NOTE

MORE THAN JUST A FACTFINDER: THE RIGHT TO UNANIMOUS JURY SENTENCING IN CAPITAL CASES

*Richa Bijlani**

For some defendants, sentencing may be even more harrowing than a determination of guilt or innocence. Those facing capital punishment have the most to lose at the sentencing phase. The Supreme Court is not ignorant to this reality, finding in Ring v. Arizona *that "the Sixth Amendment would be senselessly diminished" if it had no application to death penalty proceedings. Yet under its permissive jurisprudence, the Court has suggested that the Sixth Amendment is satisfied in the death penalty context even if its protections vanish postconviction. This Note argues instead that the Sixth Amendment—specifically the jury right—should protect defendants more during the capital sentencing phase, not less. Ultimately, it contends that defendants have a constitutional right to jury sentencing by a unanimous verdict before facing the death penalty.*

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* J.D., May 2022, University of Michigan Law School. Thank you to Professors David Moran and Matthew Bender for your thoughtful feedback and guidance. I am exceptionally grateful for the incredible Notes Editors of Volume 120, with a special thank you to Hannah Berl Hoffman. Finally, thank you to my wonderful parents, the friends that got me through law school, and Jack. I hope this piece serves the movement toward death penalty abolition in some way. No person is as bad as the worst thing they have ever done. All errors are my own.

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INTRODUCTION

At least fourteen people wanted Nathaniel Woods dead: ten out of the twelve jurors, three widows, and the prosecutor. At trial, a different set of twelve jurors convicted Mr. Woods of killing three police officers in Alabama.[1] The only question left was whether Mr. Woods should die at the hands of the State. The prosecution made Mr. Woods out to be a crack cocaine dealer, police hater, and criminal mastermind who lured police officers into a house and

1. *See* Rick Rojas, *2 Jurors Voted to Spare Nathaniel Woods's Life. Alabama Executed Him.*, N.Y. TIMES (Mar. 5, 2020), https://www.nytimes.com/2020/03/05/us/nathaniel-woods-alabama.html [perma.cc/X856-2PVN].

helped kill three of them; for this, the officers' widows and the prosecution believed he ought to die.[2]

But two jurors did not agree that Mr. Woods, a twenty-eight-year-old Black man, deserved death.[3] These jurors may have been troubled by the prosecution's failure to show that Mr. Woods plotted to ambush the officers.[4] Evidence revealed not only that Mr. Woods never fired a weapon that day but also that his co-defendant confessed to being the sole triggerman.[5] Nonetheless, Alabama executed Mr. Woods over the objections of two jurors just for being an accomplice.[6]

Today, if Mr. Woods had received the same verdict in any neighboring state, he would still be alive.[7] But in Alabama, two holdouts are still as good as none: state law permits a trial judge to impose a death sentence when at least ten jurors vote in its favor.[8] In every jurisdiction in the United States, the Sixth Amendment requires that a jury unanimously agrees on a guilty verdict to convict a defendant.[9] Yet in Alabama, this right to a unanimous verdict does not extend to sentencing decisions.[10]

This Alabama law makes clear that legislatures and courts do not believe that the Constitution affords defendants facing capital punishment the same rights during sentencing as during trial. And the United States Supreme Court has seemingly endorsed this approach, noting that capital sentencing does not "implicate the entire panoply of criminal trial procedural rights."[11] Treating sentencing as constitutionally distinct from trial means that defendants like Mr. Woods do not receive the Sixth Amendment's full protection. The result is that over ten percent of the individuals on death row in the United States could have had their cases decided by one person acting alone or over the objections of up to two jurors.[12]

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2. *Id.*; Eric Ortiz, *Alabama Inmate Nathaniel Woods Executed for 2004 Police Murders*, NBC NEWS (Mar. 6, 2020, 7:34 AM), https://www.nbcnews.com/news/us-news/supreme-court-temporarily-halts-execution-alabama-inmate-nathaniel-woods-n1150711 [perma.cc/3SQG-RWH5].

3. Rojas, *supra* note 1.

4. *See id.*

5. Ortiz, *supra* note 2.

6. *Id.*

7. *See* MISS. CODE ANN. § 99-19-101 (2020); TENN. CODE ANN. § 39-13-204 (Supp. 2021); GA. CODE ANN. § 17-10-31 (2020); FLA. STAT. § 921.141 (2021).

8. ALA. CODE § 13A-5-46 (LexisNexis Supp. 2020).

9. Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

10. § 13A-5-46.

11. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1969 (2005) (quoting Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977)).

12. *See* DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A.: FALL 2021, at 37–38 (2021). As of this writing, 2,459 individuals across the country are incarcerated on death row. Of these 2,459 individuals, 249 were sentenced to death in states that permit either judges or nonunanimous juries to make the final sentencing decision. *Id.* Another 333

The proffered reason for drawing this line in the sand is often the same: this is how we've always done it.[13] The Court has even gone so far as to suggest that defendants actually *benefit* from the limitation of some constitutional rights, like the confrontation right at trial.[14] Because of a shift in focus from retribution to reformation and rehabilitation in sentencing, the Court stated that "by careful study of the lives and personalities of convicted offenders[,] many could be less severely punished and restored sooner to complete freedom and useful citizenship."[15] This justification for distinguishing between constitutional rights at trial and those at sentencing, however, is less convincing when applied to a purely retributive sentence: death.

For defendants, the sentencing phase can be more harrowing than a determination of guilt or innocence. And those facing capital punishment have the most to lose. While the Court has recognized this reality by calling for "heightened safeguards in accordance with the Sixth Amendment" in the death penalty context, it has thus far accepted that these safeguards promptly vanish after a conviction.[16]

In contrast, this Note argues that the Sixth Amendment guarantees a constitutional right to sentencing by a unanimous jury verdict in death penalty cases. The uniqueness of death penalty sentencing requires that the Sixth Amendment confer more protection to defendants facing capital punishment, not less.[17] Part I analyzes the Court's recent efforts to clarify the extent of the Sixth Amendment jury right. It reveals not only the difficulty the Court has with drawing bright-line rules in this area but also the steady expansion of the Sixth Amendment's scope. Part II describes current state practices and explains how the doctrine as it stands may authorize such unconstitutional sentencing schemes. Part III then presents two arguments: first, that the Sixth Amendment requires juries to be the ones to impose death sentences; second,

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individuals were sentenced to death in Florida, where state law currently requires jury sentencing in capital cases, though the state's highest court has recently held that the state constitution does not require as much. *Id.*; *see also infra* Part II.E.

13. *See, e.g.*, Williams v. New York, 337 U.S. 241, 246 (1949) (discussing the lack of strict evidentiary procedural limitations during the sentencing phase through history).

14. The Court has stated that applying strict evidentiary rules to trial ensures that fact-finders are prevented from considering irrelevant and unreliable evidence while determining guilt. *Id.* at 246–47. During sentencing, though, the Court reasoned that "rigid adherence to restrictive rules of evidence" would hinder the judge's ability to select an appropriate sentence given the defendant's "life and habits." *Id.*

15. *Id.* at 249.

16. Thomas Aumann, Note, *Death by Peers: The Extension of the Sixth Amendment to Capital Sentencing in* Ring v. Arizona, 34 LOY. U. CHI. L.J. 845, 846 (2003) (citing Ring v. Arizona, 536 U.S. 584, 609 (2002)).

17. Some scholars have argued that the whole of the rights conferred by the Sixth Amendment should extend to the sentencing phase of capital proceedings. *See e.g.*, Douglass, *supra* note 11 (arguing that confrontation rights should be extended to capital sentencing phase). This Note focuses only on the Sixth Amendment right to a unanimous jury verdict that must extend to the sentencing phase in capital cases. Other Sixth Amendment rights, such as the right to confront, serve different purposes for the accused and are, therefore, beyond the scope of this Note.

that the Sixth Amendment prohibits the imposition of a death sentence following a nonunanimous verdict. Finally, Part III explains why juries are better positioned than judges to make these decisions and proposes language for jurisdictions that choose to retain the death penalty.[18]

I. THE SIXTH AMENDMENT JURY RIGHT

The right to a trial by jury in criminal prosecutions is a right so nice, they named it twice: the Constitution's Framers enshrined it in both Article III, Section 2 and the Sixth Amendment.[19] The text of the Constitution alone, however, hardly explains the extent of this right.[20] The Supreme Court has developed an extensive body of case law defining when and how the Sixth Amendment applies.[21] These cases highlight the importance of the Sixth Amendment's jury right in the guilt-innocence phase of certain criminal trials.[22] The Court's Sixth Amendment jurisprudence, however, significantly

18. To be clear, I oppose the death penalty on moral, constitutional, and practical grounds. This Note calls for reforming existing state capital sentencing schemes to ensure that defendants' Sixth Amendment rights are protected while the death penalty remains in place. Despite the Supreme Court's decision upholding the constitutionality of the death penalty in *Gregg v. Georgia*, many scholars have already argued that the death penalty itself is unconstitutional or proposed creative ways to eliminate it. 428 U.S. 153, 206–07 (1976); *see, e.g.*, Joseph Blocher, Online Essay, *The Death Penalty and the Fifth Amendment*, 111 NW. L. REV. 275 (2016) (arguing that the Fifth Amendment does not support the constitutionality of the death penalty); William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889 (2010) (advocating for the exclusion of the concept of dangerousness from capital cases as a path toward de facto abolition of the death penalty). Should the death penalty be abolished nationwide, the reform proposed in this Note would no longer be necessary.

19. U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

20. This Note will focus only on the Sixth Amendment right that simply guarantees that "the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

21. *See, e.g.*, Rothgery v. Gillespie Cnty., 554 U.S. 191, 194, 212 (2008) (reaffirming that the Sixth Amendment right to counsel attaches at first appearance and holding that the right applies at all critical stages); Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (incorporating the Sixth Amendment right to a speedy trial against the states); Bruton v. United States, 391 U.S. 123, 126 (1968) (holding that the Sixth Amendment's confrontation clause was violated when the prosecution admitted the confession of a co-defendant when the co-defendant invoked his Fifth Amendment right against self-incrimination).

22. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 145, 159 (1968) (incorporating the Sixth Amendment right to an impartial jury against the states for non-petty offenses); Baldwin v. New York, 399 U.S. 66, 69 (1970) (holding that the right to a jury trial applies to defendants facing a possible sentence of six months or longer); Taylor v. Louisiana, 419 U.S. 522, 525–26 (1975) (holding that a state jury selection system that disproportionately excluded women violated petitioner's Sixth Amendment right to an impartial jury trial because the jury was not representative of the community where the crime was allegedly committed).

limits these rights at sentencing.[23] This Part first discusses how *Ramos v. Louisiana* and *Apprendi v. New Jersey* together require a unanimous jury to determine the accused's guilt or innocence and therefore the appropriate sentencing range based on those verdicts; second, how *Ring v. Arizona* and *Hurst v. Florida* built on this momentum by requiring the same for findings that would make a defendant eligible for death.

