the constitutionality of the death penalty in State v. Finch, 54 Or. 482, 103 P. 505 (1909); University of Oregon Professor Radin's excellent theoretical article, which, however, deals generally with the death penalty without addressing Oregon issues. Radin, *The Jurisprudence of Death: Evolving Standards For the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978); and Professor Hugo Bedau's article in 1965 capping and celebrating the successful abolitionist movement of the preceding year. Bedau, *supra* note 4.

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

11. State v. Finch, 54 Or. 482, 103 P. 505 (1909).

abolished by a constitutional amendment.[12] Capital punishment reappeared in 1920 through another constitutional amendment,[13] and thereby retained immunity from state constitutional attack until its second abolition in 1964.

Second, Oregon was already in the process of abolishing the death penalty when, in 1963, Justice Goldberg's opinion dissenting from the denial of certiorari in *Rudolph v. Alabama*[14] triggered national discussion of capital punishment. Oregon abolitionists were in the mood to celebrate, rather than debate the then tenuous possibility that the *Rudolph* dissent might blossom into a full Federal Constitutional abolition.[15] The *Rudolph* dissent gave no succor or encouragement to Oregon's capital punishment proponents.

Finally, Oregon did not have a death row population or a death penalty provision when the nationwide death penalty moratorium went into effect in 1967.[16] It still had no death penalty provision in 1971 when *McGautha v. California*[17] upheld the constitutionality of California's death penalty against procedural due process attacks; in 1972 when *Furman v. Georgia*[18] struck down all existing death penalty statutes under the "cruel and unusual" punishment clause of the eighth amendment to the United States Constitution; or in 1976 when *Gregg v. Georgia*[19]

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

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

14. 375 U.S. 889 (1963)(Goldberg, J., dissenting). This was the first time any Supreme Court Justice had gone on record to question the per se constitutionality of capital punishment.

15. *See* Professor Bedau's 1965 prognostication that capital punishment in Oregon "may have passed into history once and for all." Bedau, *supra* note 4, at 2.

16. *See generally* M. MELTSNER, CRUEL AND UNUSUAL, THE SUPREME COURT AND CAPITAL PUNISHMENT 106-48 (1973).

17. 402 U.S. 183 (1971).

18. 408 U.S. 238 (1972).

19. 428 U.S. 153 (1976). While *Gregg* legalized capital punishment, the moratorium continued de facto until Gary Mark Gilmore was executed January 17, 1977, by a Utah firing squad. Gilmore refused to allow appeals of his death sentence. Gilmore v. Utah, 429 U.S. 1012 (1976).

John Spinkelink, executed May 25, 1979, in Florida's electric chair, became the first individual executed against his will in this country in more than a decade. His last

and its companion cases upheld some forms of post-*Furman* capital sentencing statutes.[20]

Oregon jurists have had no opportunity to analyze capital punishment since 1914, and Oregon scholars have had little incentive to plumb the issues themselves. The purpose of this article is to begin to fill this void by discussing the threshold question of the per se constitutionality of capital punishment in Oregon.[21]

The discussion in part I demonstrates that the Supreme Court has accepted retribution theory as necessary to its holding that capital punishment does not invariably violate the Federal Constitution. Part II, however, demonstrates that retribution is prohibited in Oregon by section 15 of the Oregon State Bill of Rights. Oregon's statutory death penalty is, therefore, per se unconstitutional. Parts III and IV consider the proper construction of two additional Oregon Constitutional provisions: article I, section 16, prohibiting "cruel and unusual punishments"; and the 1964 amendment repealing capital punishment.

I. RETRIBUTION, THE UNITED STATES SUPREME COURT AND THE DEATH PENALTY

A. *History of Retribution and the Analytic Framework*

Although much has been written about retribution in general and about its relation to capital punishment in particular,[22] there

attempts to have the execution postponed were denied. Spinkelink v. Wainwright, 99 S. Ct. 2091 (1979); Spinkelink v. Wainwright, 99 S. Ct. 2224 (1979).

20. With no Oregon prisoners waiting on tenterhooks for one or another of the United States Supreme Court's decisions, with Oregon's governors free of the awesome responsibility of considering petitions for pardon or commutation, and with no Oregon legislative action drawing even implicit criticism from a single United States Supreme Court Justice, it is understandable why there has been correspondingly little public debate in the news media, detailed legislative study or fierce political activity on this issue in Oregon despite the intense national controversy during the last fifteen years.

21. Though it is beyond the scope of the present article, the particular capital sentencing procedures of Ballot Measure 8 are constitutionally suspect for at least three reasons. First, unlike the death penalty statutes upheld by the United States Supreme Court, Ballot Measure 8 provides no narrowing or aggravating circumstances to limit murderers eligible for the death penalty to the most heinous offenders. *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 270-71 (1976). Second, Ballot Measure 8 appears to conflict with ORS 163.095-.105 (1977), Oregon's aggravated murder statute. *See* Cannon v. Gladden, 203 Or. 629, 281 P.2d 233 (1955). *But see* 39 OR. OP. ATT'Y GEN. 419 (1978). Third, Ballot Measure 8 deprives the defendant of the traditional right to have a jury decide between the death sentence and life imprisonment. *Compare* Lockett v. Ohio, 438 U.S. 586, n. 16 (1978); Witherspoon v. Illinois, 391 U.S. 510 (1968); *and* OR. CONST. art. I, § 11; *with* Proffitt v. Florida, 428 U.S. 242, 252 (1976).

22. Generally, proponents of the death penalty also support retributivist goals while

has been little analytic consideration of the specific role of retribution in the United States Supreme Court's recent death penalty decisions.

Commentators agree that retribution was the principal justification for private or societal punishment in ancient times.[23] By the sixteenth century governments had largely subsumed private retribution.[24] A competing theory, the utilitarian rationale, gained adherents and arguably replaced retribution as the dominant justification for punishment during the nineteenth century.[25]

Utilitarian theory holds that a punishment is justifiable only if it benefits society more than the deprivation it imposes harms the punished individual. It is concerned exclusively with the consequences of the punishment and, in this sense, is "forward-looking."[26]

Agreement on the parameters of retributivist theory is not uniform. An understanding of its general tenets, rather than comprehensive definition, is, however, sufficient for purposes of this discussion.[27] Retributivist philosophy requires that an individual

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opponents reject them. *See, e.g.*, I. KANT, PHILOSOPHY OF LAW 198 (Hastie trans. 1887); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975); Van Den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L. C. & P. S. 141 (1969) (each supporting both capital punishment and retribution). *See also* Gregg v. Georgia, 428 U.S. 153, 236-41 (1976) (Marshall, J., dissenting); A. CAMUS, REFLECTIONS ON THE GUILLOTINE (1960); A. KOESTLER, REFLECTIONS ON HANGING (1957); K. MENNINGER, THE CRIME OF PUNISHMENT (1966) (each opposing the death penalty and finding retributivist goals of punishment unacceptable).

23. Bourke, *The Ethical Justification of Legal Punishment*, 22 AM. J. JURIS. 1, 8-9 (1977); Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781 (1976); Warner, *The Theory of Punishment*, 7 OR. L. REV. 119, 119 (1927)("Vengeance is the theory of punishment upon which our criminal law has been built."). *See also* a wonderful old article by Arnold D. Margolin who had previously been a Justice of the Supreme Court of the Ukraine. Margolin, *The Element of Vengeance in Punishment*, 24 J. CRIM. L. C. & P. S. 755, 757 (1933)("Vengeance was the sole parent of punishment . . . preceding the legislation of Moses."). *But see* PLATO, PROTAGORAS (G. Vlastos ed. 1956) (Plato criticized retributivist punishment by analogizing it to "lashing a rock" and declaring that it was, therefore, pointlessly primitive.).

24. *See, e.g.*, Warner, *The Theory of Punishment*, 7 OR. L. REV. 119, 122 (1927).

25. *See, e.g.*, Weiler, *Why Do We Punish? The Case for Retributive Justice*, 12 U. BRIT. COLUM. L. REV. 295, 296 (1978). The author attributes the temporary ascendancy of utilitarianism largely to the work of Jeremy Bentham. This century has witnessed among some, a substantial rebirth of retributive beliefs. *See generally* G. NEWMAN, THE PUNISHMENT RESPONSE (1978); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975); A. VON HIRSCH, DOING JUSTICE (1976).

26. *See, e.g.*, J. BENTHAM, *Principles of Penal Law*, in 1 WORKS 398 (1843).

27. Those who have studied the question have found substantial imprecision and inconsistency in prior definitional attempts. For example, Arval Morris finds retribution

voluntarily commit a wrong before the individual may be punished. The extent of punishment must be proportionate to the offender's culpability[28] in order for the punishment to be "deserved." Proportionality and desert serve as both the justification for punishment and as a limit to its severity, since, to the retributivist, the imposition of deserved punishment is a self-evident moral good while disproportionate punishment is an impermissible moral evil. It follows that retribution is "backward-looking" in the sense that it focuses strictly on the culpability of the offender at the time of the offense, and is not concerned with the consequences of the punishment.[29]

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confusing because it has, at different times, focused on vengeance or reprobation. Morris, *Thoughts on Capital Punishment*, 35 WASH. L. REV. 335, 346 (1960). Martin Gardner finds at least three distinct meanings: vengeance, nonutilitarian punishment based on justice and desert, and utilitarian retribution. Gardner, *Executions and Indignities—an 8th Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO STATE L. J. 96, 115-16 (1978). Jack Gibbs criticizes prior definitions of retribution as inadequate. He defines retribution as follows: "The legal punishment of an individual, with the punishment prescribed by law solely for the reason that those on whom it is to be inflicted deserve it." Gibbs, *The Death Penalty, Retribution and Penal Policy*, 69 J. CRIM. L. & CRIMINOLOGY 291, 294 (1978). This concept of desert also finds expression in the definitions offered in Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 1093 (1978), and in Weiler, *Why Do We Punish? A Case for Retributive Justice*, 12 U. BRIT. COLUM. L. REV. 295, 310 (1978). Coffee criticizes retribution and describes the desert principles as a "mysterious assumption." Compare the disparate discussions of retribution in the plurality opinion of Justices Stewart, Powell and Stevens with the dissenting opinion of Justice Marshall in Gregg v. Georgia, 428 U.S. 153 (1976). An excellent attempt to untangle the philosophical confusion is found in Bedau, *Retribution and the Theory of Punishment*, 75 J. PHILOSOPHY 601 (1978).

28. The retributivist Biblical incantation of *lex talionis*, *Exodus* 21:22 ("eye for eye, tooth for tooth"), requires equality more than proportionality. Proportionality, as a theoretical limit on the extent of punishment, serves as the basis for one of the classic retributivist criticisms of the utilitarians; that is, an argument that utilitarian theory does not prohibit the intentional punishment of an innocent citizen where the benefits of such an action outweigh its liabilities to society as a whole. *See, e.g.*, Bourke, *The Ethical Justification of Legal Punishment*, 22 AM. J. JURIS. 1, 7 (1977). John Rawls is generally credited with developing the current utilitarian respoµse to this argument. J. RAWLS, A THEORY OF JUSTICE (1971).

29. This concept finds its most pristine statement in I. KANT, PHILOSOPHY OF LAW 198 (Hastie trans., 1887), as follows:

> Even in a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves through the whole world—the last Murderer lying in prison ought to be executed before the resolution was carried out.

Kant's notion was that man ought not to be used as an object of society for any purpose and, therefore, the true justification for punishment is pure "desert." Consequently, the

Only these two justifications, utilitarian or retributivist, have been seriously advanced to explain the imposition of criminal sanctions.[30] Therefore, any individual arguing the appropriateness of a particular punishment, in this case the death penalty, would have to take one of the following positions:

(1) *U*: Only utilitarian goals are permissible and capital punishment adequately serves these goals.

(2) *R*: Only retributivist goals are permissible and capital punishment adequately serves these goals.

(3) *Ur*: Either utilitarian or retributivist goals are permissible and capital punishment serves the utilitarian goals well enough so that any contribution or lack of contribution to retributivist goals is irrelevant.

(4) *Ru*: Either utilitarian or retributivist goals are permissible and capital punishment serves the retributivist goals well enough so that any contribution or lack of contribution to utilitarian goals is irrelevant.

(5) *u+r*: Both sets of goals are acceptable and even though the contribution of capital punishment to either goal alone is not enough to justify its imposition, the combination of its contribution to utilitarian and retributivist goals does provide an adequate justification.

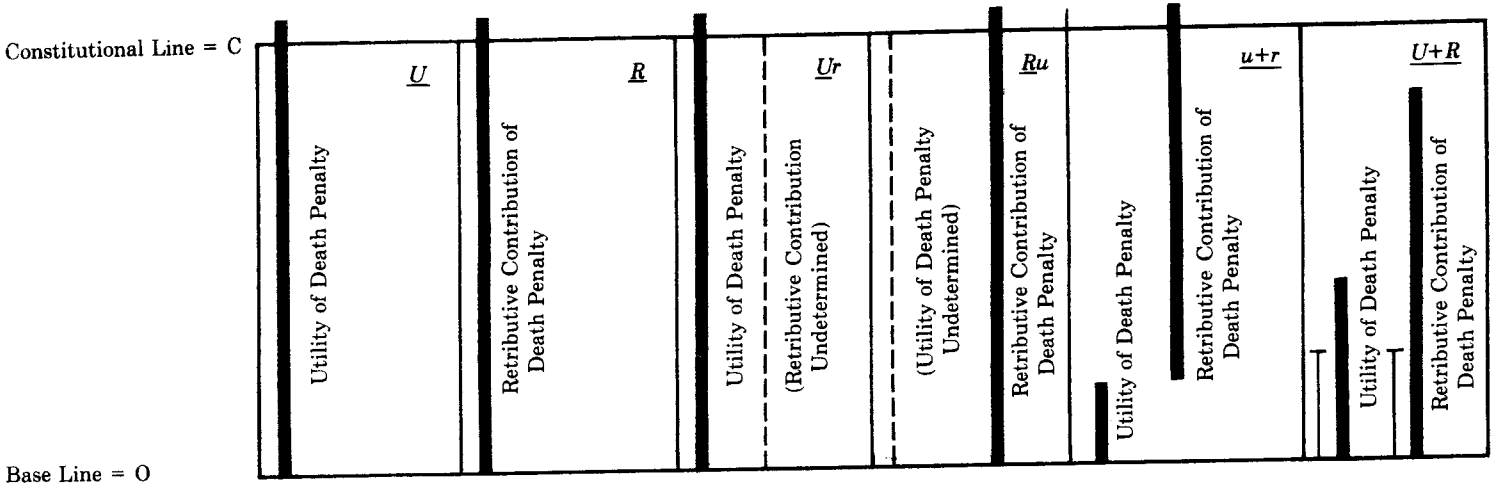
(6) *U+R*: Both utilitarian and retributivist goals are not only permissible but required, and capital punishment contributes sufficiently to each of the two sets of goals.[31]

Of these six possibilities, the first and third rely exclusively on utility to justify capital punishment. The second, fifth and

individual who "deserves" punishment is to be punished whether society will gain or lose from the punishment, even if society no longer exists to gain or lose.

30. *See, e.g.*, C. BECCARIA, ON CRIMES AND PUNISHMENTS (W. Paolucci trans. 1963); J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford ed. 1876); E. BLOCK, AND MAY GOD HAVE MERCY (1962); THE DIALOGUES OF PLATO (1973); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); *Exodus* 21:22-25; J. FEINBERG & H. GROSS, PUNISHMENT AND RESPONSIBILITY (1977); H. HART, PUNISHMENT AND RESPONSIBILITY (1968); G. HEGEL, PHILOSOPHY OF RIGHT (T. Knox trans. 1952); I. KANT, THE PHILOSOPHY OF LAW (Hastie trans. 1887); *Leviticus* 24: 17-24; *Matthew* 5:38; K. MENNINGER, THE CRIME OF PUNISHMENT (1966); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); J. RAWLS, A THEORY OF JUSTICE (1971); Bourke, *The Ethical Justification of Legal Punishment*, 22 AM. J. JURIS. 1 (1977); Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3, 32 (1955).

31. These six positions may be graphically represented as follows:



These positions may also be represented by simple mathematical formulae in which: U = Utility of Death Penalty; R = Retributive Contribution of Death Penalty; C = Minimum Constitutionality; Cr = Minimum Retributive Contribution for position six; Cu = Minimum Utility for position six.

(1) $\underline{U}$: R=O, U$\geq$C; (2) $\underline{R}$; U=O, R$\geq$C; (3) $\underline{Ur}$; U$\geq$C; (4) $\underline{Ru}$: R$\geq$C; (5) $\underline{u+r}$; U<C, R<C, U+R$\geq$C; (6) $\underline{U+R}$; Cu$\leq$U<C, Cr$\leq$R<C, U+R$\geq$C.

sixth possibilities each require an element of retribution.[32] More evidence is necessary to determine if the fourth possibility also requires an element of retribution, since this possibility contains no intrinsic information about the value of the utility of capital punishment.[33]

Applying this analytic framework to the Supreme Court's death penalty decisions will demonstrate that the Court rejects the first and third possibilities. Even if the fourth possibility is taken, arguendo, as the rationale for the Court's holdings, there is evidence in the opinions that the previously unexplored residue of capital punishment's utilitarian contribution is insufficient to justify the punishment without some measure of retribution. Therefore, the Court has accepted, at least implicitly, retribution theory as a necessary condition for its determination that the death penalty is constitutional. The predicted stability[34] of this conclusion is greatly enhanced by evidence indicating the low level of capital punishment's utility, thus making retribution the only arguably legitimate basis for the Court's holdings.

B. *Retribution and the Supreme Court Death Penalty Decisions*

In *Furman v. Georgia*,[35] the Court held that the then preva-

32. The death penalty can be constitutional if R equals zero for the first and third possibilities, but can only be constitutional under the second, fifth or sixth possibility if R is greater than zero.

33. That is U could equal zero, be between zero and C or be greater than or equal to C. If U is zero or between zero and C, then retribution is necessary as well as sufficient. If, on the other hand, U is greater than or equal to C, it is possible that a court utilizing the fourth possibility could, on being given an external constraint that R equals zero, rely on U alone and still declare the death penalty constitutional.

34. The term "stability" is used here as a measure of several concepts: (1) the likelihood that the court will apply the logical consequences of its articulated decisional principles to future cases (that is, the likelihood it will apply them as "neutral principles," *see* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)); (2) the likelihood that these principles would survive one or more changes in the present makeup of the court; and (3) the likelihood that these principles will survive over time (that is, the unlikelihood that they will be affected by changing facts and circumstances).

