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Note*

State v. Gales, 265 Neb. 598, 658 N.W.2d 604 (2003): The First Test of Nebraska's New System of Capital Punishment—The Battle Is Over, But What About the War?

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I. INTRODUCTION

The use of capital punishment has been a major source of controversy in the modern world. The United States—more specifically its
Supreme Court—has long struggled to find a balance between public demand for this well established practice and criticisms about its potentially arbitrary and discriminatory application.¹ Ring v. Arizona² was among the most recent of these developments. There, the United States Supreme Court held that capital defendants are entitled to jury determination of facts which render them vulnerable to a penalty more severe than the prescribed statutory maximum.³ Specifically, such factual findings can include aggravating circumstances when such circumstances are treated as functionally equivalent to elements of the crime of capital murder.⁴ This ruling directly invalidated Arizona's capital sentencing scheme and called into question the capital sentencing schemes of at least four other states that relied on judges for both factfinding and the ultimate sentencing decision.⁵

Nebraska was among these states. Thus, the Governor quickly called the legislature in to a special session to address the questionable status of the state's death penalty system.⁶ The result of the Special Legislative Session was Legislative Bill 1 ("LB 1").⁷ LB 1 restructured the sentencing decision to allow juries to determine aggravating circumstances, while a three-judge panel continued to determine mitigating circumstances, the balancing of the two, and proportionality review.⁸ The bill was passed with special provisions allowing it to take effect immediately.

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1. See Furman v. Georgia, 408 U.S. 238 (1972) (Stewart, J., concurring) (recognizing these conflicts).
2. 536 U.S. 584 (2002).
3. Id. at 609.
4. Id.
5. See id. at 608 (noting that only four states: Colorado, Montana, Idaho, and Nebraska, commit both factfinding and the ultimate capital decision to judges). There are other states that may not conform to the edicts of Ring because the jury determinations serve merely as recommendations and can be overridden by the reviewing judge; however, these schemes will not be discussed at length within this Note.
6. This took the form of a special assembly of the Ninety-Seventh Legislature, Third Special Session of the Nebraska Legislature to "enact procedures for jury participation in the first-degree murder sentencing process as required by the recent decision of the Supreme Court of the United States in Ring v. Arizona" and to "enact procedures to establish lethal injection as a means of enforcing a sentence of death." GOVERNOR MIKE JOHANNS, PROCLAMATION OF CALL TO THIRD SPECIAL SESSION OF THE NINETY-SEVENTH LEGISLATURE, Legislative Journal 1, at 2 (2002).
8. Prior to LB 1, a capital defendant had the choice between the trial judge or a three-judge panel containing the trial judge. The three-judge panel could also be composed of three district judges named by the Chief Justice of the Nebraska Supreme Court if the Chief Justice determined that the presiding judge was disabled or disqualified. NEB. REV. STAT. § 29-2520 (Reissue 1995).
Ring gave many death row inmates a glimmer of hope for a new appeal on the grounds of a Sixth Amendment violation. One such inmate was Arthur L. Gales, who was convicted by a Nebraska jury of the attempted second-degree murder of his girlfriend and two counts of first-degree murder for the attack on her two young children. At the penalty phase of Gales' trial, the sentencing judge evaluated the presence of aggravating and mitigating factors and weighed the two against each other. The judge concluded that the mitigating evidence was insufficient to outweigh the aggravators, and sentenced Gales to consecutive death sentences for the murders of the children. During the course of Gales' sentencing proceedings, he challenged the new sentencing structure, arguing that it violated his Sixth Amendment right to a jury trial. Because Gales preserved the issue before the judgment became final, he was able to challenge the judicial sentencing on appeal without implicating the retroactivity questions left unresolved by Ring. Gales made a number of attacks on sentencing procedures used in his case and ultimately succeeded in having his death sentences vacated and remanded for retrial under the new sentencing scheme. One of Gales' arguments involved a facial challenge to the constitutionality of LB 1 on the basis that it did not allow the jury to determine mitigators, balance aggravators and mitigators against each other, or engage in proportionality review. The Nebraska Supreme Court rejected this argument by saying that neither Ring nor Apprendi v. New Jersey cast doubt on the future viability of this distinction.

The Gales case is unique and somewhat idiosyncratic because of its procedural history and arguably unsympathetic defendant. How-

11. At this point, Ring had not yet been decided, so Gales based his challenge on the language of Jones v. United States, 526 U.S. 227 (1999), and Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring's precursors. See infra section II.D.
12. The debate raging among the circuit courts over Ring's retroactivity was recently resolved by the United States Supreme Court in Schriro v. Summerlin, 124 S. Ct. 2519 (2004). In Schriro, the Court classified Ring's holding as procedural and held that Ring does not apply retroactively. In doing so however, the Schriro Court provided little guidance as to its vision of the scope of jury involvement in capital sentencing. Id.
13. 530 U.S. 466 (2000) (holding that any fact that increased the penalty beyond a statutory maximum, other than the fact of prior conviction, must be submitted to the jury and proven beyond a reasonable doubt).
14. Many commentators have noted a positive correlation between the number of aggravating factors evinced and the likelihood of a death sentence, such that the more aggravators found, the more likely a death sentence. See Richard L. Wie-
ever, despite these idiosyncrasies, Gales’ arguments and the Nebraska Supreme Court’s analysis of those arguments suggest the possibility of new developments in the United States Supreme Court’s death penalty jurisprudence and foreshadow the significance that such developments could have on the new Nebraska capital sentencing scheme. A critical look at the cases leading up to *Ring* suggests a doctrinal shift in the U.S. Supreme Court’s philosophy about the role of the capital jury and the possibility of subsequent evolutions of these doctrines, especially in the area of mitigating circumstances. The U.S. Supreme Court in *Ring* recognized the limits of the question before it and exercised judicial restraint by limiting its holding to the facts and issues presented by that case, as did the Nebraska Supreme Court in *Gales*. However, in the course of such analyses, both courts provided *dicta* suggesting the possibility for further developments when the facts presented themselves. These glimpses into the future leave many states, including Nebraska, in limbo as to the future legitimacy of their new capital sentencing schemes.

Because of the tenuous position in which the Nebraska Unicameral finds itself, this Note will examine U.S. Supreme Court doctrine in this field in an effort to determine a navigable course through the changing tides of the Court’s death penalty jurisprudence. Part II provides an overview of Nebraska’s legislative response to *Ring*’s edicts. Part II also examines the arguments presented in *Gales* and the foundation of these arguments in the cases leading up to *Ring*. Next, Part III analyzes these arguments with a view toward predicting both future progressions and the ultimate implications of such progressions on the new Nebraska sentencing scheme. Specifically, section III.A demonstrates the Court’s recent doctrinal shift that emphasizes substance over form in its treatment of capital sentencing factors. Section III.B discusses the questions explicitly left unanswered in *Ring* and the Court’s recognition that this shift could have greater implications on capital sentencing jurisprudence rooted in either the Sixth or Eighth Amendment. Section III.C then examines the Sixth and Eighth Amendment arguments for expanding the jury’s role in capital sentencing by analyzing those factors the Court has deemed relevant. The subdivisions of section III.C consider the jury’s retributive function as the conscience of the community, the historic role of the jury in capital cases, and modern empirical research comparing judicial sentencing with jury sentencing. Examination of these various sources suggests, and it is the thesis of this Note, that the Court is likely to further expand its definition of the jury’s role in capital sentencing under either Sixth or Eighth Amendment principles, which would re-

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result in the invalidation of the newly adopted Nebraska sentencing scheme.

II. BACKGROUND

A. The Road to Ring

Ring v. Arizona\textsuperscript{15} constitutes the most substantial installment in a progression of capital punishment cases dealing with the Sixth Amendment. This progression of cases is also closely tied to constitutional due process requirements regarding the distinction between elements and sentencing factors. These distinctions can be traced back to \textit{In re Winship},\textsuperscript{16} Mullaney v. Wilbur,\textsuperscript{17} and Patterson v. New York,\textsuperscript{18} as well as McMillan v. Pennsylvania,\textsuperscript{19} Almendarez-Torres v. United States,\textsuperscript{20} and Hildwin v. Florida.\textsuperscript{21} However, for the purposes of economy, only Ring's immediate predecessors, Walton v. Arizona,\textsuperscript{22} Jones v. United States,\textsuperscript{23} and Apprendi v. New Jersey\textsuperscript{24} will be examined in detail.

1. Walton v. Arizona\textsuperscript{25}

In Walton, the Court held that Arizona's capital sentencing scheme was compatible with the Sixth Amendment because the judicially-determined aggravating circumstances used to determine death eligibility qualified as sentencing factors rather than elements of the offense.

\begin{itemize}
\item \textsuperscript{15} 536 U.S. 584 (2002).
\item \textsuperscript{16} 397 U.S. 358 (1970) (holding that the Due Process Clause requires that the accused be convicted based on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged).
\item \textsuperscript{17} 421 U.S. 684 (1975) (holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion, instead of allowing a State to shift the burden of proving provocation to the defendant).
\item \textsuperscript{18} 432 U.S. 197 (1977) (allowing the states to shift the burden of affirmative defenses to the defendant so long as the burden of proof was not reallocated merely by designating traditional elements as affirmative defenses).
\item \textsuperscript{19} 477 U.S. 79 (1986) (holding that because Pennsylvania had expressly provided in its statute that the visible possession of a firearm was not an element, but a sentencing factor, such possession need not be proven by the State beyond a reasonable doubt and the defendant's Sixth Amendment rights were not violated).
\item \textsuperscript{20} 523 U.S. 224 (1998) (holding that a provision allowing consideration of recidivism simply authorized an enhanced sentence, instead of creating a separate crime, and such provision did not overstep constitutional bounds).
\item \textsuperscript{21} 490 U.S. 638 (1989) (holding that the Sixth Amendment does not require the jury to make specific findings that sufficient aggravating circumstances exist to qualify a defendant for a death sentence).
\item \textsuperscript{22} 497 U.S. 639 (1990).
\item \textsuperscript{23} 526 U.S. 227 (1999).
\item \textsuperscript{24} 530 U.S. 466 (2000).
\item \textsuperscript{25} 497 U.S. 639 (1990).
\end{itemize}
of capital murder. Jeffrey Walton was found guilty of committing first-degree murder and sentenced to death by a judge pursuant to Arizona law. Arizona's sentencing scheme, at that time, provided for a separate sentencing hearing "before the court alone" to determine whether life or death was appropriate. Within that hearing, the State bore the burden of establishing the existence of any aggravating factors, while the defendant bore the burden of establishing mitigators.

At the time Walton was decided, the Ninth Circuit had recently declared the Arizona death penalty statute to be unconstitutional. When Walton challenged his death sentence using the Ninth Circuit's logic, the Supreme Court granted certiorari to resolve the conflict. Walton argued that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings."

In dismissing this argument, the Court quoted Clemons v. Mississippi saying, "[a]ny argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." The Court also looked to its prior decisions dealing with sentencing factors in the Sixth Amendment context to conclude that "under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (i.e., preclude the death penalty)." Based on this reasoning the Walton Court concluded that Arizona's sentencing scheme did not violate the Sixth Amendment.

26. Id. at 648.
29. Id. at 643-44.
30. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988).
31. Walton, 497 U.S. at 647.
32. Id.
34. Walton, 497 U.S. at 647 (quoting Clemons, 494 U.S. at 745).
36. Walton, 497 U.S. at 648 (quoting Poland v. Arizona, 476 U.S. 147, 156 (1986)).
37. Id. at 649.
2. *Jones v. United States*\(^\text{38}\)

In *Jones*, Nathaniel Jones and his accomplices carjacked two men, injuring one of them by shoving a gun in his ear.\(^\text{39}\) Jones and his accomplice were each indicted on counts of using or aiding and abetting the use of a firearm during and in relation to a crime of violence and carjacking or aiding and abetting carjacking, both of which are federal offenses.\(^\text{40}\) The statute on which the indictments were based had, at the time, three subsections which laid out different degrees of punishment according to the resulting degree of harm.\(^\text{41}\) The indictment did not mention any of the three subsections explicitly; nor did it charge any of the facts required for the subsections providing greater punishment for greater resulting harm.\(^\text{42}\) Further, at the arraignment, the magistrate judge told Jones that he faced a maximum of fifteen years on the carjacking charge, and the district court jury instruction made reference to this same fifteen-year maximum without mention of the facts required by the remaining subsections. The jury found Jones guilty on both counts.