A. *The Trial Jury Right*

1. *Ramos v. Louisiana*

In a jury trial, a defendant must receive a unanimous guilty verdict from the jurors before they can receive any sentence.[24] This procedure, however, was not always the case. In 1972, the Court considered Oregon and Louisiana laws permitting convictions of serious crimes by a nonunanimous jury.[25] Such laws do not directly contradict the text of the Constitution, as the Sixth Amendment does not expressly require unanimity.[26] The Supreme Court therefore upheld the Oregon and Louisiana laws.[27]

These cases paved the way for Evangelisto Ramos's conviction in June 2016: ten Louisiana jurors sitting on a twelve-person jury found Mr. Ramos guilty of second-degree murder.[28] The remaining two jurors voted to acquit Mr. Ramos because the State failed to meet its burden of proving guilt beyond a reasonable doubt.[29] Under the Louisiana state constitution, only those ten guilty votes mattered.[30] Mr. Ramos was sentenced to life without parole.[31]

When Mr. Ramos challenged his conviction,[32] Louisiana asked the Court to follow the four-justice plurality in *Apodaca v. Oregon*, which applied a cost-

23. *See* Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1787–1854 (2003) (cataloguing which constitutional trial rights apply at sentencing). *See generally* Douglass, *supra* note 11 (arguing that all Sixth Amendment trial rights should apply to capital sentencing).

24. Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020).

25. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972); LA. CONST. art. 1, § 17 (amended 2018); OR. CONST. art. I, § 11. In November 2018, Louisiana voters amended their state constitution to end the practice of conviction by nonunanimous juries. Julia O'Donoghue, *Louisiana Approves Unanimous Jury Requirement, Scrapping Jim Crow-Era Law*, NOLA.COM (Nov. 7, 2018, 4:03 PM) https://www.nola.com/news/crime_police/article_cae52b78-3812-57ae-8676-ea4dc3a5d3d0.html [perma.cc/98NF-J9AG].

26. U.S. CONST. amend. VI.

27. *Apodaca*, 406 U.S. at 404; *Johnson*, 406 U.S. at 356.

28. State v. Ramos, 231 So. 3d 44, 46 (La. Ct. App. 2017).

29. *Ramos*, 140 S. Ct. at 1394.

30. LA. CONST. art. 1, § 17 ("A case for an offense committed prior to January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.").

31. State v. Ramos, 231 So. 3d at 46.

32. *Ramos*, 140 S. Ct. at 1395.

benefit analysis to the nonunanimous jury verdict rules.[33] But the Supreme Court held that the Sixth Amendment's promise of a "trial by an impartial jury" required a unanimous jury verdict in order to convict Mr. Ramos.[34] In overturning *Apodaca*, the majority rejected the dissent's argument that Mr. Ramos's conviction should be affirmed based on the doctrine of *stare decisis*.[35]

Justice Gorsuch, writing for the majority, disagreed with the State in part because "[l]ost in the accounting are the racially discriminatory *reasons* that Louisiana and Oregon adopted their peculiar rules in the first place."[36] While the dissent criticized the majority justices in *Ramos* for acknowledging the racist history of the nonunanimous verdict laws,[37] Justice Gorsuch asked, "how can that analysis proceed to ignore the very functions those rules were adopted to serve?"[38]

Ultimately, the majority held that the right to a unanimous jury verdict, an "ancient guarantee," cannot be subjected to the Court's "functionalist assessment."[39] The Court, using English common law,[40] state practices,[41] and other documents written contemporaneously with the ratification of the Sixth Amendment,[42] concluded that convicting a criminal defendant of a felony requires unanimity.[43] Because the Court found that this right is "fundamental to the American scheme of justice," it is incorporated against the states by the Due Process Clause of the Fourteenth Amendment.[44] The willingness of a majority of the Court to overturn precedent to reach this conclusion highlights the significance of unanimity in jury verdicts.

2. *Apprendi v. New Jersey*

When the accused exercises their right to a jury trial, the Constitution requires jurors to play an important role in determining sentencing ranges. In *Apprendi v. New Jersey*, the Supreme Court considered the constitutionality of applying a sentence-enhancing statute without a jury determination of the relevant facts beyond a reasonable doubt.[45] Charles Apprendi was arrested for

33. *Id.* at 1401–02.

34. *Id.* at 1395, 1397 (quoting U.S. CONST. amend. VI).

35. *Id.* at 1404–05 ("[I]t's just an implacable fact that the [*Apodaca*] plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws.").

36. *Id.* at 1401.

37. *Id.* at 1401 n.44, 1425.

38. *Id.* at 1401 n.44.

39. *Id.* at 1401–02.

40. *Id.* at 1395.

41. *Id.* at 1396.

42. *Id.*

43. *Id.* at 1395.

44. *Id.* at 1397 (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

45. 530 U.S. 466, 469 (2000).

firing several shots into the home of an African American family in New Jersey.[46] As part of Mr. Apprendi's plea agreement, the State reserved the right to request that the trial judge impose an enhanced sentence under New Jersey's hate crime statute.[47] The state's hate crime statute allows trial judges to impose an enhanced sentence if the judge finds, by a preponderance of the evidence, that the defendant committed the offense with the purpose to intimidate a person or group based on race.[48] Finding that the evidentiary standard was met, the trial judge held that Mr. Apprendi's actions were taken "with a purpose to intimidate" and thus fell under New Jersey's hate crime statute.[49]

On appeal to the Supreme Court, Mr. Apprendi argued that the Due Process Clause requires a jury to make a finding of bias beyond a reasonable doubt before the hate crime enhancement can apply.[50] The State, however, argued that the trial judge's application of the hate crime statute was proper because the determination as to whether Mr. Apprendi's actions were taken with a "purpose to intimidate" was a "sentencing factor" rather than an "element" of the offense.[51]

The Court rejected this argument.[52] Applying a functional approach to the hate crime statute, the Court concluded that "the relevant inquiry is one not of form, but of effect" and asked if the finding "expose[d] the defendant to a greater punishment than that authorized by the jury's guilty verdict."[53] Writing for the majority, Justice Stevens invoked the "historical foundation" of these rights under the Fourteenth and Sixth Amendments, which "extends down centuries into the common law" and limits judges' discretion to operate within the statutory penalties.[54] As a result, the Court reversed the lower court's decision and remanded Mr. Apprendi's case for resentencing.[55]

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46. *Apprendi*, 530 U.S. at 469.

47. *Id.* at 470.

48. N.J. STAT. ANN. § 2C:16–1 (West Supp. 2021); *Apprendi*, 530 U.S. at 468–696. The trial judge's determination of a biased purpose was critical: such a finding controlled whether Mr. Apprendi received an aggregate sentence of twenty years or a maximum of thirty years with fifteen years of parole ineligibility. *Apprendi*, 530 U.S. at 470.

49. *Id.* at 471.

50. *Id.*

51. *Id.* at 492–93.

52. *Id.*

53. *Id.* at 494. Justice Stevens additionally noted that any distinction between a "sentencing factor" and an "element" of an offense was "unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Id.* at 478.

54. *Id.* at 477, 479.

55. *Id.* at 497.

B. *Applying the Sixth Amendment to Capital Sentencing*

In addition to cases like *Ramos* and *Apprendi*, the Court has also considered Sixth Amendment sentencing cases where the defendant received the ultimate punishment: death. These cases follow the Court's long-held belief that the Constitution affords defendants facing capital punishment at least the same extent of constitutional rights as other criminal defendants.[56]

1. *Ring v. Arizona*

In *Ring v. Arizona*, the Court invalidated Arizona's use of judges to determine the presence of aggravating factors necessary to trigger the death penalty.[57] Timothy Ring's jury found him guilty of felony murder occurring in the course of an armed robbery.[58] Under Arizona law at the time, a defendant convicted of felony murder could only receive the death penalty if they were the victim's actual killer and if the judge found at least one aggravating factor and no mitigating factors.[59] The judge found that Mr. Ring was the actual killer, that the offense was committed for pecuniary gain (an aggravating factor), and that Mr. Ring's minimal criminal record (a mitigating factor) did not call for leniency.[60] Accordingly, the judge sentenced Mr. Ring to death.[61]

On appeal, Mr. Ring argued that Arizona's capital sentencing scheme violated his Sixth Amendment right under *Apprendi* because it gave the trial judge sole authority to determine both aggravating and mitigating factors.[62] The State countered that the Court had previously upheld Arizona's capital sentencing scheme in a case called *Walton v. Arizona*,[63] and the *Apprendi* Court had declined to overrule that precedent.[64]

Writing for the majority, Justice Ginsburg found the two decisions "irreconcilable" and overruled *Walton*.[65] The Court stated that "the Sixth Amendment would be senselessly diminished if it encompassed the factfinding

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56. *See, e.g.*, United States v. Jackson, 390 U.S. 570 (1968) (arguing that the imposition of the death penalty only when defendants exercise their right to a jury trial is unconstitutional because it forces defendants to give up their constitutional right to avoid the death penalty); Ring v. Arizona, 536 U.S. 584, 609 (2002) ("[T]he Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.").

57. *Ring*, 536 U.S. at 588–89.

58. *Id.* at 584.

59. *Id.*

60. *Id.* at 594–95.

61. *Id.* at 594.

62. *Id.* at 595.

63. 497 U.S. 639, 648 (1990) ("[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (quoting Hildwin v. Florida, 490 U.S. 638, 640–41 (1989) (per curiam))).

64. *Ring*, 536 U.S. at 595–96 (citing Apprendi v. New Jersey, 530 U.S. 466, 538 (2000) (O'Connor, J., dissenting)).

65. *Id.* at 589.

necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."[66] In reaching this conclusion, the Court relied in part on original practice and meaning.[67] Under *Apprendi*, convicted defendants have the right to a jury determination of any facts that increase the maximum punishment.[68] *Ring* essentially found that eligibility for the death penalty requires the same standard.[69] In applying *Apprendi*, the Court held that the jury must make the factual findings that turn a crime into a capital offense.[70]

The Court rejected the State's argument that defendants were at risk of arbitrary imposition of the death penalty because judges are better suited than juries to make these findings.[71] Instead, it reasoned that there was no conclusive evidence establishing that judges are more equipped to make death penalty determinations.[72]

Despite this apparent consensus, Justice Scalia made clear in his concurrence that he believed that judges may continue making the ultimate sentencing decision.[73] Justice Breyer came to a different conclusion than Justices Scalia and Thomas but used different reasoning from the majority. He would have held that the Eighth Amendment mandates jury sentencing in capital cases.[74] This concurrence left open the question of whether Justice Breyer disagreed with the majority opinion because it failed to require jury sentencing or because he believed the majority did require jury sentencing but under the Sixth Amendment instead of the Eighth Amendment.

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66. *Id.* at 609.

67. *See id.* at 599 ("[T]he jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established." (emphasis omitted) (quoting *Walton*, 497 U.S. at 710–11 (Stevens, J., dissenting))). Justice Stevens also insisted that the Framers adopted the Bill of Rights with full knowledge of this role played by the jury. *Walton*, 497 U.S. at 711.

68. *Ring*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482–83).

69. *Id.* at 609.

70. *Id. Apprendi* did not specify the scope of *Ring*'s application to prior cases. Two years later, though, the Court determined that its decision, being a "procedural rule," would not apply retroactively. Schriro v. Summerlin, 542 U.S. 348 (2004). By consequence, dozens of death row inmates could not challenge their judge-imposed sentences because their cases were not in the first stages of their appeals. *U.S. Supreme Court:* Ring v. Arizona, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/u-s-supreme-court-ring-v-arizona [perma.cc/T598-L2C3].