Stability is not essential to the argument that the death penalty is unconstitutional in Oregon at the present time. It is clear, however, that the greater the stability of the retribution conclusion, the greater the chances that state courts will apply it through the eighth amendment or through their own constitutions. Furthermore, the United States Supreme Court will enforce it on state courts that do not, by taking certiorari in those cases where the retribution conclusion would lead to a result contrary to the decision of the highest state court.

35. 408 U.S. 238 (1972)(decided with Jackson v. Georgia and Branch v. Texas).

lent capital sentencing scheme giving the jury unbridled discretion to decide between life and death violated the eighth amendment, but failed to decide whether the death penalty was per se unconstitutional. Four years later, the Court held in *Gregg v. Georgia*[36] that capital punishment does not necessarily violate the "cruel and unusual punishments" clause of the eighth amendment. In light of the contrary views of two Justices, Marshall and Brennan,[37] the plurality opinion of Justices Stewart, Powell and Stevens is pivotal on this issue.

In *Gregg*, the plurality reviewed history and case law, and determined that the eighth amendment "has been interpreted in a flexible and dynamic manner"[38] and that it "'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[39] Therefore, in order to pass constitutional muster, "a challenged punishment must be acceptable to contemporary society"[40] and must also comport "with the basic concept of human dignity at the core of the amendment."[41] The plurality concluded that capital punishment is, indeed, acceptable to contemporary society by looking to "objective indicia,"[42] by presuming the validity of the legislative enactment, and by placing a "heavy burden" on those attacking the constitutionality of the legislation.[43]

A punishment, in this case the death penalty for murder,

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36. 428 U.S. 153 (1976).

37. Because of the numerous individual opinions issued by the Justices in the various death penalty cases, and the general inability of the Court to agree on a majority position, an explanation of the methodology used in analyzing the importance of retribution to the Court's holdings is in order. Justices Brennan and Marshall have taken the consistent stand that the death penalty is, in all forms, violative of the eighth amendment. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (Brennan, J., concurring; Marshall, J., concurring); Gregg v. Georgia, 428 U.S. 153 (1976)(Brennan, J., dissenting); Alford v. Florida, 428 U.S. 911 (1976)(Brennan, J., and Marshall, J., dissenting from the denial of certiorari). As long as they remain on the court, their votes will undoubtedly be to take certiorari in every case where the death penalty is imposed and, if certiorari is granted, to vote against the imposition of the death penalty. Therefore, for purposes of practical effect, it will only be necessary to establish that the views of three members of the present Court require retribution theory to uphold capital punishment. Nonetheless, the views of all of the Justices are drawn upon to enhance the "stability" of the retribution conclusion. *See* note 34 and accompanying text *supra*.

38. 428 U.S. at 171.

39. *Id.* at 173(quoting with approval from Trop v. Dulles, 356 U.S. 86, 101 (1958)).

40. *Id.* at 182. *See also id.* at 173-81.

41. *Id.* at 182. *See also id.* at 173.

42. *Id.* at 173.

43. *Id.* at 175.

could still run afoul of the eighth amendment under the second "subjective" prong of the plurality's test, which requires a determination of whether a punishment is "excessive"; that is, whether it involves "the unnecessary and wanton infliction of pain" *or* is "grossly out of proportion to the severity of the crime."[44] The plurality concluded that proportionality is not a significant constitutional concern when the offender has deliberately taken another human life.[45] The "unnecessary . . . pain" strand of its eighth amendment test was recast to prohibit the imposition of a punishment that is "so totally without penological justification that it results in the gratuitous infliction of suffering."[46] In considering this strand, the plurality recognized only two principal penological purposes: retribution and deterrence.[47]

With regard to retribution, the *Gregg* plurality stated that capital punishment is, in part, "an expression of society's moral outrage at particularly offensive conduct"; that this societal use of retribution may help to deter private retaliation; and that retribution is neither "a forbidden objective nor one inconsistent with our respect for the dignity of man."[48] The plurality was even persuaded that "certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."[49]

Thus, the plurality rejected exclusive utilitarianism, U, as a rationale for its decision upholding the constitutionality of the death penalty. The plurality's willingness to consider deterrence, a utilitarian purpose, as a possible legitimate penological goal

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44. *Id.*

45. *Id.* at 187. The plurality seemed to assume that the deliberate taking of the offender's life by the state is a perfectly symmetrical and proportional response to the crime of deliberate murder.

46. *Id.* at 183.

47. *Id.* The plurality also recognized the possible utilitarian justification of incapacitation but declined to rely on it. *See id.* at 183 n. 28. This disclaimer is appropriate since true life imprisonment would obviously incapacitate as effectively as the more severe punishment of death. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (Brennan, J., concurring).

48. 428 U.S. at 183.

49. *Id.* at 184. The plurality's footnote 30 is not reproduced in its entirety. It is enough to note that Justice Stewart quoted with approval from Lord Justice Denning, Royal Commission on Capital Punishment, *Minutes of Evidence, December 1, 1949*, 207 (1950), as follows: "The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not."

of a constitutional punishment, rules out the second possibility, *R*, as well.[50]

To determine the plurality's position on *Ur*, the third possibility, it is necessary to closely examine the Court's consideration of deterrence. In evaluating the statistical evidence and long-standing debate about whether the death penalty acts as a more effective deterrent than life imprisonment, the *Gregg* plurality stated that the results of the evidence and debate "simply have been inconclusive"[51] and that "there is no convincing empirical evidence either supporting or refuting" the view that "the death penalty may not function as a significantly greater deterrent than lesser" punishments.[52] Justice Stewart continued as follows:

> We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.[53]

The plurality then referred to its earlier presumption of validity of the legislative action, its own institutional incompetence to resolve the deterrence debate, and its placement of a heavy burden of proof on attackers of the death penalty.[54] Significantly, the *Gregg* plurality did not directly apply this three-part formula to the deterrence issue standing alone. To have done so might have implied a possible conclusion that deterrence and, therefore, utilitarianism, justifies the death penalty by itself. Instead, the plurality applied the formula to an interrelated mix of three essential parts: societal acceptance of the death penalty, retribution and deterrence. The plurality wrote:

> In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its

50. *See* 428 U.S. at 183-87, for the plurality's acceptance of deterrence as a legitimate penological purpose.

51. *Id.* at 184-85.

52. *Id.* at 185.

53. *Id.* at 185-86(footnotes omitted).

54. *Id.* at 186-87.

> particular state, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.[55]

Taken together, these statements suggest three conclusions. First, the *Gregg* plurality viewed the penological justifications of retribution and deterrence as forming an interrelated package, and that without retribution the package would lose its constitutional luster. Second, these three Justices would not allow imposition of the death penalty, a penalty which they deem "unique in its severity and irrevocability,"[56] solely on inconclusive and unconvincing evidence. This is especially true for capital murderers not contained within the limited group of those the plurality intuitively assumed to be deterred by the death penalty. For example, although the crimes of defendants Gregg, Proffitt and Jurek were certainly horrible enough, none of them fits clearly within the plurality's category, referred to above, since the murders were not carefully contemplated.[57] Third, the plurality's formula of presuming the constitutionality of the legislative enactment and placing a heavy burden of proof on attackers of the death penalty is strong evidence that the plurality adopted at least a partially retributivist constitutional framework, and that some element of retribution is essential to their decision rejecting

55. *Id.* "Moral consensus" obviously includes the acceptable level of retribution, or it would be reduced to mean mere "political consensus."

56. *Id.* at 187.

57. Jurek v. Texas, 428 U.S. 262 (1976) (Jurek killed a 10-year old girl while attempting to rape her); Proffitt v. Florida, 428 U.S. 242 (1976)(Proffitt stabbed and killed an occupant of a home that he was burglarizing); Gregg v. Georgia, 428 U.S. 153 (1976)(Gregg was convicted, over his self-defense claim, of murdering two men during the course of his armed robbery).

The Court has subsequently denied certiorari in numerous death sentence cases from these same three states. The dissents from the denial of certiorari filed by Justices Brennan and Marshall have been consistent. *See, e.g.*, Redd v. Georgia, 99 S. Ct. 2870 (1979); Ferguson v. Texas, 99 S. Ct. 2870 (1979); Muniz v. Texas, 99 S. Ct. 2850 (1979); Goode v. Florida, 99 S. Ct. 2419 (1979); Von Byrd v. Texas, 99 S. Ct. 2418 (1979); Songer v. Florida, 99 S. Ct. 2185 (1979); Denney v. Texas, 437 U.S. 911 (1978); Alford v. Florida, 436 U.S. 935 (1978); Thomas v. Georgia, 436 U.S. 914 (1978); Gibson v. Florida, 435 U.S. 1004 (1978). It is apparent that not even two other Justices have been willing to review death sentences imposed on defendants whose conduct and background take them even further from the category of deterrable offenders postulated by the plurality. The reader is cautioned, however, not to make too much of this argument because of the myriad number of factors, even in death penalty cases, that may persuade a Justice to vote against certiorari.

the per se unconstitutionality of the death penalty.

Since the plurality did not question the proportionality of capital punishment for deliberate murder, the retributivist would find the plurality's formula perfectly acceptable because proportioned punishment is not only allowed, it is morally required. To overcome this moral imperative, the offender will, naturally, bear a heavy burden in attacking the constitutionality of the punishment. The utilitarian, on the other hand, views all punishment as an evil. Capital punishment can only be acceptable if its utility to society outweighs the intrinsic evil that comes both from imposing pain on the offender and from depriving the offender of life and liberty.[58] For the utilitarian, the state has the burden of establishing that the imposition of capital punishment is of sufficient utility to outweigh its intrinsic evil.

There is one complication to this analysis in that the *Gregg* plurality, at least in part, expressly relied on two external values, federalism and a general presumption of constitutionality, to support its choice of this particular procedural formula. These values, however, do not provide adequate independent support for this formula. In other cases involving the state's deprivation of an individual's fundamental right, the Court has uniformly shifted the burden of proof to the state.[59]

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58. This distinction is made graphic in the following example of a utilitarian's traditional criticism of retribution:

> This [retributive] theory falls short . . . first and most obviously in its commitment to pointless suffering . . . . [S]uffering is an intrinsic evil, and we have the right to ask of anyone who imposes it what good he expects to come by it and how he intends to justify its price. Does he impose it to reform the sufferer? The retributivist says, No, that is not what retribution is for. Does he impose it then to protect the public through a preventative threat? No, that again would be falling back on consequences. Why then does he impose it? Simply because wickedness deserves suffering. How does he know that? Answer: It is self-evident. Now to anyone inclined, as I am, to hold as self-evident the view that you should produce the largest obtainable good, this view that you should add another evil to one which already exists, is not only not self-evident; it seems to conflict with one that is.

Blandshard, *Retribution Revisited*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 59, 74-75 (1968).

59. Where the government seeks to deprive an individual of an important (or fundamental) right, the burden is shifted to the government to show a substantial (or compelling) governmental interest. Even if such an interest is shown, the means chosen to accomplish it will be subject to close scrutiny to insure that they are closely related to the objective and that they are the least intrusive means possible. *See, e.g.*, Gardner v. Florida, 430 U.S. 349 (1977); Roe v. Wade, 410 U.S. 113 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942).

Finally, in stating that societal use of the death penalty as a means of retribution may help reduce the incidence of private retaliation, the *Gregg* plurality may, at least partially, have "utilitarianized" retribution. But the plurality presented no evidence, and there simply is no evidence, that the death penalty serves this utilitarian function better than the lesser punishment of life imprisonment.[60] It could perhaps be argued that the plural-

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The convicted offender clearly has a fundamental interest in receiving life imprisonment rather than the death penalty because of the "unique severity" of the death penalty when compared with life imprisonment and because execution is the termination of even the right to have rights. The government, therefore, would normally have to establish that the death penalty is significantly more effective in combatting crime than the less intrusive alternative of life imprisonment. *Accord*, Commonwealth v. O'Neal, 367 Mass. 440, 339 N.E.2d 676 (1975)(holding that the state did not have a compelling interest in the retention of capital punishment and that the penalty was therefore unconstitutional cruel and unusual punishment). *Cf.* Moore v. City of East Cleveland, 431 U.S. 494, 548 (1977)(ranking the interest in freedom from cruel and unusual punishments as "almost impregnable").

H.L.A. Hart, a noted authority, argues that only a strong retributivist position could justify a formula like the one adopted by the *Gregg* plurality since even a qualified-utilitarian position would require that the burden of proof be upon those who argue in favor of the death penalty. This is so since "(1) prima facie the taking of life, even by the State,. . . is an evil to be endured only for the sake of some good; (2) the death penalty is irrevocable and the risk of an innocent person being executed is never negligible. . . ." Hart, *Murder and the Principles of Punishment, England and the United States*, 52 N.W. L. REV. 433, 460 (1957).

There is language in other Supreme Court decisions that supports a limited notion of presumption of constitutionality for legislative enactments not affecting fundamental rights and of placing some burden of proof on the attackers of that legislation, but the presumption and burden are most often thought to be more applicable to federal rather than state legislation. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 154-55 (1893). *See also* Justice Holmes' oft-cited remark: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." O. W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 295-96 (1920). *Cf.* Baker v. Carr, 369 U.S. 186 (1962) (noting that a state legislature is not a branch of government co-equal with the Supreme Court, while holding justiciable a constitutional challenge to a state legislative apportionment plan). Furthermore, the entire notion of presumption of constitutionality has been persuasively criticized in Linde, *Without "Due Process" Unconstitutional Law in Oregon*, 49 OR L. REV. 125, 172 (1970).

60. Justice Marshall made this point in his *Gregg* dissent and found no evidence that life imprisonment, as compared with the death penalty, encourages private blood feuds and other disorders. 428 U.S. 153, 238 (1976)(Marshall, J., dissenting). He also rejected the notion that the death penalty might serve a "moralizing" function better than life imprisonment. Justice Marshall stated that "[i]t is inconceivable that any individual concerned about conforming his conduct to what society says is 'right' would fail to realize that murder is 'wrong' if the penalty were simply life imprisonment." *Id.*

See generally Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Atkinson, *Punishment as Assurance*, 4 TASMANIA L. REV. 45 (1972).

ity employed a heavy burden of proof and presumption of validity, and thus only implied that the burden was not carried to show the death penalty's lack of efficacy in furthering "utilitarian retribution." Once again, these procedural techniques would evidence an element of true retribution and would establish the existence of retribution theory in the plurality's opinion.[61]

All of this evidence, taken together, rules out *Ur*, the third possibility, as the true rationale of the plurality's conclusion that the death penalty is not per se unconstitutional.

The plurality quoted with approval the assertion of *Williams v. New York*, that "[r]etribution is no longer the dominant objective of the criminal law."[62] This establishes that the fourth possibility, *Ru*, is also not adequate to explain the general constitutionality of the death penalty for murder. The plurality's willingness to consider the complex deterrence debate suggests the same conclusion.[63] Even if *Ru* were assumed, arguendo, to constitutionalize capital punishment for the limited number of individual crimes for which the *Gregg* plurality recognized that death may be "the only adequate" community response,[64] the preceding discussion shows that the plurality would not be satisfied by the residue of capital punishment's utilitarian efficacy without retribution.[65]

The only remaining viable options to explain the plurality's

See also Gibbs, *Preventive Effects of Capital Punishment Other Than Deterrence*, 14 CRIM. L. BULL. 34, 47 (1978), in which the author stated, "[s]urely, there is no evidence that private vengeance of crimes is more common in jurisdictions where the death penalty has been abolished. . . . [O]nly rarely do Americans seek private vengeance for crimes, especially in cases where a legal punishment has been imposed."

But see O. W. HOLMES, THE COMMON LAW 41 (1881). One would also rationally assume that the most likely source of private vengeance would be the victim of a crime. Since the murder victim is, by definition, unavailable, it seems less persuasive that this would be an issue for murder than for other crimes such as rape.

61. *See* note 59 *supra*.

62. Williams v. New York, 337 U.S. 241, 248 (1949)(quoted in Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

63. It is unlikely the Court would have considered this intractable problem if its resolution was not essential to a conclusion about the per se constitutionality of capital punishment.

64. *See* note 49 and accompanying text, *supra*.

65. One might think of this argument as follows: If both R and U are legitimate penological functions, then, in order for a punishment to be constitutional, $R+U$ must be greater than or equal to a constitutional constant, C. The fourth possibility, *Ru*, asserts than R alone is greater than or equal to C, and, therefore, the statement that $R+U$ is greater than or equal to C does not tell us anything about the magnitude of U. The external evidence, however, establishes that U is less than C and that retribution is thus necessary to justify capital punishment.

constitutional validation of capital punishment are $\underline{u+r}$ and $\underline{U+R}$, the fifth and sixth possibilities. The portions of the *Gregg* plurality's opinion cited previously support each of these two possibilities. In fact, it is quite likely that the plurality's rationale was contained within an overlapping sub-set of $\underline{u+r}$ and $\underline{U+R}$. This evidences judicial constitutionalization of a hybrid model, with elements of utility and retribution both necessary to justify capital punishment.[66]

The theoretical framework presented here concludes that the plurality's acceptance of retribution was essential to its opinion upholding capital punishment. The validity of the framework and its conclusion can be tested by determining whether they successfully accommodate data not used in their construction. The plurality's views in subsequent cases demonstrate that these new data are not only consistent with, but buttress, the postulated model.

In two decisions contemporaneous with *Gregg, Woodson v. North Carolina*[67] and *Stanislaus Roberts v. Louisiana*,[68] the same plurality again cast the pivotal votes. In these cases, the Court struck down two mandatory death penalty laws. The plurality held that for a sentence of death to be imposed constitutionally, the sentencer must consider "the character and record of the individual offender and the circumstances of the particular offense" and "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[69]

There are two possible explanations for this holding. First, the concern for mitigating circumstances implies a search for the reformable offender, for the offender who could not have been expected to have been personally deterred by the existence of the

66. This hybrid is often referred to as the Hart-Packer model. *See* H.HART, PUNISHMENT AND RESPONSIBILITY (1968); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968). Other evidence that the Court at least implicitly has accepted the major elements of a mixed utilitarian-retributivist model can be found in United States v. United States Gypsum Co., 438 U.S. 422 (1978); Morissette v. United States, 342 U.S. 246 (1951); and Blyew v. United States, 80 U.S. (13 Wall.) 581, 600 (1871) ("[t]he object of . . . punishment is to prevent crime, as well as to vindicate public justice.").