Despite the fact that the indictment did not explicitly charge serious bodily injury, which was a requirement of the second subsection, the presentence investigation report recommended a sentence of twenty-five years for the carjacking based on the serious bodily injury to the victim's ear. Jones argued that the twenty-five-year recommendation was improper, "since serious bodily injury was an element of the offense defined in [subsection 2], which had been neither pleaded in the indictment nor proven before the jury."\(^\text{43}\) The district court did not read the subsections as separate offenses, and found that because serious bodily injury was supported by a preponderance of the evidence, a twenty-five-year sentence was warranted on the carjacking count.\(^\text{44}\) The Ninth Circuit agreed and upheld the district court, describing the subsections as sentencing factors or enhancements for the single offense of carjacking.\(^\text{45}\)

The Supreme Court, however, elected to construe the federal carjacking statute as creating three distinct offenses rather than a

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\(^\text{39}\) *Id.* at 229.
\(^\text{40}\) *Id.* at 230.
\(^\text{41}\) *Id.* The three subsections read: "(1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both." 18 U.S.C. § 2119 (1988 ed., Supp. V).
\(^\text{42}\) *Jones*, 526 U.S. at 230.
\(^\text{43}\) *Id.* at 231.
\(^\text{44}\) *Id.*
\(^\text{45}\) *Id.* at 232.
single offense with two aggravating sentencing factors. The Court recognized that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." The Court suggested that the fairest reading of the statute would treat serious bodily injury as an element as opposed to an enhancement, but recognized the "possibility of the other view." The Court stated that the interpretation adopted by the lower courts "would . . . open [the statute] to constitutional doubt in light of a series of cases over the past quarter century, dealing with due process and the guarantee of trial by jury." The Court noted that there would be serious Sixth Amendment implications when sentencing factors enhance the penalty range for a defendant without jury consideration. Because of the constitutional doubt cast by the lower court's reading, the Court stated that the rules of statutory construction required that they construe the carjacking statute as "establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict."

3. Apprendi v. New Jersey

In Apprendi, the Court addressed the question of "whether the Due Process Clause of the Fourteenth Amendment require[d] that a factual determination authorizing an increase in the maximum prison sentence for an offense from [ten] to [twenty] years be made by a jury on the basis of proof beyond a reasonable doubt." The case arose because the defendant Charles C. Apprendi, Jr. fired several bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood. When arrested, he stated that he did so "because they are black" and because he did "not want them in the neighborhood." A New Jersey Grand Jury returned a twenty-three-count indictment, although none of the counts referred to the hate crime statute, nor alleged that he acted with a racially biased purpose. Apprendi ultimately pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one

46. Id. at 232–33.
47. Id. at 232.
48. Id. at 239.
49. Id. at 240 (basing this conclusion on Winship, Mullaney, and Patterson).
50. Id. at 252.
51. 530 U.S. 466 (2000).
52. Id. at 469.
53. Id.
54. Id. (quoting New Jersey v. Apprendi, 731 A.2d 485, 486 (N.J. 1999)).
55. Id.
count of unlawful possession of an antipersonnel bomb. As a condition of the plea agreement, the State reserved the right to request that the court impose an enhanced sentence for the count based on the shooting because of Apprendi’s purportedly biased purpose. At the same time, Apprendi reserved the right to challenge the constitutionality of the hate crime sentence enhancement. Apprendi’s guilt was established at the plea hearing, and the judge found by a preponderance of the evidence that the shooting was “motivated by racial bias” and “with a purpose to intimidate,” thus the hate crime enhancement applied. The trial court then rejected Apprendi’s constitutional challenge, sentencing him to a twelve-year term of imprisonment for the shooting, and to shorter concurrent sentences on the two other counts.

On appeal, Apprendi argued that the “Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt.” As basis for this claim, he cited In re Winship, which held that the Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. The appeals court was not convinced and relied on McMillan v. Pennsylvania when finding that the state legislature had, consistent with its established power, opted to make the hate crime enhancement a sentencing factor, not an element of the underlying offense. A divided New Jersey Supreme Court, affirmed the appeals court decision, because in its view “the statute did not allow impermissible burden shifting, and did not ‘create a separate offense calling for a separate penalty.’” The New Jersey Supreme Court further asserted that “the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight given to that factor.” Nonetheless, both state courts conceded that the New Jersey statute at issue differed from McMillan’s insofar as it increased the maximum penalty to which a defendant was subject.

56. Id. at 469–70.
57. Apprendi made the statement regarding his motive at 6:04 a.m., after extended questioning following his arrest at 3:05 a.m. and later retracted the statement. See id. (citing New Jersey v. Apprendi, 731 A.2d 485, 486 (N.J. 1999)).
58. Id. at 470.
59. Id. at 471.
60. Id.
61. Id.
63. Id. at 364.
64. 477 U.S. 79 (1986).
65. Apprendi, 530 U.S. at 471.
66. Id. at 473 (quoting New Jersey v. Apprendi, 731 A.2d 485, 494–95 (N.J. 1999)).
67. Id.
The United States Supreme Court granted certiorari and reversed the state court decisions, holding that it is unconstitutional to remove from the jury the assessment of facts that increase the prescribed penalty range. Specifically, based on the Fifth and Sixth Amendments, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The Apprendi Court noted its reliance on the reasoning laid out in the Jones opinion by suggesting that its holding "was foreshadowed by [its] opinion in Jones v. United States." The Court stated that both Fourteenth Amendment due process rights and Sixth Amendment jury trial rights were jeopardized in this case, and that "[t]aken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" The Court in Apprendi came to this conclusion after conducting a historical review. That review revealed that, at common law, no distinction existed between elements and sentencing factors. Instead, indictments stated the case with sufficient precision that the defendant was given notice of the sentencing range in order to prepare his or her defense accordingly. The Court emphasized the idea of judicial sentencing discretion "within fixed statutory or constitutional limits" when disapproving removal from the jury of facts that increase the prescribed statutory maximum. The Apprendi Court described the instant statutory distinction between elements and sentencing factors that result in increases beyond the maximum statutory sentence as one of form over substance, because such factors fit "squarely within the usual definition" of elements. Apprendi's holding was limited to noncapital cases, because the Court specifically exempted Walton from its holding, despite a vigorous dissent in Apprendi that questioned the logic of that approach.

68. Id. at 476.
69. Id. (quoting United States v. Jones, 526 U.S. 227, 243 n.6 (1999)).
70. Apprendi, 530 U.S. at 476.
72. Id. at 478.
73. Id. at 482 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).
74. Id. at 490.
75. Id. at 494 n.19.
76. Id. at 522-23; see also id. at 544 (O'Connor, J., dissenting).
B. **Ring v. Arizona**

*Ring* implicated the same sentencing scheme reviewed in *Walton*, but with a drastically different result. The Court in *Ring* invalidated Arizona's capital sentencing scheme and overturned *Walton* to the extent that it allowed a sentencing judge, sitting without a jury, to determine aggravating circumstances necessary to impose the death penalty. The *Ring* Court reasoned that "the dispositive question . . . is one not of form, but of effect," and "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." Further, "a defendant may not be 'exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'"

In *Ring*, defendant Timothy Ring was convicted by a jury of felony murder for his involvement in an armored car robbery wherein the driver was shot in the head and killed. Ring was also charged with premeditated murder, but the jury deadlocked six-to-six on whether there was enough evidence to prove premeditation. The trial court later stated that, "the evidence admitted at trial failed to prove beyond a reasonable doubt that [Ring] was a major participant in the armed robbery or that he actually murdered [the driver], because there was no evidence placing him at the scene of the crime." Between Ring's trial and sentencing hearing, one of his accomplices pled guilty to second-degree murder and agreed to testify against Ring at his sentencing hearing. When called by the prosecution, the accomplice testified that Ring shot the driver and took a leadership role in planning the robbery. The accomplice also testified that Ring later chided his accomplices for not congratulating him on his marksmanship.

Felony murder is a first-degree offense in Arizona, but the statutory scheme Ring was sentenced under required a separate sentencing hearing in which "the court alone" was to make all factual determinations. Further, the judge was to sentence the defendant to death only if at least one aggravating factor was present and "there are no mitigating circumstances sufficiently substantial to call for leni-

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77. 536 U.S. 584 (2002).
78. Id. at 602 (quoting *Apprendi*, 530 U.S. at 494).
79. Id. (quoting *Apprendi*, 530 U.S. at 483 (emphasis in original)).
80. Id. at 589–91.
81. Id. at 591.
82. Id. at 591 (quoting State v. Ring, 25 P.3d 1139, 1152 (Ariz. 2001)).
83. Id. at 593.
84. Id. at 593–94.
85. Id. at 591; see also ARIZ. REV. STAT. ANN. §§ 13-703, -1105 (West 2001 & West Supp. 2001).
ency." The trial judge imposed a death sentence based on the accomplice's testimony that Ring was the shooter and a major participant in a "crime which carries with it a grave risk of death." The judge determined that two aggravating factors were implicated as was one nonstatutory mitigator. Specifically, the trial judge determined that Ring committed the offense "in expectation of the receipt, of [something] of pecuniary value," namely the cash from the armored car. The judge also found that the offense was "especially heinous, cruel, or depraved" because of the comment he made expressing pride in his marksmanship. The trial judge determined that any hope for mitigation revolved around Ring's minimal criminal record, but that such evidence was not sufficient to justify leniency.

Ring's argument on appeal to the state supreme court was that "Arizona's capital sentencing scheme violate[d] the Sixth and Fourteenth Amendments to the U.S. Constitution because it entrust[ed] to a judge the finding of a fact raising the defendant's maximum penalty." However, the Arizona Supreme Court dismissed Ring's constitutional attack, holding instead that it was bound by the Supremacy Clause to apply Walton because the Court had explicitly declined to overrule it in Apprendi. Ring then appealed to the U.S. Supreme Court, which then granted certiorari and overturned Walton, based on the logic of Apprendi. Thus, within twelve years, the U.S. Supreme Court completely reversed itself as to the treatment of sentencing factors in capital cases.

The logic and reasoning employed by the Court in Ring is discussed at greater length in subsequent sections of this Note in order to obtain a more elaborate picture of the Court's future intentions. Thus, for the sake of economy, it is not belabored here.

C. Nebraska's Special Session: Legislative Bill 1

Ring directly invalidated Arizona's capital sentencing scheme and called into question the capital sentencing schemes of at least four other states that relied on judges for both factfinding and the ultimate
sentencing decision: Colorado, Idaho, Montana, and Nebraska. To address this new constitutional infirmity with minimal impact on the state's capital defendants, the Governor elected to call the state's second Special Session for the Ninety-Seventh Legislature. The result of the Special Legislative Session was Legislative Bill 1. LB 1 restructured the sentencing decision to require juries to determine aggravating circumstances and a three-judge panel to then determine mitigating circumstances and weigh the aggravators against the mitigators. The panel is also instructed to conduct a proportionality review with regard to both the crime and the offender.

Prior to LB 1, a judge made the entire sentencing determination, although a capital defendant did have a choice between the trial judge or a three-judge panel containing the trial judge. The process began by determining death eligibility based on a list of statutory aggravators, at least one of which had to be met in order to impose a death sentence. Next, the judge considered mitigating circumstances, starting with a nonexhaustive statutory list, and weighed the aggravator or aggravators against any mitigators found to determine the appropriate sentence.