71. *Ring*, 536 U.S. at 607.

72. *Id.* (stating that the superiority of a judge's factfinding ability was not clearly evident). At that time, twenty-nine of the thirty-eight states that permitted the death penalty required the jury to make all relevant findings and impose a death sentence. *Id.* at 608 n.6. This practice indicated to the Court that states reached a consensus that juries are actually better suited for this job. *Id.* at 607–08.

73. *Id.* at 612–13 (Scalia, J., concurring) ("Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.").

74. *Id.* at 614 (Breyer, J., concurring).

2. *Hurst v. Florida*

In *Hurst v. Florida*, the Court again expressed concern with the constitutionality of trial judges making a necessary finding to impose a death sentence.[75] *Hurst* struck down a statute in which the final determination about whether the defendant would be subjected to the death penalty was left up to the judge.[76] A Florida jury convicted Timothy Hurst of first-degree murder and recommended the death penalty.[77] Following state law, Mr. Hurst's trial judge independently weighed the aggravating and mitigating factors after the jury's recommendation and sentenced Mr. Hurst to death.[78] On appeal, the court granted Mr. Hurst a new sentencing hearing.[79] Again, the jury recommended death, and the judge found the facts necessary to sentence Mr. Hurst to death.[80]

In light of *Ring*, Mr. Hurst then challenged Florida's capital sentencing scheme before the Supreme Court.[81] Even though the jury in Mr. Hurst's case recommended a death sentence, the Court took issue with the way Florida law allowed judges to authorize the death penalty even over a jury's recommendation of a life sentence.[82] Like the Arizona statute, this statute also required the judge to weigh aggravating factors against mitigating factors and make the final decision regarding the death penalty.[83] Thus, the Court declared Florida's scheme unconstitutional and held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[84]

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75. 577 U.S. 92 (2016); *see* Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. REV. 448, 462 (2019).

76. *Hurst*, 577 U.S. at 95–96. Under Florida's sentencing scheme, the jury rendered merely an "advisory sentence." *Id.* (citing FLA. STAT. § 921.141(2) (2010)).

77. *Id.* at 94.

78. *Id.*

79. *Id.* at 96.

80. *Id.*

81. *Id.* at 96–97.

82. *See id.* at 100 ("The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires."). The Court found that "Florida fail[ed] to appreciate the judge's central and singular role under Florida law, which makes the court's findings necessary to impose death and makes the jury's function advisory only." *Id.* at 93. To reach this holding, the Court overruled two cases in which the Court had previously upheld Florida's sentencing scheme. Spaziano v. Florida, 468 U.S. 447 (1984) (holding that the Sixth Amendment does not require the jury to make findings necessary to impose a death sentence); Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam) (holding the same); *Hurst*, 577 U.S. at 101 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part."). The Court was not bound by *stare decisis* because it found those cases irreconcilable with *Apprendi*. *Hurst*, 577 U.S. at 93, 101.

83. *Hurst*, 577 U.S. at 95–96.

84. *Id.* at 94. For Justice Breyer, the Florida statute—which left the "job" of sentencing defendants to death up "to Florida's judges"—violated the Eighth Amendment. *Id.* at 103 (Breyer, J., concurring). He would have held that the Eighth Amendment requires the jury to make the ultimate decision to sentence a defendant to death. *Id.* While some lower courts agree with Justice Breyer, under either the Sixth or Eighth Amendments, not all jurisdictions require jury sentencing in capital cases. *See infra* Part II.

II. CURRENT STATE PRACTICES

Lower courts and state legislatures have not settled on a uniform interpretation of the Supreme Court's somewhat uncertain jurisprudence in this area: different jurisdictions have adopted capital sentencing schemes that involve juries to varying degrees. All death penalty jurisdictions use bifurcated proceedings,[85] separating capital cases into a "guilt" phase and a "penalty" phase.[86] During the penalty phase, the defendant can typically be sentenced to death, life in prison, or a lesser penalty. An elaborate body of Sixth Amendment and Eighth Amendment case law governs this phase.[87] Determining the defendant's sentence requires at least two steps: "eligibility" and "selection."[88]

First, the factfinder must determine whether the defendant is "eligible" for the death penalty. This step involves considering the list of statutory aggravating factors that legislatures use to define serious and reprehensible circumstances that make the defendant "especially deserving of death."[89] For example, Georgia's capital sentencing statute includes as aggravating factors the existence of a prior conviction for a capital felony, the receipt of monetary compensation for committing the crime, and the use of a dangerous weapon during the commission of the crime, among others.[90] A finding of one or more such factors makes a defendant eligible for a death sentence.[91]

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85. Douglass, *supra* note 11, at 1995 (citing Beth S. Brinkmann, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 366 (1984)).

86. This Note uses the terms "penalty phase" and "sentencing phase" interchangeably.

87. *See, e.g.*, *Hildwin*, 490 U.S. 638 (holding that the Sixth Amendment does not require that a jury make the specific findings authorizing the death penalty); *Hurst*, 277 U.S. 92 (holding that Florida's capital sentencing scheme violates the Sixth Amendment); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (holding that the imposition of the death penalty constituted cruel and unusual punishment when state statutes failed to supply guidelines to protect against the capricious or discriminatory administration of capital punishment); Gregg v. Georgia, 428 U.S. 153 (1976) (upholding the validity of the death penalty under the Eighth and Fourteenth Amendments).

88. Douglass, *supra* note 11, at 1994–95. While most states address both eligibility and selection in a single penalty phase, this second phase can be further broken down. *Id.* at 1971; Marc R. Shapiro, Note, *Re-Evaluating the Role of the Jury in Capital Cases After* Ring v. Arizona, 59 N.Y.U. ANN. SURV. AM. L. 633, 647–51 (2004) (discussing *Ring*'s impact on states formerly employing "strict judicial sentencing" and "hybrid sentencing schemes"); *see infra* Part III.

89. Chelsea Creo Sharon, Note, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 225 (2011).

90. GA. CODE ANN. § 17-10-30 (2020) (listing aggravating factors).

91. § 17-10-31 ("[A] sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed.").

The second step in capital sentencing requires the factfinder to consider mitigating evidence proffered by the defendant and weigh it against the aggravating factor(s).[92] Federal law, for instance, requires the factfinder to consider factors like the defendant's background and criminal record among the other enumerated mitigating circumstances.[93]

After the Court's decisions in *Ring* and *Hurst*, all death penalty jurisdictions must require the jury to find beyond a reasonable doubt all facts relevant to capital sentencing.[94] While findings of aggravating and mitigating factors are accepted as factual in nature,[95] not every court gives them equal weight.[96] Despite inconsistencies in how these factors are weighed, most jurisdictions require the jury—not the judge—to make the ultimate sentencing decision.

Section II.A describes how many jurisdictions require a unanimous jury verdict to impose a death sentence. Yet six states continue to deny defendants this constitutional safeguard. Section II.B examines two states—Nebraska and Montana—that allow judges to make final capital sentencing decisions in all cases. Next, Section II.C considers Indiana and Missouri laws which require the judge to determine the sentence when a capital jury deadlocks. Section II.D highlights the only state that permits a nonunanimous jury to impose a death sentence: Alabama. Finally, Section II.E analyzes a recent Florida Supreme Court decision that threatens to upend the practice of requiring unanimous jury sentencing in capital cases.

A. *Twenty-Two Jurisdictions Require a Unanimous Jury to Impose a Death Sentence*

Most death penalty jurisdictions require a unanimous jury verdict at both the guilt and punishment phases.[97] Judges, though, can continue to play an important role even in jurisdictions that leave the ultimate sentencing decision to the jury.[98] Unlike the Florida statute that the Court found unconstitutional in *Hurst*, California's sentencing scheme does not allow the judge to

92. *See* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (striking down mandatory death penalties and requiring consideration of each individual defendant's character and circumstance on a case-by-case basis).

93. 18 U.S.C. § 3592(a) (listing mitigating circumstances as impaired capacity, duress, minor participation, equally culpable defendants, no prior criminal record, disturbance, victim's consent, and "other factors").

94. Ring v. Arizona, 536 U.S. 584, 609 (2002); Hurst v. Florida, 577 U.S. 92, 94, 97 (2016).

95. *E.g.*, *Hurst*, 577 U.S. at 98–99 ("It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances." (quoting Walton v. Arizona, 497 U.S. 639, 648 (1990))).

96. *See* discussion *infra* Section II.C.2.

97. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1394, 1397 (2020) (requiring unanimous jury verdicts for a conviction). For example, Oregon's statute mandates that the jury must unanimously decide that the defendant should receive a death sentence. OR. REV. STAT. § 163.150(1)(b)–(c) (2019).

98. In California, for example, after a jury returns a unanimous verdict or finding imposing the death penalty, "the judge . . . shall make a determination as to whether the jury's findings

impose a death sentence when a jury recommends life in prison.[99] Instead, a judge may only *prevent* the imposition of the death penalty when they find that the jury's verdict is contrary to the law or the evidence presented.[100] Similarly, judges in many jurisdictions are forbidden from imposing the death penalty when the jury fails to unanimously agree on a sentence.[101]

B. *Two States Permit Judges to Make Final Capital Sentencing Decisions in All Cases*

By contrast, two states—Nebraska and Montana—have effectively transformed bifurcated capital proceedings (conviction and sentencing) into trifurcated proceedings.[102] Following the Court's decision in *Ring*, these states split their sentencing procedures to allocate the eligibility determination to the jury and the penalty determination to judges.[103]

1. Nebraska

When aggravating factors exist, murder may be punishable by death in Nebraska.[104] While a jury determines the presence of aggravating and mitigating factors, a panel of three judges determines the final sentence.[105] To impose a death sentence, the panel must reach a unanimous agreement.[106] Otherwise, the judges must fix the sentence at life imprisonment.[107] Nebraska is the only state that uses a three-judge panel to impose a death sentence.[108]

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and verdicts . . . are contrary to law or the evidence presented." CAL. PENAL CODE § 190.4(e) (West 2014). California has been under a governor-imposed moratorium on the death penalty since 2019. *History of Capital Punishment in California*, CAL. DEP'T OF CORR. & REHABILITATION, https://www.cdcr.ca.gov/capital-punishment/history [perma.cc/MC3E-KQR4].

99. *Compare* Hurst v. Florida, 577 U.S. 92, 98–99 (2016) (citing FLA. STAT. § 921.141(3) (2010)), *with* PENAL § 190.4(e).

100. PENAL § 190.4(e).

101. In North Carolina, for example, if the jury cannot reach a unanimous decision as to a sentencing recommendation, the judge is required to impose a sentence of life imprisonment: "[t]he judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation." N.C. GEN. STAT. § 15A-2000(b) (2019); *see also* OR. REV. STAT. § 163.150 (2019).

102. Douglass, *supra* note 11, at 1971 n.25.

103. *Id.* (citing Shapiro, *supra* note 88, at 650–51). The Delaware Supreme Court struck down a similar state statute in 2016, making Montana and Nebraska the only states to still apply this sentencing scheme. Rauf v. State, 145 A.3d 430 (Del. 2016) (holding that under *Hurst* and the Sixth Amendment, Delaware's capital sentencing scheme violated defendants' right to have a jury determine the critical facts necessary to impose a death sentence).

104. NEB. REV. STAT. § 29-2523 (2021).

105. *Id.* § 29-2520.