Though irrelevant to the present analysis, it is worth noting that Professor Bedau has recently argued persuasively that capital punishment cannot be justified even under a mixed model. Bedau, *The Death Penalty: Social Policy and Social Justice*, 1977 ARIZ. STATE L. J. 767.

67. 428 U.S. 280 (1976).

68. 428 U.S. 325 (1976).

69. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

death penalty,[70] or even for the offender whose conduct would be unlikely to raise the specter of a "private blood feud." These all would indicate a utilitarian function. Nonetheless, if one accepts the notion that capital punishment may serve a utilitarian function, it seems illogical to criticize the legislature for deciding that the deterrent function would be best served by a clear, easily understandable mandatory death sentence provision.[71]

The second and more logical explanation for the plurality's concern with mitigating circumstances follows from an inherent belief that the Constitution forbids the execution of an offender when the "appropriate level of retribution"[72] would not justify the death penalty. That is, given the present state of the evidence concerning the uncertainty of the utility of the death penalty as perceived by the plurality, it takes a certain quantum of "constitutional retribution" to push the death penalty over the constitutional hurdle of the eighth amendment. When the level of appropriate retribution is externally constrained by the nature of the offense or offender, the death penalty becomes unconstitutional cruel and unusual punishment.[73] For example, the execu-

70. However, the plurality seems always to focus on general rather than specific deterrence. General deterrence means that a punishment of one individual deters other individuals from committing the same crime, whereas specific deterrence means punishing one individual to deter that same individual from repeating the crime in the future. That the death penalty prevents the offender, in fact, from committing future murders is a function of "incapacitation," discussed at note 47 *supra*, rather than specific deterrence.

71. Increased odds of execution would certainly enhance the deterrent value of the death penalty for the potential murderer who is the hypothetical rational calculator. The plurality itself acknowledges in *Woodson* that mandatory death "may reasonably be expected to increase the number of persons sentenced to death." 428 U.S. at 303.

72. The words "appropriate level of retribution" suggest that even if the Constitution permits some retribution, it sets a limit on the amount that can be relied on to justify a particular punishment even though the body politic may actually feel a higher subjective level of retribution. Determining what the "appropriate" level of retribution is in particular cases under the United States Constitution is difficult. Even constructing satisfactory theoretical decisional criteria seems beyond the present ability of the Court. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977). It will be seen in part II *infra*, that this complex problem does not rear its head in Oregon since the level of "allowed" retribution is explicitly set at zero by the Oregon Constitution.

73. Roberts v. Louisiana, 428 U.S. 325 (1976), and Roberts v. Louisiana, 431 U.S. 633 (1977), are most persuasive on this point. Unlike North Carolina's broad mandatory capital punishment provision, N.C. GEN. STAT. §§ 14-17, challenged in *Woodson*, Louisiana's mandatory scheme narrowly limited the classes of murder for which the death penalty would be imposed. Roberts' death sentences were nonetheless reversed. The plurality opinions led to holdings that the murderer of a peace officer, the mass murderer or even the intentional contract murderer cannot be automatically sentenced to death after a valid conviction. If there is utility in the death penalty at all, the legislature would surely be on firm footing in finding significantly greater utility in the use of the death penalty

tion of one premeditated murderer who becomes severely mentally ill after his or her conviction would have the same general deterrent value as the execution of any other premeditated murderer. Yet, if the mental illness is severe enough to sufficiently reduce society's level of appropriate retributive feelings, the offender's execution becomes impermissible.[74]

Coker v. Georgia[75] adds further support to the conclusion that the *Gregg* plurality's acceptance of retribution was essential to its upholding capital punishment. Justice White wrote for the Court in *Coker* and was joined fully by Justice Blackmun and by two members of the *Gregg* plurality, Justices Stewart and Stevens.

In *Coker*, Earl Anthony Coker, while serving time for a number of offenses including rape and murder, escaped and raped one Mrs. Carver, an adult under Georgia law though only sixteen years old. He was convicted and sentenced to death under the Georgia sentencing scheme that had been held constitutional for capital murder in *Gregg v. Georgia*.[76] The Supreme Court reversed Coker's death sentence and held that the death penalty for rape of an adult woman is per se unconstitutional under the eighth amendment.[77]

Justice White began his analysis by restating the constitutional test for cruel and unusual punishment:

> [A] punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.[78]

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in these three specific instances. In fact, if one were to hypothesize the epitome of the "rational-calculator" killer, it would be the intentional contract murderer. The plurality makes exactly this point in *Gregg*, 428 U.S. at 186. Even with the deterrent value of capital punishment at its high water mark, this deterrent value by itself is still not enough for the plurality to constitutionalize the death penalty because of the bare possibility that circumstances surrounding the individual offender may present external constraints that limit "allowed" retribution below the necessary constitutional level.

74. *See, e.g.*, Solesbee v. Balkcom, 339 U.S. 9 (1949) (Frankfurter, J., dissenting). *See also* T. ARNOLD, THE SYMBOLS OF GOVERNMENT 10-13 (1935).

75. 433 U.S. 584 (1977).

76. *Id.* at 587. *See also id.* at 605 (Burger, C. J., dissenting).

77. *Id.* at 592. The concurrences of Justices Brennan and Marshall make six votes for this proposition and make it clear that it, indeed, is the holding of the court. *Id.* at 600-01.

78. *Id.* at 592.

Since Justice White concluded that capital punishment is "grossly disproportionate" for the crime of raping an adult woman,[79] he found it unnecessary to consider the first prong of the test.[80] In reaching his conclusion of disproportionality, Justice White acknowledged the seriousness of the crime of rape[81] but wrote:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person. The murderer kills, the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability" [citation omitted], is an excessive penalty for the rapist who, as such, does not take human life.[82]

Neither Coker's prior record nor the presence of statutory aggravating circumstances persuaded Justices White, Stewart, Blackmun or Stevens that there could be any exception to the above conclusion. Justice White did not follow a utilitarian approach. This nonutilitarianism is evidenced by his statements that "prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life"[83] and that "[i]t is difficult to accept the notion, and we do not, that the rape, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim."[84] A striking similarity exists between Justice White's language and the classical retributivist pronouncement, the Biblical doctrine of *lex talionis*,[85] an eye for an eye.

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79. *Id.*

80. *Id.* at 592-93 n. 4.

81. *Id.* at 597.

82. *Id.* at 598 (footnotes omitted).

83. *Id.* at 599.

84. *Id.* at 600. The aggravated rapist is being compared to the deliberate killer who kills in the absence of statutorily provided aggravating circumstances.

85. *See, e.g., Comment, Disinterment of Ancient Law: An Eye For an Eye, No Death for Rape*, 44 BROOKLYN L. REV. 622 (1978). Others have argued more generally that the use of "increased harm" to justify "increased punishment" is inherently retributive. *See* Allen, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm*, 25 BUFFALO L. REV. 1 (1975); Shulhoffer, *Harm and Punishment: A Critique of*

Justice White's conclusion that only the offense itself, not the unrelated demonstrated recidivism of the defendant, could justify the death penalty clearly shows that this is a "backward-looking" model in the true retributive sense and pays little heed to the "forward-looking" hypothetical utility of eliminating Coker. Most importantly, Justice White did not place a heavy burden on the defendant to show that the penalty is disproportionate, or presume that it is proportionate. Since the same considerations of federalism and judicial deference present in *Gregg* were also present in *Coker*, this procedural difference can only be explained by the reduction of the retributive justification of capital punishment for the rapist as compared with the murderer. This illustrates how essential retribution is to the plurality's procedural formula in *Gregg*.

Any attempt to construct a possible explanation for the *Coker* decision would fail if one assumes that only utilitarian goals can justify a punishment and that retribution is used by the Court solely as a limit on punishments. Since proportionality serves as a retributive justification as well as a limit for punishments, such an explanation would necessarily imply that the Court accepted one-half of one tenet of retribution theory while totally rejecting the other tenets. There is no articulated, or implicit, constitutional principle to support this dichotomy, and it does not square with the plurality's language in any of these cases. The dichotomy would, for example, be inconsistent with the *Gregg* plurality's assessment of the death penalty's low level of utility as a deterrent to murder, and also with Justice White's similar conclusion that "it would be difficult to support a claim that the death penalty for rape is an indispensable part of the state's criminal justice system."[86]

If it is correct that, retribution aside, the utility of the death penalty for rape is always insufficient to justify its constitutionality, then retribution must be essential to the constitutionality of the death penalty for murder. This becomes apparent when one compares the expected utility of the death penalty for the one-time murderer with the utility of the death penalty for the recidivist rapist.

Emphasis on the Results of Conduct in the Criminal Law, 122 U. PA. L. REV. 1497 (1974). Professor Shulhoffer notes that Oregon is one of the few states to "explicitly prohibit reliance on [a crude retaliation theory, that is, vengeance] . . . ." *Id.* at 1500-01.

86. 433 U.S. 584, 592-93 n. 4 (1977).

A potential offender considering rape or murder, presumed to be a mythical rational calculator, would compute the total risk or game theoretic cost as being the same for either offense, as long as the predictable odds of actually being executed were also identical. On the other hand, the total benefit, or predicted game theoretic gain, diminishes as the severity of the offense decreases.[87] Therefore, capital punishment should achieve greater deterrence on the rapist than on the murderer, since they share an equal risk but the rapist has less to gain. Thus, in a nonretributive model without other constraints, society will achieve greater uility by imposing capital punishment on the rapist rather than on the murderer.

The counter argument is that since there is greater harm to society from a murder than from a rape, it is more imperative to deter murder than rape. Even if this is so, it seems doubtful that an unlimited number of rapes cause society less disutility than a single capital murder. If they do not, as seems obvious, society will derive more utility from executing the demonstrably recidivist rapist than the one-time murderer.

Therefore, Justice White's exclusive concentration on the single offense as a limit to punishment as opposed to a consideration of the defendant's multiple prior offenses, or the total number of rapes in society as compared with the total number of murders, cannot be justified on pure utilitarian grounds. If, on the other hand, retribution, with its "backward-looking" model, is allowed to take its rightful place in his *Coker* opinion, then this decision is clear, simple and internally consistent.[88]

The third member of the *Gregg* plurality, Justice Powell, concurred in part and dissented in part in *Coker*. He agreed en-

87. This assumes that society has properly graded murder as a more serious offense and that the offender benefits more from committing a greater offense than a lesser offense.

88. Any nonretributivist model is further weakened by the uniformly observed evidence that murderers have significantly lower recidivism rates than other offenders. *See, e.g.*, Stanton, *Murderers on Parole*, 15 CRIME & DELINQUENCY 149 (1969). *See also* Bedau, *Capital Punishment In Oregon, 1903-1964*, 45 OR. L. REV. 1 (1965). Mr. Charles Huggins of the Oregon Parole Board testified before the Oregon House Judiciary Committee in 1963 that "most persons working in the field of crime prevention say there are few [paroled murderers] if any, to ever repeat this type of crime and [murderers] are usually the best 'risks' for parole." Or. House Comm. on the Judiciary, *Minutes*, (February 9, 1963). That means that murderers are inherently more reformable and, proportionally, less in need of incapacitation than, for example, rapists. Both reformation and incapacitation are utilitarian purposes, so the utility of executing murderers is further reduced vis-à-vis rapists. It seems that rape is also more likely than murder to trigger a private retaliatory act. *See* note 60 *supra*.

tirely with the methodology, analysis, application and result of Justice White's opinion in this case.[89] Thus, everything said about Justice White's opinion applies equally to Justice Powell. Unlike Justice White, Justice Powell would leave open the possibility of the death penalty for a hypothetical grossly aggravated rape, but it is clear that this would be justified in his mind solely by the seriousness of the particular offense and not by the past history of a particular offender.[90] Therefore, his model has the same elements of retribution theory as the models of the two other members of the *Gregg* plurality. The only difference is Justice Powell's factual judgment that hypothetically there may be an aggravated rape for which the allowed level of retribution would be sufficient, combined with any arguable utility of capital punishment, to surmount the constitutional hurdle.

Thus, the subsequent views of the *Gregg* plurality further support the conclusion that the Court finds retribution theory necessary to hold capital punishment constitutional.

C. *The "Stability"[91] of the Retribution Conclusion*

There is a strong correlation between each Supreme Court Justice's position on retribution and his position on the constitutionality of capital punishment. In his dissent from the denial of certiorari in *Rudolph v. Alabama*,[92] Justice Goldberg, joined by Justices Douglas and Brennan, recognized three "permissible aims of punishment (e.g., deterrence, isolation, rehabilitation),"[93] with no mention of retribution. Justice Brennan has subsequently taken the position that the death penalty is per se unconstitutional.[94] Justice Goldberg did not remain on the Court long enough to cast a vote on this issue, but it is clear from his subsequent publications that he would have supported the Brennan conclusion.[95] There is insufficient data to confidently predict the position that Justice Douglas would eventually have taken. He did vote to invalidate the capital punishment laws in effect at the time of *Furman* on the ground that they were being applied in an

89. 433 U.S. 584, 601-03 (1976).

90. *Id.*

91. *See* note 34 and accompanying text *supra*.

92. 375 U.S. 889 (1963).

93. *Id.* at 891.

94. *See* note 37 *supra*.

95. *See, e.g.*, Goldberg, *The Death Penalty For Rape*, 5 HASTINGS CONST. L. Q. 1 (1978); Goldberg & Dershowitz, DECLARING THE DEATH PENALTY UNCONSTITUTIONAL, 83 HARV. L. REV. 1773 (1970).

arbitrary and discriminatory fashion.[96] But several of his statements in *McGautha v. California* and *Furman v. Georgia* are ambiguous and could be interpreted either way.[97] Justice Marshall, the other advocate of per se unconstitutionality, states most clearly of all the justices that true retribution is absolutely prohibited by the Constitution.[98]

On the other side, both Justices Stewart and White concurred in *Furman* but subsequently decided that the death penalty was not per se unconstitutional. They also accepted retribution as a legitimate penological function. It is especially interesting that both Stewart and White seemed to accept the legitimacy of retribution as early as their *Furman* opinions.[99]

Justices Powell and Stevens reject the per se unconstitutionality of the death penalty and clearly recognize the legitimacy of retribution as a penological function. Chief Justice Burger and Justices Blackmun and Rehnquist have also consistently rejected the per se unconstitutionality of the death penalty,[100] and have openly accepted retribution.[101] With the possible exception of Justice Douglas (about whom we have

96. Furman v. Georgia, 408 U.S. 238 (1972)(Douglas, J., concurring).

97. *See* Furman v. Georgia, 408 U.S. 238 (1972) (Douglas, J., concurring); McGautha v. California, 402 U.S. 183 (1971)(decided together with Crampton v. Ohio (Douglas, J., dissenting)).

98. "The history of the 8th amendment supports only the conclusion that retribution for its own sake is improper." Furman v. Georgia, 408 U.S. 238, 345 (1972). "Under these standards, the taking of life 'because the wrongdoer deserves it' surely must fall, for such a punishment has at its very basis the total denial of the wrongdoer's dignity and worth." Gregg v. Georgia, 428 U.S. 153, 240-41 (1976).

99. "On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment." Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

> It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received . . . . But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied.

Id. at 311 (White, J., concurring).

100. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (Burger, C.J., dissenting, joined by Justices Blackmun, Powell and Rehnquist) (Blackmun, J., dissenting) (Rehnquist, J., dissenting). *See also* Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

101. "There is no authority suggesting that the eighth amendment was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes." Furman v. Georgia, 408 U.S. 238, 394 (1972)(Burger, C. J., dissenting, joined by Justices Blackmun, Powell and Rehnquist).

insufficient information), there is a perfect correlation between each Justice's position on the per se constitutionality of the death penalty and on the legitimacy of retribution as a penological justification.

Not surprisingly, correlations between retributivist beliefs and support for capital punishment go beyond moral philosophers, criminologists and Supreme Court Justices to the general populace. Recent studies, while not comprehensive, establish high levels of correlation among selected sub-populations in both the United States and Canada.[102] In one of these studies, Sarat and Vidmar set out to test the hypothesis of Justice Marshall[103] that a hypothetically well-informed citizenry would collectively reject the death penalty. The authors concluded that individuals who score low on a retributive value test are, as a group, much less favorable toward capital punishment than those individuals who score high on the same test,[104] and that "retributiveness is more important in differentiating among supporters and opponents of capital punishment" than any other variable for which they tested.[105] Of even more interest is their finding that among the subgroup of the test population that initially responds in favor of capital punishment, those who score low on the retributivist scale are influenced, in significant numbers, to change to opposition to capital punishment after receiving information on the lack of utility of the death penalty, while those who score high on the retributivist scale are only negligibly affected by the same information.[106] This seems to establish that the correlation between retributivist beliefs and support for the death penalty is not merely coincidental, but instead, that retribution is the one stable factor that separates proponents of capital punishment from its opponents. The authors, in fact, concluded that the constitutionality of the death penalty should ultimately rest on the question of whether or not retribution is a legitimate penological function.[107]

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102. Sarat & Vidmar, *Public Opinion, The Death Penalty and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171; Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005 (1977); Vidmar, *Retributive and Utilitarian Motives and Other Correlates of Canadian Attitudes Toward the Death Penalty*, 15 CAN. PSYCH. 337 (1974). *See also* THOMAS & MASON, CORRELATES OF PUBLIC SUPPORT FOR CAPITAL PUNISHMENT (1978).

103. *See* Furman v. Georgia, 408 U.S. 238 (1972)(Marshall, J., concurring); Gregg v. Georgia, 428 U.S. 153 (1976)(Marshall, J., dissenting).

104. Sarat & Vidmar, *supra* note 102, at 193.

105. *Id.*

106. *Id.* at 193-94.

107. *Id.* at 196-97. The authors also cite a public opinion poll showing that 55% of

A second study, by Charles W. Thomas, is of a more general character, but confirms the significant correlation between retributive views and support for the death penalty.[108] A number of legal scholars have also previously and subsequently speculated that such positive correlations are bound to exist.[109]

Correlates aside, the final consideration is that from either a normative or objective methodology, one must conclude that the only way to make a credible argument, with present evidence, for the legitimacy of capital punishment is to recognize and embrace at least a certain degree of the retributivist philosophy. A number of commentators agree with this conclusion,[110] and much of the ground has already been covered in previous analysis of the Supreme Court's death penalty decisions.[111] Nonetheless, a few additional comments are in order.