Under the new scheme created by LB 1, the line of demarcation between the judge's and the jury's duties has shifted, such that juries now are involved in the sentencing process by determining aggravators. The remainder of the process remains largely unchanged. However, LB 1's provisions enable the trial jury to be retained for the

93. See id. at 608 n.6 (noting that only four states commit both factfinding and the ultimate capital decision to judges). There are other states that may not conform to the edicts of Ring because the jury determinations serve merely as recommendations and can be overridden by the reviewing judge; however, these schemes will not be discussed at length within this Note.

94. This took the form of a special assembly of the Ninety-Seventh Legislature, Third Special Session of the Nebraska Legislature to "enact procedures for jury participation in the first-degree murder sentencing process as required by the recent decision of the Supreme Court of the United States in Ring v. Arizona" and to "enact procedures to establish lethal injection as a means of enforcing a sentence of death." GOVERNOR MIKE JOHANNS, PROCLAMATION OF CALL TO THIRD SPECIAL SESSION OF THE NINETY-SEVENTH LEGISLATURE, Legislative Journal 2, at 2 (2002).


96. Id. secs. 11-14 (codified as amended in NEB. REV. STAT. §§ 29-2520 to -2522 (Supp. 2003)).

97. Id. sec. 14(3) (codified as amended in NEB. REV. STAT. §§ 29-2520 to -2522 (Supp. 2003)).

98. The three-judge panel could also be composed of three district judges named by the Chief Justice of the Nebraska Supreme Court if the Chief Justice determined that the presiding judge was disabled or disqualified. NEB. REV. STAT. § 29-2520 (Reissue 1995).
aggravation phase or allow a new jury to be impaneled in the event that no jury was used during the trial phase.\textsuperscript{99} This might arise because the defendant pled guilty or \textit{nolo contendere} or waived the jury right at trial. Similarly, under the new scheme the defendant retains the ability to waive the right to jury determination of aggravating circumstances.\textsuperscript{100} Further, under LB 1 the three-judge panel must come to a unanimous decision in favor of death.\textsuperscript{101} If the panel is unable to reach a unanimous decision, then a sentence of life imprisonment without parole must be given.\textsuperscript{102} The possibility of life imprisonment without parole differs from the prior scheme, which instead used the term "life imprisonment."\textsuperscript{103} LB 1 was passed with the emergency clause,\textsuperscript{104} and these changes went into effect on November 22, 2002, while Gales' appeal was pending.

\section*{D. The Gales Court and the Scope of Ring}

Arthur L. Gales was convicted by a Nebraska jury of the attempted second-degree murder of his girlfriend, Judy Chandler, as well as two counts of first-degree murder for the attack on her children, LaTara and Tramar.\textsuperscript{105} The charges against Gales were based on the State's theory that Gales took Judy Chandler out for the evening, leaving thirteen-year-old LaTara and seven-year-old Tramar at home.\textsuperscript{106} While out, Gales and Chandler had a disagreement, which left Chandler severely beaten and incoherent on a street corner near her home.\textsuperscript{107} Although Gales denied any involvement in the crimes, the State proposed that Gales left Chandler for dead, and when he realized that the two children could link him to her that night, he returned to the apartment to kill them, thus eliminating any possible witnesses.\textsuperscript{108} At trial, Gales did not refute the State's theory. Instead, he claimed that he was not the person who harmed Judy Chandler and her children.\textsuperscript{109} The State presented DNA evidence linking

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\textsuperscript{100.} \textit{Id.} sec. 11(3) (codified as amended in \textit{Neb. Rev. Stat.} \textsection 29-2520(3) (Supp. 2003)).
\textsuperscript{101.} \textit{Id.} sec. 14 (codified as amended in \textit{Neb. Rev. Stat.} \textsection 29-2522 (Supp. 2003)).
\textsuperscript{102.} \textit{Id.}
\textsuperscript{103.} \textit{Id.}
\textsuperscript{104.} The emergency clause is a statutory provision frequently added to important legislation, enabling that legislation to take effect immediately upon the Governor's signing of the bill. Without this provision for immediate effect, the bill would not become effective until three calendar months after the last day of the legislative session.
\textsuperscript{105.} State v. Gales, 265 Neb. 598, 601, 658 N.W.2d 604, 609 (2003).
\textsuperscript{106.} \textit{Id.}
\textsuperscript{107.} \textit{Id.}
\textsuperscript{108.} \textit{Id.}
\textsuperscript{109.} \textit{Id.}
\end{flushleft}
Gales to both crime scenes. Further evidence suggested that LaTara had been sexually assaulted prior to being manually strangled, and that Tramar had died as a result of both manual strangulation and drowning in the family bathtub. The examining pathologist testified that both children had been strangled continuously for at least four minutes before death.

Following the entry of the judgment, but prior to the sentencing hearing, Gales filed a motion challenging the constitutionality of the Nebraska capital sentencing statutes based on Jones and Apprendi, claiming that "the Defendant is entitled to a new trial for jury determination of sentence," or, in the alternative, "for jury determination of statutory aggravating and mitigating circumstances." This motion was heard and overruled at the commencement of the sentencing hearing. The trial judge conducted the sentencing hearing and found four aggravating circumstances, which were enumerated in state statute. First, the judge found that Gales had been "convicted of another crime involving the use or threat of violence to the person." Second, the judge found that Gales murdered the two children to conceal his involvement in the beating of Judy Chandler. Third, the court found the murder of LaTara to be "especially heinous, atrocious, cruel, or manifest[ing] exceptional depravity by ordinary standards of morality and intelligence" based on the sexual assault and manner of strangulation. Fourth, the judge determined that "at the time the murder was committed, the offender also committed another murder," based on the deaths of both children.

The court, in determining and weighing the mitigating circumstances, held that no statutory mitigators were triggered, while only one nonstatutory mitigator was identified: Gales' close ties to his family. The court held that the mitigator did not outweigh the ag-

110. Id.
111. Id.
112. Id.
113. 526 U.S. 227, 243 n.6 (1999) (holding that the provisions of the carjacking statute in question set forth separate offenses with distinctive elements not just sentencing factors, and as such each must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict).
114. 530 U.S. 466, 490 (2000) (holding that any fact that increased the penalty beyond a statutory maximum, other than the fact of prior conviction, must be submitted to the jury and proven beyond a reasonable doubt).
115. Gales, 265 Neb. at 601-02, 658 N.W.2d at 609.
116. Id. at 602, 658 N.W.2d at 609-10.
117. Id. at 601-02, 658 N.W.2d at 609-10.
118. NEB. REV. STAT. § 29-2523(1)(a) (Supp. 2003). Gales had previously been convicted of armed sexual battery and strong-armed robbery. Gales, 265 Neb. at 602, 658 N.W.2d at 609.
120. Id. § 29-2523(1)(d).
121. Gales, 265 Neb. at 603, 658 N.W.2d at 610.
gravators in the case of either murder, nor was the sentence of death disproportionate or excessive in comparison to similar cases.\textsuperscript{122} The court thus imposed consecutive sentences of death on each count of first-degree murder and a sentence of imprisonment for a period of fifty years on the count of attempted second-degree murder.\textsuperscript{123}

Gales appealed, contending that the district court "erred in denying appellant's motions challenging the constitutionality of Nebraska Revised Statute section 29-2519 (1995) et seq. and requesting a jury determination of sentencing issues."\textsuperscript{124} In considering the outcome, the Nebraska Supreme Court reviewed the United States Supreme Court precedents in this area culminating with consideration of the Court's recent doctrinal shift from \textit{Walton} to \textit{Jones}, \textit{Apprendi}, and \textit{Ring}.\textsuperscript{125} The court determined that, although \textit{Walton} was the controlling Sixth Amendment precedent when Gales was sentenced to death, a sentence is not a final judgment until the entry of a final mandate by an appellate court. Because an automatic direct appeal of Gales' sentence was not yet final, the Nebraska Supreme Court agreed with Gales that \textit{Ring} was the controlling precedent. This was due largely to the fact that Gales had preserved his Sixth Amendment challenge prior to his sentencing. However, the court disagreed with Gales as to the scope of \textit{Ring}'s Sixth Amendment protection.

Gales argued that a jury must determine the presence and weight of aggravators, the presence and weight of mitigators, the balancing of the two, and also the proportionality of the penalty to similar cases.\textsuperscript{126} The \textit{Gales} court however, read the claim presented in \textit{Ring} as limited to the presence of aggravating factors.\textsuperscript{127} The Nebraska Supreme Court explicitly interpreted "\textit{Ring} as affecting only the narrow issue of whether there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital

\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} 497 U.S. 639 (1990) (holding that Arizona’s capital sentencing scheme did not violate the Sixth Amendment and was not required to designate its sentencing factors as elements, nor to mandate that jurors engage in factfinding for sentencing issues).
\textsuperscript{126} 526 U.S. at 243 n.6 (holding that the provisions of the carjacking statute in question set forth separate offenses with distinctive elements not just sentencing factors, and as such, each must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict).
\textsuperscript{127} 530 U.S. 466, 490 (2000) (holding that any fact that increased the penalty beyond a statutory maximum, other than the fact of prior conviction, must be submitted to the jury and proven beyond a reasonable doubt).
\textsuperscript{128} 536 U.S. 584, 608 (2002) (overruling Walton "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty").
\textsuperscript{129} \textit{Gales}, 265 Neb. at 623, 658 N.W.2d at 623 (2003).
\textsuperscript{130} \textit{Id.} (citing \textit{Ring}, 536 U.S. at 597 n.4).
sentence is based." 131 In making this determination, the Nebraska Supreme Court looked to language in Ring that was buried in a footnote. Footnote four enumerated the precedents not currently overruled by Ring. 132 Sixth Amendment claims respecting mitigating circumstances and the ultimate determination by the jury were among those unaddressed. 133 This is not surprising in light of the fact that Ring based his appeal on Apprendi and Jones, neither of which raised the issue of the role of mitigation in the Sixth Amendment context.

The Nebraska Supreme Court went on to note that, at the time of Gales' trial and sentencing, Nebraska's capital sentencing scheme was very similar to Arizona's, and Ring thus required that the aggravating circumstances used to justify Gales' death sentence be determined by a jury rather than a judge. 134 On these grounds, the Nebraska Supreme Court was forced to vacate Gales' death sentences. Although Gales argued that the court should impose a sentence of life imprisonment, the State argued that the appropriate relief would be an order to remand to the district court to conduct a new penalty phase hearing. During that hearing, a new jury would consider the aggravating circumstances, and a judge would determine the ultimate sentence in

131. Id. at 624, 658 N.W.2d at 624.
132. Ring, 536 U.S. at 597 n.4. Footnote four states:

Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge Almendarez-Torres v. United States, 523 U.S. 224 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. See Apprendi v. New Jersey, 530 U.S. 466, 490-491, n.16 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. See Proffitt v. Florida, 428 U.S. 242, 252 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. See Clemons v. Mississippi, 494 U.S. 738 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See Apprendi, 530 U.S. at 477 n.3 (Fourteenth Amendment 'has not . . . been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury").