106. *Id.*

107. *Id.* § 29-2522.

108. *See* Maria T. Kolar, *"Finding" a Way to Complete the* Ring *of Capital Jury Sentencing*, 95 DENV. L. REV. 671, 700–01 (2018).

In 2003, the Nebraska Supreme Court upheld this death-penalty sentencing scheme in *State v. Gales*.[109] Mr. Gales argued that permitting the three-judge panel to impose a death sentence violated his Sixth Amendment rights under *Apprendi* and *Ring*.[110] The court distinguished Nebraska's law from the statute considered in *Ring* by dividing the state's sentencing scheme into two phases: (1) "death eligibility" and (2) "selection decision."[111]

In the "death eligibility" phase, the jury unanimously determines whether the applicable aggravating factors exist.[112] If not, the defendant automatically receives a life sentence.[113] But if the jury finds at least one aggravating circumstance, the case proceeds to the "selection decision" phase.[114] The panel weighs the aggravating and mitigating circumstances to determine whether a death sentence is appropriate.[115] While the Nebraska Supreme Court agreed that Mr. Gales had a Sixth Amendment right to a jury finding in the "death eligibility" phase, it declined to extend this right to the "selection decision" phase.[116]

To date, Nebraska has a death row population of twelve individuals who were all sentenced to capital punishment not by their peers but by a panel of judges.[117] While the Nebraska courts have yet to assess the statute post-*Hurst*,[118] it would likely survive a constitutional challenge because *Hurst* requires juries to make the necessary eligibility findings but does not go so far as to prohibit judges from imposing a death sentence.[119]

2. Montana

Somewhat similarly, in a Montana murder trial, the jury must be the one to find an aggravating factor in order to trigger the possibility of a death sentence.[120] During the sentencing phase, the jury must find at least one aggravating circumstance beyond a reasonable doubt for the defendant to be eligible for death.[121] Following that determination, the judge—not the jury—

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109. 658 N.W.2d 604 (Neb. 2003).

110. *Id.* at 626.

111. *Id.* at 626–27.

112. NEB. REV. STAT. § 29-2520 (2021).

113. *Id.*

114. *Id.*

115. *Id.* § 29-2521.

116. *Gales*, 658 N.W.2d at 626.

117. *See Nebraska*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska [perma.cc/6X3C-EWKZ].

118. Hessick & Berry, *supra* note 75, at 508 ("To date, the only post-*Hurst* challenge to Nebraska's capital sentencing scheme came in *State v. Vela*. Vela, however, did not raise the claim in his petition for postconviction relief in the state district court, so the Nebraska Supreme Court declined to consider it on appeal." (citing State v. Vela, 900 N.W.2d 8 (Neb. 2017))).

119. *See* discussion *supra* Section I.B.2.

120. MONT. CODE ANN. § 46-18-305 (2021).

121. *Id.*; *see* Ring v. Arizona, 536 U.S. 584, 589, 612 (2002) (requiring a jury finding of any fact that makes the defendant eligible for death).

then considers mitigating evidence and weighs it against the aggravating circumstance(s).[122] The trial judge, acting alone, may then sentence the defendant to death, life imprisonment, or any term of imprisonment authorized by the relevant statute.[123]

Montana is the only state that permits the trial judge to unilaterally sentence a defendant to death.[124] While the state has not sentenced a defendant to death since 1996,[125] two individuals sentenced solely by a judge remain on death row as of this writing.[126] These defendants did not have the opportunity to challenge the state's death-sentencing statute after the Court's decisions in *Ring* and *Hurst*. As a result, Montana courts have not recently considered the constitutionality of death sentences imposed by judges alone.[127] Regardless, under the Court's current precedent, Montana's statute likely passes constitutional muster because it requires a jury to make the factual finding necessary to increase the possible punishment to death.[128]

C. *Two States Permit the Trial Judge to Impose a Death Sentence When the Jury Is Deadlocked*

1. Indiana

In capital cases, Indiana law permits juries to recommend the death penalty, life imprisonment without parole, or neither.[129] But when a jury is unable to agree on a sentencing recommendation, an Indiana trial judge alone decides either to preserve life or to end one.[130] Indiana courts have not yet had the chance to substantively evaluate the statute's constitutionality. When asked to consider the issue, the state's highest court declined to do so because the defendant in question had not yet stood trial or been sentenced to death under Indiana's statute.[131]

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122. § 46-18-305.

123. *Id.*

124. *See id.*

125. *Montana Prosecutors Drop Death Penalty Against Mentally Ill Defendant*, DEATH PENALTY INFO. CTR. (July 26, 2018), https://deathpenaltyinfo.org/news/montana-prosecutors-drop-death-penalty-against-mentally-ill-defendant [perma.cc/9VWT-5LR2].

126. *Montana*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/montana [perma.cc/5SDS-DWWX].

127. Hessick & Berry, *supra* note 75, at 478.

128. § 46-18-305.

129. IND. CODE § 35-50-2-9(e) (2021).

130. *Id.* § 35-50-2-9(f). The state was one of four (alongside Alabama, Delaware, and Florida) that allowed a judge to override a jury's recommendation of a life sentence to the death penalty or the death penalty to a life sentence in these capital murder cases. Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 ANN. REV. L. & SOC. SCI. 539, 545 (2019). This override statute was abolished in 2002. *See id.*

131. Becky Jacobs, *Higher Court Denies Vann's Appeal to Examine Death Penalty Statute*, CHI. TRIB. (Apr. 25, 2017, 7:28 PM), https://www.chicagotribune.com/suburbs/post-tribune/ct-

As of this writing, Indiana has a death row population of eight individuals.[132] Even if these individuals received their sentences after *Ring* and *Hurst*, it is not clear whether the Court's decisions afford them constitutional protections beyond those already codified in Indiana law.

2. Missouri

Missouri permits the imposition of the death penalty for first-degree murder with aggravating circumstances, treason, and placing a bomb near a bus terminal.[133] Under Missouri law, if a jury is "unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death."[134]

In a 2019 case, *State v. Wood*, the Supreme Court of Missouri considered the constitutionality of the state's law permitting trial judges to independently evaluate the evidence and determine the sentence when the jury cannot do so unanimously—this time after *Hurst*.[135] Mr. Wood argued that, although he had been convicted of capital murder by a jury, his Sixth Amendment right to trial by jury was violated when the trial judge sentenced him to death.[136] In its 4–3 decision, the majority relied on a pre-*Hurst* Missouri case, which held that the Sixth Amendment does not prohibit a court from resolving jury deadlock

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ptb-vann-appeal-denied-st-0426-20170425-story.html [perma.cc/G233-UTGX]. In 2016, Daren Vann was charged with seven counts of capital murder in Indiana. *See* Motion to Declare Ind. Code § 35-50-2-9 Unconstitutional at 1–2, State v. Vann, Nos. 45G04-1512-MR-00009, 45G04-1603-MR-00002 (Ind. Super. Ct. Aug. 5, 2016), https://secure.in.gov/ipdc/files/Ring-Hurst-motion.pdf [perma.cc/55A3-7N95]. Mr. Vann challenged Indiana's death penalty statute as unconstitutional in response. *See id.* After the Indiana Supreme Court refused to consider the issue on the merits, Mr. Vann pleaded guilty to all charged counts of murder and received seven concurrent life sentences without parole. Becky Jacobs, *Darren Vann Pleads Guilty to Murdering 7 Women, Avoids Possible Death Sentence*, CHI. TRIB. (May 4, 2018, 5:10 PM), https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-darren-vann-guilty-st-0505-story.html [perma.cc/BD8B-RA94].

132. *Indiana*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/indiana [perma.cc/W2KX-6KS7].

133. MO. REV. STAT. § 565.030 (2016) (first-degree murder trial procedure); Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 211 (2003) (treason and placing bombs near bus terminals).

134. § 565.030. The Supreme Court of Missouri upheld this sentencing scheme (before *Hurst*) in *State v. McLaughlin*. 265 S.W.3d 257, 262–64 (Mo. 2008) (en banc). In *McLaughlin*, the jury was unable to agree unanimously on punishment. *Id.* at 261. The trial court considered all of the evidence and sentenced Mr. McLaughlin to death. *Id.* at 261–62. While Missouri's state Supreme Court precedent properly mandated that the jury make the required factual findings to increase the punishment from a life sentence to death, *Ring* did not prohibit the judge from deciding Mr. McLaughlin's punishment under Missouri law. *See* State v. Whitfield, 107 S.W.3d 253, 261-62 (Mo. 2003), *abrogated by* State v. Wood, 580 S.W.3d 566 (Mo. 2019) (en banc).

135. 580 S.W.3d 566 (Mo. 2019).

136. *Id.* at 581.

by imposing the death penalty.[137] Thus, the court characterized the weighing of aggravating and mitigating circumstances—which the jury could not do unanimously—as a sentencing factor and not a fact requiring jury determination.[138]

While Missouri applies the death penalty more conservatively today than it has in the past,[139] judges retain the ability to unilaterally sentence an individual to death even after a jury fails to agree that death is the appropriate punishment. In the past five years, only two death sentences have been imposed in Missouri.[140] Both of these sentences were decided by judges, not juries.[141] Missouri's current death row population is twenty-one individuals.[142]

D. *Alabama Permits a Nonunanimous Jury with at Least Ten Members Supporting Death*

A defendant may be sentenced to death in Alabama if a jury finds them guilty of murder committed with aggravating circumstances.[143] The jury also determines the appropriate sentence.[144] Until relatively recently, Alabama judges were free to disregard the jury's majority vote to sentence the defendant

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137. *Id.* at 582 (stating that as long as "the jury finds the facts making a defendant eligible for a death sentence, the Sixth Amendment does not prohibit the circuit court from resolving the jury's penalty phase deadlock by imposing a death sentence" (reaffirming State v. Shockley, 410 S.W.3d 179, 198–99 (Mo. 2013) (en banc))). Since the jury in Mr. Wood's case unanimously found the existence of aggravating factors, the jury satisfied that requirement. *Id.* at 584–85.

138. *Id.* at 588; *see also* Jeffrey Wermer, *The Jury Requirement in Death Sentencing After* Hurst v. Florida, 94 DENV. L. REV. 385, 402–03 (2017) ("[A] state, like Missouri . . . can sidestep the Sixth Amendment by merely characterizing mitigating circumstances as 'sentencing factors' notwithstanding *Apprendi*'s disapproval of such tactics."). The dissenting judges would have held that weighing the aggravating and mitigating circumstances is necessarily a factfinding function for the jury to determine beyond a reasonable doubt. *Wood*, 580 S.W.3d at 597 (Stith, J., dissenting) ("The jury determination whether there is evidence in mitigation sufficient to outweigh evidence in aggravation is a factual finding[.]" (cleaned up)). "[B]alancing and weighing of evidence to reach a verdict has historically been the province of the jury," they wrote. *Id.* at 599. "[J]urors are asked to balance the evidence in making factual determinations every day." *Id.* at 598.

139. Since the death penalty was reinstated in Missouri in 1977, death sentences peaked around 1987 and have followed a general downward trajectory from 1987–2021. *See Missouri*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/missouri [perma.cc/D9EC-UDTA].