The major *theoretical* stumbling block to a purely utilitarian defense of capital punishment is that, under utilitarian theory, capital punishment inflicts an obvious substantial detriment on the defendant. Therefore, in order to be justified, capital punishment must not only be shown to serve utilitarian functions

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the American public who support capital punishment admit that they would continue to support it even if they were convinced that it had no deterrent value whatever. *Id.* at 176. (The poll, a Harris survey, Louis Harris and Associates, Inc., New York, N.Y., appeared in the Chicago Tribune, June 11 and 14, 1973). *Accord*, Vidmar, *supra* note 102.

108. Thomas, *supra* note 102, at 1028. Thomas also finds a correlation between those believing in retribution and those believing in the efficacy of the deterrence of capital punishment. *Id.* at 1028-29. He finds an even higher correlation between those who believe in the efficacy of the deterrent value of capital punishment and those who support capital punishment. He does not, however, explore the stability of these views (that is, he does not measure how likely it is that these views would change after the presentation of various types of utilitarian information).

109. *See, e.g., Hearings on S.B. 1382 Before the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. 10 (1978)(statement of Hans Zeisel); Morris, *Thoughts on Capital Punishment*, 35 WASH. L. REV. 335, 335 (1960) ("[O]ur vengeful urge to punish [and] our feeble attempts to cope with our collective selves . . . account for the continued use of capital punishment."); Sellin, *Capital Punishment*, 8 CRIM. L. Q. 36, 38 (1965) ("Basically, capital punishment probably survives because many believe strongly that it possesses a certain moral fitness, that it is the only just penalty for murder, especially when the murder is particularly brutal. In a sense, these advocates adopt the Mosaic law of retaliation and thus support a publicly regulated vengeance . . . ."); Zelikow, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 HOUS. L. REV. 356, 359, 379-80 (1978).

110. *See, e.g.*, Tao, *Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment*, 51 NOTRE DAME L. REV. 722 (1976) (arguing the necessity of a morally based decision in light of his conclusion that the utilitarian debate over deterrence will not lead to a resolution of the debate over the constitutionality of the death penalty).

111. *See* notes 34, 35, 37, 56, 59, 61, 66, 84 & 85 and accompanying text, *supra*.

slightly better than does life imprisonment, but it must be shown to serve these functions *significantly* better, enough to make up for the marginally added detriment to a defendant who receives the death sentence rather than life imprisonment.[112] The Court has properly evaluated this marginal detriment as being of significant size.[113] This burden is heightened when one considers that the irrevocability of the death penalty precludes the possibility of recapturing any utility from potential rehabilitation,[114] and can lead to the enormous disutility that would arise from the execution of an innocent defendant.[115] Therefore, the pure utilitarian jutification begins with a presumption of invalidity and with a heavy burden to overcome by conclusive factual demonstration of the utilitarian efficacy of capital punishment as compared with life imprisonment. This obviously contrasts sharply with the *Gregg* plurality's formula of presuming the validity of the death penalty and requiring its attackers to bear the heavy burden of

112. *See, e.g.*, J. BENTHAM, JEREMY BENTHAM TO HIS FELLOW CITIZENS OF FRANCE, ON DEATH PUNISHMENT (London 1813); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1055 (1978).

113. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 588 (1978); (Burger, C.J., announcing the judgment of the Court in an opinion joined by Justices Stewart, Powell and Stevens); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Furman v. Georgia, 408 U.S. 238, 290-91 (1972)(Brennan, J., concurring).

The Court has traditionally recognized that a defendant facing the possibility of a death sentence is entitled to greater rights than other defendants. *See, e.g.*, Bute v. Illinois, 333 U.S. 640, 676 (1948); Powell v. Alabama, 287 U.S. 45 (1932); Moore v. Dempsey, 261 U.S. 86 (1923).

See Barzun, *In Favor of Capital Punishment*, 15 CRIME AND DELINQUENCY 21 (1969), for a contrary assessment of the relative severity of the death penalty when compared with life imprisonment.

114. "Indeed, the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different in kind from any other sentence a state may legitimately impose." Gardner v. Florida, 430 U.S. 349, 360 (1977).

115. *See, e.g.*, H. BEDAU, THE DEATH PENALTY IN AMERICA, 434-52(1967); C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974), both providing examples of innocents who have been executed and for cogent reasons why this will continue to be a realistic possibility as long as there is capital punishment.

There is disutility as well in sentencing an innocent defendant to life imprisonment. The disutility is substantially less, however, than for sending someone wrongly to his or her death for three reasons: (1) As noted previously, the death sentence is significantly more severe than life imprisonment and the disutility to the innocent individual and, consequently, to society, of a life sentence is relatively less than for a death sentence. (2) There is always the chance that the defendant's innocence will be discovered and, if he or she has a life sentence, the defendant may be released, thereby receiving less disutility than even a theoretical life sentence would impose. (3) If the defendant's innocence is established and he or she is released from prison, society may take affirmative steps to partially repair the damage done by the criminal stigma and by incarceration. Again, this will obviously benefit both the defendant and the society as a whole.

disproof of its efficacy.

The major *factual* stumbling block to any purported purely utilitarian justification for capital punishment is that there is no conclusive evidence of its efficacy. The core of the scholarly debate has naturally focused on the concept of general deterrence. While one author claims at least a marginal deterrent contribution from capital punishment,[116] the most persuasive literature indicates that the death penalty does not contribute significant marginal deterrence when compared with life imprisonment.[117] This evidence is not surprising given the severity of life imprison-

116. *See, e.g.*, Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L. J. 209 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397 (1975); Ehrlich, *Rejoinder*, 85 YALE L. J. 368 (1976); Ehrlich & Gibbons, *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence*, 6 J. LEGAL STUD. 635 (1977); Ehrlich & Mark, *Fear of Deterrence; A Critical Analysis of the "Report of the Panel on Research on Deterrent and Incapacitative Effect,"* 6 J. LEGAL STUD. 293 (1977).

117. *See, e.g.*, BLUMSTEIN, COHEN & NAGIN, INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978); CAPITAL PUNISHMENT (T. Sellin ed. 1967); J. GIBBS, CRIME, PUNISHMENT AND DETERRENCE (1975); F. ZIMRING & G. HAWKINS, DETERRENCE, THE LEGAL THREAT IN CRIME CONTROL (1973); Bailey, *Deterrence and the Death Penalty For Murder in Oregon*, 16 WILLAMETTE L. REV. 67 (1979); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975); Forst, *Deterrent Effect of Capital Punishment: A Cross State Analysis of the 1960's*, 61 MINN. L. REV. 743 (1977); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1976); Zeisel, *Deterrent Effect of the Death Penalty: Facts v. Faith*, 1976 SUP. CT. REV. 317.

A number of Justices have expressed skepticism about the efficacy of the deterrence principle in contexts far removed from the emotionally charged debate over the death penalty. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 702 (1977) (White, J., concurring) ("the State has not demonstrated that the prohibition against distribution of contraceptives to minors measurably contributes to the deterrent purposes which the State advances."); United States v. Calandra, 414 U.S. 338 (1974)(refusing to extend the exclusionary rule to Grand Jury proceedings because of the doubtfulness of its deterrent efficacy); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971)(Burger, C. J., dissenting) (criticizing the fourth amendment exclusionary rule as follows: "[s]ome clear demonstration of the benefits and effectiveness of the Exclusionary Rule is required to justify it in view of the high price it extracts from society . . . . But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials."). *See also* Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974).

One would think that police officers would be easier to deter than potential criminals. *See also* Powell v. Texas, 392 U.S. 514 (1968)(questioning the general deterrent efficacy of the imposition of criminal sanctions); Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32, 35 (1974)("Antebellum Americans . . . were satisfied that mandatory capital punishment did indeed have a deterrent effect; it deterred jurors from convicting palpably guilty men.").

ment, the doubtfulness of the myth that the potential criminal is a rational calculator, and the existence of other immutable fundamental values in our society that preclude both the hasty imposition of the death penalty and its wide indiscriminate use. Several researchers have even concluded that the death penalty may, on balance, act as a counter-deterrent.[118]

General deterrence has undoubtedly become the central focus of the utilitarian debate because other imaginable utilitarian functions are even less defensible. Eugenics, even if permissible, can obviously be accomplished with less disutility through compulsory sterilization.[119] Incapacitation and the suppression of private vengeance have already been discussed.[120] It can hardly be imagined that the relative economic cost of life imprisonment versus execution, no matter how disparate, could overcome the much greater disutility of capital punishment. In any event, there is a substantial possibility that the economic costs of capital punishment, taking all factors into account, actually exceed those of life imprisonment.[121] Finally, if there is a difference between general deterrence and "general preventive effects"[122] of the death penalty, then one need only turn to the

118. *See, e.g., Hearings on S.B. 1382 Before the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978)(statement of Hans Zeisel); Glaser & Zeigler, *Use of the Death Penalty v. Outrage at Murder*, 20 CRIME AND DELINQUENCY 333 (1974). *Cf.* Bailey, *Use of the Death Penalty v. Outrage at Murder: Some Additional Evidence and Considerations*, 22 CRIME AND DELINQUENCY 31 (1976).

119. *See* Furman v. Georgia, 408 U.S. 238, 355-58 (1972) (Marshall, J., concurring).

120. *See* notes 47, 48, 60, 61 & 88 *supra*.

One might conceivably argue that although true life imprisonment is possible in theory, society is never able to maintain the will to carry it out and that it is the recognition of this failure of will that leads to the retention of the death penalty. This seems doubtful as a factual proposition since there are some prisoners who have in fact been incarcerated for life and since, as noted, those who are released turn out to be remarkably good risks. This tends toward a counter argument that the decision to release is made upon a correct assessment of utilitarian considerations at the time of the release, rather than on undue sympathy. Even if the proposition were factually true, it would not support the retention of the death penalty on utilitarian grounds since our society will continue to have externally constraining values that limit the use of the death penalty to a few individuals among all convicted murderers. Most murderers, therefore, will continue to be released. In fact, one could argue that even if the most dangerous murderers were being sentenced to death, that putting them into the life imprisonment category would force even more careful scrutiny before a convicted murderer was released and would lead to the development of better decisional criteria. There would, in any event, be a substantial disutility to a society that willingly imposed the death penalty solely because of recognition of its lack of courage and lack of sufficient will to administer its life imprisonment system.

121. *See* Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 1, 69 (1968).

122. *See generally* Andenaes, *The General Preventive Effects of Punishment*, 114 U.

scholarly analysis of Professor Andenaes who concludes that there is no positive correlation between capital punishment and general prevention. He states that:

> The lack of correlation is understandable from a psychological point of view. In the first place, murder in our culture is surrounded by massive moral reprobation. Accordingly, the inhibitions against murder usually are broken only in situations of emotional excitement or intense pressure in which the criminal disregards the consequences. Secondly, if the potential criminal deliberates about the risk of punishment before he takes action, then both the death penalty and life imprisonment will appear so drastic that the difference between them may seem fairly insignificant. He relies on going undetected; if he is detected, he has lost.[123]

Judicial opinions, empirical research, philosophy and policy all establish that utilitarianism does not adequately explain the Supreme Court's conclusion that the death penalty is constitutional. Acceptance of the legitimacy of retribution is necessary to the Court's result. Part II, therefore, considers whether retribution is permitted under the Oregon Constitution.

II. RETRIBUTION AND THE OREGON CONSTITUTION

This part demonstrates that criminal punishment founded on retribution violates the Oregon Constitution. This conclusion, establishing the unconstitutionality of capital punishment in this state, is based on consideration of the text, history and policy of the Oregon Constitution, together with the relevant Oregon case law.

A. The Constitutional Language

The Oregon Constitution article I, section 15 provides that "[l]aws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." Several observations follow immediately from this language and syntax. First, the Constitution recognizes that a system of "justice" can be imagined and constructed that has "laws for the punishment of crime" that are vindictive in nature. Article I, section 15 rejects

PA. L. REV. 949 (1966); Hawkins, *Punishment and Deterrence: The Educative, Moralizing and Habituative Effects*, 1969 WIS. L. REV. 550.

123. Andenaes, *supra* note 122, at 967.

such a system for Oregon. Second, it recognizes that even a democratically elected legislature might, from time to time, knowingly or unknowingly, enact laws founded on vindictive justice. Therefore, laws must be scrutinized for this forbidden element and, those found defective, rooted out.[124] Third, "the principles of reformation" are mutually exclusive from the principles of "vindictive justice." Fourth, exact boundaries of the principles of reformation will be difficult to determine, since these words are embedded in the context of the concept of punishment of crime. Therefore, while crime may be punished, it must not be on the basis of vindictive justice.

B. General Principles of Constitutional Construction

The following are general principles of constitutional construction which should be used when interpreting article I, section 15 of the Oregon Constitution.

1. The federal government is a limited government of enumerated powers. It was, therefore, reasonable for the framers to debate whether it would be necessary to have a bill of rights specifically limiting the power of the federal government, or, in other words, enumerating certain rights retained by the people and by the states.[125] State governments, in contrast, start with universal power limited only by what is ceded through ratification of the Federal Constitution and by limits specifically enumerated in each state's constitution. This was well stated by Justice McBride seventy years ago:

> In this connection it must also be kept in mind that the constitution of a state, unlike that of our national organic law, is one of limitation, and not a grant, of powers, and that any act adopted by the legislative department of the state, not prohibited by its fundamental laws, must be held valid.[126]

More recently, the Oregon Supreme Court has said that "the state has plenary power to devise its laws limited only by the state and Federal Constitutions."[127] The corollary of this rule for construing state constitutions is that constitutional "mays" and

124. If the framers had only been concerned about vindictive judges or jurors, they would have omitted the words "[l]aws for the" and merely provided that "[p]unishment of crime shall be founded on the principles of reformation, and not of vindictive justice."

125. *See* The Federalist No. 84 (Cooke ed. 1961).

126. State v. Cochran, 55 Or. 170, 179, 105 P. 884, 887 (1909).

127. Brown v. Multnomah County Dist. Ct., 280 Or. 95, 99, 570 P.2d 52, 56 (1977).

even "shalls" are not especially powerful terms since the legislature already has the presumptive authority to "may" and "shall" pretty much as it will. "Thou shalt nots," on the contrary, are powerful and critically important since they provide the only state source of limitation on state governmental excess and, together with voluntary governmental restraint, protect the people from potential majoritarian tyranny. Article I, section 15 includes one "shall" and one "shall not." The government is indeed limited by the "shall not" and is absolutely prohibited from adopting punishment laws that depend on "vindictive justice." While the legislature is required to take principles of reformation into account, the "shall" is not a limit and it may be presumed that the legislature could also take other principles into account so long as they do not include vindictive justice.[128]

2. Constitutions are, for good reason, significantly more limited in length than statutes and presumptively more carefully drawn. It is unlikely then that the framers would have included misleading, incompatible or surplus provisions. As stated in *Marbury v. Madison*, "[I]t cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it."[129] At a bare minimum, this principle of construction means that article I, section 15 is not a nullity and has substantive content.

3. Article I, section 15 provides the perfect argument for Oregon Supreme Court Justice Hans Linde's oft-stated exhortation to state courts to feel free and responsible to interpret their own state constitutions independently (and, consequently, sometimes differently) from the United States Supreme Court's interpretation of the Federal Constitution.[130] Since the Federal Constitution

128. *See also* State v. Appling, 220 Or. 41, 65, 348 P.2d 759, 770 (1960) (Lusk, J., dicta) ("[t]he bill of rights of the Oregon Constitution . . . are 'thou shalt not' commandments addressed to the legislature and the other departments of government, designed to prevent governmental interference with rights and freedoms which are the heritage of the American people.").

129. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). *See also* Griswold v. Connecticut, 381 U.S. 479, 490-91 (1965)(Goldberg, J., concurring). *Accord*, State v. Cochran, 55 Or. 157, 179, 105 P. 884, 887 (1909). "When two constructions are possible, one of which raises a conflict or takes away the meaning of a section, sentence, phrase or a word, and the other does not, the latter construction must be adopted, or the interpretation which harmonizes the constitution as a whole must prevail." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

130. *See* Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

does not contain any language even arguably parallel to article I, section 15, there is no federal judicial gloss to which the Oregon courts could defer.

4. While the Federal Constitution contains minimum uniform national guarantees of individual rights, each individual state's constitution will likely go further in this direction, at least in some areas.[131] This should be particularly true in a state such as Oregon, where the Bill of Rights was drafted and adopted nearly seventy years after the ratification of the Federal Bill of Rights, since any reasonably optimistic view of political theory or history posits an evolutionary increase in the recognition of and respect for individual rights as a society matures.[132] This principle does not help determine the actual boundaries of the meaning of article I, section 15. It does, however, make it possible and not at all surprising that retribution and capital punishment could be prohibited by the Oregon Constitution even if neither is prohibited by the Federal Constitution as that document has been interpreted by a majority of the Justices on the United States Supreme Court.[133]

5. Every constitution must be read as a whole. When this is done, the structure of the constitution and the juxtaposition of different provisions will create a feedback mechanism that will have the effect of breathing substantive form into individual pro-

131. This follows from a simple least common denominator theory. That is, since the postulated federal rights are to apply uniformly throughout the nation, only those rights which are consistent with the reality of nonhomogeneous circumstances and needs in different states will be selected for a federal constitution. The state constitution need not be so timid; in some areas, those where expanded rights do not dangerously conflict with that particular state's sense of security, rights will be included which are much broader than their federal counterparts, or, as in the case of article I, section 15, which do not even have federal analogs.

132. Much the same point was made by Linde. *See* Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 182 (1970).

This analysis does not require that one entertain the naive belief that societies are consistently progressing toward enlightenment and increased civil liberties. There are far too many historical counter-examples for this to be credible. All that is required is to recognize that the process of drafting constitutions and bills of rights is an optimistic and idealistic process under which each group will naturally strive to "form a more perfect union" than their predecessors.

133. This principle, then, is somewhat analogous to Justice Goldberg's use of the ninth amendment in Griswold v. Connecticut, where he construed that little used amendment to prove there are "fundamental rights" not contained in the first eight amendments but made no claim that the ninth amendment contains these additional rights or lights up their boundaries. Griswold v. Connecticut, 381 U.S. 479, 492-93 (1965)(Goldberg, J., concurring).

visions that may, by themselves and taken out of context, seem to be formless. In *State v. Cochran*, the Oregon Supreme Court stated:

> The object and purpose of the law, whether fundamental or otherwise, must be considered; and the Constitution must not be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the objects intended by it and carry out the principles of government. The whole Constitution must be construed together.[134]

One application of this salutary principle is to consider article I, section 15 together with the following portion of article I, section 16, which provides that "[c]ruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense." The United States Supreme Court has construed the federal cruel and unusual punishments clause to include a concept of proportionality through the mechanism of retribution even though proportionality is not specifically mentioned.[135] If article I, section 15 does not ban retribution, then one could argue that the proportionality clause of article I, section 16 is surplusage. This would, however, violate principle of construction 2, which states that language is included for a purpose. If, on the other hand, article I, section 15 does ban retribution in Oregon, it is understandable why the Oregon framers felt it was essential to explicitly mention a proportionality limit on punishment.