133. See id.
134. See NEB. REV. STAT. §§ 28-105.01, -303 (Supp. 2003) (disallowing the imposition of a death sentence absent the existence of at least one aggravating factor as set forth in section 29-2523).
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accordance with sections 29-2520 and 29-2522 of the Nebraska Revised Statutes.135

Ultimately, the Nebraska Legislature resolved the dilemma by enacting LB 1, which amended various statutes dealing with the capital sentencing scheme.136 The Nebraska Supreme Court cited two changes as significant. First, the new sentencing scheme required an aggravation hearing wherein a jury determines aggravating circumstances alleged by the State. Second, the new scheme provided solely for sentencing by a three-judge panel, removing from the defendant the option of a singular trial judge or a three-judge panel. The legislature also changed the minimum penalty for a Class IA felony from “life imprisonment” to “life imprisonment without parole.”137

Gales made several arguments why the provisions of LB 1 should not be applied to his case on remand, which the Nebraska Supreme Court interpreted as facial challenges to the constitutionality of LB 1. One of these arguments was premised on the apparent doctrinal shift in the cases leading up to Ring. Although Gales acknowledged that Ring was silent on the issue, he argued that the court should construe Apprendi’s definition of the jury’s role as including mitigating facts and proportionality review.138 This argument was rejected by the court because the court felt that it was the “determination of ‘death eligibility’ which exposes the defendant to greater punishment,” thus triggering the Sixth Amendment protections afforded by Apprendi and Ring.139 The court went on to explain:

In contrast, the determination of mitigating circumstances, the balancing of aggravating circumstances against mitigating circumstances, and proportionality review are part of the “selection decision” in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined . . . . These determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.140

The Gales court pointed out that Walton was not entirely overruled by Ring, regardless of any doubt cast on its “future viability.”141

In addition to appealing to Apprendi’s language favoring restoration of the traditional jury role,142 Gales also presented arguments

135. Gales, 265 Neb. at 625, 658 N.W.2d at 626.
137. Id. sec. 1 (codified as amended in NEB. REV. STAT. § 28-105 (Supp. 2003)).
138. Gales argued that since Ring relied on and was the natural product of Apprendi, that Apprendi can be used as the basis for its expansion. Gales, 265 Neb. at 628, 658 N.W.2d at 626.
139. Gales, 265 Neb. at 628, 658 N.W.2d at 626.
140. Id. at 626, 658 N.W.2d at 626-27.
141. Id. at 628, 658 N.W.2d at 629 (noting that Walton specifically upheld the constitutionality of judicial sentencing).
142. See discussion infra subsection III.C.2.
that *Ring* constitutes a substantive change in the law that does not cover later-enacted statutes, that the “life imprisonment without parole” change would subject him to a more dubious penalty than he was originally subjected to pre-LB 1, thus constituting an *ex post facto* violation, and that even if LB 1’s changes are procedural in nature, they cannot apply upon remand, because his conviction had not been vacated. The Nebraska Supreme Court held the changes to be procedural in nature and ultimately concluded that:

The provisions of LB 1 shall apply to Gales’ new penalty phase hearing, with the following qualifications: First, the minimum penalty to which Gales may constitutionally be exposed on resentencing is life imprisonment, not life imprisonment without parole. Second, at the aggravation hearing to be conducted on remand pursuant to section 29-2520 as amended by LB 1, the State may seek to prove only those aggravating circumstances specified in LB 1, section 15, to be codified as section 29-2523(1)(a), (b), (d), and (e), with respect to the murder of LaTara and the aggravating circumstances specified in LB 1 section 15, to be codified as section 29-2523(1)(a), (b), and (e), with respect to the murder of Tramar. 143

In sum, the *Gales* court recognized the constitutional infirmity of the old Nebraska capital sentencing scheme in light of *Ring*’s new developments, and because of Gales’ unique procedural posture and the swift actions of the legislature, it authorized resentencing under Nebraska’s new sentencing scheme provided by LB 1. What remains to be seen is whether the U.S. Supreme Court will revisit the doctrines implicated by footnote four in *Ring*, and if so, how long this new sentencing scheme will withstand attack.

### III. ANALYSIS

In the perpetual jousting match that is the Supreme Court’s death penalty jurisprudence, Nebraska’s new capital sentencing scheme survived the first pass when the *Gales* Court upheld the new scheme in terms of its bare compliance with *Ring*. However, this is not to say that the new scheme is immune from further scrutiny. There are many indications that the Court intends to go further in its restoration of the jury’s role in capital sentencing, either in the form of expanding Sixth Amendment protections, or through the use of the Eighth Amendment’s emphasis on the need for employing community sentiments to determine proportionality and culpability. As Gales’ lawyers posited and as the Nebraska Supreme Court itself recognized, 144 the United States Supreme Court seems to be embarking on

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143. *Gales*, 265 Neb. at 636, 658 N.W.2d at 632.
144. In *Gales*, the Nebraska Supreme Court hinted at its recognition of problems to come when stating:

[We] note that the constitutionality of judicial sentencing was specifically upheld in that portion of *Walton v. Arizona* . . . which was not overruled by *Ring*. *Walton* thus remains binding constitutional precedent on
a shift in orientation with regard to the role of the jury in modern capital punishment jurisprudence. Because of Nebraska lawmakers' decision to restrict the jury's role to the minimum requirements of Ring, the next phase in the jousting match may leave them trudging back to session to expand the sentencing scheme yet again.

A. Doctrinal Shift: Substance Over Form

The Supreme Court's Sixth Amendment precedents have undergone some transitions over the years. The most recent transition reflects an emphasis on substance over form and a rejuvenated sense of importance for the role of the jury. This rejuvenated role reflects the Court's new-found appreciation for the unique perspectives offered by the jury and its function in capital sentencing. This regeneration is likely to either carry over into its future definitions of the jury's role in capital sentencing or to serve as a driving force in that movement. Such a transition, as reflected in the Supreme Court's recent Sixth Amendment precedents, suggests the likelihood that the jury's role will be expanded further into the sentencing determinations to all forms of factfinding. This approach implicates fact determinations related to mitigating circumstances and possibly even to the ultimate balancing of relevant factors, insofar as doing so provides a means for assigning weight to those factual findings. The expansion of the jury's role to such an extent would have detrimental implications on the narrowly drafted Nebraska sentencing scheme. Thus, to determine the implications of this new-found role, it is necessary to evaluate the reasoning and logic driving the Court's transitions.

Since the Sixth Amendment jury trial right was incorporated by the Fourteenth Amendment in Duncan v. Louisiana, the Court has expressed a desire to preserve the historic integrity of the jury. However, since that time, commentators have noted that the jury's prominence has been eroded over the years to a shadow of its former self. One of the contributing factors to the jury's demise in terms of capital

this issue, which we are obligated to follow even if we were to read Ring as casting doubt on its future viability. The U.S. Supreme Court has clearly stated that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

265 Neb. at 629, 658 N.W.2d at 627 (quoting Rodriguez de Quijas v. Shearson / Am. Exp., 490 U.S. 477, 484 (1989)) (citation omitted).


146. See AKHIL REED AMAR, THE BILL OF RIGHTS 81-118 (1998) (describing the historical role of the jury and the zealous protection of that role by both federalists and antifederalist founding fathers).
cases was the Supreme Court's decision in Furman v. Georgia\textsuperscript{147} and its progeny. Focus on the arbitrary and discriminatory application of the capital sentencing selection process led the Court to be leery of juror discretion. Because of this, subsequent opinions have encouraged state lawmakers to construct sentencing schemes wherein judges conduct the sentencing analysis. This is based on the logic that judges are more experienced arbiters of the law, and thus they are likely to yield more consistent sentencing results.\textsuperscript{148} At the same time, the Court, through other opinions, sought to provide deference to the states to formulate and structure their own criminal codes. \textit{Patterson v. New York}\textsuperscript{149} demonstrates this trend. By allowing the states to shift the burden of affirmative defenses to the defendant, so long as the burden of proof was not reallocated merely by designating traditional elements as affirmative defenses, the Court retreated from \textit{Winship}\textsuperscript{150} and \textit{Mullaney}.\textsuperscript{151} Prior to Patterson, the Court relied on a bright line rule stating that the State bore the burden of proving beyond a reasonable doubt "every fact necessary to constitute the crime with which he is charged."\textsuperscript{152} This trend of allowing states to get creative with the criminal code structures played a major role in the erosion of the jury's role in capital sentencing.\textsuperscript{153} By parceling off element-like factors into sentence enhancers, states were able to

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{147} 408 U.S. 238 (1972) (holding that the imposition of the death penalty at that time amounted to cruel and unusual punishment because it was administered in an arbitrary manner).
\item \textsuperscript{148} \textit{See, e.g.}, Proffitt v. Florida, 428 U.S. 242, 252 (1976) ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.").
\item \textsuperscript{149} 432 U.S. 197 (1977).
\item \textsuperscript{150} 397 U.S. 358, 364 (1970) (holding that the Due Process Clause requires that the accused be convicted based on "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he [or she] is charged").
\item \textsuperscript{151} 421 U.S. 684, 704 (1975) (holding that the Due Process Clause "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion," instead of allowing a State to shift the burden of proving provocation to the defendant).
\item \textsuperscript{152} \textit{Winship}, 397 U.S. at 364.
\item \textsuperscript{153} The majority in \textit{Jones} provides a good overview of how this deterioration occurs. 526 U.S. 227, 243–44 (1999). \textit{See also} Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam) (holding that the Sixth Amendment does not require specific findings authorizing the imposition of a death sentence to be made by the jury); McMillan v. Pennsylvania, 477 U.S. 79 (1986) (holding that because Pennsylvania had expressly provided in its statute that the visible possession of a firearm was not an element, but a sentencing factor, such possession need not be proven by the State beyond a reasonable doubt and the defendant's Sixth Amendment rights were not violated); Spaziano v. Florida, 468 U.S. 447 (1984) (noting that the Sixth Amendment has never been construed as guaranteeing a right to jury sentencing).
\end{enumerate}
\end{footnotesize}
evade both the due process demands of Winship and Sixth Amendment constrictions, because these crucial determinations occurred within the sentencing rather than the trial phase. However, this erosive effect on the constitutional rights of defendants has not gone unnoticed or unchallenged.

The line of recent cases that culminated in the Ring decision helped turn the tide. First, in Jones v. United States, the Court launched an attack against this erosive technique by construing the federal carjacking statute as defining three distinct offenses instead of a single offense with two aggravating sentencing factors. Of constitutional significance to the Court was the possibility of Sixth Amendment erosion by “remov[ing] from the jury the assessment of facts that alters the . . . prescribed range.” The Court was particularly attentive to the historical roots of the jury trial right. The Court voiced its concern by saying, “[i]t is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury’s function to a point against which a line must be necessarily drawn.”

The Jones Court concluded its discussion by stating:

It is not . . . that anyone today would claim that every fact with a bearing on sentencing must be found by a jury . . . . The point is simply that diminishment of the jury’s significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.

Although this statement in Jones would seem to suggest a desire to maintain the Sixth Amendment line drawn by Ring, this is not entirely clear in view of subsequent statements. Specifically, later in the opinion the Jones Court assuaged dissenters’ concerns about upsetting state sentencing schemes by stating: “If the constitutional concern we have expressed should lead to a rule requiring jury determination of facts that raise a sentencing ceiling, that rule would in no way constrain legislative authority to identify the facts relevant to punishment or to establish fixed penalties.” The Court went on to say that to the extent that the states’ “policies conflict with safe-

154. See Almendarez-Torres v. United States, 523 U.S. 224 (1998) (holding that a provision allowing consideration of recidivism simply authorized an enhanced sentence, instead of creating a separate crime, and such provision did not overstep constitutional bounds).
155. 526 U.S. at 252.
156. Id. at 253 (Scalia, J., concurring).
157. Id. at 244–48.
158. Id. at 244.
159. Id. at 248.
160. Id. at 252 n.11. When considering the Court's comments here it is also important to recall that a state cannot mandate the imposition of a death sentence; sentencers must be allowed to consider particularized mitigating factors. Roberts
guards enshrined in the Constitution for the protection of the accused, those policies have to yield to the constitutional guarantees."

Individual justices have also weighed in on their satisfaction with the Jones holding. First, Justice Stevens, in his concurrence, suggests that, in his view, “a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence, and also facts that must be established before a defendant may be put to death.” Second, Justice Scalia, in a separate concurrence, stated that, in his view, “it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.” Although these comments are arguably somewhat ambiguous as to whether they refer to death eligibility or to sentencing determinations in general, if viewed as referring to sentencing determinations in general, it would seem that their comments would require an expansion of the jury’s sentencing role.