140. *Id.*; Dan Margolies, *Missouri Supreme Court to Decide Whether a Part of the State's Death Penalty Law Is Unconstitutional*, ST. LOUIS PUB. RADIO (Jan. 22, 2019, 4:30 PM) https://news.stlpublicradio.org/2019-01-22/missouri-supreme-court-to-decide-whether-a-part-of-the-states-death-penalty-law-is-unconstitutional [perma.cc/K2WR-LQW8].

141. Margolies, *supra* note 140.

142. *Missouri*, *supra* note 139.

143. *See* ALA. CODE § 13A-5-40(a) (LexisNexis Supp. 2020) (listing twenty-one different circumstances under which murder becomes a capital offense).

144. *Id.* § 13A-5-46.

to a prison term and instead impose a death sentence.[145] At least three individuals who received a death sentence from an Alabama judge when the jury recommended a life sentence were later exonerated.[146]

While Alabama eliminated judicial overrides in 2017,[147] the state remains an outlier when it comes to capital sentencing, albeit for a different reason. Most death penalty jurisdictions require the jury to reach a unanimous verdict to sentence a defendant to death. Alabama, however, permits nonunanimous verdicts during the sentencing phase.[148] Under state law, a person can be executed if the jury reaches a 10–2 decision in favor of his death.[149]

Thus far, the United States Supreme Court has failed to strike down Alabama's use of nonunanimous juries in capital sentencing. In 2016, the Court declined to hear the argument that *Hurst*, the Sixth Amendment, and the Eighth Amendment require a unanimous jury recommendation for a death sentence.[150] The Court also has not heard a post-*Ramos* Alabama case on the issue of a nonunanimous death sentence. While *Ramos* was pending, defendant Nathaniel Woods cited that case in a filing as a reason to stay his execution.[151]

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145. Radelet & Cohen, *supra* note 130, at 545; Harris v. Alabama, 513 U.S. 504 (1995) (holding that the imposition of a death sentence by an elected judge did not violate the Eighth Amendment); Woodward v. Alabama, 571 U.S. 1045 (2013) (denying certiorari and declining to review the constitutionality of judicial override in Alabama); Brooks v. Alabama, 577 U.S. 1115 (2016) (similarly denying certiorari); *see also Alabama Suspends African American Judge Who Declared Death Penalty Unconstitutional, Alleging Abuse of Power and Anti-Death Penalty Bias*, DEATH PENALTY INFO. CTR. (Apr. 23, 2021), https://deathpenaltyinfo.org/news/alabama-suspends-african-american-judge-who-declared-death-penalty-unconstitutional-alleging-abuse-of-power-and-anti-death-penalty-bias [perma.cc/ZXV5-WEWJ].

146. Kent Faulk, *In Alabama, You Can Be Sentenced to Death Even if Jurors Don't Agree*, MARSHALL PROJECT (Dec. 7, 2016, 7:00 AM), https://www.themarshallproject.org/2016/12/07/in-alabama-you-can-be-sentenced-to-death-even-if-jurors-don-t-agree [perma.cc/D2CK-6V3R].

147. Radelet & Cohen, *supra* note 130, at 545.

148. *Compare* ALA. CODE § 13A-5-46(f) (LexisNexis Supp. 2020) ("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors."), *with* Rauf v. State, 145 A.3d 430 (Del. 2016) (holding that under *Hurst* and the Sixth Amendment, Delaware's capital sentencing scheme violates defendants' right to have a jury determine the critical facts necessary to impose a death sentence).

149. § 13A-5-46(f). After *Hurst*, the only other states that also permitted such nonunanimous sentencing verdicts—Florida and Delaware—declared their capital sentencing schemes unconstitutional. *See* discussion *infra* Part II.E. When asked to do the same, however, Alabama courts upheld the validity of these verdicts. Young v. State, No. CR-17-0595, 2021 WL 3464152, at *55 (Ala. Crim. App. Aug. 6, 2021) (citing *Ex parte* Bohannon, 222 So. 3d 525, 534 (Ala. 2016)).

150. Petition for a Writ of Certiorari at 16–17, Arthur v. Alabama (2016), *cert. denied*, 137 S. Ct. 831 (mem.), https://www.scotusblog.com/wp-content/uploads/2016/11/16-595-cert-petition.pdf [perma.cc/RHV6-MZCH].

151. Brian Lyman, *Temporary Stay Lifted, Alabama Prepares for Nathaniel Woods' Execution Amid Protests*, MONTGOMERY ADVERTISER (Mar. 5, 2020, 9:48 PM), https://www.montgomeryadvertiser.com/story/news/2020/03/05/nathaniel-woods-set-execution-amid-appeals-protests-alabama-death-penalty-nate-woods/4953559002 [perma.cc/Q65Q-3M7B]. "If the Supreme Court were to hold on Friday that non-unanimous verdicts offend the Fourteenth Amendment as well as the Sixth Amendment, it would be a tragedy if a man sentenced to death on a 10–2 death

This argument, however, did not make it to federal court in Mr. Woods's appeal to the Eleventh Circuit,[152] and Alabama executed Mr. Woods before the Court decided *Ramos*.[153]

Alabama's capital sentencing scheme has significant consequences: the state has one of the highest per capita capital sentencing rates in the country.[154] Further, out of the individuals sentenced to death and later exonerated, all five received death sentences from a judge override or a nonunanimous jury.[155] The state's death row population at the time of this writing is 170.[156]

E. *Florida in Limbo*

After Florida's capital sentencing scheme was declared unconstitutional in *Hurst*, the state revisited its approach. The new statute incorporates federal and Florida state requirements that "all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury."[157] This reform may seem like a step in the right direction, but the Florida Supreme Court soon retreated from its decision in

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verdict were executed on Thursday," attorneys wrote in a filing. *Id.* "With the risk of an unconstitutional execution so high, the equities strongly favor a stay until the opinion is announced." *Id.*

152. *See* Principal Brief of Appellant, Woods v. Comm'r, 951 F.3d 1288 (2020) (No. 20-10843), https://eji.org/wp-content/uploads/2020/03/nathaniel-woods-11th-circuit-brief-03-03-20.pdf [perma.cc/M6D4-A963] (asking the Eleventh Circuit to consider issues related to the method of execution).

153. *See* Eliott C. McLaughlin, Martin Savidge & Ray Sanchez, *Alabama Executes Inmate Nathaniel Woods*, CNN (Mar. 5, 2020, 10:43 PM), https://www.cnn.com/2020/03/05/us/alabama-nathaniel-woods-execution/index.html [perma.cc/U86K-A3TJ] (reporting that Alabama executed Mr. Woods).

154. *State Execution Rates (through 2020)*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/state-execution-rates [perma.cc/LL8M-EZHD].

155. Kent Faulk, *Alabama Gov. Kay* Ivey *Signs Bill: Judges Can No Longer Override Juries in Death Penalty Cases*, AL.COM (Apr. 11, 2017, 5:13 PM), https://www.al.com/news/birmingham/2017/04/post_317.html [perma.cc/K7JV-U7QT].

156. *Alabama*, DEATH PENALTY INFO. CTR. (May 24, 2021), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/alabama [perma.cc/M4LZ-UYPC].

157. Hurst v. State, 202 So. 3d 40, 44, 59 (Fla. 2016) (per curiam), *abrogated by* State v. Poole, 297 So. 3d 487 (Fla. 2020) (per curiam); Melanie Kalmanson, *The Difference of One Vote or One Day: Reviewing the Demographics of Florida's Death Row After* Hurst v. Florida, 74 U. MIA. L. REV. 990, 1001 (2020). The relevant portion of the Florida statute states:

> If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

FLA. STAT. § 921.141(2)(c) (2021).

Hurst v. State,[158] holding in *State v. Poole* that a jury need only reach a unanimous verdict as to "the existence of a statutory aggravating circumstance."[159] The court explained that "[n]either *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution" requires the jury to make any other statutory finding *or* recommend a death sentence.[160] As of this writing, Florida's statute states that juries cannot impose a death sentence without a unanimous sentencing verdict.[161] The effects of *Poole*, though, remain to be seen.[162] For example, *Poole* could be read to reauthorize judge sentencing in capital cases and perhaps even nonunanimous death sentences and judicial overrides. Significantly, if the court had reached the same conclusion in *Hurst* as it did in *Poole*, 147 individuals who have obtained relief under *Hurst* would likely still be on death row.[163]

III. EXPANDING THE ROLE OF CAPITAL JURIES UNDER THE SIXTH AMENDMENT

While the Supreme Court has recognized the importance of juries in criminal prosecutions in cases like *Apprendi*, *Ramos*, *Ring*, and *Hurst*, these cases fall short of fully protecting defendants' Sixth Amendment rights. This Part argues that capital defendants have a right to be sentenced by a unanimous jury. Section III.A asserts that juries, not judges, must impose capital sentences, and Section III.B argues for unanimity in jury verdicts during capital sentencing phases. Section III.C then discusses solutions to common roadblocks and proposes a sample statute.

A. *Juries, Not Judges*

The Court's Sixth Amendment doctrine fails to afford capital defendants the right to a jury at sentencing despite evidence that the Constitution requires as much. The Constitution twice provides the right to a jury trial but never explicitly states whether a "trial" encompasses sentencing.[164] Common law and practice at the Founding make clear that in capital cases the jury right does extend to sentencing. The Court should reject as unconstitutional the

158. *Poole*, 297 So. 3d at 507 ("Having thoroughly considered the State's and Poole's arguments in light of the applicable law, we recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt.").

159. *Id.*

160. *Id.* at 503.

161. § 921.141.

162. *See* Hannah L. Gorman & Margot Ravenscroft, *Hurricane Florida: The Hot and Cold Fronts of America's Most Active Death Row*, 51 COLUM. HUM. RTS. L. REV. 935, 954–56 (2020).

163. *See Florida*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida [perma.cc/7HBD-LTS3]; *see also* Radelet & Cohen, *supra* note 130, at 541, 543.

164. *See* U.S. CONST. art. III, § 2; *id.* amend. VI.

sentencing schemes of the five states which violate this jury right: Indiana, Missouri, Montana, Nebraska, and Florida.

As the Court's doctrine currently stands, defendants have a constitutional right only to jury factfinding during sentencing.[165] This right requires juries to determine the existence of aggravating factors necessary to trigger the death penalty.[166] In this line of cases, at least two justices have suggested an expanded constitutional right: the right to jury sentencing.[167] Despite this suggestion, neither of the Court's most recent Sixth Amendment capital sentencing cases explicitly establishes such a right.[168] These cases reveal that the Court either dangerously misunderstands the scope of the Sixth Amendment or—and perhaps *more* dangerously—is improperly limiting defendants' constitutional rights. In fact, the right to jury sentencing in death penalty cases is rooted in common law and historical practices. To enforce the full scope of these constitutional protections, the Court must protect this right by expanding its Sixth Amendment doctrine to require jury sentencing in all capital cases.

1. Who Should We Trust with Our Lives?

"The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders."[169] Juries, however, are in a better position to make sentencing decisions in capital cases. Some Supreme Court justices have already reached this conclusion in the past.[170] Justice Breyer, for one, has argued that "[b]ecause juries are better suited than judges to 'express the conscience of the community on the ultimate question of life or death,' the Constitution demands that jurors make, and take responsibility for, the ultimate decision to impose a death sentence."[171] The additional Sixth Amendment right to "an impartial jury of the State and district

165. *See supra* Section I.B.2.