Several other state constitutions pair an explicit proportionality clause with a constitutional mandate for reformation rather than retribution. These include New Hampshire,[136] Illinois,[137] North Carolina[138] and Indiana.[139] Indiana's constitution forms the

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134. 55 Or. 170, 179, 105 P. 884, 887 (1909).

135. *See* notes 75-85 *supra*.

136. N.H. CONST. art. I, § 18 ("All penalties ought to be proportioned to the nature of the offense . . . the true design of all punishments being to reform, not to exterminate mankind.").

137. ILL. CONST. art. I, § 11 ("All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.").

138. N. C. CONST. art. 11, § 2 ("The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary and rape, and these only, may be punishable with death, if the general assembly shall so enact."). This language stands less clearly for the proposition than the previously cited constitutions. This is because it not only recognizes reformation and prevention but also the further goal of "satisfy[ing] justice" (that is, it recognizes a more mixed set of justifications for the imposition of criminal sanctions that seem to include some element

model for much of Oregon's constitution. A former section of the Montana Constitution even provided that "[l]aws for the punishment of crime shall be founded on the principles of reformation and prevention, but this shall not affect the power of the legislative assembly to provide for punishing offenses by death."[140] This appears to recognize the possibility that capital punishment can not be justified on utilitarian grounds alone and that, in a state embracing utilitarian principles in general but still desiring to use the death penalty in at least some cases, a specific exception to the requirement of utilitarian purposes would have to be made for capital punishment in the constitution.[141]

Oregon's constitutional language, taken together with general principles of construction for state constitutions, suggests that retribution is prohibited as a penological punishment goal or justification.

C. *Original History—Direct and Inferential.*

The direct original history relating to article I, section 15 is, unfortunately, quite sketchy, including only the pithy *Official Journal*[142] and Charles Henry Carey's scholarly but retrospective recapitulation of the proceedings at the Constitutional Convention.[143] The Constitutional Convention lasted little more than a

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of retribution), and because it does not explicitly use the term "proportionality." Nonetheless, a concept of rough proportionality is clearly implicit since it lists only four crimes for which capital punishment may be used, presumably on the theory that capital punishment for lesser offenses is disproportionate and excessive.

139. IND. CONST. art. I, § 16 ("[a]ll penalties shall be proportioned to the nature of the offense."); IND. CONST. art. I, § 18 ("[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice."). *Cf.* WYO. CONST. art. I, §§ 14-15 (recognizing "humane principles of reformation and prevention," but not mentioning proportionality); ALAS. CONST. art. I, § 12; MONT. CONST. art. II, § 28. The omission of a proportionality concept in these three constitutions could be variously explained as an oversight, as acceptance of the arguably utilitarian position that even disproportionate punishment may be justifiable if it provides greater overall utility than a lesser proportionate penalty or because the framers thought proportionality was too hard to apply and that many of the evils of disproportionate punishments would be ameliorated by the ban on cruel and unusual punishments.

140. MONT. CONST. art. III, § 24 (1889), replaced by MONT. CONST. art. II, § 28 (1972).

141. No such exception appears in the Oregon Constitution.

142. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OREGON, 1857 (1882) [hereinafter cited as OFFICIAL JOURNAL].

143. C. CAREY, THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (C. Carey ed. 1926) [hereinafter referred to as C. CAREY].

month,[144] and was "composed largely of eminent lawyers, several of whom afterwards sat on the Federal, Circuit and Supreme benches in the State."[145] It may be safely assumed that these members of the Convention and, consequently, the Convention as a whole, were "familiar with the rules of constitutional construction."[146]

The question of whether a separate bill of rights should be included in the constitution was hotly debated at the Convention.[147] One of the four men identified by Carey as an opinion leader at the Convention[148] was appointed to the committee with responsibility for drafting and presenting a bill of rights.[149] Carey explains that:

> Throughout the [Constitution] there was evident an intentional design to create limitations upon the exercise of power by the people themselves. Assuming that as voters they had all powers of state government not actually surrendered, they deliberately put bounds to what could be done constitutionally, and in this they carefuly followed the models that had been tested by experience elsewhere. It was as though they knew that the expression of the popular will, or the popular desire, might lead to extravagance in action or in expenditures, and they chose to adopt restraints in the interest of good government.[150]

The general purpose and effect of Oregon's Bill of Rights was most clearly illuminated during the debate of August 29, 1857, concerning the desirability of a separate bill of rights. During this debate the framers gave explicit sanction to many of the principles of construction previously discussed in interpreting article I, section 15.

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144. The convention assembled on Monday, August 17, 1857, in the Salem Courthouse and adjourned, sine die on Friday, September 18, 1857. OFFICIAL JOURNAL, *supra* note 142, at 3, 101.

145. State v. Cochran, 55 Or. 170, 187, 105 P.2d 884, 890 (1909).

146. *Id.*

147. C. CAREY, *supra* note 143, at 28.

148. *Id.* at 29. The man was identified as Mr. Grover.

149. OFFICIAL JOURNAL, *supra* note 142, at 16. The Bill of Rights Committee made a report on August 22, 1857, and the article was read for the first time. It was read for the second time on August 26, 1857, and referred to the Committee of the Whole. The Committee of the Whole debated and worked on the Bill of Rights on September 9, 1857, and September 10, 1857. On Friday, September 11, 1857, the proposed amendments to the article containing the Bill of Rights were taken up and the article was ordered engrossed. On Saturday, September 12, 1857, the article was reported as truly engrossed, given its third reading and passed by a vote of 25 to 10. *Id.* at 20, 28, 56-58, 62, 70.

150. C. CAREY, *supra* note 143, at 56.

A Mr. Smith formally moved to add a standing committee on the bill of rights with the charge to draft such an article. Responding to his opponents, he said that "a Bill of Rights is something more than a Fourth of July oration," and "[i]t is manifest from reading [them] that they were designed to have, and do have, all the force of any other portion of the constitution."[151]

He also declared that, as model, he liked Indiana's new constitution best. He noted:

> Its Bill of Rights . . . is gold refined; it is up with the progress of the age.
>
> . . . [Indiana] nobly reasserts what our fathers said about the natural rights of man . . . but she proceeds to assert the civil rights of the citizens as ascertained in . . . 70 years of progress. Believing, as I do, that these declarations . . . will always . . . command . . . the attention of courts, I desire that such a bill may precede or become a part of our constitution.[152]

Mr. Smith continued:

> The Constitution of the United States is a constitution of conferred powers: the constitutions of the various states, constitutions of restrictions. . . . Now, the history of the world teaches us that the majority may become fractious in their spirit and trample upon the rights of the minority; that through the madness of party spirit they may infringe upon the rights of the individual citizen. Then, if the individual citizen is to be protected in this point in which he is endangered, there must be restrictions put into this Constitution.[153]

Since Smith's position was adopted, a committee on bill of rights established, and the bill of rights article ultimately passed by the Convention,[154] Smith's views, together with those of Shattuck, illuminate the proper construction of the Oregon Bill of Rights.

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151. C. CAREY, *supra* note 143, at 101 (quoting the Oregonian, Aug. 29-Sept. 5, 1857).

152. *Id.* at 101-02. Smith also said:

> Many changes have taken place since our fathers first formed constitutions.
>
> . . . I remember a great many other things which people held entirely republican and right, which subsequent experience and the progress of the age taught us are blots upon our national escutcheon. And this preamble to the constitution of Indiana recognizes this progress, and thus recognizing embodies them in her bill of rights.

Id.

153. *Id.* at 102.

154. OFFICIAL JOURNAL, *supra* note 142, at 10, 15, 70.

The framers also followed Smith's suggestion and consciously modeled much of the Oregon Constitution, including article I, section 15, on the Indiana Constitution.[155] The Oregon Constitution, including article I, section 15 was successfully passed out of the Convention on Friday, September 18, 1857, by a vote of thirty-five to ten and was adopted by the Oregon citizenry on November 9, 1857, by a vote of 7,195 to 3,195.[156]

The larger general historical context is also relevant to the meaning of article I, section 15. An increasing number of influential thinkers, writers and statesmen rejected retributivist philosophy in favor of a utilitarian model during the eighteenth and nineteenth centuries.[157] During the nineteenth century, rehabilitation became the central utilitarian goal of punishment. Rapid technological, scientific and psychological developments supported the view that the "criminal mind" would soon be understood and become "curable."[158] The "rehabilitative ideal" began on a wave of optimism and rapidly gained adherents.[159] It was, however, always an ideal: a goal to be endlessly pursued, yet not one within easy grasp.

Other utilitarian goals, such as deterrence and protection of society through incapacitation, were never entirely discarded under the rehabilitative ideal. While utilitarians considered rehabilitation to be an ideal that was not necessarily exclusive, they did not find it necessary or proper to brook any such practical compromises with retributivist principles. Here, they had no doubt that utilitarian goals were legitimate and achievable and that retributivist goals were inherently evil, base, uncivilized and anti-utilitarian. Given these historical considerations, it is easy to see how article I, section 15 took on its present shape. The utilitarians, who prevailed in Oregon, emphatically barred retri-

155. OR. CONST. art. I, § 15 closely parallels, though is not identical to, IND. CONST. art. I, § 18. *See* notes 160-62. *infra* for a discussion of the judicial interpretation of IND. CONST art. I, § 18 at the time of the adoption of the Oregon Constitution.

156. OFFICIAL JOURNAL, *supra* note 142, at 99, 130. For further general historical constitutional data, see, COMMISSION FOR CONSTITUTIONAL REVISION, A NEW CONSTITUTION FOR OREGON: A REPORT TO THE GOVERNOR AND THE 52ND LEGISLATIVE ASSEMBLY (1962).

157. *See, e.g.*, C. BECCARIA, OF CRIMES AND PUNISHMENTS (Paollucci trans. 1963); J. BENTHAM, *An Introduction to the Principles of Morals and Legislation* in WORKS, Vol. I (1962).

158. *See, e.g.*, U.S. v. Grayson, 438 U.S. 41, 45-48 (1978); Williams v. New York, 337 U.S. 241, 247-49 (1949); *see also In re* Gault, 387 U.S. 1, 14-18 (1967); Orland, *From Vengenance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 31 (1978).

159. *See generally* F. ALLEN, THE BORDERLINE OF CRIMINAL JUSTICE (1964). A. VON HIRSCH, DOING JUSTICE (1976).

bution by using the "thou shalt not" prohibition familiar to constitutional bills of rights. They chose a more moderate route in pursuing their reformative or rehabilitative ideal by strongly exhorting the legislature to take these goals into account, without precluding the possibility that the legislature might need to take other utilitarian goals into account as well.

Article I, section 15 is similar, but not identical to the Indiana Constitution article I, section 18. The Indiana provision refers to "the penal code" while Oregon refers to "laws for the punishment of crime." There is no historical indication why Oregon chose this different wording, or what effect, if any, the difference might have. As a general matter, however, it would appear justifiable to construe the Indiana provision as requiring only that the penal code be reformative as a whole, while interpreting the Oregon provision as having a broader sweep, since its language focuses more clearly on each individual sentencing law.

The most important decision interpreting the Indiana provision, *Driskill v. State*,[160] was issued by the Indiana Supreme Court in 1855, and it is to be assumed that the Oregon framers were familiar with it.[161] *Driskill* affirmed, over a number of challenges, the defendant's conviction for murder in the first degree and his death sentence. Apparently as a matter of first impression, the court specifically rejected the claim that the death penalty was inconsistent with article I, section 18. Justice Davison, speaking for the court, said:

> In connection with this point, it is insisted that the law authorizing the death penalty is in conflict with section 18 of the Bill of Rights, which requires the penal code to be founded on principles of reformation, and not of vindictive justice. The punishment of death for murder in the first degree, is not, in our opinion, vindictive, but is even-handed justice. There is, indeed, nothing vindictive in our penal laws. The main object of all punishment is the protection of society . . . . The 18th section of the Bill of Rights, when properly construed, requires the penal laws to be so framed as to protect society, and at the same time, as a system, to inculcate the principle of reform. In this view, the present code is, no doubt, founded on the principles of reformation, within the spirit

160. 7 Ind. 338 (1855).

161. State v. Finch, 54 Or. 482, 498-99, 103 P. 505, 511-12 (1909), made just this assumption.

> and intent of the constitution. The law which allows the death penalty to be inflicted, must, therefore, be held valid.[162]

It is clear that this analysis, on its terms, admits only of utilitarian goals (albeit a more inclusive set than merely the single goal of reformation) as the legitimate basis of punishment. The holding is, therefore, necessarily based upon an implicit factual assumption that, in 1855, capital punishment in Indiana effectively served utilitarian goals and was not based upon forbidden retribution. If the court had been confronted with unimpeachable evidence that an essential element of the state's capital punishment scheme was retributive, the court's own analysis would have required that the imposition of capital punishment under that scheme be declared unconstitutional in violation of article I, section 18.

The original history of the Oregon provision, taken together with the more general political and philosophical context of the times and with the preexistent judicial gloss placed on the parallel Indiana provision, again evidences the conclusion that Oregon Constitution article I, section 15 prohibits punishments based on retribution.

D. Oregon Case Law

State v. Finch, decided by the Oregon Supreme Court in 1909, rejected an article I, section 15 attack on the constitutionality of capital punishment.[163] This pronouncement predates extensive empirical evidence on the question of the efficacy of capital punishment as a deterrent and also predates the most signifi-

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162. Driskill v. State, 7 Ind. 338, 342-43 (1855). *Cf.* Rice v. State, 7 Ind. 332, 338 (1855):

> It is also decided in *Driskill v. State*, infra, that the death penalty is not in conflict with the 18th section of the first article of our constitution. If any question can be raised before the judiciary upon the discretion of the legislature under that section, we concur that it has not been abused in leaving the question of assessing that penalty to the jury. There are cases beyond the hope of reformation—criminals whose necks have become so hardened "that they should suddenly be cut off, and that without remedy."

163. 54 Or. 482, 103 P. 505 (1909). Two earlier cases mention the constitutional provision but do not add much for our purposes. *Compare* State v. Anderson, 10 Or. 448, 465 (1862)(holding without analysis that the death penalty does not violate article I, section 15), *with* State v. Walton, 50 Or. 142, 149-50, 91 P. 490, 492-93 (1907)(pointing out that the policy of article I, section 15 benefits the public as well as the defendant in that society will benefit from the defendant's service during "a longer period of his life as a reformed member of society.").

cant developments in the evolution of cruel and unusual punishment jurisprudence.[164] Thus, Oregon courts can now be expected to take a fresh look at the constitutionality of the death penalty.[165]

In *Finch*, attorney Finch had been accused of the revenge killing of another attorney whose charges of ethical violations against Finch led to his disbarment. Finch was convicted of murder in the first degree and sentenced to death under Oregon's mandatory death penalty statute.[166]

Justice McBride, speaking for the court, assumed that article I, section 15 had an "effect . . . upon existing and future legislation," but concluded that the section was not "entirely unambiguous" and did not indicate its effect "clearly by its terms."[167] Therefore, definitions must be sought and principles of construction applied. Justice McBride first cited evidence, "to which great weight is to be attached,"[168] that the death penalty continuously existed before and after the adoption of the constitution, and "was not infrequently imposed and carried into effect."[169] Since the Oregon framers were aware of this state of affairs and even participated in meting out or judicially upholding death sentences, his conclusion that article I, section 15 did not automatically, on its own terms, make capital punishment unconstitutional, is unassailable.[170] Less solidly based, however, is his

164. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S. 660 (1962)(fully applying the eighth amendment to the states through the due process clause of the fourteenth amendment); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910).

165. This prediction is bolstered by the facts that Oregon Constitution article I, section 15 has no federal analog and that state bills of rights have recently reemerged as significant independent sources of state decisional law more protective of individual rights than their federal counterparts. *See, e.g.*, Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 891-907 (1976). The Oregon Supreme Court has been in the forefront of this revival. *See, e.g.*, Brown v. Multnomah County Dist. Ct., 280 Or. 95, 570 P.2d 52 (1977); State v. Ivory, 278 Or. 499, 564 P.2d 1039 (1977); State v. Valdez, 277 Or. 621, 561 P.2d 1006 (1977); State v. Brown, 262 Or. 442, 497 P.2d 1191 (1972).

166. "Every person convicted of murder in the first degree shall be punished with death." [L. 1864; D. § 512; D. & L. § 516; H. § 1724; B & C § 1751; Lords § 1903].

167. State v. Finch, 54 Or. 482, 496, 103 P. 505, 511 (1909).

168. *Id.* at 497, 103 P. at 511.

169. *Id.*

170. There are even more direct reasons why it can be concluded that the framers of the Oregon Constitution did not explicitly intend to abolish capital punishment on the day when the constitution was enacted. First, they would probably have said so if that is what they had intended. Second, they rejected several attempts by Mr. Bristow to have

statement that "this judicial and legislative recognition of the validity of capital punishment by the very men who framed the constitution ought itself to be sufficient answer to the contention of defendant's counsel."[171] If this analysis was meant to answer the contention for all time, it is suspect for both factual and legal reasons. In the first place, it would fail to take account of the organic character of constitutions in general and bills of rights in particular. Secondly, from a factual perspective, the death penalty has subsequently been abolished twice in Oregon[172] and even when legally available it became less frequently imposed[173] so that its "continuity," relied on by Justice McBride, has been seriously interrupted.[174]

More basically, there is nothing inherently inconsistent between the Oregon Supreme Court's holding in *Finch* and the conclusion that article I, section 15 prohibits retribution; that is, one can hypothesize a constitutional death penalty based on utility with no element of retribution. This could be conclusively established if the death penalty functioned as a significantly better deterrent than life imprisonment, a conclusion for which proof is not possible today.[175] In fact, since the *Finch* rationale relies heav-

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the convention go on record in opposition to capital punishment. OFFICIAL JOURNAL, *supra* note 142, at 82, 84.