This concern for jury determination of all facts necessary to alter the range of penalties would seem to suggest an interest in requiring juries to determine the presence of both aggravators and mitigators, in addition to evaluating the balance between the two, because consideration of these facts contributes to the determination of the appropriateness of the death penalty in an individual case. Namely, although aggravators can be said to establish who is death-eligible in the sense that they are one vital aspect of that determination, the ultimate decision is not made in a vacuum. It is illogical to draw a Sixth Amendment line in the middle of the sentence-determination process, because the presence and weight of mitigators must be considered as part of the ultimate question. A more principled approach would demand these considerations to be viewed as a jurisprudential yin–yang, wherein a single sentencer must determine the presence of both classes of factors and conclude the analysis by balancing one against the other to evaluate the ultimate propriety of a death sentence.

Apprendi likewise recognized the historic role of the jury and reiterated concerns for the erosion of Sixth Amendment protections by the overzealous designation and use of sentencing factors. There, the Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasona-
ble doubt."\textsuperscript{165} The Court described the "New Jersey procedure challenged in [Apprendi as] an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system."\textsuperscript{166} In support of its holding, the Court looked again to historic practice, noting that the English trial judge had very little sentencing discretion, because the law clearly prescribed specific penalties for specific offenses.\textsuperscript{167} In this sense, the sentencing determination was not to be made by the judge, but determined by the law and announced by the judge. The Court noted that the remaining authority was in the jury to undermine the inevitable sentence by acquitting against the evidence or finding guilt to lesser included offenses.\textsuperscript{168} This concept of judicial sentencing discretion within fixed statutory or constitutional limits was a key factor in the Court's holding. The Court articulated this concern by saying:

The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.\textsuperscript{169}

The Court made clear that they were not arguing that trial practices cannot change over time, but felt the need to protect against the erosion of the jury right.\textsuperscript{170} The Apprendi decision was described by Justice Thomas in his concurrence in this manner: "Today's decision, far from being a sharp break with the past, marks nothing more than a return to the \textit{status quo ante}—the status quo that reflected the original meaning of the Fifth and Sixth Amendments."\textsuperscript{171} Thus, a shifting orientation in the way the Court views the jury's role is clearly evident.

The Apprendi Court had difficulty reaching an agreement over how to apply its return to the "original meaning"\textsuperscript{172} doctrine within a death penalty context because of the range of recent precedents within that forum that rely on the judicial determination of sentencing factors. The most prominent of these problems is the decision not to overrule Walton in Apprendi. However, other concerns are raised which remain to be resolved, such as the treatment of mitigating factors within a scheme requiring a reasonable doubt determination.\textsuperscript{173}

\textsuperscript{165} Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
\textsuperscript{166} Id. at 497.
\textsuperscript{167} Id. at 479--80.
\textsuperscript{168} Id. at 479 n.5.
\textsuperscript{169} Id. at 482--83.
\textsuperscript{170} Id. at 483.
\textsuperscript{171} Id. at 518 (Thomas, J., concurring). This argument reflects the classic death eligibility classification.
\textsuperscript{172} Id.
\textsuperscript{173} See id. at 490, 501 (Thomas, J., concurring), 542 (O'Connor, J., dissenting).
Specifically, the majority and Justice Thomas, in concurrence, remarked on the distinction between mitigators and aggravators in terms of the standard of proof required for their demonstration and whether those distinctions are implicated by Apprendi's holding. Thomas asserted that a "crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)," thus demonstrating his belief that the core crime and the aggravating factor alone constitute the aggravated crime.

However, Justice O'Connor, in dissent, described this distinction as "pure formalism," because "whether a fact is responsible for an increase or decrease in punishment rests in the eye of the beholder." For example, death penalty statutes commonly allow a defendant's prior history of violent offenses to serve as an aggravating circumstance, while the absence of such a record can serve as a mitigating circumstance. O'Connor seems to view this distinction as "pure formalism," because the presence of a given fact is often termed an aggravator, while the absence of that given fact is just as often considered a mitigator. O'Connor voiced a suspicion that the pure formalism of the majority's distinction belied a more far-reaching constitutional principle "that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt." O'Connor's emphasis on the phrase "in real terms" would seem to suggest an emphasis on the ultimate sentencing determination, not just death eligibility. Thus, her argument that the natural consequence of these decisions is an expansion of the jury's role to factfinding related to mitigators seems clear and persuasive.

Although this debate between the five members of the majority and the four dissenters hinged largely on concern for the ongoing propriety of the Federal Sentencing Guidelines, it raises questions about how the Court is likely to treat mitigating factors within future challenges to capital sentencing schemes. Thus, if O'Connor's logic is persuasive to other Court members, there is a good chance that the role of the jury will be expanded by future decisions.

**B. Ring's Unanswered Questions and Implications**

O'Connor's recognition of the yin–yang nature of aggravating and mitigating circumstances, as well as the pure formalism of the Court's

174. Id. at 501 (Thomas, J., concurring).
175. Id. at 542–43 (O'Connor, J., dissenting).
176. Id. at 542.
177. Id. at 543–44.
current distinction, demonstrates the feasibility of a principled resolution to the unanswered questions in *Ring*. Although Justice O'Connor has repeatedly asserted her disfavor with *Apprendi*, the logic of her observations is undeniable with regard to the formalism distinguishing between aggravators and mitigators in the capital context, and that logic may prove persuasive in future deliberations. That such questions will arise in the future is a near certainty based on the language of *Ring*. Specifically, the Court's new emphasis on the effect of the sentencing factors, as opposed to their stated form, along with the desire to establish a principled basis for structuring criminal statutes, would seem to suggest the possibility of subsequent changes to death penalty jurisprudence.

*Ring* itself provides little explicit insight into the prospective treatment of capital sentencing schemes like Nebraska's because of the narrow scope of Timothy Ring's claim. Because the Court explicitly reserved determination of certain implicated doctrines, observers have notice of shaky ground, but have no guidance about the resolution of those problem areas. Such problem areas include the ongoing viability of judicial determination of prior convictions, the distinction between aggravators and mitigators, the judicial determination of the ultimate sentence in capital cases, a state supreme court's ability to reweigh aggravators and mitigators after one aggravator has been struck, and the constitutional infirmity of an indictment by a Grand Jury that does not present the full scope of the crime charged.

Despite the Court's resistance to determine issues not before it, the Court has not demonstrated this same restraint in foreshadowing future changes. A number of considerations suggest that footnote four can be viewed as a premonition of changes to come. One point to consider is the fact that the Court has alluded to its desire to overrule *Almendarez-Torres*, one of the doctrines reserved for later consideration by the *Ring* Court. Specifically, in *Apprendi*, the Court described the decision as "at best an exceptional departure from . . . historic practice" and recognized that "it is arguable that *Almendarez-Torres* was incorrectly decided." Despite these comments, the Court declined to overrule the decision, because the facts presented in *Apprendi* did not require it. The Court's reluctance to reconsider *Almendarez-Torres* before the facts directly demanded it bears striking similarity to the circumstances presented by *Ring*. Thus, it stands to reason that those doctrines reserved in *Ring* may be next for reconsideration, especially in light of comments made by concurring and dissenting Justices in the cases leading up to *Ring*.

178. See *supra* note 132 and accompanying text.
179. See *supra* note 132 and accompanying text.
Another factor in support of construing footnote four as foreshadowing future evolutions is the Court's reaffirmation of the fundamental concept that "death is different." The mantra that death is different stands for the proposition that "in the area of capital punishment, unlike any other area, [the Court has] imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment." Recognition of this fundamental distinction suggests that prior dicta expressing hesitations about jury sentencing may be ripe for reconsideration. This may be particularly true in light of the distinct role played by the capital jury in a system where retribution is a substantial, if not primary, justification for capital punishment.

An additional point of interest is the fact that Justice Breyer has switched sides for the Ring decision because he "believe[s] that jury sentencing in capital cases is mandated by the Eighth Amendment." He based this decision on arguments made by Justice Stevens that retribution, as the primary justification for capital punishment, requires the jury as "more attuned to the 'community's moral sensibility'" to act as the community's conscience when determining the ultimate question of life or death.

The addition of a new advocate for jury sentencing within capital cases suggests a turning tide within the Supreme Court's capital punishment jurisprudence and lends credence to the possibility of impending shifts in the Constitutional permissibility of judicial sentencing in capital cases. The expansion of the jury's role may be justified through expansion of either Sixth or Eighth Amendment doctrines. Although Justice Breyer's advocacy for a right to jury sentencing under the Eighth Amendment may or may not catch on among the remaining Justices, it is likely to encourage new challenges on these grounds. Challenges which could be successful depending on the way the Court elects to interpret "community conscience."

Further, the advent of the Supreme Court's response to Ring's unanswered questions is pressed by each subsequent development in this area. One of the most recent developments occurred thanks to the circuit split created by the Ninth Circuit opinion of Summerlin v. Stewart, which retroactively applied Ring's new sentencing man-

181. Ring v. Arizona, 536 U.S. 584, 606 (2002) (quoting Tr. of Oral Arg. 43, Ring (No. 01-488)).
182. Id. (quoting Apprendi, 530 U.S. at 522–23 (Thomas, J., concurring)).
183. The role of retribution in the capital sentencing scheme and the concomitant argument for a more substantial jury presence in capital cases is discussed further infra section III.C.
184. Ring, 536 U.S. at 614 (Breyer, J., concurring).
185. Id. at 615–16 (quoting Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part)).
date, while other Circuits\textsuperscript{187} had limited \textit{Ring} to proactive application. The Court's reply in the form of \textit{Schriro v. Summerlin},\textsuperscript{188} presented the opportunity to provide an additional glimpse into both the Court's perspective on the proper scope of the jury and its justification for that perspective with reference to the Sixth and Eighth Amendments. In making the substantive versus procedural call required by retroactivity doctrine, the Court's analysis could have provided insight into whether it will adopt a more expansive definition of the jury's role. However, the Court, instead, chose the safer route of ambivalence: endorsing and reiterating the importance of the jury right while at the same time declaring it a procedural right. The \textit{Schriro} Court demonstrated this indecisiveness by stating:

\begin{quote}
Although "the right to jury trial generally tends to prevent arbitrariness and repression[,] . . . we would not assert . . . that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.” [In \textit{DeStefano v. Woods}, we concluded that “[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial.”]\textsuperscript{189}
\end{quote}

Thus, in \textit{Schriro}, the Court seemed determined, once again, to exemplify judicial restraint and limit its holding to the case at hand, leaving open the future of the jury right in capital sentencing. Despite the success of this first evasive maneuver, the Court will not always be so lucky. Now seems the optimum time for the Court to respond to \textit{Ring}'s unanswered questions once and for all. However, this will be no easy task, and the gravity of its implications will make it all the more difficult.

\section*{C. Grounds for Expansion: Sixth or Eighth Amendment?}

Rather than adopting a wait-and-see approach, it is helpful to analyze the clues the Supreme Court has provided and also those sources Justices purport to consult when evaluating the proper jurisprudential course to pursue. Since both Sixth Amendment and Eighth Amendment grounds have been suggested as possible bases for expanding the scope of jury involvement in capital sentencing and since neither have been foreclosed yet, despite the opportunity presented in \textit{Schriro}, both will be explored here. Within a Sixth Amendment con-

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002). The Tenth and Eleventh Circuits found \textit{Ring} to be nonretroactive, viewing it as a natural extension of \textit{Apprendi}, which was deemed strictly procedural. However, the \textit{Cannon} Court implied that, had \textit{Ring} been based on the Eighth Amendment, it would be more arguably retroactive.
\item 124 S. Ct. 2519 (2004).
\item Id. at 2525–26 (quoting \textit{DeStefano v. Woods}, 392 U.S. 631 (1968) (refusing to give retroactive effect to Duncan v. Louisiana, 391 U.S. 145 (1968)) (internal citation omitted).
\end{enumerate}
\end{footnotesize}
text, the Court seems to rely most heavily on the historic role of the jury right and the Framers' intent when analyzing the scope of the constitutional right. Similarly, Eighth Amendment analyses typically begin with a historical analysis, although they then take into consideration factors that relate to the evolving standards of decency in society, the legitimate penal purposes for the practice in question, and proportionality concerns. The structure of this Eighth Amendment analysis is treated differently in different cases, thus this Note will look to the issues implicated by these factors generally.