166. Ring v. Arizona, 536 U.S. 584 (2002); Hurst v. Florida, 577 U.S. 92 (2016).

167. Spaziano v. Florida, 468 U.S. 447, 467–90 (1984) (Stevens, J., concurring in part and dissenting in part); *Ring*, 536 U.S. at 613–19 (Breyer, J., concurring); *Hurst*, 577 U.S. at 103 (Breyer, J., concurring).

168. Hessick & Berry, supra note 75, at 476; *see also* State v. Poole, 297 So. 3d 487, 507 (Fla. 2020) ("Having thoroughly considered the State's and Poole's arguments in light of the applicable law, we recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt."); *Hurst*, 577 U.S. at 103 (Breyer, J., concurring). *But see* Rauf v. State, 145 A.3d 430 (Del. 2016) (holding that under *Hurst* and the Sixth Amendment, Delaware's capital sentencing scheme violates defendants' right to have a jury determine the critical facts necessary to impose a death sentence).

169. *Ring*, 536 U.S. at 607.

170. *See Spaziano*, 468 U.S. at 468–69 (Stevens, J., concurring in part and dissenting in part); *Ring*, 536 U.S. at 614 (Breyer, J., concurring); *Hurst*, 577 U.S. at 103 (Breyer, J., concurring).

171. Reynolds v. Florida, 139 S. Ct. 27 (2018) (Breyer, J., dissenting) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)), *denying cert. to* 251 So. 3d 811 (Fla. 2018).

wherein the crime shall have been committed" highlights the importance of the factfinder reflecting the affected community.[172]

Trusting a jury of peers to make a life-or-death decision, however, may be a big ask. For one, juries notoriously struggle to understand sentencing instructions, *especially* in capital cases.[173] But judge sentencing in death penalty cases actually exacerbates confusion.[174] Requiring jurors to make the final sentencing decision in capital cases increases both the jurors' actual responsibility and their perception of such responsibility.[175] Reallocating responsibility for capital sentencing from the judge to the jury would better protect defendants' constitutional rights.

Given the impact that actual and perceived responsibility has on juries in states where the judge makes final sentencing decisions, judicial sentencing appears to have the added benefit of consistency.[176] That consistency is concerning because judges regularly sentence more defendants to death than juries do.[177]And judges do this without the procedural safeguard of requiring twelve individual jurors to all agree that the defendant's life is not valuable enough to protect. Research has shown that states that require death sentencing by the judge alone "tend to have the highest rates in the region."[178] Further, political pressure can affect elected judges' rate of death sentences. Evidence suggests that judges facing reelection impose higher death sentence rates than other judges.[179] This high death sentencing rate among judges is at odds with the widely supported sentiment that capital punishment should be reserved for only the most extreme cases, if not abolished outright. Thus, when permitting the state to carry out an irreversible sentence, the Constitution requires

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172. U.S. CONST. amend. VI.

173. *See, e.g.*, William J. Bowers, Wanda D. Foglia, Jean E. Giles & Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 963 (2006) ("The research of the Capital Jury Project has revealed that many jurors fail to understand aspects of the law that are supposed to guide their punishment decision-making.").

174. *Id.* at 963–64 ("In hybrid, as opposed to binding states, fewer jurors understood that they were free to consider mitigating and aggravating factors beyond those enumerated in their statutes, and more jurors simply said they did not know what aggravating and mitigating factors they could consider.").

175. In fact, findings from the Capital Jury Project "reveal[] that jurors in states with hybrid systems are more likely to deny responsibility, invest less energy in understanding instructions, and more often rush to judgment." *Id.* at 950 (explaining that the Capital Jury Project is a national program of research on capital jurors' decisionmaking).

176. Proffitt v. Florida, 428 U.S. 242, 252 (1976) (highlighting consistency advantages of judicial sentencing).

177. John H. Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 177–78 (2004) (quoting DAVID C. BALDUS, GEORGE G. WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 235 (1990)).

178. *Id.*

179. *Id.* at 178 (citing JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (2002)).

that the Court be more concerned by overinclusive sentencing by judges than inconsistent or underinclusive sentencing by juries.

Exoneration data further supports limiting judicial discretion in capital sentencing. The Death Penalty Information Center found that in states that permitted nonunanimous capital sentences, one or more jurors had voted for life in more than 90 percent of death row exonerations.[180] These findings suggest that there may be strength in numbers: unilateral sentencing decisions from judges may be more likely to condemn an innocent person to death than those supported by twelve jurors.

Of course, juries are not immune to making arbitrary or irrational findings. To protect against such outcomes and promote consistency, states should follow California's lead and allow the judge to determine "whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented" but not vice versa.[181] Judges would thus have only the authority to nullify a death sentence. Therefore, permitting this type of judicial review does not have the same downfalls as hybrid sentencing schemes that give judges the power to impose the death penalty unilaterally.

2. Common Law, Originalism, and Historical Practice

The Supreme Court routinely uses English common law, historical practices, and original intent at the Founding to inform its interpretation of the Constitution. At common law, homicide, with only narrow exceptions, carried a mandatory death sentence.[182] England actually developed jury trials in the thirteenth century to determine whether one of these exceptions applied to an alleged offender.[183] In homicide cases that did not fall under any exception, the jury also had to find the existence of mitigating factors that would justify a sentence lighter than death.[184] By the seventeenth century, though, the common law definition of capital homicide had changed.[185] Rather than

180. *DPIC Analysis: Exoneration Data Suggests Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Conviction*, DEATH PENALTY INFO. CTR. (Mar. 13, 2020), https://deathpenaltyinfo.org/news/dpic-analysis-exoneration-data-suggests-non-unanimous-death-sentencing-statutes-heighten-risk-of-wrongful-convictions [perma.cc/QYT9-E4JQ].

181. CAL. PENAL CODE § 190.4(e) (West 2014).

182. A defendant would not be sentenced to death if they acted in self-defense. Aumann, *supra* note 16, at 852 n.50. Similarly, the mandatory death sentence did not apply to individuals who committed homicide involuntarily or while of unsound mind. *Id.*

183. *Id.* at 852; *see also* Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 5–7 (1989); Thomas A. Green, *The Jury and the English Law of Homicide, 1200–1600*, 74 MICH. L. REV. 413, 421–22 (1976).

184. Aumann, *supra* note 16, at 852 (citing White, *supra* note 183, at 7).

185. *Id.* at 852–53.

relying only on a short list of exceptions to the mandatory death sentence, defendants could escape capital punishment if the killing lacked premeditation.[186] This distinction arose partially as a result of juries exercising this discretion, regardless of the law, when sentencing offenders to death.[187]

With the option to convict an offender of manslaughter instead of capital murder, juries continued exercising discretion, but this time with explicit permission from the law. Jurors had to determine the offender's state of mind at the time of the killing before the offender could be sentenced to death or an alternative sentence.[188] The decision turned on whether the jury found "malice aforethought" (i.e. premeditation), thereby distinguishing capital homicide (with malice) from noncapital manslaughter (without malice).[189] Functionally, "the murkiness of the required factual determinations inevitably vested the jury with considerable discretion."[190] As a result, juries often reached a verdict of manslaughter when they determined that the circumstances of the particular case did not warrant a death sentence.[191]

Under this capital punishment scheme, there was no bifurcation between guilt and sentencing.[192] Yet common law juries necessarily engaged in "de facto sentencing" when deciding whether the defendant was guilty as well as the degree of guilt.[193] In contrast, judges had little to no discretion in sentencing.[194] It was with this distribution of discretion between the judge and jury that the United States established its early criminal legal system.

The common law system heavily influenced the American jury system.[195] Even before the Sixth Amendment guaranteed "the right to . . . an impartial jury,"[196] Article III provided that "the Trial of all Crimes . . . shall be by

186. *Id.*

187. Douglass, *supra* note 11, at 2012–13 n.261 (citing Green, *supra* note 183, at 415). Many juries opted for life in prison even when the law required the imposition of a death sentence. Aumann, *supra* note 16, at 852 n.50 (citing Green, *supra* note 183, at 432).

188. Aumann, *supra* note 16, at 853 n.52 ("As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense." (quoting White, *supra* note 183, at 10)).

189. Douglass, *supra* note 11, at 2013 (citing McGautha v. California, 402 U.S. 183, 198 (1971) (discussing history of concept of malice)).

190. *Id.* (citing White, *supra* note 183, at 8).

191. *Id.*

192. *See id.*

193. *Id.* at 1973.

194. *Id.* at 1973 n.34 ("The substantive criminal law tended to be sanction-specific . . . ." (quoting Apprendi v. New Jersey, 530 U.S. 466, 479 (2000))).

195. John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial*, 44 U. MIA. L. REV. 643, 650 (1990)); Aumann, *supra* note 16, at 852; *see also id.* at 856 nn.75–77, 857 n.78 (discussing state adoptions of the Model Penal Code formulation of a death sentencing scheme, which provides no mandate for juries to make the sentencing determination).

196. U.S. Const. amend. VI.

Jury."[197] As a result, early juries in the United States enjoyed the same level of discretion as English juries when it came to capital offenses. Even beyond homicide cases, juries engaged in what Blackstone called "pious perjury": issuing "partial verdicts" or "downvaluing" stolen goods to avoid imposing the death penalty when it didn't think it was appropriate.[198] Juries effectively suspended many capital statutes with these tactics.[199] According to Rachel Barkow, "the power of juries to exercise this kind of sentencing discretion by issuing unreviewable verdicts [of acquittal], even if contrary to the evidence, had become an accepted characteristic of jury trials by the time of the American Constitution."[200] These practices reveal that juries produced more than just "mere 'factual findings.'"[201] The Founders, then, likely fully aware of the implications of giving the jury such discretion, chose to enshrine the role of the jury in the Constitution in not one, but two, places.

3. Post-Ratification Shift

As history demonstrates, mandatory capital sentences effectively gave juries the power to determine both guilt and punishment at the trial stage. This use of mandatory capital sentences for certain offenses continued even after the ratification of the Eighth Amendment.[202] As the United States grew, however, mandatory capital punishment for certain offenses diminished.[203] Some states began to abolish the death penalty altogether.[204] Other states that re-

197. *Id.* art. III, § 2.

198. Douglass, *supra* note 11, at 2013 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *239 (1765)).

199. *Id.* (quoting LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 95 (1948)).

200. *Id.* at 2014; *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 49–50 (2003).

201. Douglass, *supra* note 11, at 2014 n.266 ("Juries at the time of the framing could not be forced to produce mere 'factual findings,' but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence." (quoting United States v. Gaudin, 515 U.S. 506, 513 (1995))); *see also* Woodson v. North Carolina, 428 U.S. 280, 289–90 (1976).

202. *Woodson*, 428 U.S. at 289 ("At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.").

203. Aumann, *supra* note 16, at 852–55 (citing Poulos, *supra* note 195, at 651; Act of Jan. 10, 1838, ch. 29, 1838 Tenn. Pub. Acts 55 (enacting a scheme of absolute sentencing discretion for capital cases in Tennessee)).