171. State v. Finch, 54 Or. 482, 497, 103 P. 505, 511 (1909). Even at the time of the constitution, the legislature was free to eliminate capital punishment, and, since the framers dealt in general and abiding principles and values, there is no reason to suppose that these principles and values might not preclude capital punishment on a constitutional level under changed factual circumstances. That these circumstances have changed in precisely this way, at least as perceived by the United States Supreme Court in eighth amendment decisions fully binding on the states, is the conclusion of parts I and II of this article.

172. *See* notes 4, 12 *supra*.

173. *See* Bedau, *Capital Punishment in Oregon, 1903-64*, 45 OR. L. REV. 1, 5-9 (1965). Only one person was executed from 1954 through 1964 and there have been no executions in Oregon since 1964. *Id.* at 8.

174. Similar comments may be made about the court's inference from its view that the death penalty is implicitly provided for in other parts of the constitution. State v. Finch, 54 Or. 482, 497-98, 103 P. 505, 511-12 (1909). The court relies only upon the word "reprieves" in article V, section 14 of the original constitution, an inartful way to permanently immunize capital punishment from all constitutional attack, especially suspect today in light of the 1914 and 1964 constitutional amendments explicitly abolishing capital punishment.

175. *See* notes 51, 52, 116, 117, 118 and accompanying text *supra*, for the conclusion that proof of capital punishment's superior deterrent efficacy is impossible with present evidence. John Stuart Mill, in contrast, argued from nineteenth century evidence that the death penalty was justifiable on utilitarian grounds. J. Mill, 1868 Parliamentary Address in Favor of Capital Punishment, *reprinted in* J. FEINBERG & H. GROSS, PHILOSOPHY OF LAW

ily on the reasoning of the Indiana Supreme Court in *Driskill*, it actually supports the construction of article I, section 15 prohibiting retribution.

Two Oregon Supreme Court decisions from the mid-1950's, *State v. Hicks*[176] and *Eacret v. Holmes*,[177] are also relevant. The *Hicks* court rejected article I, section 15 and article I, section 16 challenges to Oregon's Habitual Criminal Act.[178] Ironically, the court found support for the constitutionality of the Act by holding that the justifications for habitual criminal treatment are the "principles of modern penology" that allow the sentencer to focus on the character of the defendant rather than merely upon the nature of the offense.[179] That is, while upholding the Act, the *Hicks* court rejected purely retributive justifications for punishment.[180]

In *Eacret*, the court denied a plea from the parents of a murder victim for an order preventing the governor from commuting the convicted murderer's death sentence. *Eacret* explicitly rejected private vengeance as a basis for criminal punishment in Oregon and implicitly rejected the notion that public vengeance is any more acceptable. Speaking for the court, Justice Lusk stated:

> It must be at once apparent that the plaintiffs have no standing to maintain this suit. The wrong of which they complain — if there be a wrong — is public in character. The complaint discloses no special injury affecting the plaintiffs differently from other citizens. The fact that it was their son for whose murder Nunn has been sentenced to die does not alter the case, even though it be natural that they should feel more deeply upon the subject than other members of the general public. Punishment for crime is not a matter of private vengeance, but of public policy.[181]

"Public policy" must mean utilitarian justifications for punishment and the court's statement may be taken as a direct testament to the Oregon prohibition of retributive punishments.

(1977). *But see* J. BENTHAM, JEREMY BENTHAM TO HIS FELLOW CITIZENS OF FRANCE, ON DEATH PUNISHMENT (London 1813).

176. 213 Or. 619, 325 P.2d 794 (1958), *cert. denied* 359 U.S. 917 (1959).

177. 215 Or. 121, 333 P.2d 741 (1958).

178. 1955 Or. Laws ch. 663, § 2 (repealed by 1961 Or. Laws, ch. 648, § 13).

179. State v. Hicks, 213 Or. 619, 629-30, 325 P.2d 794, 799 (1958).

180. The most serious difficulty with the *Hicks* holding involves the doubtfulness of whether it can be squared with the express proportionality limit of article I, section 16.

181. Eacret v. Holmes, 215 Or. 121, 124-25, 333 P.2d 741, 743 (1958).

A number of recent Oregon decisions contain dicta about the meaning of article I, section 15, but little in the way of authoritative construction. Justice Linde, speaking for the supreme court,[182] and Chief Judge Schwab,[183] Judge Fort[184] and Judge Foley[185] of the court of appeals, all ascribe a utilitarian philosophy to article I, section 15. Dicta from court of appeals' Judges Thornton[186] and Tanzer are more ambiguous. Judge Tanzer's comments about article I, section 15 from separate cases require especially careful scrutiny:

> [Article I, section 15] is significant as a hortative philosophical base for Oregon's penal code and correctional programs.[187]
>
> [A]lthough Article I, § 15, of the Oregon Constitution exhorts us to apply punishment upon principles of reformation wherever possible for the benefit of those amenable to correctional treatment, [citation omitted] still the underlying nature of imprisonment and parole is penal and deterrent, however enlightened its philosophical overlay may be.[188]

If Judge Tanzer's reference to article I, section 15 as merely a hortative philosophical base applies only to that clause of article I, section 15 setting forth the reformative ideal, then his reference may be seen as an essentially correct interpretation of the clause. If, on the other hand, it is meant to apply to the entire section, then dissenting Judge Fort is surely right in claiming that Judge Tanzer is improperly reading an important section out of

182. Brown v. Multnomah County Dist. Ct., 280 Or. 95, 570 P.2d 52 (1977). "And [the retribution] aim, in turn, is confined by the constitutional prohibition against vindictive justice." *Id.* at 106, 570 P.2d at 59. Footnote 13 to this passage states: "The 1859 Constitution commits the state to the hopeful aim of 'reformation,' whatever the more recent pessimism on that score." *Id.* at 106 n.13, 570 P.2d at 59 n. 13.

183. State v. Dinkle, 34 Or. App. 375, 579 P.2d 245 (1978). "The propriety of [retribution] is questionable in Oregon. *See* OR. CONST. art. I, § 15. . . ." *Id.* at 385 n.2, 579 P.2d at 250 n. 2.

184. Kent v. Cupp, 26 Or. App. 799, 554 P.2d 196 (1976) (Fort, J., dissenting). Article I, section 15 sets forth "the constitutionally mandated objective of reformation." *Id.* at 807, 554 P.2d at 200.

185. State v. Duncan, 15 Or. App. 101, 514 P.2d 1367 (1973) (Foley, J., dissenting). Article I, section 15 expresses "the rehabilitative philosophy" of our constitution. *Id.* at 106, 514 P.2d at 1370.

186. State v. Puckett, 22 Or. App. 154, 538 P.2d 74 (1975). "Art. I, § 15 . . . does not eliminate the requirement that those who violate the criminal laws must stand trial for their violations and, if convicted, be punished as provided by law." *Id.* at 157, 538 P.2d at 76.

187. Kent v. Cupp. 26 Or. App. 799, 802-03, 554 P.2d 196, 198 (1976).

188. Dietrich v. Brooks, 27 Or. App. 821, 825, 558 P.2d 357, 360 (1977).

the constitution altogether.[189] In that event, Judge Tanzer's interpretation would be unsupported by the constitutional language, principles of construction, original history, case law, logic or policy. The second passage suggests he was referring only to the reformative ideal in labeling article I, section 15 as merely hortative, because he refuses to limit the legislature to the goal of reformation and admits of the legitimacy of both penal and deterrent goals. Deterrence is obviously utilitarian, and, although it is not clear what Judge Tanzer means by the penal nature of imprisonment, it seems apparent that he does not claim to allow the legislature to utilize vindictive justice as a justification for punishment.

In any event, the Oregon Supreme Court issued an authoritative interpretation of article I, section 15 in *Tuel v. Gladden*.[190] Justice Denecke, now Chief Justice, speaking for the court, reaffirmed the *Hicks* holding that Oregon's Habitual Criminal Act was not violative of article I, section 15. He said:

> Reformation means doing over to bring about a better result, correction, or rectification. Vindictive, on the other hand, is defined by words such as "revenge," "retaliate," or "punishment." The best known law applying vindictive justice is *lex talionis*: "An eye for an eye, and a tooth for a tooth." *Matthew* 5:38.
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> . . . .
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> . . . The Oregon Constitution does not attempt to state all of the principles to be followed by the legislature in enacting sentencing laws. The constitution does contain sentencing restrictions . . . [including article I, section 15, and article I, section 16. But the drafters of the constitution] did not include the most important consideration of all, the protection and safety of the people of the state. Such a principle does not have to be expressed in the constitution as it is the reason for criminal law. All jurisdictions recognize its overriding importance [citations omitted] . . . . We interpret Art. I, § 15, of the Oregon Bill of

189. Kent v. Cupp, 26 Or. App. 799, 806-07, 554 P.2d 196, 200 (1976) (Fort, J., dissenting):

> I would point out first that it would not seem necessary to have the provision in the constitution at all to accomplish the latter objective. Second, and more important, I most emphatically disagree that any provision of the Bill of Rights of the Oregon Constitution can be considered only as an hortatory expression. Yet, if Section 15 is to be considered only as hortatory, why does not that rationale apply to all the other great human rights described in Article I? The majority points to no Oregon decision so holding. I am aware of none.

190. 234 Or. 1, 379 P.2d 553 (1963).

> Rights to command and require that Oregon sentencing laws have as their object reformation and not retaliation, but they do not require that reformation be sought at substantial risk to the people of the state."[191]

This passage establishes that reformation and protection of society, purely utilitarian goals, are constitutional functions of the imposition of criminal sanctions in Oregon, but that retaliation is absolutely prohibited.[192]

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191. *Id.* at 5-6, 554 P.2d at 555. Justice Denecke's definitions demonstrate an exact congruence between "vindictive justice" and classical retribution theory.

192. *See also* Harrell v. Ames, 265 Or. 183, 508 P.2d 211 (1973)(upholding a punitive damage award based upon the defendant's drunk driving that resulted in plaintiff's injuries, and holding that the purpose of punitive damages is deterrence); Harrell v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977)(holding in the same fact situation, that the defendant in the prior case was insured against the punitive damage award and that such an insurance clause did not violate public policy). In *Harrell v. Travelers Indem. Co.*, Justices Holman and Linde filed separate dissenting opinions, believing that allowing insurance against punitives would undercut their deterrent efficacy. Justice Linde, however, also said in his dissent:

> But aside from deterrence, statutory or common-law measures of recovery beyond actual compensation may be designed to make a private suit worthwhile where individual damages are small or difficult to prove, or to channel plaintiff's anger from retaliation into a court when the tort is to his dignity more than to his pocketbook, or they may simply reflect social outrage apart from any remedial purpose.

Id. at 232, 567 P.2d at 1029.

This language is not inconsistent with the present analysis, since article I, section 15 does not purport to apply to civil actions. *Cf.* Ingraham v. Wright, 430 U.S. 651, 664-67 (1977). It should be read together with Justice Linde's other, previously mentioned comments on the proper construction of article I, section 15. *See also* Roshak v. Leathers 277 Or. 207, 560 P.2d 275 (1977), which again held that the purpose of punitives is deterrence and also holding that there is no constitutional bar to the imposition of punitives in a case where the defendant has already received a criminal penalty. Justice Lent implied that, in Oregon, deterrence is only legitimate as a function of criminal sanctions because it is not "more like vindictive justice than a means to reformation." *Id.* at 214, 560 P.2d at 278. Justice Holman, in a dissenting opinion joined by Chief Justice Denecke, stated that "[the purpose of the] criminal justice system . . . is adequate punishment and determent." *Id.* at 221, 560 P.2d at 282.

The purposes section of the Oregon Criminal Code, ORS 161.025 (1977) (enacted in 1971), which is some evidence of legislative interpretation of the constitution, also fully supports the conclusion that retribution is prohibited in Oregon. The purposes include prevention of crime through deterrence, reformation of those convicted, incapacitation when required for public protection, making penalties proportionate to the seriousness of offenses, taking into account each offender's potential for rehabilitation and "[safeguarding] offenders against excessive, disproportionate, or arbitrary punishment." ORS 161.025(1)(a), (f), (g) (1977). *See also* ORS 144.780 (1977).

E. Logic, Policy and Harmony.

The first clause of article I, section 15 commands the legislature to take into account principles of reformation in drafting each statute that provides for the punishment of criminal offenses. The structure of state governments and the interrelated theory of state constitutions show that this command is not exclusive; the legislature may look to other legitimate justifications for particular punishments for particular crimes as long as reformation is taken into account. A contrary interpretation, that reformation was the sole constitutional justification for punishment, would depend upon the Latin maxim, *expressio unius est exclusio alterius.*[193] The application of this maxim to the Oregon Constitution was specifically rejected in *State v. Cochran.*[194] The framers' decision not to limit the legislature exclusively to reformation was a wise one, for, while striving for the rehabilitative ideal was an essentially stable moral value choice, the practicality of relying solely on this principle depended entirely upon constantly changing facts and circumstances relating to our knowledge of the human mind and its potential for reform. The rehabilitative ideal, not totally attainable during the times of the framers, seems still to be well beyond our grasp.

Although Justice Linde was surely correct in criticizing a *legal* presumption of constitutionality,[195] the choice of the most

193. "Expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 692 (4th ed. 1968).

194. 55 Or. 157, 190-91, 105 P. 884, 891 (1909). Of course, this maxim has a valid application to the Federal Constitution where the government is a limited one of enumerated powers and where, consequently, the express grant of a set of powers implies that those not expressly granted are prohibited.

This is not meant to ignore McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). That case merely holds that certain implied powers, necessary to the more specific catalog of explicit powers, were also expressly granted to the federal government by the "necessary and proper" clause of article I, section 8 of the United States Constitution.

195. Linde, *Without "Due Process," Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970):

> Constitutionality is a legal conclusion, not a fact to be "presumed" until overcome by evidence. The term "presumption of constitutionality" might best be discarded; but if it must be retained, it implies that insofar as the constitutionality of the legislative judgment depends upon a state of facts, those facts are presumed to exist until shown otherwise.

Id. at 172. *See also* Brown v. Multnomah County Dist. Ct., 280 Or. 95, 570 P.2d 52 (1977). The court described the presumption of constitutionality as "an often misleading usage, since presumptions properly refer to . . . factual predicates (which may include the presumption that the legislature meant to enact a valid law) but not to . . . legal conclusions at issue." *Id.* at 100 n. 6, 570 P.2d at 56 n. 6.

efficacious mix of utilitarian punishment goals, such as reformation, deterrence and incapacitation, is largely a *factual* determination left to the legislature, so long as its acts in good faith and takes careful account of the reformative ideal. This follows not only from the constitutional allocation of power, but also from a consideration of the relative institutional competence of the legislature, vis-a-vis the courts, in making this political-factual judgment.[196] Assuming good faith, one might even argue for a very heavy presumption of validity of the implicit legislative choice that certain percentages of the total justification for a particular criminal sanction should be assigned respectively to reformation, specific deterrence, general deterrence and incapacitation.[197]

Nothing previously stated would preclude a court from determining whether the legislature necessarily acted on the basis of the forbidden justification, retribution, or from examining whether or not the particular means chosen (that is, the particular criminal sanction) effectively accomplished the legislative mix of utilitarian justifications significantly better than a lesser penalty. If the evidence presented to a court established that the chosen sanction did not better serve a utilitarian purpose than a lesser sanction, and if the legislature had chosen to rely upon that particular utilitarian justification for selecting the sanction, then the court would be obligated to declare the sanction unconstitutional.

In contrast with the first clause of article I, section 15, the second clause is a direct prohibition on the legislature and gives

196. Paradoxically, significantly less deference might be due to a ballot box judgment by the voters, since it is not likely that many individual voters would have the resources or expertise to gather the data or make the factual findings necessary to the correct judgment. This "paradox" is not, however, especially troubling even in a society committed generally to democratic principles. The very existence of bills of rights establishes a salutary countermajoritarian check on majority dominance. It is to be noted that the Oregon legislature has not chosen to reinstate capital punishment since its abolition in 1964 and that Ballot Measure 8 was adopted by the voters on a simple up or down vote. For a more detailed consideration of the limited information available to the voters about Ballot Measure 8 and capital punishment in general, see parts III and IV *infra*.

197. *Cf.* State v. Dinkel, 34 Or. App. 375, 579 P.2d 245 (1978), where Chief Judge Schwab said:

> To make a reasoned sentencing decision, a trial judge must determine the priority and relationship of appropriate objectives in each particular case. The duration of a sentence should therefore depend on which of these objectives is to be accorded primary weight in a particular case and on the relative weight to be assigned to the secondary objectives.

Id. at 385, 579 P.2d at 250-51. If the presumption of validity approached conclusiveness, the question might become essentially nonjusticiable.

the courts the power and responsibility to scrutinize legislation for any element of vindictive justice. If vindictive justice (that is, retribution) is found, the courts are obliged to declare that law unconstitutional.

Unlike the reformative ideal, which depends completely and intricately for its attainment on the coalescence of numerous hypothetical facts and circumstances, the timeless debate over retribution does not depend on fact or technology but reflects instead abiding moral value judgments. This is the stuff of which constitutions are supposed to be made; that is, a consideration of all available evidence on a transcendent moral value issue at the time of the constitution's framing, and an expression of the people's choice on this value judgment in terms that are inviolate except through the process of constitutional amendment. The Oregon framers decided, at least for Oregon, that retribution was not an appropriate social response to crime and not essential to the social compact.[198]

Finally, one of the most important policies underlying federalism is the belief that great benefit will accrue to the national well-being from allowing the individual states to act as experimental laboratories to test political and philosophical theories in the crucible of differing circumstances and practical experience.[199] In theory, this winnows out ineffective or immoral policies, and encourages diversity, innovation, and the ascendency of those policies which are most humane and efficacious. Enforced national standardization, on the other hand, would require the application of the least common denominator principle to choose safe, conservative, but not spectacular policies to avoid the risk that a potentially spectacular policy might fail and harm the entire nation. If the goal of federalism is to work, states must not only experiment, within the limits of the Federal Constitution, with restrictive views of human rights and conservative penal policies, but must be willing to commit themselves to experi-

198. Several commentators have cited Oregon's unusual prohibition of retribution. *See, e.g.*, Barnett, *The Grounds of Pardon*, 6 OR. L. REV. 356, 361-62 (1927); Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51, 52 n. 3 (1972). *See also* 1935 Or. Laws 841, S. J. Res. 16; 1949 Or. Laws 1011-12, S. J. Res. 18; 33 OR. OP. ATT'Y GEN. 551 (1968); *Report of Committee on Pardons and Paroles*, 2 OR. L. REV. 213, 253 (1923).