1. Retribution and the Community Conscience

When considering these factors, it is important to note that one of the most common arguments in support of the jury involves the link it provides "between contemporary community values and the penal system." Various terms have been used to refer to this role, but at its core this notion seems to carry normative connotations. The Court's concern for normative connotations intimates the justificatory role that retribution plays in the Court's capital punishment jurisprudence.

The desire to integrate the community conscience into capital punishment decisions has implications on the jury's role from both a Sixth and an Eighth Amendment perspective. From a Sixth Amendment perspective, the jury has historically served as an additional check and balance on overreaching State action by providing a vehicle for introducing community values into capital decisionmaking. Within an Eighth Amendment context, it is the driving force of the analysis because of its "central if not dispositive place in judging whether punishments are disproportionate or not." For this reason, this Note evaluates the historic role of the jury as a necessary first step in both Sixth and Eighth Amendment analyses, and then proceeds on to consideration of other Eighth Amendment factors. Because the Court has made it clear through its emphasis on the community conscience that

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190. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (holding that the death penalty as it was administered at that time constituted cruel and unusual punishment using this type of analysis).


retribution is a primary and perhaps vital justification for capital punishment, examination of legitimate penal purposes served by the practice will not be explored extensively, independent of this concept. Instead, empirical research prompting scholarly commentators’ views on the judge-versus-jury debate is explored at greater length for the purpose of the evolving standards of decency and proportionality factors.\textsuperscript{195}

However, before the implications of the community conscience can be evaluated in light of their court-mandated tests, the ambiguity of the Court’s definition of community conscience must be noted. Commentators have observed that the Supreme Court’s language describing this “community conscience” notion can be approached from three different perspectives. Each of these three perspectives suggests a somewhat different role for the jury in capital sentencing decisions.\textsuperscript{196} First, it can be argued that a jury is to serve as a representative sample of the community, so that each juror will bring to the sentencing discussions his own perspective. Thus, any decision made within that forum would be roughly representative of the decision that society as a whole would make. Second, it can be argued that a jury composed of twelve citizens of the community is better prepared to set aside the perspectives of the individuals and identify the consensus of the community than would be a single judge who is sheltered from the community by her unique standing as an educated legal scholar. Third, it can be argued that the community conscience can be determined from those laws that a community enacts through its legislative representatives to define the standards with which the community expects its members to conform. This third premise favors judicial sentencing, in that judges have historically been the arbiters of legal interpretation and would arguably be best suited for this form of community conscience application. The other two approaches suggest the propriety of jury sentencing in that if the layperson’s perspective on justice or desert is valued, then the layperson himself is likely to be the best gauge.

This debate is very clear in Spaziano v. Florida.\textsuperscript{197} There, the majority stated that “[i]mposing the sentence in individual cases is not the sole or even the primary vehicle through which the community’s

\textsuperscript{195} Although different justices assign different weights and degrees of relevance to empirical research, this Note explores the contributions of this field primarily with a view towards the findings’ implications on the best interpretation of “community conscience.”


\textsuperscript{197} 468 U.S. 447 (1984) (holding that a trial court’s imposition of the death penalty over the life imprisonment recommendation of the jury did not violate the Eighth Amendment or the Sixth Amendment because there is no constitutional guarantee for jury sentencing).
voice can be expressed,” because that decision is reviewable by an appellate court and because the legislature provides the structure for that decision.\textsuperscript{198} The Spaziano Court asserted that “[t]he community’s voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined.”\textsuperscript{199} In contrast, the minority\textsuperscript{200} asserted that “capital punishment rests on not a legal but an ethical judgment.”\textsuperscript{201} The minority argued that if the justification for capital punishment rests on expression of the community’s moral sensibilities, and thus retribution, then it follows “that a representative cross section of the community must be given the responsibility for making that decision.”\textsuperscript{202} This debate still rages, although members of the Court seem to use these differing perspectives interchangeably at times. This ambivalence suggests that the Court has not come to a final conclusion on this issue.

Because the perspective adopted has implications for the proper jury role, an understanding of these concepts is needed to determine the appropriate sentencer in capital cases. Specifically, basic laws of statistical analysis suggest that a twelve-member subset of the population is more likely to be representative of the population and community as a whole than would be a single member.\textsuperscript{203} However, it is worth noting that jury selection, and capital jury selection in particular, does not seek to provide a truly representative sample of the population.\textsuperscript{204} Arguments have also been made that lay jurors are distinguishable from the average judge in other ways. Specifically, factors such as age, education, and experience with the subject matter are commonly asserted.\textsuperscript{205} However, if the laws of the community can adequately serve this function, then these arguments are less compelling because of the judiciary’s traditional role in interpreting law.

\textsuperscript{198} Id. at 462.
\textsuperscript{199} Id.
\textsuperscript{200} Justice Stevens, Justice Brennan, and Justice Marshall concurred in part and dissented in part.
\textsuperscript{201} Spaziano, 468 U.S. at 481 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{202} Id.
\textsuperscript{203} See generally Charles Stangor, Research Methods for the Behavioral Sciences (1998); see also Michael L. Radelet, Rejecting the Jury: The Imposition of the Death Penalty in Florida, 18 U.C. Davis L. Rev. 1409, 1426 (1985) (The court stated that “the decision to impose a death sentence is primarily a question about community desires for retribution. As a reflection of community sentiments, the feelings of a panel of twelve are, by definition, a more accurate measure than are the feelings of one judge.”).
\textsuperscript{204} The practice of life and death qualification for capital jurors as a safeguard for impartiality necessarily eliminates certain segments of the population, thus diminishing its representativeness. See infra notes 241, 242.
The *Spaziano* majority seems comfortable in allowing each method to play a role in determining the status of the community conscience, such that "the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge."206 However, the historic role of the jury may provide insight as to the delineation of roles played by judges and jurors within the capital context. Thus, the historic role of the jury provides a proper starting point.

2. The Historic Role of the Jury: Checks and Balances

The jury as an institution of democratic control within the judicial branch was easily the most hallowed and least controversial tenet of the Bill of Rights at the time of its passage.207 Commentator Akhil Amar, in his in-depth analysis of the historical context of the Bill of Rights, has noted that juries in various forms were the explicit subject of three amendments and were implicitly involved in many more.208 Additionally, in the twenty years that followed the signing of the Declaration of Independence, the right to a jury trial in criminal cases was the only right secured in all state constitutions.209 This is because the jury was seen as playing a pivotal role in protecting ordinary citizens from the overreaching of government through the judiciary.210 For instance, the jury system has been described as "fundamentally populist and majoritarian: '[t]he institution of the jury... places the real direction of society in the hands of the governed, ... and not in that of the government.'"211

Commentators have gone so far as to describe juries as the "'lower judicial bench' in a bicameral judiciary"212 which is "more necessary than representatives in the legislature."213 The jury's role in expressing community values has received special recognition within the criminal justice context and capital sentencing decisions particu-

208. *Amar*, supra note 146, at 83.
209. *Id.* (construing LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS 227 (1985)).
210. *Id.* at 82–83 (noting the cruel punishments dealt out by the Star Chamber in response to government criticism). See also Duncan v. Louisiana, 391 U.S. 145, 151–52 (1968) (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349–50 (Cooley ed. 1899)).
211. *Amar*, supra note 146, at 88 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293–94 (Phillips Bradley ed., Vintage 1945)).
212. *Id.* at 95 (quoting JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (W. Stark ed., 1950) (1814)).
213. *Id.* (citing Essays by a Farmer IV, reprinted in 5 THE COMPLETE ANTI-FEDERALIST 36–38 (Herbert J. Storing ed., 1981)).
Part of this historic role encompassed the frequent exercise of jury nullification. Jury nullification is made possible because jurors are not obliged to justify their conclusions, and yet their decisions, with few exceptions, are unreviewable. Although it is recognized as a settled principle of law that juries determine the facts, while judges determine the law, throughout history juries have exercised this freedom to "both individualize the sentence and dispense mercy" by altering the facts to find defendants guilty of lesser included offenses.

Nowhere has this power of nullification been used more frequently than with capital offenses. In fact, commentators have argued that jury nullification has played a major role in the English common law's evolution toward murder gradations recognizing varying degrees of culpability. Professor Thomas Green, after extensive study of both the English and American jury traditions, observed that the evolution toward recognizing different degrees of murder was forestalled because juries so frequently nullified murder charges when the sentence of death seemed disproportionate to the crime. Although nullification may have a stultifying effect on the maturation of public policy, it demonstrates the community's reluctance to sacrifice its individual members to disproportionate application. Thus, throughout history the jury has provided an important check on the legislative expressions of community norms, which are, by their procedural constraints, slower to evolve. The check and balance provided by early nullification practices has now become a legitimate function under Eighth Amendment principles valuing community sentiments in culpability and proportionality assessments. What was once an extralegal exercise is now both legitimate and expected when performed within the legal constraints of capital sentencing proceedings.

214. Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, J., dissenting) (recognizing the "basic trust in lay jurors as the keystone in our system of criminal justice").
215. AMAR, supra note 146, at 96–97 (noting the "right—of the petit jury to do justice by acquitting against the evidence").
216. SAMUEL WALKER, POPULAR JUSTICE 30 (2d ed. 1998).
217. See Thomas A. Green, The Jury and the English Law of Homicide, 1200–1600, 74 MICH. L. REV. 413 (1976) (providing a history of the jury's role in the evolution of English homicide laws); see generally THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE 379 (1985) (exploring the "jury's role as a mitigator of capital sanctions in felony trials").
218. See supra note 217.
219. See supra note 217.
220. "The jury also is a significant and reliable objective index of contemporary values because it is so directly involved. The Court has said that 'one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system.'" Gregg v. Georgia, 428 U.S. 153, 181 (1976) (quoting Witherspoon v. Illinois, 391 U.S. 510,
This tradition of the jury as a check and balance has long been recognized by the Court and the states. The United States Supreme Court in *Duncan v. Louisiana* affirmed the importance of the jury's role within criminal trials when it held that the right to jury trial was a fundamental right for the purposes of Fourteenth Amendment incorporation. When arriving at its conclusion, the Court looked to its predecessors' frequent recognition of the jury's importance, the strong support given the right by state laws, and the historical context surrounding the adoption of jury trial provisions within the federal and state constitutions. The Court was very clear about its convictions:

A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

The *Duncan* Court also described the jury trial right as corresponding to a spectrum of crime, wherein the less serious the crime, the less pertinent the right, such that trials for petty offenses do not require a jury; whereas, the more serious the crime, the more immediate the right. This would suggest that, from a Sixth Amendment perspective, capital cases, because of their placement at the most serious end of that spectrum, would dictate the most stringent application of the right to a jury trial. Thus, because death is different and because capital cases dictate the most stringent application of the jury trial right, that right can be properly extended into the sentencing determination.

As previously discussed, modern death penalty jurisprudence has repeatedly described the primary function of the jury as interjecting the conscience of the community into the sentencing decision. Further, many have cited *Duncan* as support for preserving the jury right.

519 n.15 (1970)). For a review of cases emphasizing the importance of community sentiments in capital cases, see *supra*, note 192 and accompanying text.

222. *Id.* at 149–50.
223. *Id.* at 153–57.
224. *Id.* at 155–56 (footnote omitted).
225. *Id.* at 160–61.
Thus, by all indications, the Court conceives of the jury modernly as performing the same function as it did historically: interjecting the community's normative understanding of culpability and proportionality into the proceedings as a means of curbing abuses by the State and its actors.