204. Robert A. Stein, Speech, *The History and Future of Capital Punishment in the United States*, 54 SAN DIEGO L. REV. 1, 6 (2017); *see Michigan*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/michigan [perma.cc/M8KS-RRJ5] ("Michigan became the first English-speaking territory in the world to abolish capital punishment in 1847."); RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 9 (1991) (Rhode Island, Maine, and Wisconsin also prohibited the death penalty); LARRY W. KOCH, COLIN WARK & JOHN F. GALLIHER, THE DEATH OF THE AMERICAN DEATH PENALTY 13–14, 16 (2012) (Vermont, Iowa, and West Virginia abolished the death penalty).

tained the death penalty enacted new sentencing schemes that gave the factfinder unconstrained discretion, after a finding of guilt, to determine whether to impose the death penalty.[205] By 1972, discretionary sentencing became the dominant capital sentencing scheme in the country.[206] These sentencing schemes began to implement the bifurcated procedure most death penalty states still use today.[207] But this bifurcation only arose post-ratification and was "born from a movement away from capital punishment, not as a means to implement it."[208]

The Court has repeatedly invoked judicial discretion in sentencing as an "age-old" norm, however, without acknowledging the historical practice of unitary proceedings.[209] Similarly, the Court noted in *Spaziano v. Florida*, a now overturned case, that "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue."[210] This assumption that "the Sixth Amendment right to [a] jury trial '[never has] been thought' to encompass sentencing is to ignore the world of the founders, where a unitary proceeding adjudicated guilt and punishment with a single jury verdict."[211] Contrary to *Spaziano*'s conclusion, the question of "appropriate punishment" was not only at issue in those unified proceedings but was often the principal issue faced by the jury.[212]

While *Apprendi* took a step in the right direction, the ruling fell short of fully acknowledging the jury's historic role in capital cases. In *Apprendi*, the Court recognized that the jury in the eighteenth century had to find all of the relevant facts to justify a particular sanction.[213] But the Court failed to recognize the role of the jury beyond factfinding.[214] To justify its conclusion, the Court found that "nothing in this history suggests that it is impermissible for

205. Aumann, *supra* note 16, at 853–54 (citing Poulos, *supra* note 195, at 651; John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 148 (1986)).

206. Aumann, supra note 16, at 854 (citing Poulos, *supra* note 195, at 652).

207. *See* discussion *supra* Part II.

208. Douglass, *supra* note 11, at 1973.

209. *See, e.g.*, Williams v. New York, 337 U.S. 241, 250 (1949).

210. Spaziano v. Florida, 468 U.S. 447, 459 (1984).

211. Douglass, *supra* note 11, at 1986 (quoting *Spaziano*, 468 U.S. at 459).

212. *Id.* at 2013 (citing JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 59 (A.W. Brian Simpson ed., 2003)).

213. Douglass, *supra* note 11, at 2021; Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) ("The substantive criminal law tended to be sanction-specific . . . .").

214. *See* Douglass, *supra* note 11, at 2021 (citing *Apprendi*, 530 U.S. at 482–83) (noting that the Court only went so far as to "conclude[] that the jury's constitutional role is to find any fact necessary to subject a defendant to the maximum penalty prescribed by statute" "[b]ecause historically, a jury's felony verdict effectively authorized the punishment fixed by law for a given offense.").

judges to exercise discretion . . . in imposing a judgment *within the range* prescribed by statute."[215] While judges exercised this sort of discretion for misdemeanor offenses,[216] the unitary adjudication of guilt and punishment in capital cases suggests that judges should not have the latitude to unilaterally sentence a defendant to death.

The Court's Sixth Amendment death penalty cases similarly ignore the original role of the jury in such proceedings. Carissa Byrne Hessick and William W. Berry have posited that, instead, the Court has focused "more on history and formalism than on the values underlying the Sixth Amendment jury trial right."[217] And the *Ring* Court did just that. The line that *Ring* attempted to draw between factfinding to establish death eligibility and the ultimate sentencing decision was rooted in formalism and lacked historical support.[218] As a result, the final sentence selection decision fell outside of the Sixth Amendment's protection.[219]

Hessick and Berry also argue that *Hurst* was a spark of revival for the Court.[220] In practice, though, the rule from *Hurst* seems to be less administrable than originally believed.[221] *Hurst* still pigeonholed the jury as a mere factfinder. Failing to recognize a jury right "for findings that are part of a judge's unfettered sentencing discretion" assumes the constitutionality of judge sentencing in capital cases.[222] And this assumption fails to recognize the historic role juries played in imposing the death sentence.

Nonetheless, these cases emphasize the Court's reliance on originalism and historical practice in developing its death penalty doctrine. But the Court's hindsight is not 20/20: so far, it has only recognized the jury's role after the post-ratification shift toward more judicial discretion in sentencing. However, "[w]e cannot assume, as the Court seems to have done, that separation of trial and sentencing is part of the natural order of things, or that the 'trial rights' of the Sixth Amendment were conceived with such a separation

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215. *Apprendi*, 530 U.S. at 481.

216. Douglass, *supra* note 11, at 1974.

217. Hessick & Berry, *supra* note 75, at 468.

218. Douglass, *supra* note 11, at 2022.

219. *See* Ring v. Arizona, 536 U.S 584 (2002); *see also* discussion *supra* Section I.B.1.

220. *See* Hessick & Berry, *supra* note 75, at 475 ("*Hurst* pushes back on the encroachment of the Sixth Amendment sentencing rights that has occurred in recent years. It restores a balance between the historical origins of the Sixth Amendment doctrine and the reasons underlying the jury right, and it does so in formalistic terms that are sensible and easily administrable.")

221. *See* Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016) ("All the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury."). *Compare* State v. Poole, 297 So. 3d 487, 507 (Fla. 2020) ("Having thoroughly considered the State's and Poole's arguments in light of the applicable law, we recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt."), *with* Rauf v. State, 145 A.3d 430, 434 (Del. 2016) ("Because Delaware's death penalty statute does not require the jury to [find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist,] it is unconstitutional.").

222. Hessick & Berry, *supra* note 75, at 497.

in mind."[223] Therefore, if it claims to apply an originalist understanding throughout these Sixth Amendment cases, the Court must acknowledge the role of the jury as the final decisionmaker in capital sentencing.

B. *Unanimity*

The right to an impartial jury would be incomplete without requiring that all twelve jurors agree in order to impose a death sentence. *Ramos* has already laid the foundation for this acknowledgment.[224] Thus, this Section argues that a unanimity requirement at the sentencing phase in capital cases is not only constitutionally required but also a natural extension of the Court's Sixth Amendment doctrine.

1. *Ramos* Requires Unanimity

No defendant should be executed at the hands of the state if even a single member of the jury believes that the individual's life is worth preserving. In *Ramos*, the jury convicted Mr. Ramos of second-degree murder in a nonunanimous verdict, and the Court sentenced him to life without parole.[225] As a result, *Ramos* only considered the Sixth Amendment issue at the guilt-innocence phase of a noncapital trial. But the entirety of a defendant's constitutional rights does not vanish after this phase of a criminal trial in federal or state courts. Some trial rights have already been extended to the sentencing phase of criminal proceedings. Such rights include the right to effective assistance of counsel,[226] *Brady* rights,[227] the right against self-incrimination,[228] and the right to a jury determination beyond a reasonable doubt of all facts that increase the possible sentence.[229]

The Constitution protects these rights in capital and noncapital cases alike. In *Ring*, the Court rejected the argument that defendants facing the death penalty should receive less constitutional protection than other criminal defendants.[230] Indeed, the Court stated that the meaning of the Sixth Amendment would be "senselessly diminished" if the Court did not apply the Sixth

223. Douglass, *supra* note 11, at 1973 (citing Williams v. New York, 337 U.S. 241, 245–46 (1949)).

224. Ramos v. Louisiana, 140 S. Ct. 1390, 1391 (2020).

225. *Id.* at 1390.

226. Mempa v. Rhay, 389 U.S. 128 (1967); Strickland v. Washington, 466 U.S. 668 (1984).

227. Brady v. Maryland, 373 U.S. 83 (1963) (holding that the prosecution must turn over all exculpatory evidence related "to guilt or to punishment" to the defendant in a criminal case); *see also* Andrew Weissmann & Katya Jestin, *"Brady" and Sentencing*, NAT'L L.J. (Oct. 27, 2008, 12:00 AM), https://www.law.com/nationallawjournal/almID/1202425458913/?slreturn=20211007080107 (on file with the *Michigan Law Review*).

228. Mitchell v. United States, 526 U.S. 314 (1999).

229. Apprendi v. New Jersey, 530 U.S. 466 (2000).

230. Ring v. Arizona, 536 U.S. 584 (2002).

Amendment to death penalty determinations.[231] Read together with *Hurst*, *Ring* suggests that the Sixth Amendment right to a unanimous jury verdict at the capital sentencing phase should apply in all jurisdictions.

Another case, *Andres v. United States*, furthers this point. The *Andres* Court affirmatively held that "[i]n criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt *and punishment*—which are left to the jury."[232] Though the underlying case in *Andres* originated from a federal district court,[233] the *Ramos* Court held that "if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court."[234] Since *Andres* reads the Sixth Amendment to require a unanimous verdict to support a punishment decided by a jury, the Constitution should require no less in other jurisdictions.[235]

2. Dealing with Deadlock

Requiring unanimous verdicts at the guilt phase of criminal proceedings runs the risk of more hung juries. Applying the same right to the sentencing phase of capital trials does not necessarily pose the same risk. In most death penalty jurisdictions, if the jury is unable to reach a verdict during the sentencing phase, the court is required by law to impose a sentence of life without parole.[236] A hung jury during the sentencing phase in these jurisdictions, then, does not have the same drawbacks as hung juries during the guilt phase of criminal proceedings.[237]

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231. *Id.* at 609.

232. 333 U.S. 740, 748 (1948) (emphasis added); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 n.21 (2020) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply." (quoting *Andres*, 333 U.S. at 748)).

233. *Andres*, 333 U.S. at 741.

234. *Ramos*, 140 S. Ct. at 1397.

235. I have narrowed my analysis of *Andres* to capital sentencing because this Note argues that the Sixth Amendment requires jury sentencing in capital cases in all jurisdictions. The issue of jury sentencing in noncapital cases is beyond the scope of this Note.

236. *See supra* Section II.A.

237. *See, e.g.*, William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Verdicts*, 25 INT'L REV. L. & ECON. 1, 2 (2005) (discussing costs of retrial after a hung jury). In Indiana and Missouri, state law authorizes the court to determine the defendant's sentence when the jury deadlocks. *See supra* Section II.C. If states are concerned about having hung juries during the sentencing phase, they could alter their sentencing scheme to require the court to impose a mandatory sentence of life without parole when the jury is unable to reach a unanimous verdict. Alternatively, when the jury is unable to reach a unanimous decision imposing a sentence of death in Utah, state law requires the jury to then determine whether the penalty of life in prison without parole should be imposed. UTAH CODE ANN. § 76-3-207 (LexisNexis 2017). If the jury is further deadlocked as to whether to impose life without parole, Utah permits the court to discharge the jury and impose an indeterminate prison term of not less than 25 years. *Id.* Finally, states could impanel a different set of jurors for a new sentencing phase when the original jury deadlocks.