199. *See, e.g.*, Johnson v. Louisiana, 406 U.S. 356 (1972)(Powell, J., concurring); Apodaca v. Oregon, 406 U.S. 404, 405 (1972).

ments with more humane penal policies and with increased sensitivity to human rights. Article I, section 15 of the Oregon Constitution firmly places Oregon in the forefront of this rather small group of intrepid states. As noted in the final report of the Oregon Constitutional Review Commission, which met in 1961 and 1962:

> A state constitution's Bill of Rights is not a fifth wheel. It is the most important portion of the document if a free way of life is worth preserving.
>
> . . . .
>
> It is true that the Federal Bill of Rights, since the Fourteenth Amendment, provides some protections against the state as well as federal abuse of authority. But these are minimum guarantees. If state courts are to have an opportunity to interpret civil rights and liberties on a higher level than is provided by federal case law, these rights and liberties must be present in the state constitution. The Federal Constitution is controlling, but only at a minimum.
>
> One would hope that Oregon state courts can interpret these matters on a higher plane than is the case in other states or on the federal level.[200]

These sentiments accurately mirror the original intent of the Oregon Bill of Rights, and they express the proper frame of reference for the Oregon Supreme Court to use in interpreting article I, section 15.

F. The Constitutionality of Capital Punishment in Oregon

It may be productive at this point to dispose of a straw person argument that may be raised against the present analysis. The scarecrow might look something this: "If retribution is essential for the constitutionality of capital punishment, is it not also possible that retribution may be essential for all forms of incarceration? If this is so, and article I, section 15 is interpreted to prohibit retribution, then will not an absurd result follow; that is, will Oregon be precluded from imposing incarceration for any offense?"

The proper response is that there are significant differences between incarceration and capital punishment that demonstrate that incarceration serves at least some utilitarian functions significantly better than lesser penalties. In the first place, incarcer-

200. COMMISSION FOR CONSTITUTIONAL REVISION, A NEW CONSTITUTION FOR OREGON: A REPORT TO THE GOVERNOR AND THE 52ND LEGISLATIVE ASSEMBLY 45 (1962).

ation temporarily protects society through incapacitation when compared with less or no incarceration.[201] Incarceration may also serve a specific deterrent function by encouraging the offender not to repeat criminal conduct once released from prison.[202] We may always hope for the rehabilitation or reformation of the incarcerated offender, even when the sentence is life imprisonment with no chance for parole.[203] For example, if the offender subsequently completely reforms, the Chief Executive has the power of pardon or commutation to return the offender to usefulness in society. The offender may even contribute to society through writing or other productive work while incarcerated. Execution, on the other hand, is the antithesis of reform.

The irreversibility of the death penalty results in a quantum leap in disutility if an innocent person is put to death. Unjust incarceration also produces disutility, but it is apparent that the magnitude of this disutility is insignificant in comparison to the magnitude of the difference between the disutility of execution and life imprisonment. One should also compare the cost of losing one's life against a temporary or permanent loss of liberty. This comparison is no longer an open question. Life is the most fundamental of all rights and is significantly more so than any lesser right, even liberty. Death is the cessation of even the potential of having the right to any other rights because of its unique finality and severity.[204]

To summarize, capital punishment adds nothing to specific deterrence, incapacitation or reformation when compared with life imprisonment, while incarceration may contribute significantly to any or all of these possible utilitarian justifications for punishment when compared with lesser penalties. Furthermore, the defendant's interest in avoiding execution is different in kind,

201. As already mentioned, the death penalty does not incapacitate any better than true life imprisonment. *See* notes 47 & 120 *supra*.

202. The offender has no such second chance after execution.

203. For a possibly contrary view, see Tuel v. Gladden, 234 Or. 1, 5, 379 P.2d 553, 555 (1963), where Mr. Justice Denecke said: "It has been suggested that life confinement is not inconsistent with reformation, i.e., the person might be reformed, but, nevertheless, his confinement would be continued. That view, we believe, is contrary to an implied essential corollary of reformation that permanent reformation should be followed by release from confinement."

204. *See, e.g.*, Schick v. Reed, 419 U.S. 256, 267 (1974); Furman v. Georgia, 408 U.S. 238, 290 (1972)(Brennan, J., concurring) ("[a]n executed person has indeed 'lost the right to have rights.'"); Biddle v. Perovich, 274 U.S. 480, 486-87 (1927); Calton v. Utah, 130 U.S. 83, 87 (1889).

not just in degree, from the defendant's interest in avoiding incarceration. Since the legislature is essentially free to select the mix of utilitarian justifications that it believes will be most efficacious, it seems highly unlikely that the legislative provision for incarceration could run afoul of the present analysis.[205]

It has now been independently established that retribution is prohibited by the Oregon Constitution and that capital punishment, stripped of its retributive function, would be unconstitutional under the eighth amendment to the Federal Constitution. Since the Supreme Court's ratio decidendi for its eighth amendment death penalty decisions is binding upon Oregon under the fourteenth amendment, it follows immediately that the death penalty is unconstitutional in Oregon under our present constitution. This combined analysis of state and federal sources of law is neither unusual nor questionable.[206] In any event, the same result would obtain under the Oregon Constitution alone since Oregon also has a cruel and unusual punishments clause in article I, section 16, which, at a minimum, would have to be interpreted as restrictively as the eighth amendment to the United States Constitution.[207]

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205. It is just for this reason that article I, section 16 retains important vitality in Oregon by prohibiting excessive incarceration in relation to a minor offense without requiring a detailed and difficult, if not impossible, inspection of the total utilitarian impact.

206. *See, e.g.*, James v. Strange, 407 U.S. 128 (1972). *See also* Fuller v. Oregon, 417 U.S. 40 (1974)(upholding the constitutionality of Oregon's statutory scheme to recoup attorneys' fees expended for indigent defendants). The majority and concurring opinions recognized that the Oregon Constitution article I, section 19, prohibiting imprisonment for debt, might have a bearing on the federal equal protection argument, but they refused to consider it since it was not properly presented below and since the state courts were not given the opportunity of first resolving this issue of state law. 417 U.S. at 48 n. 9; *Id.* at 57-58 (Douglas, J., concurring). Justice Marshall, joined by Justice Brennan, in dissent, would have reached the issue and resolved it as follows:

> Article I, section 19, of the Oregon Constitution is representative of a fundamental state policy consistent with the modern rejection of the practice of imprisonment for debt as unnecessarily cruel, and essentially counterproductive. Since Oregon chooses not to provide imprisonment for debt for well-heeled defendants who do not pay their retained counsel, I do not believe it can, consistent with the Equal Protection Clause, imprison an indigent defendant for his failure to pay the costs of his appointed counsel.

417 U.S. at 60-61; Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

207. See part III *infra* for a more extensive discussion of Oregon Constitution article I, section 16.

III. The Death Penalty and Oregon's Cruel and Unusual Punishment Clause

The purpose of this part is to explore several alternative frameworks that a court might derive from the Oregon Constitution article I, section 16, and to suggest the parameters that should be used in selecting and applying the appropriate methodology.

Oregon Constitution article I, section 16 provides in pertinent part: "[c]ruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."

A. History and Policy

The words "cruel and unusual punishment" came to this country directly from the English Bill of Rights adopted at the end of the seventeenth century. The phrase was intended, at a minimum, to prohibit barbarous and torturous methods of punishment.[208] The evidence is more ambiguous with respect to whether or not they were originally intended to prohibit excessive punishments as well,[209] but the United States Supreme Court has now interpreted the words to have this effect.[210]

There is no Oregon case explicitly deciding whether or not capital punishment violates article I, section 16 of the Oregon

208. *See, e.g.*, Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839 (1969); Schwartz & Wishingrad, *The 8th Amendment, Beccaria, and The Englightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975); Welling & Hipfner, *Cruel and Unusual?: Capital Punishment in Canada*, 26 U. TORONTO L.J. 55 (1976).

209. Note 208 *supra*. Granucci looks to the historical evil which gave rise to the English Bill of Rights and concludes that the English specifically intended to prohibit "excessiveness." Schwartz and Wishingrad point out that European philosophers, including Beccaria, heavily influenced the American framers of the eighth amendment, that Beccaria had specifically and forcefully articulated an excessiveness principle, and that the framers were aware of and adopted Beccaria's rationale. Welling and Hipfner conclude that there is insufficient evidence to establish Granucci's premise beyond doubt, but that there is also insufficient evidence to support the earlier view that the English Bill of Rights drew a clear line between barbarous and excessive punishments and intended to prohibit only the former. Welling and Hipfner, however, disagree with Schwartz and Wishingrad, and believe that the American framers intended to outlaw only barbarous methods of punishment.

210. *See* Coker v. Georgia, 433 U.S. 589 (1977); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Weems v. United States, 217 U.S. 349 (1910). Of course, Oregon Constitution article I, section 16 contains an explicit proportionality limit.

Constitution.[211] The United States Supreme Court decided in *Gregg* that capital punishment does not invariably violate the parallel clause in the eighth amendment,[212] but the Oregon courts are free to interpret the state constitution in a more restrictive manner. Several other state courts have already held state capital punishment laws invalid as cruel and unusual punishment.[213]

There are five significant policy reasons why capital punishment may be required to pass a more exacting constitutional standard under Oregon Constitution article I, section 16 than under the eighth amendment to the United States Constitution.

1. Structural and functional differences exist between the state and federal constitutions, particularly between their respective bills of rights.[214]
2. The Oregon Bill of Rights was drafted seventy years after the Federal Bill of Rights, and its framers intended it to be more restrictive of government power and more protective of individual rights and liberties.[215]
3. Factual circumstances relating to capital punishment are disparate. For example, homicide rates, evidence on the various utilitarian functions of punishment, community standards of morality and propriety, penological philosophies and the historical experience with capital punishment are all different between Oregon and the rest of the nation.[216]
4. The impact of a national decision declaring the death penalty per se unconstitutional would be more traumatic than the same decision on an individual state-by-state basis.[217]

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211. State v. Finch, 54 Or. 482, 103 P. 505 (1909) and State v. Anderson, 10 Or. 448 (1882) rejected only article I, section 15 attacks, though *Anderson* also contained the following general language: "It must be regarded as settled in this state that the constitution does not prohibit the legislature from enacting laws for the infliction of capital punishment in proper cases." 10 Or. at 465.

212. Gregg v. Georgia, 428 U.S. 153 (1976).

213. *See, e.g.*, People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972); Commonwealth v. O'Neal, 367 Mass. 440, 339 N.E.2d 676 (1975).

214. *See generally* discussion in notes 125-28, 130-33 and accompanying text *supra*.

215. *See generally* the discussion in note 152 and accompanying text *supra*.

216. *See, e.g.*, Bailey, *Deterrence and the Death Penalty For Murder in Oregon*, 16 WILLAMETTE L. REV. 67 (1979). There is an interesting analogy between this notion of differing community standards and the United States Supreme Court's recent obscenity decisions holding that, even for federal first amendment purposes, differing local community standards of morality may be constitutionally significant. *See, e.g.*, Smith v. United States, 431 U.S. 291 (1977); Miller v. California, 413 U.S. 15 (1973).

217. In fact, in upholding capital punishment, the *Gregg* plurality relied partly on its reluctance to constitutionally shut off all national debate on the death penalty, on its federalist reluctance to trench too heavily on stateSegislatures, especially in the area of defining crimes and punishments, and on the strong *national* historical and precedential

5. The language of article I, section 16 is different from, and more restrictive than, the language of the eighth amendment.[218]

In deciding what functional test to use in measuring the barbarousness or excessiveness of capital punishment, it is helpful to look at the various frameworks articulated by the Justices of the United States Supreme Court. Although these views are controlling only as minimum protections of individual rights, they are useful because of their diversity and because of the great degree of care and attention offered this problem by the Justices.

B. Cruel and Unusual Punishment Analysis in the United States Supreme Court

The one majority principle in the recent Supreme Court death penalty decisions is the *Furman* Court's conclusion that capital punishment is cruel and unusual if it can only be applied in a significantly discriminatory, selective, arbitrary, wanton, freakish or spotty manner.[219] A majority of the Justices are now satisfied that it can be applied in a way that avoids the most significant of these defects,[220] but the Oregon Supreme Court is free to reach a different factual conclusion. Professor Charles Black has argued that capital punishment can never be administered evenhandedly, given its nature and the inherent character of our social and criminal justice systems.[221] Whether or not Professor Black is correct in theory, he is correct in practice. Even the new death penalty statutes upheld in *Gregg* and companion cases have not, as applied, significantly ameliorated these constitutional defects.[222]

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support for the death penalty. Gregg v. Georgia, 428 U.S. 153, 154 (1976)(opinion of Stewart, Powell and Stevens). None of these factors is present for the Oregon Supreme Court as it prepares to interpret article I, section 16 and to render a decision on the constitutionality of capital punishment binding only on Oregon.

It should also be mentioned that it is significantly easier to amend the Oregon Constitution than to amend the United States Constitution. This follows from Oregon's much smaller population and also from the significantly different amendment procedures. *Compare* United States Constitution article V, *with* Oregon Constitution article XVII.

218. Unlike the eighth amendment to the United States Constitution, article I, section 16 contains an explicit proportionality limit on punishments.

219. *See* Furman v. Georgia, 408 U.S. 238, 255-57 (1972)(Douglas, J., concurring)(Stewart, J., concurring)(White, J., concurring).

220. Gregg v. Georgia, 428 U.S. 153 (1976).

221. *See* C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974).

222. *See, e.g.*, Reidel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*,

The history of executions in Oregon does not encourage greater optimism for an evenhanded application of capital punishment here. Of the fifty-eight individuals who have been executed since 1903, only one was in the middle or upper social and economic classes, and not a single one was a female.[223] A recent Oregon study concludes that the single most important factor in determining the disposition for defendants charged with murder is the defendant's attorney. More than half of the murder defendants since 1971 received private court-appointed attorneys and they fared significantly more poorly than other defendants who either were represented by public defenders or retained private counsel of choice.[224] Since the largest public defender in Oregon, the Multnomah and Washington County Metropolitan Public Defender, Incorporated, has refused to handle capital cases for economic reasons,[225] it is clear that an increasing percentage of capital murder defendants will receive private court-appointed attorneys and will be at a significant disadvantage. The outcome of further studies of these data by social scientists should help to determine whether the death penalty in Oregon is unconstitutional under the *Furman* principle.

Some of the Justices have developed elaborate individual frameworks to apply the eighth amendment beyond the *Furman* holding. Justice Brennan has interpreted the cruel and unusual punishments clause to require "the state, even as it punishes, [to] treat its members with respect for their intrinsic worth as human beings" and to prohibit punishments that do not

49 TEMP. L. Q. 261 (1976); Wolfgang, Kelley & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L. C. & P. S. 301 (1962); Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227 (1976); National Coalition Against the Death Penalty, Death-Row Census (Nov. 8, 1978). Since Ballot Measure 8 is modeled partly on the Texas capital sentencing statute, it is worth noting that these problems have been expecially apparent in Texas. *See, e.g.*, Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U. L. REV. 1 (1976); Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343 (1977). *Cf.* Crump, *Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531 (1977).

223. *See* Bedau, *Capital Punishment in Oregon, 1903-64*, 45 OR. L. REV. 1, 10, 14 (1965)(one woman, Jeanace Freeman, was sentenced to death, but her sentence was commuted to life imprisonment).

224. Comment, *Oregon's Revised Murder Statutes: The Regressive Impact of Court-Appointed Counsel for Indigent Defendants*, 56 OR. L. REV. 702 (1977).

225. Private conversation with James D. Hennings, Esq., Director, Metropolitan Public Defender, Inc. (Feb. 23, 1979).

"comport with human dignity."[226] In determining whether a punishment is "so severe as to be degrading to the dignity of human beings"[227] and, therefore, unconstitutional, he considers four factors: the severity of the punishment, including physical and mental pain;[228] the question of whether a severe punishment is being inflicted "arbitrarily";[229] the question of whether the severe punishment is acceptable "to contemporary society";[230] and the question of whether the severe punishment is "excessive" in that it is "unnecessary" and involves "the pointless infliction of suffering" because "there is a significantly less severe punishment adequate to achieve the purposes" for the imposition of criminal sanctions.[231] Justice Brennan's test is normally cumulative, taking all four factors into account.[232]

It is now settled that Justice Brennan was correct in concluding that capital punishment is uniquely severe when compared with any other arguably permissible punishment.[233] Justice Brennan would have held the death penalty unconstitutional on this ground alone "were it not that death is a punishment of long standing usage and acceptance in this country."[234] Since the usage and acceptability of capital punishment are far less well established in Oregon, the application of even the first prong of his test could invalidate the punishment altogether under article I, section 16. Justice Brennan's conclusion that capital punishment is likely to be inflicted arbitrarily[235] is amply supported by empirical evidence.[236] In Oregon, only one individual has been executed in the last twenty-five years and the people have twice voted capital punishment out of existence. This suggests that his third conclusion, that "contemporary society views this punishment with substantial doubt," is even more persuasive in Oregon than in the nation as a whole.[237]

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226. Gregg v. Georgia, 428 U.S. 153, 229 (1976)(Brennan, J., dissenting); Furman v. Georgia, 408 U.S. 238, 270 (1972)(Brennan, J., concurring).

227. Note 226 *supra*.

228. Furman v. Georgia, 408 U.S. 238, 271 (1972)(Brennan, J., concurring).

229. *Id.* at 274.

230. *Id.* at 277.

231. *Id.* at 279.

232. *Id.* at 282.

233. *Id.* at 290-91. *See* note 113 *supra*.

234. 408 U.S. at 291.

235. *Id.* at 293-95.

236. *See* notes 219, 221, 222 and accompanying text *supra*.

237. 408 U.S. at 300. As will be discussed, the rather overwhelming vote of the people to reinstate capital punishment in Oregon in 1978 does not substantially undercut this conclusion. *See* notes 241-46 and accompanying text *infra*.

Finally, Justice Brennan concluded that capital punishment does not serve legitimate penological aims significantly better than life imprisonment, and that it, therefore, amounts to the wanton infliction of unnecessary pain and suffering.[238] This conclusion is more likely to command a majority of the Oregon court since retribution is not even arguably a legitimate function of the criminal justice system here, since several Justices of the Oregon Supreme Court have expressed skepticism about the efficacy of general deterrence, and since Oregon has managed for large portions of its history without capital punishment.[239] Additional empirical work on the utility of capital punishment in Oregon would be valuable, but even without it, under Justice Brennan's methodology, the conclusion that capital punishment is per se unconstitutional in Oregon is supported by more evidence than was available for his similar conclusion on a national level.[240]

Justice Marshall's doctrinal framework is similar to that of Justice Brennan. According to Justice Marshall, a punishment is unconstitutional if it is either unnecessary because it "serves no valid legislative purpose" better than a lesser penalty, or if it is "morally unacceptable" to the citizenry.[241] Like Justice Brennan, he concluded that there is insufficient penological efficacy to justify capital punishment.[242]

The second prong of Justice Marshall's test requires a judicial prediction of how a hypothetically well-informed citizenry would respond to the question of whether or not society should have capital punishment.[243] Since retribution is impermissible in Oregon as a decisional criterion for the people to use in making this moral judgment about capital punishment, the previously

238. 408 U.S. at 300-06.