Much of the Court's logic in support of defining the jury's role in this way focuses on the use of retribution as a justificatory basis for capital punishment. It seems that the Court has also at times supported the jury's community conscience role as affording the defendant an avenue for the interjection of mercy, either in the form of diminished culpability determinations or as an expression of reticent doubts about the defendant's guilt. In *Caldwell v. Mississippi*, the Court considered whether it was appropriate for a trial judge to instruct a sentencing jury about the appellate review process, concluding that it was not, because it diminished the jury's understanding of the gravity of its decision. In *Caldwell*, the Court recognized a need for sentencers, whether judge or jury, to be present during the trial to witness the "intangibles" that cannot be gleaned from an appellate record, such as the defendant's and witness' demeanors during testimony. The Court noted that "an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." This seems to suggest that the Court values sentencers' individual impressions of those presenting evidence, and that to miss the opportunity to form such impressions does a disservice to capital defendants.

This has potentially serious implications for Nebraska's use of the three-judge panel, because, at best, only one of the three judges has been privy to all of the evidence adduced at trial. It also suggests problems with Nebraska's new practice of impaneling juries for the sentencing phase that were not privy to trial evidence. With the three-judge panel, the nontrial judges may read the appellate record and observe the witnesses presented at the sentencing phase, but many of the intangibles with which the Court is concerned will be unavailable to two-thirds of the sentencing panel. Further, a potential problem arises from the fact that the remaining two panel judges may inadvertently rely on the trial judge's opinion and impressions when

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229. *Id.* at 330.
230. *Id.*
231. However, within the jury context, a sentencing jury is impaneled only after the defendant waives his right to jury trial. There are fewer constitutional implications when defendants knowingly and voluntarily waive a right, than when the State makes that decision for them.
making the final determination.\textsuperscript{232} This type of reliance would essentially moot the utility of the three-judge panel, because the trial judge's opinion would likely form the basis for the decision, with the other two judges merely following his or her lead. In this sense the legislature's efforts to make this sentencing determination more reliable by emulating the jury's "two heads are better than one" logic backfires because of the inherent differences between judges and juries.

Within both Sixth and Eighth Amendment analyses, the historic role and function of the jury is a primary consideration. With regard to capital sentencing, it seems that the Court has demonstrated that the jury's function as an additional check and balance on the State and its actors, including its judges, is a paramount consideration. Within a Sixth Amendment framework, it appears that the Court can easily rely on \textit{Duncan}'s spectrum analogy in combination with its recognition that death is different to justify extending the jury trial right into the sentencing determination. Likewise, within an Eighth Amendment analysis, the first hurdle has been cleared, because the jury has clearly played a consistently prominent role in capital cases by interjecting community norms into culpability and proportionality determinations. However, in order to fully justify Justice Breyer's Eighth Amendment projections, other factors must be considered.

3. Commentators' Recommendations: Judge Versus Jury

As previously stated, the Court looks to a series of factors in its Eighth Amendment analysis.\textsuperscript{233} One factor that weighs heavily deals with the evolving standards of decency in society. It has been said that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{234} In conducting this analysis, the Court has emphasized the need to consider objective evidence whenever possible. The Court has elaborated by asserting that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."\textsuperscript{235} While some Justices would conclude the analysis with legislative enactments, a majority of the Court in \textit{Atkins v. Virginia},\textsuperscript{236} stated that "objective evidence, though of great importance, did not 'wholly determine' the

\textsuperscript{232} It is arguable that the problem of one judge dominating the deliberations is as likely to hinge on personality characteristics as the status of the trial judge, yet this does not address the Court's concern with witnessing and taking into consideration "intangibles."
\textsuperscript{233} See supra section III.C.
\textsuperscript{235} \textit{Id.} at 312 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
\textsuperscript{236} 536 U.S. 304 (2002).
controversy, 'for the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question.' Specifically, the majority in *Atkins* stated that the proper course is to "first review the judgment of the legislatures that have addressed [the issue] and then consider reasons for agreeing or disagreeing with their judgment." Thus, this Note will do the same.

There is little doubt that Nebraska is in the minority in its approach to capital sentencing. In *Ring*, the Court noted that "of the 38 States with capital punishment, 29 generally commit sentencing decisions to juries," and at the time of *Ring*, "[o]ther than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges." Now, Nebraska is in league with only one other state—Montana—in allowing the court to impose a death sentence after the jury makes the death eligibility determination. Thus, with regard to the judgment of the country's legislatures, Nebraska is clearly outnumbered. However, because the Court has expressed an interest in considering for itself the logic behind the states' judgment, this analysis is not complete. The Court has often looked to empirical research to inform its decisions regarding evolving standards of decency, and again, this Note will do so as well.

Commentators have struggled to determine if the decisionmaking process varies in any appreciable way for judges and jurors. One source for information on this topic is the Capital Jury Project ("CJP"). CJP is a multistate research effort by academics of varying disciplines aimed at exploring the dynamics of juror decisionmaking in capital cases. Project members conducted extensive interviews with over 1,000 jurors who had served on capital cases in different states. CJP provides many insights into the complications arising from the rigorous demands of modern death penalty jurisprudence on lay jurors. Specifically, CJP results suggest that, despite due process requirements, capital jurors tend to be less than impartial. In theory, the

237. *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

238. *Id.* at 313.


242. The United States Supreme Court has held that as a matter of due process, criminal defendants and capital defendants, particularly, have the right to a fair trial by a panel of impartial and indifferent jurors. The Court has defined partiality as when a "juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Morgan v. Illinois*, 504 U.S. 719, 728 (1992) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980).
“death-qualification”\textsuperscript{243} and “life-qualification”\textsuperscript{244} process demanded by the Supreme Court should all but eliminate jurors whose personal beliefs would hinder a fair and impartial consideration\textsuperscript{245} of the life or death decision, yet fourteen percent of jurors described death as the only appropriate punishment for murder, while two percent described death as never an appropriate punishment for murder.\textsuperscript{246}

The CJP also demonstrated that capital jurors tend not to understand the law they are charged with applying. Jurors tend to misunderstand the role and definition of aggravating and mitigating circumstances, and to believe that the same rules apply to both. For instance, CJP suggested that jurors tend to misunderstand jury instructions and seemingly fall back on popular culture representations of the way the system operates.\textsuperscript{247} Most jurors believe that aggravating factors must be proved beyond a reasonable doubt and that the jury decision must be unanimous in this regard.\textsuperscript{248} However, jurors tend to think these same rules apply to mitigating factors and also miss the distinction between statutory and nonstatutory sentencing factors.\textsuperscript{249} These juror misconceptions violate the \textit{Lockett} doctrine,\textsuperscript{250} which affords a capital defendant the nearly unqualified opportunity to proffer evidence in mitigation.\textsuperscript{251}

According to some commentators, these juror misconceptions also suggest the possibility that jurors may impose death sentences based on facts that would lead them to impose life sentences if they under-

\begin{itemize}
  \item \textsuperscript{243} See \textit{Witherspoon} v. \textit{Illinois}, 391 U.S. 510 (1968) (suggesting that jurors who state unambiguously that they would vote only for life upon conviction of a capital offense can be challenged for cause); see also \textit{Lockett} v. \textit{Ohio}, 438 U.S. 586 (1978) (upholding the exclusion of prospective jurors who stated unequivocal opposition to the death penalty).
  \item \textsuperscript{244} See \textit{Morgan}, 504 U.S. at 729 (holding that a capital defendant may challenge for cause prospective jurors who would automatically impose death upon conviction of a capital offense).
  \item \textsuperscript{245} For a definition of impartiality, see \textit{supra} note 242.
  \item \textsuperscript{246} Blume et al., \textit{supra} note 241, at 151–52. Note also that this CJP data suggested this to be a conservative estimate, because when the crime was described in greater detail (“[a] planned, premeditated murder” vs. “convicted murderers”) the number of jurors who described death as the only appropriate punishment increased dramatically.
  \item \textsuperscript{247} \textit{Id.} at 156.
  \item \textsuperscript{248} \textit{Id.} at 154–56.
  \item \textsuperscript{249} \textit{Id.} at 156–59.
  \item \textsuperscript{250} \textit{Lockett} v. \textit{Ohio}, 438 U.S. 586, 604–05 (1978) (requiring that the defendant in capital cases be allowed to present to a sentencer any and all mitigating information).
  \item \textsuperscript{251} There are ambiguities about the intended scope of the defendant's right to introduce mitigating evidence.
\end{itemize}
stood the law better. This misunderstanding has been blamed on the fact that “mitigating” and “aggravating” as legal terms of art, are unfamiliar to most jurors and the terms’ common definitions typically lend little aid to the lay juror.

The most interesting implications of juror misunderstandings come into play when considering the way the jurors interpret and employ these factors. Specifically, various commentators have suggested that nonstatutory factors may be the most influential in terms of sentencing outcomes. Key nonstatutory mitigators are said to include the defendant’s remorse, the defendant’s affect, the victim’s family’s affect, sentence certainty, and the decisionmakers’ views of the death penalty. Interestingly, the CJP suggested that many of these same sentencing factors are heavily relied upon in terms of their aggravating characteristics. This lends credence to Justice O’Connor’s recognition of the yin–yang feature of these factors, whereby the presence of one factor can serve as an aggravator, while the absence of that same factor can serve as a mitigator.

Two of the most influential factors are the defendant’s remorsefulness and the defendant’s future dangerousness. When jurors thought the defendant was remorseful or sorry, they tended to vote for life, when they thought the defendant had little remorse, they tended to vote for death. Similarly, if they thought the defendant presented a substantial risk of future danger, they were more apt to vote for death than if they viewed the defendant as posing a lesser risk. Interestingly, when assessing future dangerousness, jurors tended to look to both the seriousness of the crime and the remorsefulness of the defendant, in addition to the defendant’s opportunity to commit future crimes if not given the death penalty. Thus, in this sense, jurors’ perceptions of remorsefulness played a major role in the death determination.

Also of interest is the fact that jurors tend to grossly underestimate the duration of life sentences, which in turn, impacts the likelihood of a death sentence, since the less time a juror thinks the defendant will


253. Peter Meijes Tiersma, Dictionaries and Death: Do Capital Jurors Understand Mitigation?, 1995 Utah L. Rev. 1, 12–15 (noting also the frequency with which capital jurors have requested dictionaries during deliberation or a further definition from the judge).

254. Wiener, supra note 14, at 771; see also Blume et al., supra note 241, at 161–68.

255. Wiener, supra note 14, at 771.


257. Id.
serve, the greater likelihood he or she will vote for death. According to CJP, "jurors on average estimated that defendants not sentenced to death would be imprisoned for only nineteen years, eleven less than the time a defendant would in fact be required to serve [in that jurisdiction] before he would become eligible for parole, let alone be actually released." This demonstrates another pertinent circumstance wherein jurors misunderstand the framework of the law that they are to take into consideration and apply.

The incomprehensibility of juror instructions is something that likewise infects the guilt determination phase of trials. Further, it does so without attracting a significant degree of attention from the legal community, despite the fact that commentators have persistently argued that this problem can be easily remedied through the use of more juror-friendly instructions. Such instructions have been demonstrated through empirical research to improve juror comprehensibility in specific situations. Thus, proper jury instructions could arguably rectify the problems denoted thus far.

For all their frailties, juries arguably may still provide superior representation of community values in the nature of capital sentencing context. Although arguments have been made that judicial sentencing would lead to greater consistency, based on the fact that trial judges are arguably more experienced in sentencing than jurors, some commentators have challenged this assertion. These commentators have noted that capital sentencing is highly distinguishable from traditional sentencing in both its rarity and its structure. Specifically, the typical trial judge sees so few capital murder cases over the course of his or her career that the opportunity to develop

258. Id. at 167.
259. Id.
261. See Wiener, supra note 14, at 768–69 n.37 (providing a bibliography of studies on the comprehensibility of capital jury instructions); see generally Wiener et al., supra note 252.
262. Proffitt v. Florida, 428 U.S. 242, 252 (1976) (upholding Florida's jury-override sentencing scheme). It is interesting to note that one of the reasons that the Court supported the jury-override system was that judges were adhering to the stated policy of the giving capital defendants a second chance for life with the trial judge by vacating death sentences that had been determined as inappropriate. Id. at 253; see also Dobbert v. Florida, 432 U.S. 282, 296 (1977) (stating the second-chance policy).
263. Radelet, supra note 203, at 1426; Gillers, supra note 205, at 57–59.
consistency is diminished. Further, the litany of typical sentencing considerations differs from the structured nature of capital sentencing factors. Thus the judge's greater knowledge and experience are not called upon in the capital context. These commentators argue that consistency is best attained through the appellate review process because of the need for reliance on the jury's community conscience during sentencing.