As Justice Gorsuch stated in *Ramos*, "who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the plurality said it should—deliberating carefully and safeguarding against overzealous prosecutions?"[238] This sentiment is especially true in capital cases, as votes for life sentences are typically not the result of a jury stacked with anti-death penalty jurors: the Constitution permits prosecutors in death penalty cases to assemble "death-qualified juries" by striking any potential juror who firmly opposes the death penalty.[239] In such cases, a juror holding out on a death sentence that deadlocks the jury is a feature, not a bug.

C. *Reforming Current Capital Sentencing Schemes*

Most capital sentencing schemes share a similar structure. Jurisdictions that already protect the Sixth Amendment rights discussed in this Note typically require four steps at the penalty phase in capital cases.[240] First, the jury must find one of the aggravating factors enumerated in the relevant statute to be true beyond a reasonable doubt.[241] Second, "the jury considers evidence . . . to determine 'whether any mitigating factors exist.' "[242] Third, the jury must assess whether the mitigating evidence outweighs the aggravating factor(s).[243] Only if the jury finds beyond a reasonable doubt that the mitigating factor(s) *do not* outweigh the aggravating factor(s) does the jury proceed to the fourth step.[244] In the fourth step, the jury must ultimately decide "whether death is the appropriate punishment."[245] This step gives the jury discretion to impose a sentence other than death even when the mitigating evidence is insufficient to outweigh the aggravating factor(s).

These third and fourth steps are where the Court has fallen short of protecting defendants' Sixth Amendment rights. Since these steps do not require any factfinding but rather necessitate a weighing of circumstances, *Hurst* does

238. *Ramos*, 140 S. Ct. at 1401.

239. Radelet & Cohen, *supra* note 130, at 545 (citing Witherspoon v. Illinois, 391 U.S. 510 (1968)).

240. *E.g.*, Hessick & Berry, *supra* note 75, at 495 n.230 (citing Sam Kamin & Justin Marceau, *Waking the* Furman *Giant*, 48 U.C. DAVIS L. REV. 981, 1017 (2015)) (discussing Colorado's capital sentencing system).

241. *See* GA. CODE ANN. § 17-10-31 (2020) ("[A] sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed.").

242. Hessick & Berry, *supra* note 75, at 495 n.230.

243. *Id.*

244. *Id.*

245. *Id.* (discussing Colorado's capital sentencing system and stating that the fourth step could be given to a judge without running afoul of *Hurst* because the final determination does not require factfinding).

not necessarily demand that a jury conduct them.[246] This Note, however, argues that the Sixth Amendment requires the jury to weigh the evidence and eventually make the final sentencing determination because the decision of whether or not a defendant should live or die should be made by a jury of his peers and *checked* by the state, not *made* by the state. The following is a proposed statute that would recognize and protect these rights while maintaining the role of the state.

1. Sample Statute

(1) Where, upon a trial by jury, a person is convicted of an offense that may be punishable by death, the jury must return a unanimous verdict imposing the death penalty.
    (a) Before imposing a sentence of death, the jury must: unanimously find beyond a reasonable doubt that at least one (1) statutory aggravating factor exists;
    (b) Consider any mitigating evidence offered by the defendant;
    (c) Unanimously determine beyond a reasonable doubt that the aggravating factor(s) outweigh the mitigating circumstances that are found to exist;
    (d) And unanimously determine beyond a reasonable doubt that death is the appropriate punishment.
(2) The judge shall decide whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment.
(3) The judge shall, in no instance, impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.
(4) In nonjury cases, the court shall follow the requirements of this section in determining the sentence to be imposed.

2. Death Is Different

Some have argued that extending the Sixth Amendment doctrine to protect capital defendants' right to a jury sentence would be a slippery slope.[247] This is not the case. Extending the Sixth Amendment doctrine to protect defendants' right to jury sentencing in capital cases does not necessarily require

246. *See* MONT. CODE ANN. § 46-18-305 (2021) (requiring that judges weigh aggravating and mitigating factors and decide whether death is the appropriate sentence); NEB. REV. STAT. § 29-2522 (2021) (requiring the same); *see also* State v. Wood, 580 S.W.3d 566, 588 (Mo. 2019) (en banc) (characterizing the weighing of aggravating and mitigating factors as a sentencing factor, not a fact to be found by a jury).

247. *E.g.*, Douglass, *supra* note 11, at 1973–74.

jury sentencing in all criminal cases.[248] First, original practice counsels in favor of extending the right solely in capital cases. As discussed in Section III.A.2, eighteenth-century common law and the early American jury system held capital trials that "were essentially sentencing hearings" but did not retain this same focus on sentencing issues in noncapital cases.[249] Original practice, then, provides no reason to extend this right to all—capital and noncapital—criminal proceedings.

Second, to suggest, as the Court has, that capital sentencing "involves the same fundamental issue[s]" as noncapital sentencing is at odds with the Court's complex death penalty case law.[250] Since the overhaul of capital sentencing schemes in the 1970s,[251] case law has repeatedly demonstrated how capital sentencing *is* fundamentally different from noncapital sentencing.[252] The Court has held that the Constitution "requires States to apply special procedural safeguards when they seek the death penalty."[253] For these two reasons, expanding the Sixth Amendment doctrine as this Note proposes would not necessitate expanding the doctrine in all criminal proceedings.

3. Retroactivity

A Supreme Court decision finding that death sentences must be unanimously made by a jury need not undermine the validity of each and every past capital proceeding. Prior to May 2021, only newly recognized "watershed rules" of criminal procedure could apply in collateral review.[254] This exception, though, was extremely narrow, and the Court failed to announce a single new rule of criminal procedure capable of meeting the demanding test set out in *Teague*.[255] Given this void, the Court recently found that the "watershed" rule effectively does not exist.[256] While considering whether *Ramos* applies

248. *But cf.* Spaziano v. Florida, 468 U.S 447, 459 (1984) ("[A] capital sentencing proceeding involves the same fundamental issue[s] involved in any other sentencing proceeding . . . .").

249. Douglass, *supra* note 11, at 1974; *see* discussion *supra* Section III.A.1; *see also* Douglass, *supra* at 1974 ("[T]he first criminal legislation passed by the First Congress . . . prescribed death as a mandatory punishment for a number of offenses. It prescribed sentencing ranges for a handful of noncapital offenses. But there were no crimes for which a sentencing judge could make a choice between life and death." (footnotes omitted)).

250. *Spaziano*, 468 U.S. at 459.

251. *See generally* John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913 (2012).

252. *See, e.g.*, Beck v. Alabama, 447 U.S. 625, 637 (1980) ("[T]here is a significant constitutional difference between the death penalty and lesser punishments.").

253. Ring v. Arizona, 536 U.S. 584, 614 (2002) (Breyer, J., concurring).

254. Teague v. Lane, 489 U.S. 288, 311–12 (1989). Such rules included those that "implicate the fundamental fairness [and accuracy] of the trial." *Id.* at 312.

255. Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020).

256. Edwards v. Vannoy, 141 S. Ct. 1547, 1557 (2021) ("In practice, the exception has been theoretical, not real.").

retroactively, the Court in *Edwards v. Vannoy* eliminated the watershed exception altogether.[257] As a result of this recent decision,[258] a newly recognized right to unanimous jury sentencing in capital cases would not apply retroactively.

Regardless, expanding the Court's Sixth Amendment doctrine will protect important constitutional rights. Collectively, the potentially affected states have a population of 561 individuals on death row.[259] Additionally, a 2016 report by Harvard Law School's Fair Punishment Project also found that 89 percent of Florida and Alabama's death penalty sentences since 2010 were decided by nonunanimous juries.[260] The *Ramos* Court considered the effect of finding the sentencing schemes of just two states unconstitutional. In a rare nod towards legal realism, the Supreme Court recognized that ruling in favor of the states "would invite other States to relax their own . . . requirements."[261] Further, any single individual at risk of facing a judge-imposed death sentence "today, and elsewhere tomorrow, would dispute the . . . suggestion that their Sixth Amendment rights are of 'little practical importance.' "[262] These rights, whatever their effect, must be enshrined in both case law and capital sentencing statutes.

CONCLUSION

The Sixth Amendment jury right was intended to protect defendants against the routine, machine-like gears of the criminal justice system. As early

257. *Id.* at 1560. Justice Kavanaugh, writing for the majority, asked, "[i]f landmark and historic criminal procedure decisions—including *Mapp*, *Miranda*, *Duncan*, *Crawford*, *Batson*, and now *Ramos*—do not apply retroactively on federal collateral review, how can any additional new rules of criminal procedure apply retroactively on federal collateral review?" *Id.* at 1559. Opposing this sentiment, Justices Kagan, Breyer, and Sotomayor dissented and criticized the majority for "flaunting decisions since *Teague* that held rules non-retroactive" when "the majority comes up with none comparable to this case." *Id.* at 1574 (Kagan, J., dissenting).

258. Analyzing the implications and validity of the Court's decision in *Edwards v. Vannoy* is important given the bright-line rule it imposes, but such a discussion is beyond the scope of this Note.

259. *See supra* Part II. As of this writing, Montana had 2 people on death row, while Nebraska had 12, Indiana had 8, Missouri had 21, Alabama had 170, and Florida had 347.

260. C.J. Ciaramella, *Condemned to Death by a Split Jury in Florida*, REASON (Apr. 27, 2020, 6:00 AM), https://reason.com/2020/04/27/condemned-to-death-by-a-split-jury-in-florida [perma.cc/C7DL-JK5G].

261. Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020). As in *Ramos*, it doesn't require much imagination to predict how states could experiment with judge sentencing and nonunanimous death sentences. As discussed above, the Florida Supreme Court has already paved the way for the state to reduce safeguards for capital defendants. *See* discussion *supra* Section II.E. Additionally, in 2007 and 2008, Georgia legislators considered bills that would have allowed the judge to sentence a defendant to death when jurors could not reach a unanimous sentencing verdict, and that would have permitted nonunanimous capital sentencing, respectively. Lisa Caucci, *Evaluating the Constitutionality of Proposals to Allow Non-Unanimous Juries to Impose the Death Penalty in Georgia*, 26 GA. ST. U. L. REV. 1003, 1006–08 (2012).

262. *Ramos*, 140 S. Ct. at 1408 (quoting *id.* at 1426 (Alito, J., dissenting)).

as the 1760s, supporters of the jury right recognized that these gears move not only at the behest of the prosecution but also at the hands of judges.[263] These gears do not suddenly halt postconviction. Yet, the Court's current Sixth Amendment doctrine provides less protection for defendants during the sentencing phase.

Recently, in cases like *Ring* and *Hurst*, the Court has begun to recognize that the established distinction between trial and sentencing is less clear in capital cases. And more state legislatures have taken steps beyond the Court's permissive doctrine to limit judicial discretion and increase the jury's role. But relying on states and incremental progress from the Court to sufficiently protect defendants' interests during the capital sentencing phase has proved ineffective. To date, over 20 percent of individuals on death row were sentenced under statutes that permit judges or unanimous juries to impose a death sentence.[264] Expanding the Sixth Amendment to require unanimous jury sentencing in capital cases will fulfill the original purpose of the jury right and would streamline the procedure by which states authorize capital punishment by requiring jurisdictions to adopt statutes similar to that proposed in this Note.[265] Most importantly, though, acknowledging the original scope and full protection of the Sixth Amendment would serve as an incremental—nonetheless important—step toward abolishing the death penalty in its entirety.

263. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *350.

264. *See supra* note 12 and accompanying text.

265. *See supra* Section III.C.1.