239. *See, e.g.*, Harrell v. Travelers Indem., 279 Or. 199, 567 P.2d 1013 (1977); Roshak v. Leathers, 277 Or. 207, 214-15, 560 P.2d 275, 278-79 (1977); Harrell v. Ames, 265 Or. 183, 190-91, 508 P.2d 211, 215 (1973).

240. For general consideration of the question of the utility or lack of utility of capital punishment, see notes 116-23 and accompanying text *supra*.

241. Furman v. Georgia, 408 U.S. 238, 331-32 (1972)(Marshall, J., concurring).

242. *See, e.g., id.* at 342-45, 353-59. In fact, he considers utilitarian purposes more fully than any of the other Justices in reaching this conclusion. He also explicitly rejects retribution as a legitimate penological function. *Id.* at 345.

243. Gregg v. Georgia, 428 U.S. 153, 231-32 (1976)(Marshall, J., dissenting); Furman v. Georgia, 408 U.S. 238, 360-64, 369-70 (1972)(Marshall, J., concurring). The notion that the Bill of Rights ever authorizes the court to block the will of the legislature or of the people is inherently counter-majoritarian and, perhaps, also elitist. The more pertinent question of whether this form of elitism is desirable and constitutionally required, will depend upon what decisional criteria are used by a judge applying the "Marshall Hypothesis"; that is, what does the test look like as a functional matter?

cited empirical studies are impressive in suggesting that, in Oregon, support for capital punishment would abruptly cease among hypothetically well-informed citizens who factored retribution out of their moral calculus.[244] Speculation about the acceptability of capital punishment to well-informed Oregonians could be resolved by a statewide empirical study. Such a study would be useful to the Oregon courts.

Whatever the outcome of such a study might be, Oregonians were not well-informed on November 7, 1978, when they voted to reinstate the death penalty. The text of Ballot Measure 8 was not included on the official ballot, although it was contained in the official voters' pamphlet.[245] The official ballot title erroneously estimated the financial effect of reinstating capital punishment as a "one-time cost of $130,000 in general revenue to construct a gas chamber."[246] The cost of the gas chamber is insignificant when compared with the other costs of administering a criminal justice system that includes capital punishment. This informational error could be written off as a macabre joke if the issue were not so serious. The official explanation of Ballot Measure 8, required by ORS 254.222, provided: "Under current law, the penalty for murder is life in prison without any statutory requirement that some minimum period of time be spent in prison."[247] This statement was inaccurate since Oregon already had an aggravated murder statute providing that the most serious murderers serve substantial minimum periods of incarceration before becoming eligible for parole.[248] The voter's pamphlet argument in favor of Ballot Measure 8 was premature and misleading in assuring the voters that "[t]his measure complies with recent United States Supreme Court decisions upholding the constitutionality of the death penalty in states after which this proposal is modeled."[249] Finally, press coverage was brief and generally of a poor quality.[250]

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244. *See* notes 102-07 and accompanying text *supra*.

245. OREGON SECRETARY OF STATE, OFFICIAL 1978 GENERAL VOTER'S PAMPHLET 48-49 (1978)[hereinafter cited as 1978 Voter's Pamphlet].

246. *Id.* at 49.

247. *Id.* at 50.

248. ORS 163.095-.105 (1977).

249. 1978 Voter's Pamphlet, *supra* note 245, at 50. *See* note 21 *supra* for some of the constitutionally significant distinctions between Ballot Measure 8 and the death penalty statutes upheld by the United States Supreme Court.

250. An informal survey of the Oregonian Index, for example, indicates there were only approximately 20 articles relating to the death penalty before the 1978 election. This

To summarize, use of Justice Marshall's penological justification test would result in the Oregon Supreme Court declaring capital punishment unconstitutional under article I, section 16. Marshall's alternate test, relating to the judgment of hypothetically well-informed citizens, can only be adequately applied with further empirical research. The presently available evidence, however, suffices to dispel any contention that the vote in favor of capital punishment on November 7, 1978, was reflective of the considered judgment of an informed electorate.

Much of the framework of the *Gregg* plurality, made up of Justices Stewart, Powell and Stevens, has been discussed.[251] The plurality agreed that the cruel and unusual punishment clause requires "an assessment of contemporary values concerning" capital punishment, but claimed to be able to make this assessment strictly on "objective indicia" of the public attitude.[252] It concluded that the death penalty is consistent with current values since the majority of state legislatures responded to *Furman* with new death penalty laws and since juries seem willing to sentence a significant number of people to death under the new laws.[253] Because Ballot Measure 8 deprives the jury of its function in capital sentencing, the Oregon Supreme Court will not have this kind of evidence in determining whether the death penalty, *as applied*, comports with the contemporary values of Oregonians.

The *Gregg* plurality also stated that there is a separate strand of cruel and unusual punishment jurisprudence which requires the court to make a subjective judgment as to whether a challenged punishment is "so totally without penological justification that it results in the gratituitous infliction of suffering."[254] In applying this test, the plurality presumed the validity of the legislative judgment and placed a heavy burden on those attacking capital punishment. Parts I and II of this article have already demonstrated the principal reasons why this procedural formula is inappropriate in Oregon. Additionally, there is not even a legislative judgment in favor of capital punishment to which the Oregon Supreme Court can defer. Instead, the Oregon legislature has

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compares with at least 39 articles before the 1964 death penalty election. One explanation is the great deal of attention given Measures 6 and 11 (the property tax relief proposals) during the 1978 election campaign. There were 99 articles on those issues.

251. *See* notes 36-65 and accompanying text *supra*.

252. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

253. *Id.* at 179-82.

254. *Id.* at 183.

rejected capital punishment each time it has studied the question during the last fifteen years.[255]

With the plurality's presumptions and burdens appropriately adjusted to account for the structural and institutional differences in state and federal constitutions, capital punishment should be invalidated under article I, section 16, absent new, conclusive evidence that it deters significantly better than life imprisonment. Even if the Oregon Supreme Court were to adopt the plurality's procedural formula word for word, the death penalty might still be unconstitutional under article I, section 16 of the Oregon Constitution, depending on the results of comparative analyses of the Oregon and national evidence on the punishment's utilitarian efficacy.

The views of Chief Justice Burger, and Justices White, Renquist and Blackmun, are less important since the Oregon court is precluded from adopting them.[256] In any event, these Justices also acknowledge that the eighth amendment prohibits "extreme cruelty" and "embodies a moral judgment."[257] The basic difference between their views and those of the plurality is that they give an even greater deference, approaching an absolute abdication of judicial review, to the legislature.[258]

255. *See* H.B. 2321, died in committee July 5, 1977, Legislative Calendar of the 59th Session, H-48 (1977)(the wording of H.B. 2321 is nearly identical to the wording of Ballot Measure 8); H.B. 2512, died in committee June 14, 1975, Journals and Calendars of the 58th Session, H-80 (1975); H.B. 2828, H.B. 2380, H.B. 2382, all tabled in committee April 4, 1973; Journal of the 57th Legislative Assembly, C-427.428, 553 (1973); S.B. 890, defeated 19-10 June 20, 1973, Journal of the 57th Legislative Assembly, C-267 (1973); H.B. 1680, tabled in committee March 3, 1967, Journal of the 53rd Legislative Assembly, H-52 (1967).

256. This is so because their views are less restrictive of state power than the binding holdings of the Court.

257. Furman v. Georgia, 408 U.S. 238, 382 (Burger, C.J., dissenting; Justices Blackmun, Powell and Rehnquist join).

258. *See id.* at 384. Other worthwhile exegeses of doctrinal frameworks may be found in Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler plate": Mental Disorder As a Mitigating Factor*, 66 GEO. L. J. 757 (1978); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978); Tarnopolsky, *Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look For Guidance?*, 10 OTTAWA L. REV. 1 (1978); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972). Professor Radin offers the most original and comprehensive proposal. She argues persuasively for a sliding scale standard of review under the cruel and unusual punishments clause based upon a "risk-error" calculation that evaluates the risk and magnitude of potential errors on the defendant's side and on the state's side. She suggests at least nine factors to take into account in determining the standard of review for a particular punishment. *See* Radin, *The Jurisprudence of Death:*

C. *Applying Article I, Section 16 to Capital Punishment*

Oregon case law does not offer much guidance in determining which, if any, of these alternative methodologies should be adopted by the Oregon Supreme Court as the proper functional construction of article I, section 16 of the Oregon Constitution.[259] Each of the frameworks, however, points to the common conclu-

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Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U. PA. L. REV. 989, 1022-27 (1978). Applying these factors, she concludes that "the death penalty should be subject to strict scrutiny for cruelty." *Id.* at 1030. She goes on to explore the substantive strands of eighth amendment jurisprudence and determines that they are "dignity" and "excessiveness." *Id.* at 1044-47. Finally, applying this procedural and substantive model to the death penalty, she concludes that the death penalty is presently cruel and unusual punishment. *Id.* at 1062-64.

259. *See, e.g.*, State v. Humphrey, 253 Or. 183, 452 P.2d 755 (1969); State v. Van Kleeck, 248 Or. 7, 432 P.2d 173 (1967); State v. Thornton, 244 Or. 104, 416 P.2d 1 (1966), all holding that in order to reverse a statutorily authorized sentence involving a term of years the sentence would have to be "so disproportionate to the offense as to shock the conscience of fair minded men . . . ." State v. Humphrey, 253 Or. 183, 184, 452 P.2d 755, 755 (1969). *See also* State v. Hicks, 213 Or. 619, 629-30, 325 P.2d 794, 799 (1958), *cert. denied* 359 U.S. 917 (1959)(upholding the Habitual Criminal Act against an article I, section 16 "proportionality" attack); State v. Smith, 128 Or. 515, 524-26, 273 P. 323, 326 (1929)(holding that the Habitual Criminal Act did not violate article I, section 16); Sustar v. County Ct. for Marion County, 101 Or. 657, 665, 201 P. 445, 447-48 (1921)(affirming a sentence of six months incarceration and a $500 fine for illegal possession of intoxicating liquor, but citing with approval the proportionality test in Weems v. United States, 217 U.S. 349 (1910)); State v. Ross, 55 Or. 450, 473-74, 104 P. 596, 604-05 (1910), *modified* 55 Or. 450, 106 P. 1022 (1910) (holding that a fine of over $500,000 which might be served by one day in the county jail for every $2 of the fine was "excessive" and "cruel and unusual punishment" and therefore unconstitutional). (The court said:

> There can be no question that a sentence may be excessive, even though within the maximum of the statute, but if excessive, it is within the power of the appellate court to enforce this provision of the Bill of Rights, and avoid the judgment so far as it is excessive.),

State v. Dinkel, 34 Or. App. 375, 384-90, 579 P.2d 245, 250-53 (1978)(again discussing the court's statutory and constitutional role in reviewing sentences involving the imposition of statutorily authorized terms of years); State v. Franklin, 11 Or. App. 239, 240, 502 P.2d 392, 393 (1972)(holding without analysis that a life sentence for murder does not violate either Oregon Constitution article I, section 15 or article I, section 16).

The Indiana cases are not nearly as persuasive with respect to the true meaning of article I, section 16 as they are with respect to article I, section 15. This follows since the "cruel and unusual punishment" language was in quite general use at the time of the adoption of the Oregon Constitution. The Indiana Constitution cannot, therefore, be assumed to be so close a godfather to this provision of the Oregon Constitution. Additionally, the most pertinent Indiana case, Hobbs v. State, 133 Ind. 404, 32 N.E. 1019 (1892), wherein the Indiana Supreme Court uttered dicta that the cruel and unusual punishment clause "according to modern interpretation, does not affect legislation providing imprisonment for life or for years, or the death penalty by hanging or electrocution," *id.* at 404, 32 N.E. at 1021), was sharply criticized in Weems v. United States, 217 U.S. 349, 376 (1910), and *Weems* rather than *Hobbs* has been cited as the controlling principle by the Oregon courts.

sion that article I, section 16 contains an "excessiveness" prohibition and also a requirement that a judgment be made on the acceptability of capital punishment to contemporary morality. Substantively, the core of these methodologies is that the court will have to make judgments about the contemporary acceptability of capital punishment and about whether the punishment serves legitimate penological purposes significantly better than does life imprisonment. Procedurally, the presumptions utilized by the *Gregg* plurality will need to be adjusted and the burdens shifted. Further empirical evidence is also desirable, but it seems that under any such hybrid formulation, the statutory death penalty, in any form, is presently unconstitutional under article 1, section 16 of the Oregon Constitution.

IV. The 1964 Constitutional Amendment Repealing the Death Penalty

From 1920 until 1964, the Oregon Constitution explicitly authorized the death penalty for murder in the first degree.[260] The 1963 Legislature proposed and referred to the voters a constitutional amendment to repeal this authorization. The people adopted the repealer by a vote of 455,654 to 302,105 on November 3, 1964.[261] This part considers whether the amendment acts as positive constitutional law prohibiting the death penalty.

Since the repealer did not insert any prohibitory language into the Oregon Constitution, the argument against capital punishment has to depend directly on the measure's constitutional purpose. The people were responsible for adopting this amendment. It is their knowledge and intent on November 3, 1964, that is dispositive in determining this purpose.

The official ballot title that the people had before them in the voting booth provides the best evidence of what they thought they were accomplishing by adopting Ballot Measure 1.[262]

> CAPITAL PUNISHMENT BILL— Purpose: To amend Constitution to abolish the death penalty for murder in the first degree and to make the penalty life imprisonment.
>
> YES ☐ NO ☐

The official explanation of Ballot Measure 1[263] in the voters'

260. Or. Const. art. I, §§ 37, 38 (1920, repealed 1964).

261. *See* note 4 *supra*.

262. Oregon Secretary of State, Official 1964 General Voter's Pamphlet 6 (1964) [hereinafter cited as 1964 Voter's Pamphlet].

263. *Id.* at 3.

pamphlet states that the measure would remove the death penalty sections from the Oregon Constitution and would give the legislature "power to fix the penalty for murder in the first degree."[264] It then explains that the legislature has already acted and, if the measure is passed, the

> penalty for first degree murder will be life imprisonment with no possibility of parole for at least 10 years. . . . Therefore, the immediate effect of the amendment and of legislation which automatically goes into effect with it is to repeal the death penalty in Oregon for first degree murder and to substitute the penalty of life imprisonment.

The explanation in the pamphlet concludes:

> If this amendment is defeated, the death penalty for first degree murder will remain in effect as a part of the Constitution of the State. If you wish to retain the death penalty, vote no on Ballot Measure 1. *If you wish to abolish the death penalty*, vote yes on ballot measure No. 1.[265]

A voter reading this somewhat ambiguous language would logically conclude that a "yes" vote would constitutionally prohibit capital punishment, but would still allow the legislature leeway to modify the mandatory minimum period of incarceration as societal needs changed.[266]

The Voter's Pamphlet also presented the electorate with two unofficial arguments in favor of Ballot Measure 1 and none in opposition.[267] These arguments contained numerous exhortations to vote for Ballot Measure 1 and repeatedly stated that the measure would "ABOLISH THE DEATH PENALTY IN OREGON!"[268]

In sum, especially in view of the clear language of the official ballot title, there is evidence that the abolitionist constitutional amendment of 1964 acts as a positivist prohibition on capital punishment in Oregon that can only be reversed by a new constitutional amendment.

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264. *Id.*

265. *Id.* (emphasis added).

266. Legislative history is ambiguous with respect to whether the 1964 repealer was intended to constitutionally prohibit capital punishment. *Compare* Or. Senate Comm. on the Judiciary, *Minutes of the Hearings* (March 22, 1963 & April 1, 1963), *and* Or. House Comm. on Constitutional Revision, *Minutes of the Hearings*, 2-3 (May 20, 1963), *with* Or. House Comm. on Constitutional Revision, *Minutes of the Hearings*, 1-3 (May 9, 1963).

267. 1964 VOTER'S PAMPHLET, *supra* note 262, at 4-5.

268. *Id.* This exhortation was repeated six times in capital letters.

CONCLUSION

The statutory death penalty, in any form, is presently per se unconstitutional in Oregon because retribution is prohibited by section 15 of the Oregon Bill of Rights and because the United States Supreme Court would declare capital punishment, stripped of its retributive justifications, to be cruel and unusual punishment. The Oregon judiciary now has the solemn responsibility to declare the death penalty invalid. The legislative and executive branches of govenment have the equally important responsibility to insure that it is not implemented, and to work either for its repeal or for its constitutionalization through a new constitutional amendment.

It is essential that the discussion begun by this article be continued and refined so that the difficult decisions ahead for the judiciary, the legislature, the executive and the people of Oregon will be made after full debate.

The conclusion that retribution is necessary to the constitutionality of capital punishment under the Federal Constitution applies with equal force to every state. Each of the states remains free to interpret its own cruel and unusual punishment clause or other provisions of its constitution as prohibiting retribution. Facially strong state constitutional arguments supporting this prohibition already exist in Indiana,[269] Wyoming,[270] Alaska,[271] Montana[272] and possibly Illinois.[273] In any state where retribution is found to be prohibited, the statutory death penalty will be per se unconstitutional. Therefore, scholarly and judicial attention in other states should now concentrate on the development of analytic techniques to determine if retribution is prohibited by other state constitutions.

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269. IND. CONST. art. I, § 18.

270. WYO. CONST. art. I, § 15. The Wyoming argument is not as strong as Oregon's because there is no explicit prohibition in the Wyoming Constitution of "vindictive justice." It is possible, however, that since Wyoming includes both "reformation" and "prevention" as purposes for the penal code, article I, section 15 could be interpreted to provide an exhaustive list of constitutional justifications and, consequently, to prohibit retribution.

271. ALAS. CONST. art. I, § 12.

272. MONT. CONST. art. II, § 28. See the discussion relating to this provision in notes 139-40 and accompanying text *supra*.

273. ILL. CONST. art. I, § 11.