Another criticism of judicial sentencing involves the age-old concern of whether the independent judiciary provides the public sufficient protection against abuses of power. Some commentators argue that the Framers' concerns that judges would be "too responsive to the voice of higher authority" still thrive today, but that the "higher authority" has evolved to become "a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty." This has been argued because judges face election in most states that employ the death penalty. The form of these elections varies between election by the state legislature, partisan or nonpartisan election by the people, and retention election by the people. Nebraska is a retention state. Election in any form can be said to erode judicial impartiality, because the judge arguably has a direct interest in the outcome of certain cases.

The most prominent example of this trend can be seen in the states with jury-override sentencing schemes: Alabama, Florida, and Indiana, where "there is no better way to demonstrate toughness on crime than through the use of the judicial override." In each state, a wide disparity exists between overrides used to overturn death recommendations and those used to overturn life recommendations, such that jury recommendations of life were abandoned much more frequently

264. Radelet, supra note 203, at 1426 (citing Gillers, supra note 205, at 57–59).
265. Gillers describes typical sentencing considerations as: "the availability of rehabilitative resources in the jurisdiction's jails and prisons; the nature of various diversion programs; community support services; the competence of probation authorities; the probable amount of time that will be served for a given sentence; sentences imposed by both the sentencing judge and other judges for similar offenders; and recidivism rates for different crimes." Gillers, supra note 205, at 57.
266. Gillers, supra note 205, at 60; Radelet, supra note 203, at 1426.
270. Burnside, supra note 268, at 1045–47 (noting possible due process violations in cases where a judge could lose his or her job based on the outcome of a case).
271. Id. at 1039.
than jury recommendations of death.\textsuperscript{272} What is more disconcerting, is the finding that the overall number of jury overrides increases in election years,\textsuperscript{273} and that some judges actually ask for capital cases come election time, to get their names in the press and to demonstrate their "tough on crime" philosophies.\textsuperscript{274} These pressures are not illusory, community activist groups and political parties have spearheaded campaigns for judicial removal based on death penalty decisions,\textsuperscript{275} and politicians have made it clear that this type of removal is a reality.\textsuperscript{276}

Although jury-override states provide a poignant example of concern for judicial appearances, these concerns are in no way limited to override states or even to direct election states. In fact, some commentators have argued that retention elections, like those held in Nebraska, are even worse than direct elections because the absence of a direct opponent allows various groups to target the judge without regard for the possible replacement.\textsuperscript{277} There are a number of solutions proposed for impartiality concerns, ranging from eliminating elections altogether, to restricting judicial deference in politically sensitive matters, or assigning sensitive political matters to those not facing election. These recommendations remain largely untested; thus it is difficult to assess their efficacy. However, the possibility of returning to a more legitimately independent judiciary by eliminating election procedures is another possible remedy.

Based on a cursory review of commentators' suggestions in this realm, it seems that both judges and juries have their shortcomings. This leaves the Supreme Court with a choice between juror miscomprehension and politicized judges. In light of the fact that both series of problems are arguably somewhat remediable, one is left to consider the Framer's intent for the jury as a check and balance on the State's overzealous actions. It would seem that if judges are acting in the manner that the Framer's feared, then the jury as an additional check

\textsuperscript{272} Ingrid A Holewinski, "Inherently Arbitrary and Capricious": An Empirical Analysis of Variations Among State Death Penalty Statutes, 12 CORNELL J.L. & PUB. POL'Y 231, 237–38. (2002) (noting that Alabama's ratio of life overrides to death overrides was almost ten-to-one, while Florida's was three-to-one, and Indiana's was two-to-one). Also, it is interesting to note that Delaware is the only override state that does not have judicial elections and they are also the only state to only override death sentences. Burnside, supra note 268, at 1042–43.

\textsuperscript{273} Burnside, supra note 268, at 1039; Holewinski, supra note 272, at 238.

\textsuperscript{274} See Burnside, supra note 268, at 1037–38 (providing numerous other examples of judicial campaigning).

\textsuperscript{275} See id. at 1035–38; see also Bright & Keenan, supra note 269, at 779–93.

\textsuperscript{276} Governor Don Sundquist of Tennessee made these comments after the removal of a judge following an organized campaign: "Should a judge look over his shoulder about whether they're [sic] going to be thrown out of office? I hope so." Burnside, supra, note 268, at 1037.

\textsuperscript{277} Id. at 1042.
and balance seems the more defensible position. However, before
drawing specific conclusions, it is best to consider Nebraska-specific
information as well.

The final consideration then, will revolve around a specific look at
Nebraska and the way its system has been operating in light of the
commentators' concerns just enumerated. A recent study by David
Baldus and colleagues took an in-depth look at Nebraska's pre-Ring
factor-weighing sentencing scheme. The study indicates that Ne-
braska's capital sentencing system appears to have been functioning
basically as it should, without systematic disparate treatment be-
tween offenders. However, a pattern did emerge that suggested
disparate treatment on the basis of victim socioeconomic status
("SES"), such that defendants charged with killing victims with high
SES were more likely to receive the death penalty than those killing
low-SES victims. Another relevant finding involved geographic dis-
parities in the rates that capital cases advance to a penalty trial which
were not attributable to defendant culpability. These disparities
demonstrate that the rate in the major urban counties was substan-
tially higher than it was in more rural areas. However, Baldus and
his colleagues concluded that judicial sentencing policies have tended
to offset and partially cancel out this effect, because the sentencing
rates of judges in urban areas are slightly below the statewide
norm. This finding has implications for the race of defendants, be-
cause most of Nebraska's minority defendants were prosecuted in ur-
ban areas. Thus, were it not for the judicial offset, more minorities
would likely have received death sentences.

Commentators have noted the irony of Ring in this context. Because
Nebraska's prior use of pure judicial sentencing served to offset
and balance out racial disparities, it is possible that more racial dis-
parities in sentencing may emerge when juries are the final arbiters of
the sentencing decision, or at least of the aggravating component of
that decision. However, it is possible that the judges' role in propor-
tionality review would facilitate the perpetuation of this balancing
function.

278. David C. Baldus et al., Arbitrariness and Discrimination in the Administration of
the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience
(1973–1999), 81 Neb. L. Rev. 486 (2002) (providing a complete overview of the
study, its objectives, results, and implications).
279. Id. at 661–62. The authors note that their results “provide support for the Prof-
titt hypothesis that judicial sentencing is superior to jury sentencing in terms of
arbitrariness and comparative justice” because of the absence of racial dispari-
ties. Id.; see also id. at 656–69.
280. Id. at 607–23.
281. Id. at 631–33.
282. Id.
283. Id.
In addition to the post-*Ring* effect on defendants, it is important to consider what effect the expansion of jury sentencing would have on the disparities relating to victims. Some commentators have argued that the consciously and deliberately expressed values of the community would not likely support such discriminatory action toward victims.\(^{284}\) However, the fluidity of the *Lockett* doctrine, requiring nearly unrestrained introduction of mitigating circumstances may open the door for implicit consideration of such factors. The possibility that the “community conscience” may sanction mitigation based on victim characteristics as opposed to offender characteristics is an unpleasant possibility, but a real one, in light of the history of jury nullification.\(^ {285}\) However, it has been argued that the idea of community conscience also encompasses the notion of community biases, such that even if these considerations are improper, they are the community’s notions nonetheless and are probably pervasively held within that community’s entire criminal justice system, including its judges and the laws interpreted by those judges.\(^ {286}\) Thus, in this sense, the concept of pervasive bias can be viewed as an indictment of both judges and juries. Considerations such as this suggest that the United States Supreme Court has much to consider when reevaluating the unanswered questions left pending in *Ring*.

### IV. CONCLUSION

The death penalty has historically been one of the most controversial institutions in American society, while the jury has typically been viewed as among the least controversial. These two institutions have intersected and come to a head in the newest line of U.S. Supreme Court death penalty precedents. The collision of these two forces has swept the nation, leaving dozens of state legislatures scrambling to address the aftermath. The Court has suggested that a doctrinal shift is impending with regard to the extent and nature of the jury’s role in capital sentencing procedure, but has revealed very little as to the scope of this shift. This ambiguity leaves states like Nebraska in limbo as to the propriety of their current sentencing schemes and raises questions as to where and when the court will resolve this ambiguity. Nebraska is left in a particularly curious position, because, in addition to the cryptic foreshadowing of *Ring*, the *Gales* court dealt with a limited situation and could do little more than address the facts

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286. *Id.* at 48; *see also* Wiener, *supra* note 14, at 773.
before it, while qualifying its holding through recognition of the tenu-
ous nature of U.S. Supreme Court precedents in this field.

Although consideration of the principles underlying the recent doc-
trinal shift suggest a preference for substance over form when defin-
ing elements necessary to establish death eligibility and a preference
for a principled approach to capital sentencing decisionmaking, many
of the Court's recent doctrines could be implicated by pursuing such a
principled approach. The scope of doctrinal implications is likely to
hinge, at least in part, on the Court's perspective on the role of the
jury in defining the community conscience. Thus, considerations of
the historic role of the jury in capital proceedings and the process by
which judges and jurors set about making their decisions helps eluci-
date the strengths and weaknesses of each course.

From a historical perspective, it seems that the jury has always
served as an additional check and balance on its elective branches in
terms of the protection of its individual citizens, thus suggesting the
need for a subset of that community to fill that role. In comparison, a
review of empirical commentators suggests that neither sentencing
system is perfect, and each has distinct frailties. It is likely that Ne-
braska legislators have demonstrated such loyalty to judicial sentenc-
ing because of the outcome of the comprehensive capital sentencing
study conducted recently. Judges may afford a greater degree of con-
sistency, at least in Nebraska, but problems remain because of their
inability to fulfill the historic check-and-balance role. While jurors re-
quire more precise judicial instruction to prevent the arbitrariness
and discriminatoriness that modern death penalty jurisprudence is
constitutionally bound to ward off, they provide a unique perspective,
that a number of the United States Supreme Court Justices seem to
view as an important part of capital sentencing.

Many of the unanswered questions in *Ring* go to the very heart of
the past decades' death penalty jurisprudence. Given these considera-
tions, the Court's task of addressing those questions left unanswered
is unenviable. The Court has spent the past twenty-five years trying
to recover from *Furman*, its last highly divisive plurality opinion in
the area of capital punishment, and may very well spend the next
twenty-five trying to recover from its next highly divisive opinion in
this area.

Regardless of the daunting task before the Court, Nebraska is still
faced with the uncertainty of the future constitutionality of its capital
sentencing structure. As a preventive measure, it may be advisable to
amend the new structure during upcoming legislative sessions so as to
circumvent impending problems. It would seem that an appropriate
compromise between Nebraska's loyalty to judicial sentencing and the
likely constitutional demands of greater jury involvement could be
reached. For example, a possible remedy would be to provide the trial
jury with structured discretion in the selection phase by allowing them to weigh the already adduced aggravators against any mitigators they might identify, giving the jury the authority to determine the ultimate sentence. If the jury’s findings were presented in a written statement describing its decision, a three-judge panel could then conduct a thorough proportionality review to ensure that inappropriate factors and considerations, such as victim race or SES, were not being employed.

Only time will tell whether the Supreme Court’s footnotes and *dicta* will prove to be foreshadowing or just footnotes and *dicta*. However, the Nebraska Supreme Court’s recognition of the possibility for change and the prospect of another special session are arguably sufficient motivators to take another look at the state’s capital sentencing scheme.

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